

M.Com. Second Semester
(Under CBCS)

MASTER OF COMMERCE

Paper: COM 2016
ECONOMIC LEGISLATIONS



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ISBN:
October, 2023

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Published on behalf of Gauhati University Centre for Distance and Online Education by the Director, and printed at Gauhati University Press, Guwahati-781014.

BLOCK I : UNIT I
COMPETITION ACT, NEED, OBJECTIVE AND DEFINITIONS.

Unit Structure

- 1.1: Introduction:
- 1.2: Objectives
- 1.3: Need for the Competition Act
- 1.4: Objective of the Competition Act
- 1.5: Chapters in the Act
- 1.6: Definitions
- 1.7: Summing Up
- 1.8: References and suggested reading
- 1.9: Model Questions
- 1.10: Answer to 'Check your Progress'.

1.1: Introduction:

The Monopolies and Restrictive Trade Practices Act, 1969 was replaced by the Competition Act 2002. The main objective of enacting Competition Act was to do away with the disadvantages of the MRTP, 1969 and protect the interest of the consumer and players in the Indian market by promoting healthy competition and restricting monopolistic practices. The monopolistic trade practices, which were popular after independence could no longer serve India's aspiration as India moved towards rapid industrialization and hence in 1969 the MRTP Act was enacted with the objective of reducing the concentration of economic powers in the hands of few, reducing monopolies of companies and restricting monopolistic trade practices. The general outcome of opening up the economy in the form of 'New Economic Policy 1991' was that the Indian markets and players should be ready to face competition from within and outside the country. The role of MRTP Act has narrowed down and become obsolete in the changing economic environment, as there was an urge for the policy shift from curbing monopolies to promoting healthy competition. In order to fall in line with the Competition Policy of the World Trade Organization and to cope up the changed economic environment, there was a need for a new law which would fully focus on promoting healthy competition. Hence the Government of India ,after considering the suggestions of the trade and industry and the general public enacted a law on Competition known as The Competition Act 2002.

1.2: Objectives:

After going through this unit, you will be able to:-

- Understand the needs of Competition Act.
- Understand the objectives of Competition Act
- Explain the various definition as per the Competition Act

1.3: Need for the Competition Act

The MRTP Act 1969 could no longer serve the purpose as regards to the changed national and international business and economic environments. There was a paradigm shift in the policy from restricting monopolies to encouraging healthy competition. In such a situation the need for a new act/law was felt and accordingly The Competition Act 2002 was enacted. The act seeks to ensure fair competition in India by prohibiting trade practices, which cause adverse effects on the competition in Indian markets. Competition Act ensures the establishment of a quasi-judicial body called the *Competition Commission of India*, which aims at curb the negative aspects of competition. Hence the need of Competition Act is as follows:

- To do away/replace the MRTP Act, which has become almost obsolete in the current situation.
- Establishment of the Competition Commission of India, a quasi-judicial body for curbing the negative aspect of competition
- To promote and sustain healthy competition in Indian markets
- To create awareness and training on competitive issues.
- To protect the interest of the consumers.

Stop to Consider

List out the reasons why the MRTP Act 1969 was replaced by Competition Act 2002.

1.4: Objective of the Competition Act:

The Competition Act was enacted with the following objectives:

- Establishment of a quasi-judicial body called the Competition Commission of India.

- To protect and promote the interest of the consumer in the Indian market.
- To create and promote an ecosystem for healthy and sustainable competition.
- To ensure freedom of trade carried on by any participants in markets, in India.
- To prevent the abuse of dominant position in the market
- To prevent trade practices that have adverse impact on Indian market
- To regulate the operation and activities of combinations (acquisitions, mergers and amalgamation).

The Act mainly covers the following aspects-

- Establishment of Competition Commission of India (CCI).
- Power and functions vested on the Commission of India (CCI).
- Prohibition of Anti-Competitive Agreement.
- Prohibition of the abuse of dominant position.
- Regulation of Merger, Acquisition and amalgamation (Combination).

Check Your Progress

1. What does MRTP Act stands for?
2. What are the objectives of MRTP Act?
3. Explain the needs of Competition Act.
4. What are the objectives of Competition Act?

1.5: Chapters in the Act-

The Competition Act, 2002 was passed by the Parliament in the year 2002, to which the President accorded assent in January, 2003. It was subsequently amended by the Competition (Amendment) Act, 2007. The Act is applicable to whole of India except Jammu and Kashmir.

In accordance with the provisions of the Amendment Act, the *Competition Commission of India* and the *Competition Appellate Tribunal* have been established. The Competition Commission of India is now fully functional with a Chairperson and six members. The provisions of the Competition Act relating to anti-competitive agreements and abuse of dominant position were notified on May 20, 2009.

The whole Competition Act is divided into nine Chapters and each Chapters deals with the specific matter as shown below:

CHAPTER	ISSUES DEALT WITH
Chapter 1	Preliminary Provisions
Chapter 2	Prohibition of certain agreement, Abuse of Dominant Position and Regulation of Combination.
Chapter 3	Competition Commission of India
Chapter 4	Duties, powers and functions of the Commission
Chapter 5	Duties of Director General
Chapter 6:	Penalties
Chapter 7	Competition Advocacy
Chapter 8	Finance, Accounts and Audit
Chapter 9	Miscellaneous

(In this unit we shall deal with Chapter 1: Preliminary Provisions of the Competition Act)

1.6: Definitions: The definitions of various terms as per Competition Act are as follows:-

- a) **“acquisition”** means, directly or indirectly, acquiring or agreeing to acquire—
 - (i) shares, voting rights or assets of any enterprise; or
 - (ii) control over management or control over assets of any enterprise;
- (b) **“agreement”** includes any arrangement or understanding or action in concert,—
 - (i) whether or not, such arrangement, understanding or action is formal or in writing; or
 - (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings
- (c) **“cartel”** includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

Stop to Consider

Why did the Competition Commission of India order a probe into alleged '*cartel*' by certain airlines (Air India, Spicejet, GoAir, & Jet Airways) in 2015. Are you aware with the final verdict of the probe?

(d) "***Chairperson***" means the Chairperson of the Commission appointed under sub-section (1) of section 9;

(e) "***Commission***" means the Competition Commission of India established under sub-section(1) of section 7;

(f) "***consumer***" means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;

(g) "***Director General***" means the Director General appointed under sub-section (1) of section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section;

(h) "***enterprise***" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or

more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation.-For the purposes of this clause,—

- (a) “activity” includes profession or occupation;
- (b) “article” includes a new article and “service” includes a new service;
- (c) “unit” or “division”, in relation to an enterprise, includes
 - (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
 - (ii) any branch or office established for the provision of any service;
- (i) “**goods**” means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes—
 - (A) products manufactured, processed or mined;
 - (B) debentures, stocks and shares after allotment;
 - (C) in relation to goods supplied, distributed or controlled in India, goods imported into India;
- (j) “**Member**” means a Member of the Commission appointed under sub-section (1) of section 9 and includes the Chairperson;
- (k) “**notification**” means a notification published in the Official Gazette;
- (l) “**person**” includes—
 - (i) an individual;
 - (ii) a Hindu undivided family;
 - (iii) a company;
 - (iv) a firm;
 - (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
 - (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
 - (vii) any body corporate incorporated by or under the laws of a country outside India;
 - (viii) a co-operative society registered under any law relating to co-operative societies;

- (ix) a local authority;
- (x) every artificial juridical person, not falling within any of the preceding sub-clauses;
- (m) **“practice”** includes any practice relating to the carrying on of any trade by a person or an enterprise;
- (n) **“prescribed”** means prescribed by rules made under this Act; (o) **“price”**, in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing;
- (p) **“public financial institution”** means a public financial institution specified under section 4A of the Companies Act, 1956 (1 of 1956) and includes a State Financial, Industrial or Investment Corporation;
- (q) **“regulations”** means the regulations made by the Commission under section 62;
- (r) **“relevant market”** means the market which may be determined by the commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;
- (s) **“relevant geographic market”** means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;
- (t) **“relevant product market”** means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;
- (u) **“service”** means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;
- (v) **“shares”** means shares in the share capital of a company carrying voting rights and includes—
 - (i) any security which entitles the holder to receive shares with voting rights;
 - (ii) stock except where a distinction between stock and share is expressed or implied;

(w) **“statutory authority”** means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto;

(x) **“trade”** means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services;

(y) **“turnover”** includes value of sale of goods or services;

(z) words and expressions used but not defined in this Act and defined in the Companies Act, 1956 (1 of 1956) shall have the same meanings respectively assigned to them in that Act.

Check Your Progress

5. Define-
- i) Cartel
 - ii) Agreement
 - iii) Person
 - iv) Public Financial Institution
 - v) Commission

1.7: Summing Up

- The Competition Act, 2002 was passed by the Parliament in the year 2002, to which the President accorded assent in January, 2003. The Act is applicable to whole of India except Jammu and Kashmir.
- The Competition Act, 2002 replaced the erstwhile MRTP Act 1969. With the opening up of the economy in 1991, the aspirations and the needs of the market and market players could not be met up by the existing act. The main objective of the MRTP Act was to restrict monopolistic trade practices.
- The main objective of the Competition Act is to promote healthy and sustainable competition in the Indian market by protecting the interest of consumer and small companies and prohibiting abuse of dominant position.
- The Competition Act provides for the establishment of a quasi- judicial body called the Competition Commission of India.
- The Competition Act mainly covers the following aspects-
 - Establishment of Competition Commission of India (CCI).

Prohibition of Anti-Competitive Agreement.
Prohibition of the abuse of dominant position.
Regulation of Merger, Acquisition and amalgamation (Combination).

1.8: References and Suggested Readings:

Taxman ,2006. Economic Laws. Taxman Publication

Kumar, Sanjeev. 2006. Economic Laws & Practice . Vrinda Publication

WWW.CCI.GOV.IN

<https://www.jagranjosh.com/general-knowledge/competition-act-2002-1553606677-1>

<https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/no-evidence-of-cartelisation-among-5-airlines-cci/articleshow/81167341.cms?from=mdr>

1.9: Model Questions:

1. Explain the reason behind the establishment of Competition Commission of India.
2. Briefly explain the needs and objectives of the Competition Act 2002.
3. Write Short notes on :
 - a) Cartel
 - b) Enterprise
 - c) Goods
 - d) Consumer

1.10: Answer to ‘Check your Progress’:

1. MRTP Act stands for Monopolistic Restrictive Trade Practices Act. It was passed in the year 1969.
2. The main objective of MRTP Act was to restrict the monopolistic trade practices.
3. The need of Competition Act are as follows:
 - To do away/replace the MRTP Act, which has become almost obsolete in the current situation.
 - Establishment of the Competition Commission of India, a quasi-judicial body for curbing the negative aspect of competition
 - To promote and sustain healthy competition in Indian markets
 - To create awareness and training on competitive issues.
 - To protect the interest of the consumers.

4. The Competition Act was enacted with the following objectives:

- Establishment of a quasi-judicial body called the Competition Commission of India.
- To protect and promote the interest of the consumer in the Indian market.
- To create and promote an ecosystem for healthy and sustainable competition.
- To ensure freedom of trade carried on by any participants in markets, in India.
- To prevent the abuse of dominant position in the market
- To prevent trade practices that have adverse impact on Indian market
- To regulate the operation and activities of combinations (acquisitions, mergers and amalgamation).

5 . i) **“cartel”** includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services

ii) **“agreement”** includes any arrangement or understanding or action in concert,—

i) whether or not, such arrangement, understanding or action is formal or in writing; or

ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings

iii) **“person”** includes—

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;

(vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(vii) any body corporate incorporated by or under the laws of a country outside India;

(viii) a co-operative society registered under any law relating to co-operative societies;

(ix) a local authority;

(x) every artificial juridical person, not falling within any of the preceding sub-clauses;

iv) **“public financial institution”** means a public financial institution specified under section 4A of the Companies Act, 1956 (1 of 1956) and includes a State Financial, Industrial or Investment Corporation

v) **“Commission”** means the Competition Commission of India established under sub-section(1) of section 7 of the Competition Act 2002

BLOCK I : UNIT-II
**PROHIBITION OF CERTAIN AGREEMENTS, ABUSE OF DOMINANT
POSITION AND REGULATION OF COMBINATIONS**

Unit Structure:

- 2.1: Introduction
- 2.2: Objectives
- 2.3: Aspects covered by Competition Act.
- 2.4: Prohibition of certain agreements
- 2.5: Abuse of dominant position
- 2.6: Combinations and Regulation of Combinations
- 2.7: Summing Up
- 2.8: References and suggested reading
- 2.9: Model Questions
- 2.10: Answer to 'Check your Progress'

2.1: Introduction:

The main objective of Competition Act was to do away with the disadvantages of the MRTP, 1969 and to protect the interest of the consumers and players in the Indian market by promoting healthy competition and restricting monopolistic practices. The Act sought to promote healthy competition by prohibiting anti-competitive agreement and abuse of dominant position. Any agreement between parties in the market, either dealing in goods and services or taking part in bidding which is detrimental and harms the spirit of healthy competition and causes adverse impact on competition in India is understood to be anti-competitive agreement. Certain players/companies/ enterprise enjoy dominant position in the market. Dominant position means the strength enjoyed by any enterprise in relevant Indian market to operate independently of its competitors and have the power to influence the market, competitors and the consumers in its favour. In order to keep up the spirit of healthy competition, the Competition Act prohibits the 'abuse' of such dominant position by any company/enterprise/players. The Act also prohibits such 'combination' which causes appreciable adverse impact on competition in India and declares such combination as void.

2.2: Objectives: After going through this unit, you will be able to

- Understand the meaning anti-competitive agreements and dominant position.
- Explain the abuse of dominant position.
- Define Combination
- Explain how Combination are regulated as per the Competition Act

2.3: Aspects covered by Competition Act.

The Act mainly covers the following aspects;

1. Prohibition of anti competitive agreements: In order to protect the small companies and safeguard the interest of the consumers at large and to promote healthy and sustainable competition in India ,the Act prohibits all such agreement which are detrimental to the spirit of healthy competition in true sense.

2. Prohibition of abuse of dominant position : Because of the strength(dominance) enjoyed by any enterprise in the relevant market to operate independently and to influence its competitors and consumers in their favour, it might become quite difficult for the new and small competitors to survive in the market because the ‘large sharks may gradually eat up all the small fishes’ by abusing/misusing their dominant position in the market . Hence ,the Act prohibits abuse of such dominant positions by any large players in the market

3. Regulation of Combination: Combination, which generally means coming together of two or more players ,may take the form of acquisition, mergers, and amalgamation of certain size. Such combinations may sometimes be undertaken with certain ulterior objectives. The Act discourages and nullifies such combination which have ulterior motives as it adversely affects the spirit of healthy competition in India.

4. Establishment of the Competition Commission of India: Competition Act ensures the establishment of a quasi-judicial body called the *Competition Commission of India*, which aims at curb the negative aspects of competition. The Competition Commission of India (CCI) was established in March 2009 by Government of India under the Competition Act, 2002 for the administration, implementation, and enforcement of the Act.

2.4: Prohibition of certain agreements:

The Competition Act prohibits any such agreement/s which is /are detrimental to the interest of healthy and sustainable competition. Such agreements are called Anti-Competitive agreements. Sec 3(1) of the Competition Act defines Anti-Competitive agreement as follows-

Anti-competitive agreements:

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, “bid rigging” means any agreement,

between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

- (a) tie-in arrangement;
- (b) exclusive supply agreement;
- (c) exclusive distribution agreement;
- (d) refusal to deal;
- (e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

- (a) “tie-in arrangement” includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- (b) “exclusive supply agreement” includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- (c) “exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- (d) “refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- (e) “resale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

- (a) the Copyright Act, 1957 (14 of 1957);
- (b) the Patents Act, 1970 (39 of 1970);
- (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Check your Progress

1. What are the various aspects covered by Competition Act 2002.
2. What does Sec 3 of the Competition Act deal with?
3. What is Cartel?
4. What is bid rigging or collusive rigging?
5. What is 'exclusive supply agreement'?

2.5: Abuse of dominant position:

Dominant position means the strength enjoyed by any enterprise in relevant Indian market to operate independently of its competitors and have the power to influence the market, competitors and the consumers in its favour. In order to keep up the spirit of healthy competition, the Competition Act prohibits the 'abuse' of such dominant position by any company/enterprise/players. Sec 4 of the Competition Act defines 'Abuse of dominant position' and 'dominant position' as follows.

(1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

(Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service

referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market there for; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. (**Explanation.**—For the purposes of this section, the expression—

(a) “*dominant position*” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) “*predatory price*” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

STOP TO CONSIDER

Cases of contravention of Sec 4(Abuse of dominant position) was made by Bharti Airtel and C Shanmugam and Manish Gandhi in the 2017 , against Jio (new player in the telecom sector). The aggrieved parties approached both the Telecom Regulatory Authority of India (TRAI) and the Competition Commission of India (CCI). The main issue raised was that of ***abuse of dominant position***, in the form of ***predatory pricing*** by Jio. Upon detailed investigation into the allegations of the informants, the Commission was of the view that, Jio being a *non-dominant player* in the *relevant market* with the provision of wireless telecommunication services to end users in India, *did not engage in predatory pricing*.

Check your Progress

6. What does Sec 4 of Competition expressly deals with?
7. What is a dominant position?
8. Explain Predatory price.

2.6: Combinations and Regulation of Combinations:

Combination, which generally means coming together of two or more players, may take the form of acquisition, mergers, and amalgamation of certain size. Such combinations may sometimes be undertaken with certain ulterior objectives. The Act discourages and nullifies such combination which has ulterior motives as it adversely affects the spirit of healthy competition in India. Sec 5 of the Competition Act defines Combination as follows-
The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

(a) any acquisition where—

(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—

(A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or

(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or

turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—

(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,—

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or

(ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have,—

(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores or

(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or

(c) any merger or amalgamation in which—

(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India,

or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,—

(A) either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees Fifteen Hundred Crores in India.

(Explanation.— For the purposes of this section,—

(a) “control” includes controlling the affairs or management by—

(i) one or more enterprises, either jointly or singly, over another enterprise or group;

(ii) one or more groups, either jointly or singly, over another group or enterprise;

(b) “group” means two or more enterprises which, directly or indirectly, are in a position to —

(i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or

(iii) control the management or affairs of the other enterprise;

(c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights, if any, referred to in sub-section (5) of section 3.

Regulation of combinations:

Sec 6 of the Competition Act defines Regulation of Combination as follows:

(1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

(2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details

of the proposed combination, within 14 [thirty days] of—

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

(No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section(2) or the Commission has passed orders under section 31, whichever is earlier.)

(3) The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.

(4) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

(5) The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub-section (4), shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

Explanation.—For the purposes of this section, the expression—

(a) “foreign institutional investor” has the same meaning as assigned to it in clause (a) of the *Explanation* to section 115AD of the Income-tax Act, 1961(43 of 1961);

(b) “venture capital fund” has the same meaning as assigned to it in clause (b) of the *Explanation* to clause (23 FB) of section 10 of the Income-tax Act, 1961(43 of 1961);.

Check your Progress

9. What does Section 5 and Section 6 of Competition Act deals with?
10. What is “exclusive distribution agreement” ?

2.7: Summing Up:

- Any agreement between parties in the market, either dealing in goods and services or taking part in bidding which is detrimental and harms the spirit of healthy competition and causes adverse impact on competition in India is understood to be anti-competitive agreement.
- Sec 3 of the Competition Act defines Anti-Competitive agreement and prohibits all such agreement which are against the spirit of healthy competition. However, Sec 3 doesn't restrict the right of any person to restrain any infringement of or to impose reasonable conditions ,as may be necessary for protecting any of his rights which have been or may be conferred upon him under The Copyright Act, 1957, the Patent Act,1970, the Trademark Act 1999, the GIG(registration and protection Act) 1999, the Design Act 2000. Etc.
- Sec 4 of the Competition Act defines ‘Abuse of dominant position’ and ‘dominant position’. Dominant position is the strength enjoyed by any enterprise in relevant Indian market to operate independently of its competitors and have the power to influence the market, competitors and the consumers in its favour. Sec 4 expressly prohibits any enterprise from abusing its dominant position.
- Sec 5 of the Competition Act defines Combination. Combination, which generally means coming together of two or more players, may take the form of acquisition, mergers, and amalgamation of certain size. Such combinations may sometimes be undertaken with certain ulterior objectives. The Act discourages and nullifies such combination which has ulterior motives as it adversely affects the spirit of healthy competition in India.
- Sec 6 of the Competition Act regulates Combination. The Section say that, no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void

2.8: References and Suggested Readings:

Taxman ,2006. Economic Laws. Taxman Publication

Kumar, Sanjeev. 2006. Economic Laws & Practice . Vrinda Publication

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<https://www.jagranjosh.com/general-knowledge/competition-act-2002-1553606677-1>

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2.9: Model Questions

1. What is dominant position and what do you mean by abuse of dominant position?

Explain

2. Explain the Anti-Competitive agreement under this act.
3. Explain what is Combination and how they are regulated.

2.10: Answer to ‘Check your Progress’:

1. Various aspects of Competition Act 2002 are Prohibition of anti competitive agreements, Prohibition of abuse of dominant position, Regulation of Combination and Establishment of the Competition Commission of India
2. Sec 3 of Competition Act deals with Anti- Competitive Agreement.
3. Cartel is a common concept that refers to anti-competitive agreements such as price fixing, bid rigging etc. Cartel includes an association of producers, sellers ,distributors, traders or service providers who, by agreement amongst themselves ,limit, control or attempt to control the production ,distribution, sale or price of or trade in goods or services.
4. “bid rigging” means any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding
5. “exclusive supply agreement” includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person
6. Sec 4 of Competition expressly deals with the prohibition of the ‘abuse of dominant position’.
7. Dominant position is the strength enjoyed by any enterprise in relevant Indian market to operate independently of its competitors and have the power to influence the market,

competitors and the consumers in its favour. Sec 4 expressly prohibits any enterprise from abusing its dominant position.

8. “*predatory price*” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

9. Sec 5 defines the meaning of Combination and Sec 6 deals with the Regulation of Combination.

10. “exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods

BLOCK I: UNIT III
COMPETITION COMMISSION OF INDIA: DUTIES, POWER, FUNCTIONS OF
COMMISSION, DUTIES OF DIRECTOR GENERAL

Unit Structure:

- 3.1 Introduction
- 3.2 Objectives
- 3.3 Introduction to Competition Commission of India
- 3.4 Duties, powers, and functions of commission
- 3.5 Duties of Director General
- 3.6 Summing up
- 3.7 References and suggested readings
- 3.8 Model Questions
- 3.9 Answers to check your progress

3.1 Introduction

Keeping in view the economic development of the country, it has become important to establish a Commission to prevent adverse practices which has effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

3.2 Objectives

This unit attempts to throw light on the law keepers of the Competition Act 2002. After going through this chapter, you will be able to:

- Know about role of law keepers and their duties in embracing the Act
- Discuss the power and functions of law keepers as per the Act

3.3 Introduction to Competition Commission of India

The Competition Act, 2002 was passed by the Parliament in the year 2002, to which the President gave consent in January 2003. It was amended by the Competition (Amendment) Act, 2007.

In accordance with the provisions of the Amendment Act, the Competition Commission of India and the Competition Appellate Tribunal have been established. The Competition

Commission of India is now fully functional with a chairperson and six members. The provisions of the Competition Act relating to anti-competitive agreements and abuse of dominant position were notified on May 20, 2009.

3.4 Duties, powers, and functions of commission

Subject to the provisions of this Act, it shall be the duty of the Commission:

- to eliminate practices having adverse effect on competition,
- promote and sustain competition,
- protect the interests of consumers and
- ensure freedom of trade carried by other participants, in markets of India
- the Commission may make arrangement with prior approval of the Central Government, or with any agency of any foreign country to enter into memorandum.
- the Commission shall while determining whether an agreement has an appreciable adverse effect on competition or not has to consider the following factors, namely:—
 - (a) creation of barriers to new entrants in the market;
 - (b) driving existing competitors out of the market;
 - (c) foreclosure of competition by hindering entry into the market;
 - (d) accrual of benefits to consumers;
 - (e) improvements in production or distribution of goods or provision of services; or
 - (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.
- The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—
 - (a) market share of the enterprise.
 - (b) size and resources of the enterprise;
 - (c) size and importance of the competitors.
 - (d) economic power of the enterprise including commercial advantages over competitors;
 - (e) vertical integration of the enterprises or sale or service network of such enterprises; (f) dependence of consumers on the enterprise.
 - (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
 - (i) countervailing buying power;
 - (j) market structure and size of market;
 - (k) social obligations and social costs;
 - (l) relative advantage by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
 - (m) any other factor which the Commission may consider relevant for the inquiry.
- For determining whether a market constitutes a “relevant market” for the purposes of this Act, the Commission shall have due regard to the “relevant geographic market” and “relevant product market”.
 - The Commission shall, while determining the “relevant geographic market”, have due regard to all or any of the following factors, namely:—
 - (a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services.
 - The Commission shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely:- (a) physical characteristics or end-use of goods; (b) price of goods or service (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialised producers; (f) classification of industrial products. Inquiry into combination by Commission
 - The jurisdiction, power and authority of the Commission may be exercised by Benches thereof. The Benches shall be constituted by the Chairperson and each Bench shall consist of not less than two Members. Every Bench shall consist of at least one Judicial Member.

Stop to consider

“Judicial Member” means a Member who is, or has been, or is qualified to be, a Judge of a High Court.

- The Bench over which the Chairperson presides shall be the Principal Bench and the other Benches shall be known as the Additional Benches. There shall be constituted by the Chairperson one or more Benches to be called the Mergers Bench or Mergers Benches exclusively to deal with matters referred to in sections 5 and 6 of the Act.
- On receipt of any complain from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter: Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.
- If the report of the Director General relates to a complaint and such report recommends that there is no contravention of any of the provisions of this Act, the complainant shall be given an opportunity to rebut the findings of the Director General.
- If, after hearing the complainant, the Commission agrees with the recommendation of the Director General, it shall dismiss the complaint. If, after hearing the complainant, the Commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint.
- If the report of the Director General relates on a reference made under any sub-section and such report recommends that there is no contravention of the provisions of this Act, the Commission shall invite comments of the Central Government or the State Government or the statutory authority, as the case may be, on such report and on receipt of such comments, the Commission shall return the reference if there is no prima facie case or proceed with the reference as a complaint if there is a prima facie case.
- Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years. In case any agreement referred to in section 3 the complainant has been entered into cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.

- Commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten percent. of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher;”
- Where the Commission is of prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted. After receipt of the response of the parties to the combination under sub- section (1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct. The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, or the receipt of report from Director General called under sub section (1A), (whichever is later) direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination. (3) The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within

fifteen working days from the date on which the details of the combination were published under sub-section (2). The Commission may, within fifteen working days from the expiry of the period specified in sub-section (3), call for such additional or other information as it may deem fit from the parties to the said combination.

- The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within fifteen days from the expiry of the period specified in sub-section (4). After receipt of all information and within a period of forty-five working days from the expiry of the period specified in sub-section (5), the Commission shall proceed to deal with the case in accordance with the provisions contained in section 31.
- A person or an enterprise or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

Stop to consider

“chartered accountant” means a person who has obtained a certificate of practice under Chartered Accountants Act, 1949.

“company secretary” means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 and who has obtained a certificate of practice under the act.

“cost accountant” means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 and who has obtained a certificate of practice under the act.

3.4.1 Power to award compensation :

The Commission may, after an inquiry made into the allegations mentioned in the application made, pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realisable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II having been committed by such enterprise.

- Where any loss or damage is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Commission, make an application on behalf of, or for the benefit of, the persons so interested.

- The Commission shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have powers to regulate its own procedure including the places at which they shall have their sittings, duration of oral hearings when granted, and times of its inquiry.
- The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908(5 of 1908), while trying a suit, in respect of the following matters, namely:— (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses or documents; (e) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office; (f) dismissing an application in default or deciding it ex parte; (g) any other matter which may be prescribed.
- Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Commission shall be deemed to be a civil court for the purposes of section 195 (2 of 1974) and Chapter XXVI of the Code of Criminal Procedure, 1973.
- The Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist the Commission in the conduct of any inquiry or proceeding before it. The Commission may direct any person— (a) to produce before the Director General or the Registrar or an officer authorised by it, such books, accounts or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act; (b) to furnish to the Director General or the Registrar or any officer authorised by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.

- The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:- (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses or documents; (e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), any public record or document or copy of such record or document from any office. The Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it.
- The Commission may direct any person: (a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act; (b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.

3.4.2 Review of orders of Commission:

Any person aggrieved by an order of the Commission from which an appeal is allowed by this Act but no appeal has been preferred, may, within thirty days from the date of the order, apply to the Commission for review of its order and the Commission may make such order thereon as it thinks fit: Provided that the Commission may entertain a review application after the expiry of the said period of thirty days, if it is satisfied that the applicant was prevented by sufficient cause from preferring the application in time. Provided further that no order shall be modified or set aside without giving an opportunity of being heard to the person in whose favour the order is given and the Director General where he was a party to the proceedings.

3.4.3 Rectification of orders:

(1) With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of this Act. Subject to the other provisions of this Act, the Commission may make— (a) an amendment under sub-section (1) of its own motion; (b) an amendment for rectifying any such mistake which has been brought to its notice by any party to the order. Explanation.— For the removal of doubts, it is hereby declared that the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

3.4.4 Execution of orders of Commission imposing monetary penalty:

(1) If a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations. (2) In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961, it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act. (3) Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961.

3.4.5 Execution of orders of Commission:

Every order passed by the Commission under this Act shall be enforced by the Commission in the same manner as if it were a decree or order made by a High Court or the principal civil court in a suit pending therein and it shall be lawful for the Commission to send, in the event of its inability to execute it, such order to the High Court or the principal civil court, as the case may be, within the local limits of whose jurisdiction,— (a) in the case of an order against a person referred to in sub-clause (iii) or sub-clause (vi) or subclause (vii) of clause (1) of section 2, the registered office or the sole or principal place of business of the person in India or where the person has also a subordinate office, that subordinate office, is situated; (b) in the case of an order against any other person, the place, where the person concerned voluntarily resides or carries on business or personally works for gain, is situated, and thereupon the court to which the order is so sent shall execute the order as if it were a decree or order sent to it for execution

Check your progress:

1. What are the rules for Commission to execute orders for imposing monetary penalty?
2. What are the circumstances under which compensation may be awarded?

Self-Asking Questions:

1. What are the factors to be considered while enquiring whether an enterprise enjoys a dominant position or not under section 4?

3.5 Duties of Director General

The following are the list of duties assigned to the Director General under the Act:

- The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.
- The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of section 36.
- Without prejudice to the provisions of sub-section (2), sections 240 and 240A of the Companies Act, 1956 (1 of 1956), so far as may be, shall apply to an investigation made by the Director General or any other person investigating under his authority, as they apply to an inspector appointed under that Act. 67
- Explanation.—For the purposes of this section, -- (a) the words “the Central Government” under section 240 of the Companies Act, 1956 (1 of 1956) shall be construed as “the Commission”; (b) the word “Magistrate” under section 240A of the Companies Act, 1956 (1 of 1956) shall be construed as “the Chief Metropolitan Magistrate, Delhi”.

3.6 Summing up

1. The Competition Act, 2002 was passed by the Parliament in the year 2002, to which the President gave consent in January 2003. It was amended by the Competition (Amendment) Act, 2007.

2. Duties of Commission
 - to eliminate practices having adverse effect on competition,
 - promote and sustain competition,
 - protect the interests of consumers and
 - ensure freedom of trade carried by other participants, in markets of India
 - the Commission may make arrangement with prior approval of the Central Government, or with any agency of any foreign country to enter into memorandum.
3. Power to award compensation: The Commission may, after an inquiry made into the allegations mentioned in the application made, pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realisable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II having been committed by such enterprise.

3.7 References and suggested readings

1. Bare Act of Competition Act 2002

3.8 Model Questions

1. Identify the Duties of Commission under the Competition Act 2002.
2. Identify the factors which may create an adverse effect on competition under the Competition Act 2002.
3. Identify and explain the factors which an enterprise enjoys to remain in an dominant position under section 4 of the Competition Act 2002.
4. On receipt of any complain from the Central Government or a State Government or a statutory authority or on its own knowledge under section 19 of the Competition Act 2002, what are the steps taken by the commission?
5. Explain the Power to award compensation under the Competition Act 2002.
6. List the Duties of Director General under the Competition Act 2002.

3.9 Answers to check your progress

1. Execution of orders of Commission imposing monetary penalty: (1) If a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the

regulations. (2) In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961, it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act. (3) Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961.

2. The Commission may award compensation in the following circumstances: the commission may after an inquiry made into the allegations mentioned in the application made and pass an order directing the enterprise to make payment to the applicant. Where any loss or damage is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Commission, make an application on behalf of, or for the benefit of, the persons so interested. Further, the Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary, to assist the Commission in the conduct of any inquiry or proceeding before it.

BLOCK I : UNIT IV
PENALTIES- PROVISION RELATING TO FINANCE, ACCOUNTS AND AUDIT-
MISCELLANEOUS PROVISION

Unit Structure:

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4.1 Introduction

The Government of India in April 1964 appointed the Monopolies Inquiry Commission under the Chairmanship of Justice K. C Das Gupta, a judge of the Supreme Court, to inquire into the extent and effect of concentration of economic power in private hands and prevalence of monopolistic and restrictive trade practices in important sectors of economic activity other than agriculture.

To regulate advertising, in 1984, Parliament inserted a chapter on unfair trade practices in the Monopolies and Restrictive Trade Practices Act, 1969. The Monopolies and Restrictive Trade Practices Commission was constituted in the year 1970.

The Monopolies and Restrictive Trade Practices Act, 1969 had its genesis in the Directive Principles of State Policy embodied in the Constitution of India. It received the assent of the President of India on 27 December 1969. The Monopolies and Restrictive Trade Practices Act was intended to curb the rise of concentration of wealth in a few hands and of monopolistic practices. It was repealed on September 2009. The Act has been succeeded by The Competition Act, 2002. The Competition Bill, 2001 was introduced in Lok Sabha by Finance Minister Arun Jaitley on 6 August 2001.

4.2 Objectives

This unit attempts to throw light on the process of levying penalty under the competition commission Act 2002 on the individuals as well as institutions. After going through this chapter, you will be able to:

- Know about role, power and functions of commission
- Discuss the Importance of levying penalty
- Power of various authorities under the Act.

4.3 Introduction to Penalties

Under section 27 of the Competition Act 2002, the Competition Commission of India (CCI) is empowered to impose some of the highest economic penalties on enterprises. The CCI routinely passes final orders imposing penalties on parties that have been found to be in violation of the Act without detailing why. On several occasions, the obsolete Competition Appellate Tribunal (COMPAT) reprimanded the CCI for its arbitrary practice of imposing penalties. This has culminated in not only the implicated parties frequently challenging the CCI's final orders before the appellate tribunal but also a poor realisation of the CCI's penalties.

Despite finding violations of the Act, the CCI in several of its orders in the last two years has either imposed no penalties or symbolic penalties due to the economic ramifications of covid-19. However, in some other orders, the CCI has not extended the same benefit to the parties, despite the parties pleading the economic devastation of the covid-19 pandemic as a mitigating factor. This has brought returned focus to a regulatory issue plaguing the CCI's decision-making process that has led to uncertainties for businesses and practitioners – the lack of penalty imposition guidelines.

4.3.1 Contravention of orders of Commission

The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act. If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine. If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a

term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit.

4.3.2 Compensation in case of contravention of orders of Commission

Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission.

4.3.3 Penalty for failure to comply with directions of Commission and Director General

If any person fails to comply, without reasonable cause, with a direction given by—

- (a) the Commission under sub-sections (2) and (4) of section 36; or
- (b) the Director General while exercising powers referred to in sub-section (2) of section 41, such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission.

Stop to consider

Competition (Amendment) Act, 2007 for:“(1) Without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Commission, or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or fails to pay the penalty imposed under this Act, he shall be liable to be detained in civil prison for a term which may extend to one year, unless in the meantime the Commission directs his release and he shall also be liable to a penalty not exceeding rupees ten lakhs.(2) The Commission may, while making an order under this Act, issue such directions to any person or authority, not inconsistent with this Act, as it thinks necessary or desirable, for the proper implementation or execution of the order, and any person who commits breach of, or fails to comply with, any obligation imposed on him under such direction, may be ordered by the Commission to be detained in civil prison for a term not exceeding one year unless in the meantime the Commission directs his release and he shall also be liable to a penalty not exceeding rupees ten lakhs.”

4.3.4 Power to impose penalty for non-furnishing of information on combinations

If any person or enterprise who fails to give notice to the Commission under sub-section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent, of the total turnover or the assets, whichever is higher, of such a combination.

4.3.4 Penalty for making false statement or omission to furnish material information

If any person, being a party to a combination,—(a) makes a statement which is false in any material particular, or knowing it to be false; or
(b) omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

4.3.5 Penalty for offences in relation to furnishing of information:

Without prejudice to the provisions of section 44, if a person, who furnishes or is required to furnish under this Act any particulars, documents or any information—

- (a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or
- (b) omits to state any material fact knowing it to be material; or
- (c) wilfully alters, suppresses, or destroys any document which is required to be furnished as aforesaid, such person shall be punishable with fine which may extend to rupees one crore as may be determined by the Commission. Without prejudice to the provisions of sub-section (1), the Commission may also pass such other order as it deems fit.

4.3.6 Power to impose lesser penalty

The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations. Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure. Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true

and vital disclosures under this section. Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader, or service provider included in the cartel, who has made the full, true and vital disclosures. Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission. Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,—

- (a) not complied with the condition on which the lesser penalty was imposed by the Commission; or
- (b) had given false evidence; or
- (c) the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

Crediting sums realised by way of penalties to Consolidated Fund of India

All sums realised by way of penalties under this Act shall be credited to the Consolidated Fund of India.

4.3.7 Contravention by companies

Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other

officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

4.3.8 Grants by Central Government

The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the Commission grants of such sums of money as the Government may think fit for being utilised for the purposes of this Act.

4.3.9 Constitution of Fund

(1) There shall be constituted a fund to be called the “Competition Fund” and there shall be credited thereto. All Government grants received by the Commission and the interest accrued on the amounts referred to in 82[clauses (a) and (c)].

(2) The Fund shall be applied for meeting the salaries and allowances payable to the Chairperson and other Members and the administrative expenses including the salaries, allowances and pension payable to the Director General, Additional, Joint, Deputy or Assistant Directors General, the Registrar and officers and other employees of the Commission.

(3) The Fund shall be administered by a committee of such Members of the Commission as may be determined by the Chairperson.

(4) The committee appointed under sub-section (3) shall spend monies out of the Fund for carrying out the objects for which the Fund has been constituted.

Stop to consider

(a) “company” means a body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.

Self Asking Questions

1. What are the Powers vested to impose lesser penalty under the competition Act 2002?

Check your progress

1. What do you mean by Competition Fund?
2. What are the consequences for contravention by companies?

4.4 Penalties- Provision relating to finance and accounts

4.4.1 Accounts and Audit

(1) The Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Commission shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Commission to the Comptroller and Auditor-General of India.

Explanation.—For the removal of doubts, it is hereby declared that the orders of the Commission, being matters appealable to the Appellate Tribunal or the Supreme Court, shall not be subject to audit under this section.

(3) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Commission shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India generally has, in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission. (4) The accounts of the Commission as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

4.4.2 Furnishing of returns, etc., to Central Government

(1) The Commission shall furnish to the Central Government at such time and in such form and manner as may be prescribed or as the Central Government may direct, such returns and statements and such particulars in regard to any proposed or existing measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues, as the Central Government may, from time to time require.

(2) The Commission shall prepare once in every year, in such form and at such time as may be prescribed, an annual report giving a true and full account of its activities during the previous year and copies of the report shall be forwarded to the Central Government.

(3) A copy of the report received under sub-section (2) shall be laid, as soon as may be after it is received, before each House of Parliament.

4.4.3 Competition Advocacy

(1) The Central Government may in formulating a policy on competition (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.

(2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government or the State Government, as the case may be in formulating such policy.

(3) The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

Stop to consider

Android Case

The instant case was initiated by Umar Javeed against Google. It was alleged that Google was abusing its dominant position by imposing unfair terms on the app developers and end-users which was causing foreclosure in the market and harming the competitive environment in the market. The informants placed the reliance on the international precedents decided by other antitrust regulators which had already found Google to be dominant in the relevant market. In the present case, the CCI relied on the findings provided by the informants. This shifted the burden of proof to the opposite party to discharge the doubt placed by the informants.

Check your progress:

3. What are the details required for furnishing of returns to Central Government ?

Self-Asking Questions:

Maruti Suzuki Case

This particular case was a suo moto case initiated by the Competition Commission of India (CCI) after it received an anonymous mail which alleged that Maruti Suzuki is abusing its dominant position in the relevant market. It stated that Maruti did not allow the dealers to give discounts to the end consumers based on their own discretion and it placed a cap on the same. If any dealer is giving a discount and he would be subjected to penalty. Moreover, it was stated that such information resulted in consumer harm since they were not able to acquire the best price which was prevailing in the relevant market.

The Competition Commission of India (CCI) invoked Section 3(4) of the Competition Act, 2002 and also ordered for the investigation in order to form a “prima facie” of the violation. It is pertinent to note that, Maruti filed several affidavits for testifying and countering the allegations of the mail, however, the CCI shifted the burden of proof to Maruti to justify itself for not causing contravention to any provisions of the Act. In this particular case, the CCI adopted the “omission of act” approach for formulating its opinion.

1. What is your opinion on the case?

4.5 Audit- miscellaneous provision

4.5.1 Miscellaneous Power to exempt:

The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification—

- (a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;
- (b) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries;
- (c) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government. Provided that in case an enterprise is engaged in any activity including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions.

4.5.2 Power of Central Government to issue directions

(1) Without prejudice to the foregoing provisions of this Act, the Commission shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy, other than those relating to technical and administrative

matters, as the Central Government may give in writing to it from time to time. Provided that the Commission shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.

(2) The decision of the Central Government whether a question is one of policy or not shall be final.

4.5.3 Power of Central Government to supersede Commission

(1) If at any time the Central Government is of the opinion—

(a) that on account of circumstances beyond the control of the Commission, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or

(b) that the Commission has persistently made default in complying with any direction given by the Central Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Commission or the administration of the Commission has suffered; or

(c) that circumstances exist which render it necessary in the public interest so to do, the Central Government may, by notification and for reasons to be specified therein, supersede the Commission for such period, not exceeding six months, as may be specified in the notification: Provided that before issuing any such notification, the Central Government shall give a reasonable opportunity to the Commission to make representations against the proposed supersession and shall consider representations, if any, of the Commission.

(2) Upon the publication of a notification under sub-section (1) superseding the Commission,— (a) the Chairperson and other Members shall as from the date of supersession, vacate their offices as such;

(b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Commission shall, until the Commission is reconstituted under subsection (3) be exercised and discharged by the Central Government or such authority as the Central Government may specify in this behalf;

(c) all properties owned or controlled by the Commission shall, until the Commission is reconstituted under sub-section (3), vest in the Central Government.

(3) On or before the expiration of the period of supersession specified in the notification issued under subsection (1), the Central Government shall reconstitute the Commission by a fresh appointment of its Chairperson and other Members and in such case any person who

had vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for re-appointment.

(4) The Central Government shall cause a notification issued under sub-section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament at the earliest.

4.5.4 Restriction on disclosure of information

No information relating to any enterprise, being an information which has been obtained by or on behalf of the Commission or the Appellate Tribunal for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.

Chairperson, Members, Director General, Secretary, officers and other employees, etc., to be public servants. The Chairperson and other Members and the Director General, Additional, Joint, Deputy or Assistant Directors General and Secretary and officers and other employees of the Commission and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed, while acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).]

4.5.5 Protection of action taken in good faith

No suit, prosecution or other legal proceedings shall lie against the Central Government or Commission or any officer of the Central Government or the Chairperson or any Member or the Director- General, Additional, Joint, Deputy or Assistant Directors General or the Secretary or officers or other employees of the Commission or the Chairperson, Members, officers and other employees of the Appellate Tribunal for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

4.5.6 Act to have overriding effect

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

4.5.7 Exclusion of jurisdiction of civil courts

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act to

determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

4.5.8 Application of other laws not barred

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

4.5.9 Power to make rules

(1) The Central Government may, by notification, make rules to carry out the provisions of this Act. In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the term of the Selection Committee and the manner of selection of panel of names under sub-section (2) of Section 9

(b) the form and manner in which and the authority before whom the oath of office and of secrecy shall be made and subscribed to under sub-section (3) of section 10

(c) the salary and the other terms and conditions of service including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities to be provided to the Chairperson and other Members under sub-section (1) of section 14;

(d) the number of Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner in which such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees may be appointed under sub- section (1A) of section 16

(e) the salary, allowances and other terms and conditions of service of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under sub-section (3) of section 16;

(f) the qualifications for appointment of the Director General, Additional, Joint, Deputy or Assistant Directors General or such officers or other employees under sub-section (4) of section 16

(g) the salaries and allowances and other terms and conditions of service of the Secretary and officers and other employees payable, and the number of such officers and employees under sub-section (2) of section 17

(h) the form in which the annual statement of accounts shall be prepared under sub-section (1) of section 52 the time within which and the form and manner in which the Commission

may furnish returns, statements and such particulars as the Central Government may require under sub-section (1) of section 53;

(i) the form in which and the time within which the annual report shall be prepared under sub-section (2) of section 53

(j) the form in which an appeal may be filed before the Appellate Tribunal under sub-section (2) of section 53B and the fees payable in respect of such appeal. The fee which shall be accompanied with every application made under sub-section (2) of section.

(2) Every notification issued under sub-section(3) of section 20 and section 54 and every rule made under this Act by the Central Government shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or rule, or both Houses agree that the notification should not be issued or rule should not be made, the notification or rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or rule, as the case may be.

4.5.10 Power to make regulations

(1) The Commission may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing provisions, such regulations may provide for all or any of the following matters, namely:— (a) the cost of production to be determined under clause (b) of the Explanation to section 4; (b) the form of notice as may be specified and the fee which maybe determined under sub-section(2) of section 6; (c) the form in which details of the acquisition shall be filed under subsection(5) of Section 6; 101[(d)] the procedures to be followed for engaging the experts and profession-also under sub-section(3) of section 17;(e) the fee which may be determined under clause (a) of sub-section(1) of section 19; (f) the rules of procedure in regard to the transaction of business at the meetings of the Commission under sub-section(1) of section 22; (g) the manner in which penalty shall be recovered under sub-section(1) of section 39; (h) any other matter in respect of which provision is to be, or may be, made by regulations.

(3) Every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation, or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

4.5.11 Power to remove difficulties

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as may appear to it to be necessary for removing the difficulty: Provided that no such order shall be made under this section after the expiry of a period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

4.5.12 Repeal and Saving.

The Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) is hereby repealed and the Monopolies and Restrictive Trade Practices Commission established under subsection (1) of section 5 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved. The repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) shall, however, not affect,-

a) the previous operation of the Act so repealed or anything duly done or suffered thereunder; or

b) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed; or

c) any penalty, confiscation or punishment incurred in respect of any contravention under the Act so repealed; or

d) any proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, confiscation or punishment as aforesaid, and any such proceeding or remedy may be

instituted, continued or enforced, and any such penalty, confiscation or punishment may be imposed or made as if that Act had not been repealed.

On the dissolution of the Monopolies and Restrictive Trade Practices Commission, the person appointed as the Chairman of the Monopolies and Restrictive Trade Practices Commission and every other person appointed as Member and Director General of Investigation and Registration, Additional, Joint, Deputy, or Assistant Directors General of Investigation and Registration and any officer and other employee of that Commission and holding office as such immediately before such dissolution shall vacate their respective offices and such Chairman and other Members shall be entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of term of their office or of any contract of service. Provided that the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices

Commission appointed on deputation basis to the Monopolies and Restrictive Trade Practices Commission, shall, on such dissolution, stand reverted to his parent cadre, Ministry or Department, as the case may be. Provided further that the Director-General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee who has been, immediately before the dissolution of the Monopolies and Restrictive Trade Practices Commission, employed on regular basis by the Monopolies and Restrictive Trade Practices Commission, shall become, on and from such dissolution, the officer and employee, respectively, of the Competition Commission of India or the Appellate Tribunal, in such manner as may be specified by the Central Government, with the same rights and privileges as to pension, gratuity and other like matters as would have been admissible to him if the rights in relation to such Monopolies and Restrictive Trade Practices Commission had not been transferred to, and vested in, the Competition Commission of India or the Appellate Tribunal, as the case may be, and shall continue to do so unless and until his employment in the Competition Commission of India or the Appellate Tribunal, as the case may be, is duly terminated or until his remuneration, terms and conditions of employment are duly altered by the Competition Commission of India or the Appellate Tribunal, as the case may be.

Provided also that notwithstanding anything contained in the Industrial Disputes Act, 1947(14 of 1947), or in any other law for the time being in force, the transfer of the services of any Director General of Investigation and Registration, Additional, Joint, Deputy or

Assistant Directors General of Investigation and Registration or any officer or other employee, employed in the Monopolies and Restrictive Trade Practices Commission, to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall not entitle such Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or any officer or other employee any compensation under this Act or any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority: Provided also that where the Monopolies and Restrictive Trade Practices Commission has established a provident fund, superannuation, welfare or other fund for the benefit of the Director General of Investigation and Registration, Additional, Joint, Deputy or Assistant Directors General of Investigation and Registration or the officers and other employees employed in the Monopolies and Restrictive Trade Practices Commission, the monies relating to the officers and other employees whose services have been transferred by or under this Act to the Competition Commission of India or the Appellate Tribunal, as the case may be, shall, out of the monies standing] on the dissolution of the Monopolies and Restrictive Trade Practices Commission to the credit of such provident fund, superannuation, welfare or other fund, stand transferred to, and vest in, 106[the Competition Commission of India or the Appellate Tribunal as the case may be, and such monies which stand so transferred shall be dealt with by the said Commission or the Tribunal, as the case may be, in such manner as may be prescribed.

All cases pertaining to monopolistic trade practices or restrictive trade practices pending (including such cases, in which any unfair trade practice has also been alleged), before the Monopolies and Restrictive Trade Practices Commission shall, on the commencement of the competition Amendment Act, 2009 stand transferred to the Appellate Tribunal and shall be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed. "Explanation- 'For the removal of doubts, it is hereby declared that all cases referred to in this sub-section, sub-section(4) and sub-section (5) shall be deemed to include all applications made for the losses or damages under section 12(B) of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) as it stood before its repeal". Subject to the provisions of sub-section(3), all cases pertaining to unfair trade practices other than those referred to in clause (x) of sub-section(1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Monopolies and Restrictive Trade Practices Commission "immediately before the commencement of the Competition (Amendment) Act, 2009 shall, on such commencement",

shall, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission shall dispose of such cases as if they were cases filed under that Act. Provided that the National Commission may, if it considers appropriate, transfer any case transferred to it under this sub-section, to the concerned State Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986) and that State Commission shall dispose of such case as if it was filed under that Act. Provided further that all the cases relating to the unfair trade practices pending, before the National Commission under this sub-section, on or before the date on which the competition (Amendment) Bill, 2009 receives the assent of the President, shall, on and from that date, stand transferred to the Appellate Tribunal and be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.

All cases pertaining to unfair trade practices referred to in clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 and pending before the Monopolies and Restrictive Trade Practices Commission shall, “on the commencement of the Competition (Amendment) Act, 2009” stand transferred to the Appellate Tribunal and the Appellate Tribunal shall dispose of such cases as if they were cases filed under that Act. All investigations or proceedings, other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit. All investigations or proceedings, relating to unfair trade practices, other than those referred to in clause (x) of sub-section (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the National Commission constituted under the Consumer Protection Act, 1986 (68 of 1986) and the National Commission may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit. “Provided that all investigations or proceedings, relating to unfair trade practices pending before the National Commission, on or before the date on which the Competition (Amendment) Bill, 2009 receives the assent of the President shall, on and from that date, stand transferred to the Appellate Tribunal and the Appellate Tribunal may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.” All investigations or proceedings relating to unfair trade practices referred to in

clause (x) of subsection (1) of section 36A of the Monopolies and Restrictive Trade Practices Act, 1969(54 of 1969), and pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India and the Competition Commission of India may conduct or order for conduct of such investigation in the manner as it deems fit. The mention of the particular matters referred to in sub-sections (3) to (8) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

Check your progress:

4. What are the provisions under Protection of action taken in good faith ?

Multiple cinema owners such as PVR, Inox, Cinepolis that they were levying “virtual printing fee” from the informants and also they are acting in collusion which is anti-competitive conduct as per the Competition Act, 2002. The CCI did not find “prima facie” violations as per the Act. And it also held that the informants have to discharge the burden of proof on it as per the scheme of the Competition Act, 2002 in order to have an order for investigation. Therefore, it failed to define the “initial burden of proof” which is placed upon the parties.

Self-Asking Questions:

OYO Rooms Case

In Federation of Hotel & Restaurant Associations of India v. Ashok Kumar Gupta, RKG Travels Pvt. Ltd (Informants) alleged that OYO is abusing its dominant position in the relevant market by imposing unfair conditions on owners of the hotel for maximizing its revenue and consumer base. The Competition Commission of India (CCI) did not form any ‘prima facie’ view of the violation of Competition Act, 2002 and closed the case in accordance with 26(2) of the Act. Moreover, the CCI defined the relevant market as “market for franchising services for budget hotels in India”. However, it tracked back the same later. And also, ultimately took view on the opposite party based on the relevant market which was defined in the first place.

1. Share your views on the OYO Rooms Case.

4.6 Summing up

If any person fails to comply with the orders or directions of the Commission shall be punishable with fine which may extend to ₹ 1 lakh for each day during which such non compliance occurs, subject to a maximum of ₹ 10 crore.

If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under this section, he shall be punishable with imprisonment for a term which will extend to three years, or with fine which may extend to ₹ 25 crores or with both.

Section 44 provides that if any person, being a party to a combination makes a statement which is false in any material particular or knowing it to be false or omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than ₹ 50 lakhs but which may extend to ₹ 1 crore.

4.7 References and suggested readings

1. Bare Act Competition Commission Act 2002

4.8 Model Questions

1. What are the steps taken to penalise for failure to comply with directions of Commission and Director General?
2. Penalty for making false statement or omission to furnish material information
3. What are the duties and functions of Accounts and Audit under the Competition Commission Act 2002?
4. What are the Powers bestowed upon Central Government to issue directions under the Competition Commission Act 2002?
5. What are the Power of Central Government to supersede Commission under the Competition Commission Act 2002?

4.9 Answers to check your progress

1. All Government grants received by the Commission and the interest accrued on the amounts are put in the fund called competition fund.
2. Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as

the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly

3. The Commission shall furnish to the Central Government at such time and in such form and manner as may be prescribed or as the Central Government may direct, such returns and statements and such particulars in regard to any proposed or existing measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues, as the Central Government may, from time to time require. The Commission shall prepare once in every year, in such form and at such time as may be prescribed, an annual report giving a true and full account of its activities during the previous year and copies of the report shall be forwarded to the Central Government. A copy of the report received under subsection (2) shall be laid, as soon as may be after it is received, before each House of Parliament.
4. No suit, prosecution or other legal proceedings shall lie against the Central Government or Commission or any officer of the Central Government or the Chairperson or any Member or the Director- General, Additional, Joint, Deputy or Assistant Directors General or the Secretary or officers or other employees of the Commission or the Chairperson, Members, officers and other employees of the Appellate Tribunal for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

BLOCK II : UNIT-I
FOREIGN EXCHANGE MANAGEMENT ACT 1999: OBJECTIVES, DEFINITIONS,
REGULATION AND MANAGEMENT OF FOREIGN EXCHANGE: DEALINGS IN
FOREIGN EXCHANGE, HOLDING OF FOREIGN EXCHANGE ETC.

Unit Structure:

- 1.1 Introduction
- 1.2 Objectives
- 1.3 FEMA 1999: Introduction
- 1.4 FEMA 1999: Objectives
- 1.5 FEMA 1999: Definitions
- 1.6 Regulation and Management of Foreign Exchange:
 - 1.6.1 Dealings in Foreign Exchange
 - 1.6.2 Holding of Foreign Exchange
- 1.7 Summing Up
- 1.8 References and Suggested Readings

1.1 Introduction

The Foreign Exchange Management Act, 1999 is one of the most important economic legislation in India. After the adoption of the Liberalisation, Privatisation and Globalisation policies by the Indian Government, it became pertinent to regulate and manage the foreign exchange in a way which was more akin to the newly adopted policies. FEMA 1999 enables the Central Government to achieve desired outcomes by providing a mean for implementation of its monetary and fiscal policies.

1.2 Objectives

This unit shall familiarize students with the FEMA 1999. After completion of the unit the students shall be able to-

- Discuss the objectives of the acts.
- Comprehend the various definitions under the act.
- Comprehend the various provisions relating to Dealing and Holding of Foreign Exchanges.

1.3 FEMA 1999: Introduction

After the LPG policy was adopted in the year 1991 the Foreign Exchange Regulation Act (FERA), 1973 had become obsolete. It was imperative to repeal and replace the act to accommodate for the changes that the globalization brought. Thus Foreign Exchange Management Act (FEMA), 1999 came into force from 1st June 2000 to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India. The bare act consisted of seven (07) chapters and forty nine (49) sections upon its inception.

Stop to Consider	
Some differences between FERA 1973 and FEMA 1999	
FERA 1973	FEMA 1999
Treated foreign exchange as a scarce resource.	Treated foreign exchange as an asset.
It was to regulate the transactions involving foreign exchange.	It is related to management of foreign exchange
It was restrictive in nature.	It is less restrictive in nature.
Contraventions were treated as a criminal offence.	Contraventions are treated as a civil offence.
Appeals were made to High Court.	Appeals are made to Special Director (Appeals) or designated Tribunal.
Citizenship was the basis to determine residential status of a person.	Residential status of the person is dependent on whether the person stayed 182 days or more in the previous financial year.

1.4 Objectives

- a) Amendment of obsolete FERA, 1973:FERA, 1973 was very restrictive in nature and had become quite arbitrary after the implementation of the LPG policies. Thus FEMA 1999 was introduced to adapt to the dynamic nature of the Indian Policies.
- b) Simplification of foreign exchange law:The erstwhile law treated foreign exchange as a scarce resource and hence was a very law. FEMA simplified the law to facilitate external trade and payments.

- c) Implementation of foreign trade policy in India by the RBI and Central Government: In addition to facilitate the implementation of the monetary policies the FEMA 1999 was enacted to implement the dynamic foreign trade policies through rules passed under the act by the Central Government.
- d) Free reign over current account transactions: The current account transactions, which were cumbersome earlier are free from any prohibition.
- e) Promotion of overall economic development and management of foreign exchange in India.

Self Assessment Question

1. What led to enactment of FEMA 1999?

1.5 FEMA 1999: Definitions

- i. Adjudicating Authority: It means an officer authorised under Section 16 (1).
- ii. Appellate Tribunal: It means the Appellate Tribunal for Foreign Exchange established under Section 18.
- iii. Authorised Person: It means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities.
- iv. Capital Account Transaction: It means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6.
- v. Currency: It includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellerscheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank.
- vi. Currency Notes: It means and includes cash in the form of coins and bank notes.
- vii. Current Account Transaction: It means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes-
 - payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business,
 - payments due as interest on loans and as net income from investments,

- remittances for living expenses of parents, spouse and children residing abroad, and
 - expenses in connection with foreign travel, education and medical care of parents, spouse and children.
- viii. Export: with its grammatical variations and cognate expressions, means-
- the taking out of India to a place outside India any goods,
 - provision of services from India to any person outside India.
- ix. Foreign Currency: It means any currency other than Indian currency.
- x. Foreign Exchange: It means foreign currency and includes-
- deposits, credits and balances payable in any foreign currency,
 - drafts, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,
 - drafts, travelerscheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency.
- xi. Foreign Security: It means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency.
- xii. Import: with its grammatical variations and cognate expressions, means bringing into India any goods or services.
- xiii. Indian Currency: It means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of India Act, 1934 (2 of 1934).
- xiv. Person: It includes-
- an individual,
 - a Hindu undivided family,
 - a company,
 - a firm,
 - an association of persons or a body of individuals, whether incorporated or not,
 - every artificial juridical person, not falling within any of the preceding sub-clauses, and
 - any agency, office or branch owned or controlled by such person.
- xv. Person resident in India: It means-

- a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include-
 - (a) a person who has gone out of India or who stays outside India, in either case-
 - (i) for or on taking up employment outside India, or
 - (ii) for carrying on outside India a business or vocation outside India, or
 - (iii) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period
 - (b) a person who has come to or stays in India, in either case, otherwise than-
 - (i) for or on taking up employment in India, or
 - (ii) for carrying on in India a business or vocation in India, or
 - (iii) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.
 - any person or body corporate registered or incorporated in India.
 - an office, branch or agency in India owned or controlled by a person resident outside India.
 - an office, branch or agency outside India owned or controlled by a person resident in India.

xvi. Person Resident Outside India: It means a person who is not resident in India.

Stop to Consider

Residential status of a person is not dependent upon their citizenship but the number of days stayed in India in previous financial year. Since financial year is not defined in FEMA 1999, it is presumed that the financial year is the same as defined under Income Tax Act.

xvii. Repatriate To India: It means bringing into India the realised foreign exchange and-

- the selling of such foreign exchange to an authorised person in India in exchange for rupees, or
- the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank.

and includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange and the expression “repatriation” shall be construed accordingly.

xvii. Security: It means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944 (18 of 1944), savings certificates to which the

Government Savings Certificates Act, 1959 (46 of 1959) applies, deposit receipts in respect of deposits of securities and units of the Unit Trust of India established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 (52 of 1963) or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act.

xviii. Service: It means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

xix. Transfer: includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

Check Your Progress

1. What is Capital Account Transaction?
2. What is Foreign Security according to FEMA 1999?
3. Who is a 'person' according to FEMA 1999?

1.6 Regulation and Management of Foreign Exchange

From section 3 onwards the regulatory and management provisions of the Foreign Exchange are given.

1.6.1 Dealings in Foreign Exchange (Sec. 3)

Save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall-

- (a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;
- (b) make any payment to or for the credit of any person resident outside India in any manner;
- (c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Explanation.—For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance

from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person.

(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Explanation.—For the purpose of this clause, “financial transaction” means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

Therefore any dealings in foreign exchange are prohibited unless those dealings are done through an authorised dealer.

1.6.2 Holding of Foreign Exchange (Sec. 4)

Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015: These regulations clarified the limit on the possession of the Foreign Exchange in India by a person.

Limits for possession and retention of foreign currency or foreign coins:

- i. The possession of foreign currency and coins is unlimited for an authorised person within the scope of his authority.
- ii. No limit on possession of foreign coins by any person.
- iii. Retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques not exceeding US\$ 2000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques;
 - a) was acquired by him while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India; or
 - b) was acquired by him, from any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation; or
 - c) was acquired by him by way of honorarium or gift while on a visit to any place outside India; or

- d) represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

Possession of foreign exchange by a person resident In India but not permanently resident therein: A person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and travellers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the regulations made under the Act.

Explanation : for the purpose of this clause, 'not permanently resident' means a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.

Check Your Progress

4. Who can deal in Foreign Exchange?
5. Can a person hold Foreign Exchange?

1.7 Summing Up

After the adoption of the LPG policies in 1991, the existing FERA 1973 had become obsolete and was no longer viable. FEMA 1999 was enacted to suit the need of the modern India, its economy and its people. The bare act has given important definitions and has less room for ambiguity. The definition of a person and determination of their residential is exhaustively given. The act has clearly specified that the dealings of any foreign exchange shall take place only through an authorised dealer and otherwise the dealings are prohibited.

Discussing a Question

1. As defined in Section 2(e) of the FEMA, "capital account transaction" means transactions which alters the assets or liabilities, including contingent liabilities outside India, of persons resident in India or assets or liabilities, in India, of persons resident outside India and includes transactions referred to in section 6(3) of the FEMA.
2. It means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities

expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency.

3. A person is an Individual, a Hindu undivided family, a company, a firm, an association of persons or a body of individuals, whether incorporated or not, every artificial juridical person, not falling within any of the preceding sub-clauses, and an office, branch or agency outside India owned or controlled by a person resident in India.
4. Only an authorized dealer can deal in Foreign Exchange.
5. Yes, a person can hold foreign exchange but it is subject to some limits mentioned in section 4 of the FEMA 1999.

1.8 References and Suggested Readings

FEMA 1999, its subsequent amendments and RBI circulars.

Francis Cherunilam, *Business Environment*. New Delhi:Himalaya Publishing House

BLOCK II : UNIT-2

FEMA 1999: CURRENT ACCOUNT TRANSACTIONS, CAPITAL ACCOUNT TRANSACTIONS, EXPORT OF GOODS AND SERVICES, REALIZATION AND REPATRIATION OF FOREIGN EXCHANGE, EXEMPTION

Unit Structure:

- 1.1 Introduction
- 1.2 Objectives
- 1.3 Current Account Transactions
- 1.4 Capital Account Transactions
- 1.5 Export of Goods and Services
- 1.6 Realization and Repatriation of Foreign Exchange
- 1.7 Exemption from Realization and Repatriation of Foreign Exchange
- 1.8 Summing up
- 1.9 References and Suggested Readings

1.1 Introduction

In the previous unit you learnt the definitions provided by the FEMA 1999 and some provisions relating to the management and regulation of foreign exchange. One of the novel change that FEMA 1999 brought was the delimitation of current account transactions and the explanation of scope of the capital account transactions. This unit is a further discussion of the regulation and management of foreign exchange under FEMA 1999.

1.2 Objectives

This unit shall further familiarise students with the regulation and management of foreign exchange under FEMA 1999. After completion of the unit the students shall be able to-

- Comprehend current and capital account transactions
- Comprehend the export of goods and services.
- Comprehend the various provisions relating to realization and repatriation of foreign exchange.

1.3 Current Account Transactions

According to the section 5 of the act, any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction:

Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

All current transactions are permitted if the sale or drawl of foreign exchange is done to or from an authorized person, unless specified by the RBI or the Central Government as per

section 6(4) of the Foreign Exchange Management Act, 1999 and Foreign Exchange Management (Current Account Transactions) Rules, 2000. Some examples of current account transaction are given below (sale or drawl of foreign exchange for the purpose of):

1. Gift or donation
2. Maintenance of close relatives abroad
3. Expenses in connection with medical treatment abroad
5. Studies abroad

The following current account transactions are prohibited (see rule 3 and schedule I):

- i. Remittances out of lottery winnings
- ii. Remittance of income from racing/ riding etc. or any other hobby
- iii. Remittance for purchase of lottery tickets, banned/ prescribed magazines, football pools, sweepstakes, etc.
- iv. Payment of commission on exports made towards equity investment in Joint Ventures/ Wholly Owned Subsidiaries abroad of Indian companies
- v. Remittance of dividend by any company to which the requirement of dividend balancing is applicable
- vi. Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco
- vii. Payment related to “Call Back Services” of telephones
- viii. Remittance of interest income on funds held in Non-Resident Special Rupee (Account) Scheme.
- ix. Drawal of foreign exchange by any person is prohibited for travel to Nepal and/ or Bhutan and/ or a transaction with a person resident in Nepal or Bhutan.

The following current account transaction need prior approval of the Central Government (see rule 4 and schedule II):

Purpose of Remittance	Ministry/Department of Govt. of India whose approval is required
1. Cultural Tours	Ministry of Human Resources Development, (Department of Education and Culture)
2. Advertisement in foreign print media for the purposes other than promotion of	Ministry of Finance, (Department of

tourism, foreign investments and international bidding (exceeding USD 10,000) by a State Government and its Public Sector Undertakings	Economic Affairs)
3. Remittance of freight of vessel chartered by a PSU	Ministry of Surface Transport, (Chartering Wing)
4. Payment of import by a Govt. Department or a PSU on c.i.f. basis (i.e. other than f.o.b. and f.a.s. basis)	Ministry of Surface Transport, (Chartering Wing)
5. Multi-modal transport operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
6. Remittance of hiring charges of transponders by (a) TV Channels (b) Internet Service providers	Ministry of Information and Broadcasting Ministry of Communication and Information Technology
7. Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
8. Remittances under technical collaboration agreements where payment of royalty exceeds 5% on local sales and 8% on exports and lumpsum payment exceeds USD 2 million	Ministry of Commerce and Industry
9. Remittance of prize money/sponsorship of sports activity abroad by a person other than International / National / State Level sports bodies, if the amount involved exceeds USD 100,000.	Ministry of Human Resources Development (Department of Youth Affairs and Sports)
10. Remittance for membership of P& I Club	Ministry of Finance, (Insurance Division)

The following current account transactions need prior approval of the Reserve Bank of India (see rule 5 and schedule III):

- i. Release of exchange exceeding USD 10,000 or its equivalent in one calendar year, for one or more private visits to any country (except Nepal and Bhutan)

- ii. Gift remittance exceeding USD 5,000 per remitter/donor per annum.
- iii. Donation exceeding USD 5000 per remitter/donor per annum.
- iv. Exchange facilities exceeding USD 100,000 for persons going abroad foremployment.
- v. Exchange facilities for emigration exceeding USD 100,000 or amount prescribed bycountry of emigration.
- vi. Remittance for maintenance of close relatives abroad,
 - 1. exceeding net salary (after deduction of taxes, contribution to provident fund and other deductions) of a person who is resident but not permanently resident in India and –
 - (a) is a citizen of a foreign State other than Pakistan; or
 - (b) is a citizen of India, who is on deputation to the office or branch or subsidiary or joint venture in India of such foreign company.
 - 2. exceeding USD 100,000 per year, per recipient, in all other cases.
- vii. Release of foreign exchange, exceeding USD 25,000 to a person, irrespective of period of stay, for business travel, or attending a conference or specialised training or for maintenance expenses of a patient going abroad for medical treatment or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/check-up.
- viii. Release of exchange for meeting expenses for medical treatment abroad exceeding the estimate from the doctor in India or hospital/doctor abroad.
- ix. Release of exchange for studies abroad exceeding the estimate from the institution abroad or USD 100,000, per academic year, whichever is higher.
- x. Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or 5% of the inward remittance whichever is more.
- xi. Remittance exceeding USD 1,000,000 per project, for any consultancy service procured from outside India.
- xii. Remittance exceeding USD 100,000 by an entity in India by way of reimbursement of pre-incorporation expenses.

Stop to Consider

There are no restriction on current account transactions provided that the transaction is done through an authorised dealer. There are some prohibited transactions which are covered under rule 3 and schedule I of the Foreign Exchange Management (Current Account Transactions) Rules, 2000. While there are some transactions which need prior of approval of the central government according to the rule 4 and schedule II of the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

While the transactions which are not prohibited, if they cross a certain threshold/ceiling in terms of amount, need prior approval of the reserve bank according to the rule 5 and schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

Check Your Progress

1. Briefly explain the rules and regulations regarding the current account transactions.

1.4 Capital Account Transactions

The capital account transactions are covered under the section 6 of the FEMA 1999. The following are the sub-sections related to it:

- (1) Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.
- (2) The Reserve Bank may, in consultation with the Central Government, specify-
 - (a) any class or classes of capital account transactions, involving debt instruments, which are permissible.
 - (b) the limit up to which foreign exchange shall be admissible for such transactions.
 - (c) any conditions which may be placed on such transactions.

Provided that the Reserve Bank or the Central Government shall not impose any restrictions on the drawal of foreign exchange for payment due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business.

- (3) *This sub section has been omitted*¹
- (4) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India 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.
- (5) A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.
- (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

- (7) For the purposes of this section, the term “debt instruments” shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.

The Reserve Bank exercised the provision of subsection 2 and made a notification named **Permissible Capital Account Transactions (Notification No. FEMA 20 /2000-RB dated 3rd May 2000)**. Schedules I and II of this regulation specify the classes of capital account transactions of resident and non-residents for which foreign exchange may draw or sold to an authorised person.

Schedule I: Classes of capital account transactions of persons resident in India-

- (a) Investment by a person resident in India in foreign securities.
- (b) Foreign currency loans raised in India and abroad by a person resident in India.
- (c) Transfer of immovable property outside India by a person resident in India.
- (d) Guarantees issued by a person resident in India in favour of a person resident outside India.
- (e) Export, import and holding of currency/currency notes.
- (f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India.
- (g) Maintenance of foreign currency accounts in India and outside India by a person resident in India.
- (h) Taking out of insurance policy by a person resident in India from an insurance company outside India.
- (i) Loans and overdrafts by a person resident in India to a person resident outside India.
- (j) Remittance outside India of capital assets of a person resident in India.
- (k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.

Provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction.

Schedule II: Classes of capital account transactions of persons resident outside India-

- (a) Investment in India by a person resident outside India, that is to say,
 - (i) issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
 - (ii) investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.
- (b) Acquisition and transfer of immovable property in India by a person resident outside India.
- (c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
- (d) Import and export of currency/currency notes into/from India by a person resident outside India.
- (e) Deposits between a person resident in India and a person resident outside India.
- (f) Foreign currency accounts in India of a person resident outside India.

(g) Remittance outside India of capital assets in India of a person resident outside India.

Provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction.

Prohibited Capital Account Transactions (Notification No. FEMA 20 /2000-RB dated 3rd May 2000)

Save as otherwise provided in the Act, rules or regulations made thereunder-

- (a) no person shall undertake or sell or draw foreign exchange to or from an authorised person for any capital account transaction.
- (b) no person resident outside India shall make 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—
 - (i) in the business of chit fund, or
 - (ii) as Nidhi Company, or
 - (iii) in agricultural or plantation activities, or
 - (iv) in real estate business, or construction of farm houses, or
 - (v) in trading in Transferable Development Rights (TDRs).

Stop to Consider

All the capital account transactions are prohibited even if done through an authorised dealer. However there some classes of capital account transaction which are permissible when done through an authorised dealer. These classes are divided into transactions according to residential status. This is covered by the **Permissible Capital Account Transactions (Notification No. FEMA 20 /2000-RB dated 3rd May 2000)**. If the capital account transactions are related to inheritance or ownership are permissible as well. Any further prohibition or permissibility are notified by the reserve bank under the sub-section 2 of the section 6 of the FEMA 1999.

Check Your Progress

2. Briefly explain the rules and regulations regarding the capital account transactions.

Self-Assessment Question

1. What are the differences between Current Account Transactions and Capital Account Transactions?

1.5 Export of Goods and Services

The export of goods and services are regulated under the section 7 of the FEMA 1999. The following are the provisions under section 7:

- (1) Every exporter of goods shall-

- (a) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the full export value or, if the full export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India,
 - (b) furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realisation of the export proceeds by such exporter.
- (2) The Reserve Bank may, for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit.
- (3) Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services.

Furthermore the **Foreign Exchange Management (Export of Goods & Services) Regulations, 2015** provides some regulations which were devised on the exercise of various sub-sections discussed above:

Declaration of exports (Regulation 3):

(1) In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing –

(i) the full export value of the goods or software; or

(ii) if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.

(2) Declarations shall be executed in sets of such number as specified.

(3) For the removal of doubt, it is clarified that, in respect of export of services to which none of the Forms specified in these Regulations apply, the exporter may export such services

without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

(4) Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

Exemptions from declaration of exports (Regulation 4):

- a) trade samples of goods and publicity material supplied free of payment;
- b) personal effects of travellers, whether accompanied or unaccompanied;
- c) ship's stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements;
- d) by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value
- e) aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling /repairs, within a period of six months from the date of their export;
- ea) re-export of leased aircraft/helicopter and/or engines/auxiliary power units (APUs), either completely or in partially knocked down condition re-possessed by overseas lessor and duly de-registered by the Directorate General of Civil Aviation (DGCA) on the request of Irrevocable Deregistration and Export Request Authorisation (IDERA) holder under 'Cape Town Convention' or any other termination or cancellation of the lease agreement between the lessor and lessee subject to permission by DGCA/Ministry of Civil Aviation for such export/s;
- f) goods imported free of cost on re-export basis;
- g) the following goods which are permitted by the Development Commissioner of the Special Economic Zones, Electronic Hardware Technology Parks, Software Technology Parks or Free Trade Zones to be re-exported, namely:
 - 1) imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators;
 - 2) goods imported from foreign suppliers/collaborators on loan basis;
 - 3) goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations.

(ga) goods listed at items (1), (2) and (3) of clause (i) to be re-exported by units in Special Economic Zones, under intimation to the Development Commissioner of Special Economic Zones / concerned Assistant Commissioner or Deputy Commissioner of Customs

(h) replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.

(i) goods sent outside India for testing subject to re-import into India;

(j) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.

(k) exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission.

Authority to whom declaration is to be furnished and the manner of dealing with the declaration (Regulation 6):

A. Declaration in Form EDF (Export Declaration Form)

(i) The declaration in form EDF shall be submitted in duplicate to the Commissioner of Customs.

(ii) After duly verifying and authenticating the declaration form, the Commissioner of Customs shall forward the original declaration form/data to the nearest office of the Reserve Bank and hand over the duplicate form to the exporter for being submitted to the authorised dealer.

B. Declaration in Form SOFTEX (Software Export)

(i) The declaration in Form SOFTEX in respect of export of computer software and audio/video/ television software shall be submitted in triplicate to the designated official of Ministry of Information Technology, Government of India at the Software Technology Parks of India (STPIs) or at the Free Trade Zones (FTZs) or Special Economic Zones (SEZs) in India.

(ii) After certifying all three copies of the SOFTEX form, the said designated official shall forward the original directly to the nearest office of the Reserve Bank and return the duplicate to the exporter. The triplicate shall be retained by the designated official for record.

Manner of payment of export value of goods (Regulation 8):

Unless otherwise authorised by the Reserve Bank, the amount representing the full export value of the goods exported shall be paid through an authorised dealer in the manner specified in the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 as amended from time to time.

Payment for the Export (Regulation 12):

In respect of export of any goods or software for which a declaration is required to be furnished under Regulation 3, no person shall except with the permission of the Reserve Bank or, subject to the directions of the Reserve Bank, permission of an authorised dealer, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing –

(i) that the payment for the goods or software is made otherwise than in the specified manner; or

(ii) that the payment is delayed beyond the period specified under these Regulations; or

(iii) that the proceeds of sale of the goods or software exported do not represent the full export value of the goods or software subject to such deductions, if any, as may be allowed by the Reserve Bank or, subject to the directions of the Reserve Bank, by an authorised dealer;

Provided that no proceedings in respect of contravention of these provisions shall be instituted unless the specified period has expired and payment for the goods or software representing the full export value, or the value after deductions allowed under clause (iii), has not been made in the specified manner within the specified period.

(iv) Export of services to which no Form specified in these Regulations apply, the exporter may export such services without furnishing any declaration, (i), (ii) & (iii) above shall apply.

Stop to Consider

The export of goods and services are governed under the section 7 of the FEMA 1999 and subsequent rules/regulations issued by the Reserve Bank from time to time. All the exports of goods and services are to be declared except for those exports covered under the regulation 4 of **Foreign Exchange Management (Export of Goods & Services) Regulations, 2015** through EDF or SOFTEX forms. All the payments regarding the export of goods and services shall be done through an authorised dealer.

Check Your Progress

3. Give some examples of export which are exempt from the mandated declaration.

1.6 Realization and repatriation of foreign exchange

According to the section 8 of the FEMA 1999, any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

Reserve Bank made the following regulations relating to the manner of, and the period for, realisation of foreign exchange, repatriation of realised foreign exchange to India and its surrender under **Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2000:**

Manner of Repatriation (Regulation 4):

- (1) On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and -
 - (a) sell it to an authorised person in India in exchange for rupees; or
 - (b) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
 - (c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.
- (2) A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

Period for surrender of realised foreign exchange (Regulation 5):

A person shall sell the realised foreign exchange to an authorised person under clause (a) of sub-regulation (1) of regulation 4, within the period specified below:-

- i) foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt ;
- ii) in all other cases within a period of ninety days from the date of its receipt.

Period for surrender in certain cases (Regulation 6):

- (1) Any person who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under sub-section (5) of Section 10 of the Act does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of sixty days from the date of its acquisition or purchase by him.
- (2) Notwithstanding anything contained in sub-regulation (1), where the foreign exchange acquired or purchased by any person from an authorised person is for the purpose of foreign travel, then, the unspent balance of such foreign exchange shall, save as otherwise provided in the regulations made under the Act, be surrendered to an authorised person -
 - (i) within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and
 - (ii) within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques.

Nothing in these regulations are applicable to foreign exchange in the form of currency of Nepal or Bhutan.

1.7 Exemption from realization and repatriation in certain cases

According to section 9 of the FEMA 1999, the following are exempted from realization and repatriation:

- (a) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify;
- (b) foreign currency account held or operated by such person or class of persons and the limit up to which the Reserve Bank may specify;
- (c) foreign exchange acquired or received before the 8th day of July, 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of a general or special permission granted by the Reserve Bank;
- (d) foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (c), including any income arising therefrom;
- (e) foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and
- (f) such other receipts in foreign exchange as the Reserve Bank may specify.

Check Your Progress

4. How is foreign exchange repatriated?

1.8 Summing Up

The current account transactions are not prohibited except for some transactions which are mentioned in the subsequent regulations notified by the Reserve Bank. Whereas in the case of capital account transactions, all such transactions are prohibited except for those classes of transactions which were notified by the Reserve Bank. In case of exports, all the exports are to be declared using an EDF or SOFTEX forms except for those exports which are exempted. The realization and repatriation of foreign exchange is mandatory according to the section 8 of FEMA 1999 and shall be done so in the manner and the time specified by the Reserve Bank through its notifications. All the discussed transactions are to be done only through an authorized dealer.

Discussing a Question

1. There are no restriction on current account transactions provided that the transaction is done through an authorised dealer. There are some prohibited transactions which are covered under rule 3 and schedule I of the Foreign Exchange Management (Current Account Transactions) Rules, 2000. While there are some transactions which need prior of approval of the central government according to the rule 4 and schedule II of the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

While the transactions which are not prohibited, if they cross a certain threshold/ceiling in

terms of amount, need prior approval of the reserve bank according to the rule 5 and schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

2. All the capital account transactions are prohibited even if done through an authorised dealer. However there some classes of capital account transaction which are permissible when done through an authorised dealer. These classes are divided into transactions according to residential status. This is covered by the Permissible Capital Account Transactions (Notification No. FEMA 20 /2000-RB dated 3rd May 2000). If the capital account transactions are related to inheritance or ownership are permissible as well. Any further prohibition or permissibility are notified by the reserve bank under the sub-section 2 of the section 6 of the FEMA 1999.

3. Some examples of export which are exempt from the mandated declaration are:

- a) trade samples of goods and publicity material supplied free of payment;
- b) personal effects of travellers, whether accompanied or unaccompanied;
- c) goods imported free of cost on re-export basis;
- d) goods sent outside India for testing subject to re-import into India.

4. Foreign exchange is repatriated by:

- (a) selling it to an authorised person in India in exchange for rupees; or
- (b) retaining or holding it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
- (c) using it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.

1.9 References and Suggested Readings

FEMA 1991, its subsequent amendments and RBI circulars.

Francis Cherunilam, *Business Environment*. New Delhi:Himalaya Publishing House

ⁱTHE FINANCE ACT, 2015, NO. 20 of 2015, s.139

BLOCK II : UNIT-3

AUTHORISED PERSON - CONTRAVENTION & PENALTIES- ADJUDICATION & APPEAL, DIRECTORATE OF ENFORCEMENT- MISCELLANEOUS PROVISIONS

Unit Structure:

- 1.1 Introduction
- 1.2 Objectives
- 1.3 Authorised Person
- 1.4 Contravention and Penalties
- 1.5 Adjudication & Appeal
- 1.6 Directorate of Enforcement
- 1.7 Miscellaneous Provisions
- 1.8 Summing Up
- 1.9 References and Suggested Readings

1.1 Introduction

In the previous two units we learnt how the foreign exchange is managed and regulated according to the provisions of the act and related notifications made under the act by the Reserve Bank and the Central Government. In this unit you shall learn who is an authorised person and their duties, what are the provisions for any contraventions and its related penalties. You shall learn the powers of the Directorate of Enforcement as well as learn how adjudication and appeals work under the framework of the FEMA 1999.

1.2 Objectives

This unit shall further familiarise students with the regulation and management of foreign exchange under FEMA 1999. After completion of the unit the students shall be able to-

- Understand regarding authorised person
- Comprehend the contravention and penalties.
- Comprehend the various provisions relating Directorate of Enforcement.

1.3 Authorised Person

According to section 2(c) an "authorised dealer" is an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of Section 10 of the Act to deal in foreign exchange or foreign securities.

The sub-sections and clause of section 10 are given below:

Authorisation and its revocation-

(1) The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an

authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.

(2) An authorisation under this section shall be in writing and shall be subject to the conditions laid down therein.

(3) An authorisation granted under sub-section (1) may be revoked by the Reserve Bank at any time if the Reserve Bank is satisfied that—

(a) it is in public interest so to do; or

(b) the authorised person has failed to comply with the condition subject to which the authorisation was granted or has contravened any of the provisions of the Act or any rule, regulation, notification, direction or order made thereunder: Provided that no such authorisation shall be revoked on any ground referred to in clause (b) unless the authorised person has been given a reasonable opportunity of making a representation in the matter.

Duties-

(4) An authorised person shall, in all his dealings in foreign exchange or foreign security, comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and, except with the previous permission of the Reserve Bank, an authorised person shall not engage in any transaction involving any foreign exchange or foreign security which is not in conformity with the terms of his authorisation under this section.

(5) An authorised person shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorised person shall refuse in writing to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter to the Reserve Bank.

(6) Any person, other than an authorised person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorised person under sub-section (5) does not use it for such purpose or does not surrender it to authorised person within the specified period or uses the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder shall be deemed to have committed contravention of the provisions of the Act for the purpose of this section.

Categories of authorised dealers under FEMA:

FEMA has divided the authorised persons into four categories. Each category captures one segment of those who are authorised persons under FEMA. They are as follows:

Category	Entities	Permitted Activities
Authorized Dealer – Category I	Commercial Banks, State Co-op Banks, Urban Co-op Banks	All current and capital account transactions as per RBI directions issued from time to time
Authorized Dealer- Category II	Upgraded FFMCS, Coop Banks, Regional Rural Banks (RRBs), others	Specified non-trade related current account transactions and all activities permitted to FPMC
Authorized Dealer – Category III	Select Financial and other institutions	Transactions incidental to the foreign exchange
Full Fledged Money Changers (FFMC)	Department of Post, Urban Co-op Banks, Other FPMC	Purchase of foreign exchange and sale for private and business visits abroad.

1.4 Contravention and Penalties

Section 13 (1) states that if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

According to sec. 13 (1A) if any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property. Furthermore sec. 13 (1C) states that in addition to the penalty imposed under sub-section (1A), an imprisonment for a term which may extend to five years and with fine may be imposed.

Compounding of Contraventions

RBI has been given powers for compounding all cases of contraventions other than cases under section 3(a) of FEMA. Cases of contravention under section 3(a) relate to dealing in or transfer of foreign exchange and foreign security to any person other than an authorised dealer. For these, Enforcement Directorate will be responsible.

Depending on the sum involved, various officers have been designated to look into applications for compounding. In case where the sum involved in such contravention is

- ₹10 lakh or below - The Assistant General Manager of the Reserve Bank of India
- More than ₹10 lakh but less than ₹40 lakhs - The Deputy General Manager of Reserve Bank of India;
- More than ₹40 lakh but less than ₹100 lakhs - The General Manager of Reserve Bank of India;
- ₹100 lakhs or more - The Chief General Manager of the Reserve Bank of India;

(Provided further that no contravention shall be compounded unless the sum involved in such contravention is quantifiable)

The compounding authority can call for any information, record or any other documents relevant to the compounding proceedings. The compounding authority is required to pass an order within 180 days from the date of application. The sum for which the contravention is compounded has to be paid within 15 days from the date of order of compounding.

Check Your Progress

1. Who is an authorised person?
2. What is the provision regarding penalties for contravention?

1.5 Adjudication and appeal

The provisions relating to adjudication and appeal is covered under the chapter V of the FEMA 1999.

Appointment of Adjudicating Authority

The section 16 deals with the appointment of the adjudicating authority. The related sub-sections are given below-

(1) For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty: Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty, if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit.

(2) The Central Government shall, while appointing the Adjudicating Authorities under sub-section (1), also specify in the order published in the Official Gazette, their respective jurisdictions.

(3) No Adjudicating Authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government.

(4) The said person may appear either in person or take the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the Adjudicating Authority.

Powers of Adjudicating Authority

According to section 16, sub-section 5:

Every Adjudicating Authority shall have the same powers of a civil court which are conferred on the Appellate Tribunal under sub-section (2) of section 28 and—

(a) all proceedings before it shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860);

(b) shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

Duties of Adjudicating Authority

According to section 16, sub-section 6, Every Adjudicating Authority shall deal with the complaint under sub-section (2) as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint. Provided that where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period.

Appeal against the order of Adjudicating Authority through Appeal to Special Director (Appeals):

It is covered under the section 17, the sub-sections are discussed below:

- (1) The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction.
- (2) Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, may prefer an appeal to the Special Director (Appeals).
- (3) Every appeal under sub-section (1) shall be filed within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed: Provided that the Special Director

(Appeals) may entertain an appeal after the expiry of the said period of forty-five days, if he is satisfied that there was sufficient cause for not filing it within that period.

- (4) On receipt of an appeal under sub-section (1), the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit, confirming, modifying or setting aside the order appealed against.
- (5) The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority
- (6) The Special Director (Appeals) shall have the same powers of a civil court which are conferred on the Appellate Tribunal under sub-section (2) of section 28 and—
 - (a) all proceedings before him shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860);
 - (b) shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

Qualifications, for appointment of Special Director (Appeals):

According to the section 21 of the act, A person shall not be qualified for appointment as a Special Director (Appeals) unless he—

- (a) has been a member of the Indian Legal Service and has held a post in Grade I of that Service; or
- (b) has been a member of the Indian Revenue Service and has held a post equivalent to a Joint Secretary to the Government of India.

Terms and Condition of service of Special Director of (Appeals):

According to the section 23 of the act, the salary and allowances payable to and the other terms and conditions of service of the Special Director (Appeals) shall be such as may be prescribed.

Staff of Special Director (Appeal) [Section 27]:

- (1) The Central Government shall provide the office of the Special Director (Appeals) with such officers and employees as it may deem fit.
- (2) The officers and employees of the office of the Special Director (Appeals) shall discharge their functions under the general superintendence of the Special Director (Appeals).
- (3) The salaries and allowances and other terms and conditions of service of the officers and employees of the office of the Special Director (Appeals) shall be such as may be prescribed.

Appeal to Appellate Tribunal:

According to section 18 of the act, The Appellate Tribunal constituted under sub-section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property)

Act, 1976 (13 of 1976), shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act.

The appeals made to appellate tribunal are covered under the section 19 of the act and states that:

(1) Save as provided in sub-section (2), the Central Government or any person aggrieved by an order made by an Adjudicating Authority, other than those referred to in sub-section (1) of section 17, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal.

Provided that any person appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government.

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or the Special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed: Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Special Director (Appeals), as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal.

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing off the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the Adjudicating Authority under section 16 in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.

Procedure and powers of Appellate Tribunal and Special Director (Appeals) [Section 28]:

(1) The Appellate Tribunal and the Special Director (Appeals) shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal and the Special Director (Appeals) shall have powers to regulate its own procedure.

(2) The Appellate Tribunal and the Special Director (Appeals) shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:—

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) reviewing its decisions;
- (g) dismissing a representation of default or deciding it *ex parte*;
- (h) setting aside any order of dismissal of any representation for default or any order passed by it *ex parte*; and
- (i) any other matter which may be prescribed by the Central Government.

(3) An order made by the Appellate Tribunal or the Special Director (Appeals) under this Act shall be executable by the Appellate Tribunal or the Special Director (Appeals) as a decree of civil court and, for this purpose, the Appellate Tribunal and the Special Director (Appeals) shall have all the powers of a civil court.

(4) Notwithstanding anything contained in sub-section (3), the Appellate Tribunal or the Special Director (Appeals) may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

(5) All proceedings before the Appellate Tribunal and the Special Director (Appeals) shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974).

Civil court not to have jurisdiction (Section 34):

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Authority or the Appellate Tribunal or the Special Director (Appeals) is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Appeal to High Court (Section 35):

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Check Your Progress

3. What is the duty of adjudicating authority?
4. What kind of powers do adjudicating authority and special director have?

1.6 Directorate of Enforcement

Establishment and composition

According to section 36,

(1) The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act.

(2) Without prejudice to the provisions of sub-section (1), the Central Government may authorise the Director of Enforcement or an Additional Director of Enforcement or a Special Director of Enforcement or a Deputy Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement.

(3) Subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act.

Powers of Directorate of Enforcement [Sec. 37]

- (1) The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13.
- (2) Without prejudice to the provisions of sub-section (1), the Central Government may also, by notification, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India to investigate any contravention referred to in section 13.

The officers referred to in sub-section (1) shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 (43 of 1961) and shall exercise such powers, subject to such limitations laid down under that Act.

Special provisions relating to assets held outside India in contravention of section 4

According to section 37A,

(1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property.

Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

(2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.

(3) The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.

Explanation.—While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.

(4) The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure made under sub-section (1).

Provided that if, at any stage of the proceedings under this Act, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, as the case may be, on receipt of an application in this regard from the aggrieved person, and after affording an opportunity of being heard to the aggrieved person and representatives of the Directorate of Enforcement, shall pass an appropriate order as it deems fit, including setting aside of the seizure made under sub-section (1).

(5) Any person aggrieved by any order passed by the Competent Authority may prefer an appeal to the Appellate Tribunal. (6) Nothing contained in section 15 shall apply to this section.

Empowering other officers [Section 38]:

(1) The Central Government may, by order and subject to such conditions and limitations as it thinks fit to impose, authorise any officer of customs or any central excise officer or any police officer or any other officer of the Central Government or a State Government to exercise such of the powers and discharge such of the duties of the Director of Enforcement or any other officer of Enforcement under this Act as may be stated in the order.

(2) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on the income-tax authorities under the Income-tax Act, 1961 (43 of 1961), subject to such conditions and limitations as the Central Government may impose.

Check Your Progress

5. What are the powers of the Directorate of Enforcement?

1.7 Miscellaneous Provisions

Presumption as to documents in certain cases [Section 39]:

Where any document—

(i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law; or

(ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed) in the course of investigation of any contravention under this Act alleged to have been committed by any person, and such document is tendered in any proceeding under this Act in evidence against him, or against him and any other person who is proceeded against jointly with him, the court or the Adjudicating Authority, as the case may be, shall—

(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been

signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;

(c) in a case falling under clause (i), also presume, unless the contrary is proved, the truth of the contents of such document.

Powers of Central Government:

Suspension of operation of this Act (Sec. 40)

(1) If the Central Government is satisfied that circumstances have arisen rendering it necessary that any permission granted or restriction imposed by this Act should cease to be granted or imposed, or if it considers necessary or expedient so to do in public interest, the Central Government may, by notification, suspend or relax to such extent either indefinitely or for such period as may be notified, the operation of all or any of the provisions of this Act.

(2) Where the operation of any provision of this Act has under sub-section (1) been suspended or relaxed indefinitely, such suspension or relaxation may, at any time while this Act remains in force, be removed by the Central Government by notification.

(3) Every notification issued under this section shall be laid, as soon as may be after it is issued, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be issued, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

Power of Central Government to give directions (Sec. 41)

For the purposes of this Act, the Central Government may, from time to time, give to the Reserve Bank such general or special directions as it thinks fit, and the Reserve Bank shall, in the discharge of its functions under this Act, comply with any such directions.

Removal of difficulties (Sec. 45)

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, do anything not inconsistent with the provisions of this Act for the purpose of removing the difficulty. Provided that

no such order shall be made under this section after the expiry of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

Power to make rules (Sec. 46)

(1) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for,-

(a) the imposition of reasonable restrictions on current account transactions under section 5;

(aa) the instruments which are determined to be debt instruments under sub-section (7) of section 6;

(ab) the permissible classes of capital account transactions in accordance with sub-section (2A) of section 6, the limits of admissibility of foreign exchange, and the prohibition, restriction or regulation of such transactions.

Powers of RBI (Sec. 47)

(1) The Reserve Bank may, by notification, make regulations to carry out the provisions of this Act and the rules made thereunder.

(2) Without prejudice to the generality of the foregoing power, such regulations may provide for-

(a) the permissible classes of capital account transactions, the limits of admissibility of foreign exchange for such transactions, and the prohibition, restriction or regulation of certain capital account transactions under section 6;

(b) the manner and the form in which the declaration is to be furnished under clause (a) of sub-section (1) of section 7;

(c) the period within which and the manner of repatriation of foreign exchange under section 8;

(d) the limit up to which any person may possess foreign currency or foreign coins under clause (a) of section 9;

(e) the class of persons and the limit up to which foreign currency account may be held or operated under clause (b) of section 9;

(f) the limit up to which foreign exchange acquired may be exempted under clause (d) of section 9;

(g) the limit up to which foreign exchange acquired may be retained under clause (e) of section 9;

(ga) export, import or holding of currency or currency notes;

(h) any other matter which is required to be, or may be, specified.

Stop to Consider

All regulations made by the Reserve Bank before the date on which the provisions of this section are notified under section 6 and section 47 of this Act on capital account transactions, the regulation making power in respect of which now vests with the Central Government, shall continue to be valid, until amended or rescinded by the Central Government.

Self Assessment Question

1. What is the scope of the powers of the central government under FEMA 1999?

Rules and regulations to be laid before Parliament [Section 48]:

Every rule and regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation, or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

Check Your Progress

6. What powers do central government have under FEMA 1999?

1.8 Summing Up

Authorised Person are the money changers who are appointed and governed by the section 10 of the Act and can be classified under four (04) categories. Any contraventions and its penalties can result in imposition of fine, imprisonment up to five years or both. The contraventions and penalties are decided by an Adjudicating Authority. Any orders/decisions made by the Adjudicating Authority can be appealed through a Special Director (Appeals) or Appellate Tribunal. No civil courts have any jurisdiction in cases related to contravention of FEMA 1999, however any orders/decisions made by the appellate tribunal can be appealed in a High Court.

The provisions of the FEMA1999 are enforce through an Enforcement Directorate whose officers have powers like those of the Income Tax officers. Under miscellaneous provisions of the Act, the powers of the Central Government and Reserve Bank are laid down.

Discussing a Question

1. According to section 2(c) an "authorised dealer" is an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of Section 10 of the Act to deal in foreign exchange or foreign securities.
2. Section 13 (1) states that if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is

issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

3. According to section 16, sub-section 6, Every Adjudicating Authority shall deal with the complaint under sub-section (2) as expeditiously as possible and endeavour shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint. Provided that where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period.

4. The Adjudicating Authority and Special Director (Appeals) have the powers to regulate their own procedure and have the same powers as that of a civil court under the Code of Civil Procedure, 1908 (5 of 1908).

5. They have the power to take up investigation regarding any contravention covered under section 13 of the act and have the same powers as that of Income Tax Authorities as vested by the Income Tax Act, 1961 (43 of 1961).

6. The powers of the Central Government are covered under various sections viz. sec. 40, 41, 45 and 46. The Central Government may suspend the operation of the Act if it deems that it is in the best interest of the public. It can issue directions from time to time to Reserve Bank and has powers to impose restrictions on the current account transactions and impose permissibility on capital account transactions, the limits of admissibility of foreign exchange, and the prohibition, restriction or regulation of such transactions.

1.9 References and Suggested Readings

FEMA 1999, its subsequent amendments and RBI circulars.

Francis Cherunilam, *Business Environment*. New Delhi: Himalaya Publishing House

BLOCK III : UNIT 1

STANDARDS OF WEIGHTS AND MEASURES ACT, 1976

Unit Structure:

- 1.1 Introduction
- 1.2 Objectives
- 1.3 The Standards of Weights and Measures Act, 1976
- 1.4 Appointment and Powers of Director and other Staff
- 1.5 Inter-State Trade or Commerce in Weight, Measure or Other Goods
- 1.6 Import and Export of Weights and Measures
- 1.7 Provisions for Packaged Commodities
- 1.8 Legal Metrology Act, 2009
- 1.9 Summing Up
- 1.10 References and Suggested Readings

1.1 Introduction

The Standards of Weights and Measures Act, 1976 was enacted for the enforcement of standards of weights and measures. This Act is extended to the whole of India and intends to protect the interest of the consumer. These laws along with the delegated legislation framed try to protect both pecuniary interest as well as other interests of the consumers. The establishment of national standards of weights and measures and their proper enforcement aims at ensuring accuracy of measurements and measuring instruments and thus legal metrology strengthens the national economy in a broader sense besides being a potential instrument of consumer protection.

Earlier to this in 1956, a uniform standard of weights and measure based on metric system was established, which is known as 'The Standards of Weights and Measures Bill, 1956. Every unit of weight or measure to be in accordance with the metric system based on the international system of units. Weights and measures embrace every aspect of modern living. In fact, the influence and impact of the system of weights and measures is very important for trade. Even if it is very critical but at the same time it is utmost important for a country to have an accurate system of weights and measures. A Standard system of weights and measures is indispensable in facilitating trade- as it fosters certainty, trust and confidence in all transactions.

The branch of knowledge concerning weights and measures is technically known as legal metrology. In other words, metrology is the science of measurement. The Standard of Weights and Measures Act, 1976 was replaced by The Legal metrology Act, 2009. This act

intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto (The Legal metrology Act, 2009).

1.2 Objectives

After going through the unit, you will be able to:

- Define the purpose of implementing The Standards of Weights and Measures Act, 1976.
- Understand the various sections pertaining to this Act.
- Discuss the implementation of power between the Central and State government relating to Standards of Weights and Measures.
- Analyse the provisions relating to commodities in packaged form.
- Summarize the Legal Metrology Act, 2009

1.3 The Standards of Weights and Measures Act, 1976

The Standard of Weights and Measures Act, 1976, aims at introducing standards in relation to weights and measures used in trade and commerce. The Act regulates inter-state trade or commerce in weights, measures and other goods which are sold or distributed by weight, measure or number, and to provide for matters connected therewith. The main objective is to protect the interests of consumer. Standard of weights and measures leads to fair trade and competition, which promotes efficiency and helps economy to grow.

Authorities responsible to administer the Act

The act is extended to whole of India and the power to take up necessary decisions is bestowed on the Central Government. Central Government administers the provisions of the Act by issuing orders/directions notified in the official gazette and by delegating the authority to State Governments and administrators of Union Territories. The Central Government at its apex level is responsible for achieving the objectives enshrined by the Parliament under this Act for the welfare and general well-being of all the citizens.

The Central Government looks after the matters of national policy and other related functions such as, uniform laws on weights and measures, technical regulations, training, precision laboratory facilities and implementation of the International Recommendations. The State Governments and Union Territory Administration are responsible for the day to day enforcement of the laws. Department of Consumer Affairs looks after the Weights and Measures Unit. It is the central authority for dealing with the subject to handle the matters falling within the purview of the Central Government.

1.3.1 Definitions

The Act contains definitions of some important terms, namely:

1. “Bureau” means the Bureau of Standards established by the Standards Act.
2. “Container” includes any form of packaging of goods for sale as single item, whether by way of wholly or partly enclosing the goods or by way of attaching the goods to, or winding the goods round, some other article, and in particular includes a wrapper or confining band.
3. “Inspector” means a person appointed as an inspector of weights and measures under this Act.
4. “Premises” includes any place and any stall, vehicle, vessel or aircraft.
5. “Pre-packed” means made up in advance ready for retail sale in or on a container; and on any premises where articles of any description are so made up, or are kept or stored for sale after being so made up, any articles of that description found made up in or on a container shall be deemed to be pre-packed unless the contrary is proved; and it shall not be sufficient proof of the contrary to show that the container has not been marked in accordance with the requirements of this Act or of any regulations made there under.
6. “Trade” includes any transaction for the transferring or rendering of money or money’s worth in consideration of money or money’s worth.
7. “Weighing or measuring equipment” means equipment for measuring in terms of length, area, volume, capacity, weight or number, whether or not the equipment is constructed to give an indication of the measurement made or other information determined by reference to that measurement.

1.3.2 Objective of the Act:

The Act enlists the following objectives –

- Establish standards of weights and measures.
- Regulate inter-State trade or commerce in weights and measures and other goods, which are sold or distributed by weights, measures and number.

1.3.3 Establishment of Standards of Weights and Measures

Chapter II of the Act containing sections 4 to 14 deals with standard weight and measure. Section 4 provides units of weights and measures to be based on metric system according to the international system of units as recommended by the General Conference on Weights and Measures and also by the International Organisation of Legal Metrology. Section 5 to 11 provides the base unit of weights and measures.

Base Unit of weights and measures

- i. The base unit of length shall be the metre.

- ii. The base unit of mass shall be the kilogram.
- iii. The base unit of time shall be the second.
- iv. The base unit of electric current shall be the ampere.
- v. The base unit of thermodynamic temperature shall be the kelvin.
- vi. The base unit of luminous intensity shall be the candela.
- vii. The base unit of amount of substance shall be the mole.

Section 12 specifies that the Central government will make rules on behalf of the 'Derived unit' which means a unit which is derived from the base, or supplementary, units or both. Section 13 states that the base unit of numeration shall be the unit of the international form of Indian numeral. Every numeration shall be made in accordance with the decimal system. The decimal multiples and submultiples of the numerals shall be of such denominations and be written in such manner as may be prescribed.

1.3.4 Physical representation of standard units

Section 15 to 19 suggest that the Central Government shall prepared a national prototype of the kilogram, meter. Also other than the base unit of mass, the Central Government shall prepare such objects or equipment or both, which accuracy is to be certified by the International Bureau of Weights and Measures in terms of the international prototype and deposit the same in such custody and at such place as that Government may think fit. Section 17 states that there must be a prescribed national prototype of the base unit as specified in section 15 and every object or equipment, or both, as referred in section 16.

Section 18 and 19 provides the reference, secondary and working standard shall conform to the standards established by or under this Act and be verified and authenticated at such periodical intervals and in such manner as may be prescribed. The physical characteristics, configuration, constructional details, materials, equipment, performance, tolerances, period of re-verification, methods or procedures of tests shall be such as may be prescribed.

1.3.5 Standards of Weights and Measures

Chapter III of the act deals with Standards of Weights and Measures which ranges from section 20 to 23. No weight, measure or numeral, other than the standard weight, measure or numeral, shall be used as a standard weight, measure or numeral. No weight or measure, shall be manufactured or imported unless it conforms to the standards of weight or measure. Also no weight, measure or other goods shall bear any inscription or indication of weight, measure or number except in accordance with the standard unit of such weight, measure or numeration established by or under this Act.

1.3.6 Custody and verification of standard equipment

Chapter IV includes section 24 to 27 reveals about the custody and verification of standard equipments. According to Section 24, the Central government should prepare reference standards and supply to each State government as many sets of reference standards as it may think fit. As prescribed the Central government should keep in custody such number of

reference standards as necessary. Also Central government should prepare as many secondary or working standards as necessary in such a custody as prescribed under Section 25.

Every secondary standard referred shall be verified with the reference standard to conform to the standards established under this Act, which is duly stamped by the authority. Every working standard shall be verified with the secondary standard which has been stamped by that authority as per Section 26. Any secondary standard or working standard which is not verified and stamped shall be not be deemed to be a secondary standard or working standard and shall not be used. Section 27 clearly states that if because of the size or nature of any secondary standard or working standard, it is not desirable or practicable to put a stamp then a certificate may be issued and stamped to the effect that such secondary standard or working standard conforms to the standards established by or under this Act.

Check Your Progress

1. What does Chapter II of the Act deals with?
2. Who is responsible to administer the Act?
3. According to Section 24 and 25, what is the role of Central and State government?

1.4 Appointment and Powers of Director and other Staff

According to section 28, the Central Government will provide notification for appointment of Director of Legal Metrology and as many Additional, Joint, Deputy or Assistant Directors and other officers and staff as may be necessary for exercising the powers and efficiently discharging the duties conferred or imposed on them under this Act.

Some of the important provisions under this section are-

- i. All the Additional, Joint, Deputy or Assistant, Director and other officer appointed shall exercise the powers and discharge the functions of the Director as authorized in this behalf by the Central Government.
- ii. The Director may, by general or special order, define the local limits within which each Additional, Joint, Deputy or Assistant Director or other officers appointed shall exercise his powers and discharge the duties imposed on him under this Act.
- iii. Subject to the provisions of the Act, every Additional, Joint Deputy or Assistant Director and every other officer, shall discharge the duties of his office under the general superintendence, direction and control of the Director.
- iv. The Director and every Additional, Joint Deputy and Assistant Director and every other officer will perform his/her duties as a public servant within the meaning of section 21 of the Indian Penal Code.
- v. No Suit, prosecution or other legal proceeding shall lie against any officer authorised to perform any duty in respect of anything which is in good faith done or intended to be done under this Act.

vi. The Central Government with the consent of the State Government may delegate the powers of the Director to the person for the time being holding the office of the Controller of Legal Metrology in the State, and such Controller may in public interest, delegate such of the powers given to him to any officer subordinate to him, not being an officer below the rank of an Inspector, and where any such delegation of powers is made by such Controller, the person to whom such powers are delegated shall exercise those powers in the same manner and with the same effect as if they had been conferred on him directly by this Act and not by way of delegation.

vii. When delegation of powers is made, the powers so delegated shall be exercised under the general superintendence, direction and guidance of the Director.

Section 29 gives the power of inspection to the Director, or any person authorised to exercise the powers or discharge the functions of the Director. If the Director believe, whether from any information given to him by any person and taken down in writing or from personal knowledge or otherwise, that any weight or measure or other goods in relation to which any inter-State trade or commerce has taken place or is intended to take place which is a punishable offence under this Act appears to have been, or is likely to be, committed are either kept or concealed in any premises or are in the course of transportation from one State to another. Then the Director has the power to enter at any reasonable time into any such premises and search for and inspect any weight, measure or other goods in relation to which inter-State trade or commerce has taken place, or is intended to take place, and any record, register or other related documents. The power also includes seizure of any weight, measure or other goods and any record, register or other document or article which may furnish evidence indicating punishable offence under this Act in relation to any inter-state trade or commerce. Every search or seizure shall be carried out in accordance with the provisions of the Code of Criminal Procedure 1973.

Section 30 states that if any false or unverified weight or measure, and every false package, used in inter-State trade or commerce is seized, then it is liable to be forfeited to the Central Government, provided the person from whom such weight or measure was seized gets the same verified and stamped within such time as may be prescribed. Also the seized articles/goods should be disposed of in the prescribed manner.

1.5 Inter-State Trade or Commerce in Weight, Measure or Other Goods

Section 31 to 38 of the act deals with the matters concerning to inter-state trade or commerce. Section 31 states that the provision of this part will apply to every weight or measure which are made or manufactured for the purpose of inter-State trade or commerce and to all the goods and services that are used, sold, distributed, delivered or otherwise transferred in the course of inter-State trade or commerce.

Section 33 declares that no person in relation to any goods or service should-

- i) Quote or announce either by word of mouth or otherwise, any price or charge
- ii) Issue or exhibit any price list, invoice, cash memo or other document
- iii) Prepare or publish any advertisement, poster or other document

- iv) Indicate the net content on the package itself or on any label, carton or other thing
- v) Express any quantity in relation to any transaction, industrial production or protection, otherwise than in accordance with the standard unit of weight, measure or numeration.

Section 35 discusses that every person who makes, manufactures, sells, distributes, disposes or repairs of any weight or measure or other goods which are sold, delivered or distributed by weight, measure or number, shall maintain as prescribed such records and registers shall produce such records and registers before the Director or such other officer as the Director may authorize in this behalf, for inspection. Moreover if the Director have an opinion in regard to the nature or volume of the business carried on by any maker, manufacturer, dealer or repairer, it is necessary so to do, he may, by order exempt such maker, manufacturer, dealer or repairer from the operation of that sub-section.

1.6 Import and Export of Weights and Measures

Section 47 and its various sub-sections talks about need and process of registration as an exporter or importer.

Section 47 (1) quotes that “No dealer or manufacturer shall export or import any weight or measure unless he is registered under this section as such exporter or importer”.

Section 47(2) states “Every person who intends to commence or continue business as an exporter or importer of any weight or measure shall make an application for the inclusion of his name in the register to be maintained for the purpose”.

Section 47(3) states “The application referred to in sub-section (2) shall be made to the Director and every such application shall be made in such form, in such manner and on payment of such Section fees, not exceeding one thousand rupees, as may be prescribed”.

According to Section 47 (4) the Director on receipt of such application, if he is satisfied after such inquiry include the name of the applicant in the register and issue a certificate to the applicant that his name has been included and send a copy of the said certificate to the Controller of Legal Metrology in the State in which such exporter or importer is carrying on his business.

Section 47 (5) states that “A certificate granted under sub-section (4) shall be valid for the period specified therein and may be renewed, from time to time, for such further period as may be prescribed”.

1.7 Provisions for Packaged Commodities

Chapter IV of this act basically deals with commodities in packaged form which are sold or distributed in Inter-State trade or commerce. Section 29 states that no person shall-

- i. Make, manufacture, pack, sell, or cause to be packed or sold; or
- ii. Distribute, deliver, or cause to be distributed or delivered; or
- iii. Offer, expose or possess for sale,

any commodity in packaged form unless such package bears thereon or a label securely attached thereto a definite, plain and conspicuous declaration, as prescribed about-

- i. The identity of the commodity in the package
- ii. The net quantity, in terms of the standard unit of weight or measure, or the commodity in the package;
- iii. Where the commodity is packaged or sold by number, the accurate number of the commodity contained in the package;
- iv. The Unit sale price of the package.
- v. The sale price of the package.

Where the term 'Unit sale price' means the price according to such unit of weight, measure or number as may be prescribed.

Section 39(2) -Every package shall bear the name and address of the manufacturer. In case where the manufacturer is not the packer, then name and address of the packer shall be given.

Section 39(3)- If any package of a commodity bears a representation as to the number of servings, of the commodity, such package or label shall also bear a statement as to the net quantity (in terms of weight, measure or number) of each such serving.

Section 39(4)- The statement on a package or label as to the net weight, measure or number of the contents shall not include any expression which tends to quality such weight, measure or number, provided the Central Government may, by rules, specify the commodities, the weight or measure of which is likely to increase or decrease beyond the prescribed tolerance limits by reason of climatic variations; and it shall be lawful for the manufacturer or packer to use the words 'when packed' in the statement of the net content.

Section 39 (5)-In case the Central Government finds that there is undue proliferation of weight, measure or number related to any commodities being packed for sale, distribution or delivery and such undue proliferation impairs in the opinion of that Government, the reasonable ability of the consumer to make a comparative assessment of the prices after considering the net quantity or number of such commodity, that Government may direct the manufacturers and also the packers or distributors to sell, distribute or deliver such commodity in such standard quantities or number as may be prescribed.

Section 39 (6) -If the retail price or quantity of a commodity in packaged form, is stated in any advertisement, then it should include a conspicuous declaration as to the net quantity or number of the commodity contained in the package or the retail sale price thereof respectively.

Section 39 (7) - No person shall sell, distribute or deliver for sale a package containing a commodity whichfilled less than the prescribed capacity of such package except where it is proved by such person that the package was so filled with a view to protect to the contents of the package or meet the requirements of machines used for enclosing the contents of such package.

Section 39 (8)- The Central Government may, by rules, specify such reasonable variations in the net contents of the commodity in a package as may be caused by the method of packing or the ordinary exposure which may be undergone by such commodity after it has been introduced in trade or commerce.

Section 39 (9)- The Central Government may, by rules, specify the classes of commodities or packages in relation to which all or any of the provisions of this section shall not apply or shall apply with such exceptions or modifications as may be specified therein.

1.7.1 Export and import of weights, measures and commodities in packaged form

Section 48 and 49 in Chapter V basically talks about the export and import of packaged commodities. Section 48 (1) states that the Central Government may allow, on application to the Director, the export of any weight or measure which has been made or manufactured exclusively for export, provided such weight or measure conforms to the standards established by or under this Act. The application shall be made in such form, in such manner and on payment of such fees, not exceeding one thousand rupees, as may be prescribed.

Section 48 (2) provides that when any commodity in packaged form is exported, the exporter may, in addition to specifying the net contents of such package in terms of the standards unit of weight or measure established by or under this Act, also specify the weight or the net contents thereof in terms of such units of weight or measure as may be specified by the person to whom such commodity is to be exported.

Section 48 (3) goods which are exported should mention-

- (a) Quotation of any price;
- (b) Issue of any price list, invoice or cash memo;
- (c) Indication of the weight or measure or number of net contents of package on any label, cartoon or other thing;
- (d) Expression of any dimension,

Section 49 (1) reveals that “No weight or measure, whether singly or as a part or component of any machine or machinery, shall be imported unless it conforms to the standards of weights or measure established by or under this Act”.

Section 49 (2) states that “Where any commodity, machinery or any part or component of any machinery is imported from a country in which the metric system of weight or measure is not in force, or in which such system being in force, such commodity, machinery, part or component of any machinery has not been made or manufactured in accordance with such system, the importer shall, before making such import, make an endeavor to obtain the weight or measurement thereof expressed in terms of the standard unit of weight or measure established by or under this Act”.

Section 49 (3) states that in case any weight or measure has not been expressed in terms of the standard unit of weight or measure established by or under this Act, the importer shall within six months from the date of import, get the weight or measure there of expressed on

such commodity, machinery, part or component and on the drawings thereof in terms of the standard unit of weight or measure established by or under this Act.

Check Your Progress

4. State the importance of Chapter IV of The Standards of Measures Act, 1976.
5. What are the restrictions under the provision of sale or distribution of package commodities for Inter-State trade or commerce?
6. Define “Unit Sale Price”?

1.8 Legal Metrology Act, 2009

Legal metrology is the application of legal requirements to measurements and measuring instruments. In other words, it deals with units of measurement, methods of measurement and measuring instruments in statutory, technical and legal requirements which ultimately aims at assuring public guarantee from the point of view of security and of appropriate accuracy of measurements. Legal metrology Act, 2009 aims to establish and enforce standards of weights and measures to regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and its related matters. This act came into effect after its publication in the official gazette from 14th January 2010 replacing the Standards of Weights and Measures Act, 1976 and Standards of Weights and Measures (Enforcement) Act, 1985. The new Act will become operative after the Rules there under is also notified. Appointment of Government approved Test Centers for verification of weights and measures. Allowing the companies to nominate a person who will be held responsible for breach of provisions of the Act. Simplified definition of "Packaged Commodity and more stringent punishment for violation of provisions are some of the new features of the Act.

Even though the coverage of legal metrology varies from country to country but the scope of legal metrology according to international practice extends to three broad fields of human activities, namely, commercial transactions, industrial measurements and measurements needed to ensure public health and human safety. According to section 2(g) "Legal Metrology means that part of metrology which treats units of weight and measurement, methods of weight and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weightings and measurements."

1.8.1 Standard Weights and Measures under Legal Metrology Act

Chapter II of the Legal Metrology act deals with the Standard Weights and Measures consisting of Section 4 to 12. Section 4 defines that all the units of weight or measure shall be in accordance with the metric system based on the international system of units. Section 5 provides the base unit of measure which is very similar to the Standards of Weights and Measures Act 1976. Section 6 deals with base unit of numeration which should be in accordance with the decimal system. Section 7 provides the standard units of weights and

measures and states that the Central Government shall prepare objects or equipments in such manner as may be prescribed.

Section 8 states standard weight, measure or numeral which states that “No weight, measure or numeral, other than the standard weight, measure or numeral, shall be used as a standard weight, measure or numeral.” Section 8 (4) reveals that “No weight or measure, shall be manufactured or imported unless it conforms to the standards of weight or measure specified.” However, the aforesaid provisions shall not apply for manufacture done exclusively for export or for the purpose of any scientific investigation or research. Section 9 talks of reference standards, secondary standards and working standards of weights and measures. “Every reference standard, secondary standard and working standard shall be verified and stamped in such manner and after payment of such fee as may be prescribed” and if not verified and stamped in accordance with the provisions shall not be deemed to be a valid standard. Section 10 deals with use of weight or measure for particular purposes which states that “Any transaction, dealing or contract in respect of any goods, class of goods or undertakings shall be made by such weight, measure or number as may be prescribed.”

Section 11 of the Act provides that no person shall, in relation to any goods, things or service, quote, or make announcement of, whether by word of mouth or otherwise, any price or charge, or issue or exhibit any price list, invoice, cash memo or other document, or prepare or publish any advertisement, poster or other document, or indicate the net quantity of a pre-packaged commodity, or express in relation to any transaction or protection, any quantity or dimension, otherwise than in accordance with the standard unit of weight, measure or numeration.

Stop To Consider

Legal metrology Act, 2009 intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.

1.8.2 International Organization of Legal Metrology (OIML)

The International Organization of Legal Metrology (OIML), established in 1955 is an inter-governmental treaty organization to promote the global harmonization of legal metrology procedures. Its membership include Member States, Countries which participate actively in technical activities and Corresponding Members, countries which join the OIML as observers.

The OIML develops International recommended model regulations, which provide members with an internationally agreed basis for the establishment of national legislation on various categories of measuring instruments. Given the increasing national implementation of OIML guidelines, more and more manufacturers are referring to OIML International Recommendations to ensure that their products meet international specifications for metrological performance and testing.

1.8.3 Appointment and Power of Director, Controller and legal metrology officers

Chapter III of the Act containing sections 13 to 23 of the Act deals with appointment and powers of director, controller and legal metrology officers. It is the Central Government who notifies for the appointment of Director of legal metrology, Additional Director, Joint Director, Deputy Director, Assistant Director and other employees for exercising the powers and discharging the duties conferred or imposed on them by or under this Act in relation to inter-State trade and commerce. The Director, the Controller and every legal metrology officer shall be deemed to be a public servant as per section 21 of the Indian Penal Code.

1.8.4 Forfeiture

All unverified or non-standard weight or measure, and any package made in contravention to this act in relation to inter-State trade and commerce, shall be liable to be forfeited to the State Government. Provided that such unverified weight or measure shall not be forfeited to the Government if the person from whom such weight or measure was seized gets the same verified and stamped within such time as may be prescribed.

As per Section 16 (2), every weight, measure or other goods seized but not forfeited, shall be disposed of by such authority and in such manner as may be prescribed.

1.8.5 Declarations on pre-packaged commodities

Section 18 (1) claims that “No person shall manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any pre-packaged commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed.”

Section 18 (2) Any advertisement mentioning the retail sale price of a pre-packaged commodity shall contain a declaration as to the net quantity or number of the commodity contained in the package in such form and manner as may be prescribed.

Stop To Consider

A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.

1.8.6 Import and Export of Weights and Measures

Section 19 talks about registration of Importer which states that no person shall import any weight or measure unless registered with the Director in such manner and on payment of such fees, as may be prescribed. On the other hand, Section 20 reveals that no weight or measure, whether singly or as a part or component of any machine shall be imported unless it conforms to the standards of weight or measure established by or under this Act.

Check Your Progress

7. When was the Legal Metrology Act enacted? Why?
8. What is the provision for Forfeiture?

1.9 Summing Up

1. The Standards of Weights and Measures Act provide for the enforcement of standards of weights and measures as per international standards.
2. Every unit of weight or measure to be in accordance with the metric system based on the international system of units.
3. The Standards of Weights and Measures Act is one of the many laws that intends to protect the interest of the consumer.
4. Central government can appoint Director of Legal Metrology, Additional, Joint, Deputy and Assistant Directors and other officers necessary for exercising powers and efficiently discharging the duties imposed on them under this Act.
5. A person shall not manufacture, pack, sell, import, distribute, deliver, offer, expose or possess for sale any prepackaged commodity unless such package is in such standard quantities or number and bears thereon such declarations and particulars in such manner as may be prescribed.
6. Legal metrology Act, 2009 intend to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.
7. "Legal Metrology" means that part of metrology which treats units of weight and measurement, methods of weight and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weighments and measurements.
8. A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practiced.

1.10 References and Suggested Readings

Aggarwal, V.K. "Consumer Protection Law and Practice", Bharat Law House Pvt. Ltd.

Gupta, V. and Pathak, G. (2018), The Legal Metrology Act, 2009.

Lawmann (2017), Essential Commodities Act, 1955.

The Legal metrology Act, 2009, Department of Consumer Affairs

The Standards of Weights and Measures Act, 1976, Department of Consumer Affairs

1.11 Model Questions

1. Specify the authority responsible for the administration and execution of the Act?
2. Explain about the different chapters pertaining to Standards of Weights and Measures Act 1976.
3. What is the purpose and provision related to Inter-State Trade or Commerce in weights, measure or other goods under the Act of 1976?
4. Discuss the declaration made on packed commodity.
5. What are the objectives of Legal Metrology Act, 2009?
6. Enumerate the powers and functions of Controller and Legal Metrology Officer?
7. Elaborate the Legal Metrology Act, 2009.
8. Write short note on Counterfeit.
9. Every non-standard weight and measure used in the course of trade is liable to be forfeited. Comment.
10. Briefly explain the provision regarding declaration on pre-packed commodities.

1.12 Answers To Check Your Progress

1. Chapter II of the Act basically deals with Establishment of Standards of Weights and Measures.
2. Matters of national policy and other related functions such as, uniform laws on weights and measures, technical regulations, training, precision laboratory facilities and implementation of the International Recommendations are to be looked after by Central Government. The State Governments and Union Territory Administration are responsible for the day to day enforcement of the laws. The Weights and Measures Unit is monitored by the Department of Consumer Affairs which is the central authority to deal with the subject to handle all the matters falling within the purview of the Central Government.
3. According to Section 24, the Central government should prepare reference standards and supply to each State government as many sets of reference standards as it may think fit. Central government should keep in custody such number of reference standards as necessary. Also Central government should prepare as many secondary or working standards as necessary in such a custody as prescribed under Section 25.
4. Chapter IV of the act deals with Provisions for Packaged Commodities.
5. Chapter IV Section 29 of this act basically deals with commodities in packaged form which are sold or distributed in Inter-State trade or commerce. The restrictions under Section 29 states that no person shall-

- i. Make, manufacture, pack, sell, or cause to be packed or sold; or
- ii. Distribute, deliver, or cause to be distributed or delivered; or
- iii. Offer, expose or possess for sale.

6. The term 'Unit sale price' means the price according to such unit of weight, measure or number as may be prescribed.

7. The Legal Metrology Act was enacted in the year 2009. It intends to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto.

8. Every false or unverified weight or measure, and every false package, used in the course of, or in relation to, any inter-State trade or commerce and seized under Sec. 29, shall be liable to be forfeited to the Central Government. Provided that such unverified weight or measure shall not be forfeited to Government if the person from whom such weight or measure was seized gets the same verified and stamped within such time as may be prescribed.

BLOCK III : UNIT-II

APPLICABLE PROVISIONS CONCERNING PENALTIES AND OFFENCES UNDER STANDARDS OF WEIGHT AND MEASURES ACT 1976

Unit Structure:

- 2.1 Introduction
- 2.2 Objectives
- 2.3 Penalty for use of non-standard weights and measures
- 2.4 Penalties for contravention of various sections of the act
- 2.5 Penalty for manufacture of weights or measures unless approval of model is in force.
- 2.6 Penalty for sale, etc. of unverified weights in the course of inter-State trade.
- 2.7 Penalty where no specific penalty is provided
- 2.8 Penalty for personation of officials
- 2.9 Cognizance of offences
- 2.10 Offences by companies
- 2.11 Summing Up
- 2.12 References and Suggested Readings

2.1 Introduction

There are so many ways where consumers are exploited such as by the traders or shopkeepers when they sale adulterated goods, degrade the quality of a product, supply of defective goods and so on but the most important amongst all of these is the fraudulent use of any instrument for weighing actually less than the full weight. The instruments may be used in industrial production or commercial affair etc.

Hence, there are provisions concerning penalties to be imposed for various types of offences related to false measurements of weight mentioned in Sections 50 to 75 in the Standards of Weight and Measures Act 1976.

2.2 Objectives

This unit is focused on the importance of penalties so as to implement standard weight and measures across all types of measurements. After going through this unit you will be able to:

- Explain the need of penalties from proper imposition of rules and regulations related to weight and measures.
- Discuss the various penalties imposed for different type of offences.

- Analyse the effect of having a well-defined law on the smooth trading from consumer as well as seller point of view.
- Understand the outcome of imposition of various types of penalties.

STOP TO CONSIDER

The Standard of Weights and Measures Act, 1976 was enacted to establish standards of weights and measures, to regulate inter-state trade or commerce in weights, measures and other goods which are sold or distributed by weight, measure or number, and to provide for matters connected therewith or incidental thereto.

2.3 Penalty for use of non-standard weights and measures

According to Section 50 of the act, “Whoever uses any weight or measure or makes any numeration other than in accordance with the standards of weight or measure or the standards of numeration, as the case may be, established by or under this Act, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both, and, for the second or subsequent offences, with imprisonment for a term which may extend to two years and also with fine”.

2.4 Penalties for contravention of various sections of the act

The penalty for contravention of Section 18 is mentioned in Section 51 of the act. It states that, “Whoever tampers with, or alters, in any way, any reference standard, secondary standard, or working standard except where such alteration is made for the correction of any error noticed therein on verification, shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both”. The penalty for contravention of Section 22 is mentioned in Section 52 of the act. As per section 52 of the act, “Except where any weight or measure is made or manufactured, with the permission of the Central Government, exclusively for export, every person who makes or manufactures any weight or measure which does not conform to the standards of weight or measure established by or under this Act, shall, where such offence is not punishable under any other law relating to weights and measures for the time being in force, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand rupees, or with both, and, for the second or subsequent offence with imprisonment for a term which may extend to three years and also with fine”

The penalty for contravention of Section 23 is mentioned in Section 53 of the act. Section 23 deals with prohibition with regard to inscriptions etc. As mentioned in Section 53 of the act, “Except where any weight or measure is made or manufactured, with the permission of the Central Government, exclusively for export, every person who makes or manufactures any weight or measure which bears thereon any inscription of weight, measure or number which does not conform to the standards of weight or measure or numeration established by or under this Act, shall, where such offence is not punishable under any other law relating to weights and measures for the time being in force, be punished with imprisonment for a term which may extend to one year, or with

fine which may extend to two thousand rupees, or with both, and, for the second or subsequent offence, with imprisonment for a term which may extend to three years and also with fine”.

The penalty for contravention of Section 29 is mentioned in Section 54 of the act. Section 29 mentions the power of inspection of Director or any person authorised to exercise the powers or discharge the functions of the Director who may be referred as the ”authorised officer”. According to Section 54, “Whoever obstructs the Director or the authorised officer in the exercise of his powers or discharge of his functions as Director or authorised officer, or with intent to prevent or deter the Director or such authorised officer from exercising his powers or discharging his functions, or in consequence of anything done or attempted to be done by the Director or such authorised officer in the lawful exercise of his powers or discharge of his functions as such, shall be punished with imprisonment for a term which may extend to two years, and, for the second or subsequent offence, with imprisonment for a term which may extend to five years.

The penalty for contravention of Section 32 is mentioned in Section 55 of the act. Under Section 32 of the Act, the Central Government has power to direct by making rules therefore, that in respect of the class of goods or undertakings or users specified therein no transaction, dealing or contract could be made or had except by such weight, measure or number as may be specified in the said rules. Contravention of this provision attracts penalty under Section 55, in the form of fine up to Rs. 2,000 and for the second or subsequent offence, imprisonment up to one year and also fine.

The penalty for contravention of Section 33 is mentioned in Section 56 of the act. Section 33 deals with the prohibition of quotations, etc. otherwise than in terms of standard units of weights, measures or numeration. As per Section 56, “Whoever, in the course of any inter-State trade or commerce, contravenes the provisions of Sec. 33 shall be punished with fine, which may extend to two thousand rupees, and, for the second or subsequent offence, with imprisonment for a term which may extend to three years and also with fine”.

The penalty for contravention of Section 34 is mentioned in Section 57 of the act. Section 34 of the act deals with standards of weights and measures related to customs or inter-state trade. As per section 57 of the act, any person shall be punished with fine which may extend to five thousand rupees, and for the second or subsequent offence with imprisonment for a term which may extend to five years and also with fine, if commits a crime related to standards of weight and measures which falls under the following four categories:

- i) Sells, delivers, or causes to be sold or delivered to the purchaser any quantity or number of any article or thing, less than the quantity or number contracted for or paid for ; or
- ii) Renders any service by weight, measure or number, less than the service contracted for or paid for ; or
- iii) Demands, or causes to be demanded, or receives or causes to be received, while buying any article or thing, any quantity or number of goods in excess of the quantity or number contracted for or paid for or
- iv) Obtains any service in excess of the service contracted for or paid for.

The penalty for contravention of Section 35 is mentioned in Section 58 of the act. Section 35 mentions about maintaining records and registers by manufacturers, etc. As per section 58 of the act, “Whoever, being required by or under this Act so to do, without any reasonable excuse, omits or fails to maintain any record or register, or being required by the Director or the authorised

officer, to produce any record or register for his inspection omits or fails, without any reasonable excuse, so to do, shall be punished with fine which may extend to one thousand rupees, and, for the second or subsequent offence, with imprisonment for a term which may extend to six months and also with fine”.

Whoever being required by Section 36 to submit the model of any weight or measure for approval omits or fails to do so without any reasonable cause shall be punished under Section 59, with a fine up to Rs. 5000 in the case of first offence and imprisonment for a period up to five years as also fine for second or subsequent offences.

CHECK YOUR PROGRESS

1. Under Section 51, what is the punishment for tampering with standards?
2. Which Section prohibit manufacture of non- standard weight or measure?

2.5 Penalty for manufacture of weights or measures unless approval of model is in force. -

As per Section 60 of the act the following penalties will be imposed if weights or measures are manufactured without proper approval:

- i) Whoever makes or manufactures any weight or measure, which is, or is intended to be, sold, distributed delivered or otherwise transferred in the course of inter-State trade or commerce, shall, unless a certificate of approval of the model of such weight and measure granted under Sec. 36 is in force, be punished with imprisonment for a term which may extend to two years and shall also be liable to fine, and, for the second or subsequent offence, with imprisonment for a term which may extend to five years and also with fine.
- ii) Whoever, without any reasonable excuse, manufactures any weight or measure in accordance with an approved model with any material other than the material approved or recommended by the prescribed authority, shall be punished with imprisonment for a term which may extend to five years and also with fine.

The penalty for contravention of Section 38 is mentioned in Section 61 of the act. Section 38 mentions that weight or measure should contain number of the approved model. As per Section 61, “Whoever makes or manufactures any weight or measure without complying with the requirements of Sec. 38 shall be punished with fine which may extend to five thousand rupees, and. for the second or subsequent offence with imprisonment for a term which may extend to five years and also with fine”.

2.6 Penalty for sale, etc. of unverified weights in the course of inter-State trade.

As per Section 62 of the act, “Whoever, in the course of inter-State trade or commerce, sells, distributes, delivers or otherwise transfers any weight or measure which does not conform to the standards of weight or measure established by or under this Act or which has not been duly verified under any other law relating to weights and i-measures for the time being in force, shall be punished With fine which may extend to ten thousand rupees, and, for the second or subsequent offence, with imprisonment for a term which may extend to seven years and also with fine”.

The penalty for contravention of Section 39 is mentioned in Section 63 of the act. Section 39 mentions that quantities and origin of commodities in packaged form is to be declared. As per Section 63, “Whoever, in the course of inter-State trade or commerce, sells, distributes, delivers or otherwise transfers, or causes to be sold, distributed, delivered or otherwise transferred any commodity in a packaged form which does not conform to the provisions of this Act or any rule made thereunder, shall be punished with fine which may extend to five thousand rupees, and for the second or subsequent offence, with Imprisonment for a term which may extend to five years and also with fine”.

The penalty for contravention of Section 47 is mentioned in Section 64 of the act. As per Section 64 of the act, “Whoever exports or imports any weight or measure without being registered under this Act shall be punished with fine which may extend to one thousand rupees, and, for the second or subsequent offence, with imprisonment for a term which may extend to six months and also with fine”.

The penalty for contravention of Section 48 is mentioned in Section 65 of the act. Section 48 of the act, deals with conditions under which export of non-standard weight and measures and other goods may be made. As per Section 65 of the act, “Every person who exports any weight or measure or commodity in packaged form which does not conform to the standards of weight or measure established by or under this Act shall, except where such export has been made with the previous approval of the Central Government, be punished with fine which may extend to five thousand rupees, and, for the second or subsequent offence, with imprisonment for a term which may extend to five years and also with fine”.

The penalty for contravention of Section 49 is mentioned in Section 66 of the act. Section 49 of the act, mentions that any commodity is not to be imported with non-metric weight or measure. As per Section 66 of the act, “Whoever contravenes, without any reasonable excuse, the provisions of Sec. 49, shall be punished with fine which may extend to five thousand rupees, and, for the second or subsequent offence, with imprisonment for a term which may extend to five years and also with fine”.

2.7 Penalty where no specific penalty is provided

Section 67 of the Standards of Weights and Measures Act 1976 mentions that, “Whoever contravenes any provisions of this Act for the contravention of which no punishment has been separately provided in any of the provisions of this Act, shall be punished with fine which may extend to two thousand rupees”.

Section 68 of the act mentions that following presumption are to be made in certain cases:

- i) If any person in the course of inter-State trade or commerce, uses, or causes to be used, sells, distributes, delivers or otherwise transfers, or causes to be sold, distributed, delivered or otherwise transferred, any false or unverified weight or measure, it shall be presumed, until the contrary is proved, that he had done so with the knowledge that the weight or measure was a false or unverified weight or measure.
- ii) If any person makes or manufactures or has in his possession, custody or control any false or unverified weight or measure in such circumstances as to indicate that such weight or measure is likely to be used in the course of inter-State trade or commerce, it shall be presumed, until the contrary is proved, that such false or unverified weight or measure was

made, manufactured, possessed, held or controlled by such person with the knowledge that the same would be, or is intended to be, used in the course of inter-State trade or commerce.

2.8 Penalty for personation of officials

Section 69 of the Standards of Weights and Measures Act 1976 mentions that, “Whoever personates, in any way, the Director, or any authorised officer, shall be punished with imprisonment for a term which may extend to three years”.

As per Section 70 of the act, the following penalties are imposed accordingly for giving false information or false returns:

- i) Whoever gives information to the Director or the authorised officer which he may require or ask for in the course of his duty and which such person either knows or has reason to believe to be false shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.
- ii) Whoever, being required by or under this Act so to do, submits a return which is false in material particulars, shall be punished with fine which may extend to two thousand rupees, and, for the second or subsequent offence, with imprisonment for a term which may extend to one year and also with fine.

Section 71 of the act, mentions penalties against vexatious actions. An authorised officer who knows that there are no reasonable grounds for so doing, and yet searches, or causes to be searched, any house, conveyance or place; or searches any person; or seizes any weight, measure or other moveable property, shall, for every such offence, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand rupees, or with both.

CHECK YOUR PROGRESS

3. What is the penalty for manufacturing any weight or measure without complying with the requirements?
4. What is the penalty for import of commodity non-metric weight or measure?

2.9 Cognizance of offences

As regards cognizance of offences aforesaid, Section 72 provides that no court shall take cognizance of an offence punishable under the Act except upon a complaint in writing made by the Director or any authorised officer or any person aggrieved or a recognised consumer association whether the person aggrieved is a member of such association or not.

Section 73 of the act deals with the compounding of offences. Any offence punishable under Sec. 50, Sec. 55, Sec. 56, Sec. 57, Sec. 58, Sec. 59, Sec. 60, Sec. 63, Sec. 64, Sec. 65, Sec. 66 or Sec. 67 may, either before or after the institution of the prosecution, be compounded by the Director or such other officer as may be specially authorised by him in this behalf, on payment for credit to the Government of such sum as the Director or such other officer may specify.

2.10 Offences by companies

Section 74 of the Act, mentions the following guidelines to be followed for offences by companies and power of court to publish name, place of business, etc. of companies convicted:

1. If an offence under this Act is committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly, provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.
2. Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to the neglect on the part of, any director, manager, secretary or other officer, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
3. Where any company is convicted under this Act for contravention of any of the provisions thereof, it shall be competent for the Court convicting the company to cause the name and place of business of the company, nature of the contravention, the fact that the company has been so convicted and such other particulars as the Court may consider to be appropriate in the circumstances of the case, to be published at the expense of the company in such newspapers or in such other manner as the Court may direct.
4. No publication under sub-section (3) shall be made until the period for preferring an appeal against the orders of the Court has expired without any appeal having been preferred, or such an appeal having been preferred has been disposed of.
5. The expenses of any publication under sub-section (3) shall be recoverable from the company as if it were a fine imposed by the Court.

As mentioned in Section 75 of the Act, “The provisions of the Indian Penal Code, 1860 (45 of 1860), in so far as such provisions relate to offences with regard to weights and measures, shall not apply to any offence which is punishable under this Act”.

2.11 Summing Up

1. Penalties basically relates to the violation of manufacturing of non-standard weights and measures, use of unverified weights and measures, counterfeiting, not making mandatory declaration on package commodities.
2. As per section 50 of the act, if any weight or measure or any numeration is not in accordance with the standards of weight or measure or the standards of numeration, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to one

thousand rupees, or with both, and, for the second or subsequent offences, with imprisonment for a term which may extend to two years and also with fine”.

3. As per Section 61, “Whoever makes or manufactures any weight or measure without complying with the requirements of Sec. 38 shall be punished with fine which may extend to five thousand rupees, and, for the second or subsequent offence with imprisonment for a term which may extend to five years and also with fine”.

4. Section 64 to 66 talks about the penalties link to exports or imports any weight or measure without being registered, export of non-standard weight and measures and import of commodities with non-metric weight or measure.

5. Section 72 deals with cognizance of offences, and states that no court shall take cognizance of an offence punishable under the Act except upon a complaint in writing made by the Director or any authorised officer or any person aggrieved or a recognised consumer association whether the person aggrieved is a member of such association or not.

6. The Central government after consultation with the State government in relation to the conditions, limitations and restrictions, delegate powers of the Director to the Controller of Legal Metrology in the State. If the Controller is of the opinion for public interest can delegate such powers to the Legal Metrology Officer. But when such powers are delegated, the person should exercise those powers in the same manner as if they had been conferred on him/her directly by this act and not by way of delegation.

2.12 References and Suggested Readings

The Standards of Weights and Measures Act, 1976, Department of Consumer Affairs

Aggarwal, V.K. “Consumer Protection Law and Practice”, Bharat Law House Pvt. Ltd.

Gupta, V. and Pathak, G. (2018), The Legal Metrology Act, 2009.

Lawmann (2017), Essential Commodities Act, 1955.

Economic Laws (2006), Taxmann Publication.

2.13 Model Questions

1. What is the purpose and provision of Section 50 of this Act?
2. Which Section covers the penalty to obstructs the Director or other authorised officer in the exercise of his powers? Mention the penalty.
3. Write a short note on the applicable provisions related to the penalties in the Standards of Weights and Measures Act, 1976.
4. Briefly explain the provision regarding declaration on standards of weights and measures related to customs or inter-state trade, under section 57.
5. Explain the provisions of penalties under section 74 which relates to the offences by companies.
6. Write a brief note on tampering or alteration of any reference standard.

7. What is the punishment mentioned for use of non-standard weights and measures or numeration under the Standards of weight and measurement Act 1976?
8. Why do we need to follow weights and measures standards?
9. What is compounding of offence under Standards of Weight and Measures Act 1976?
10. Briefly explain the provision regarding declaration on packed commodities. Discuss the penalty associated with packed commodities.

2.14 Answers To Check Your Progress

1. According to Section 51, “Whoever tampers with, or alters, in any way, any reference standard, secondary standard, or working standard except where such alteration is made for the correction of any error noticed therein on verification, shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both”.
2. Section 53 of the act prohibit manufacture of non- standard weight or measure.
3. As per Section 61, “Whoever makes or manufactures any weight or measure without complying with the requirements of Sec. 38 shall be punished with fine which may extend to five thousand rupees, and, for the second or subsequent offence with imprisonment for a term which may extend to five years and also with fine”.
4. Section 66 of the act, “Whoever contravenes, without any reasonable excuse, the provisions of Sec. 49, which mentions about import of any commodity with non-metric weight or measure shall be punished with fine which may extend to five thousand rupees, and, for the second or subsequent offence, with imprisonment for a term which may extend to five years and also with fine”.

BLOCK IV : UNIT-I

Paper Name: Economic Legislations

Block 4: Securities and Exchange Board of India Act 1992

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1.4.1: Strengthening of SEBI

1.1: Objective:

SEBI plays an important role in regulating all the players operating in the Indian capital market. It attempts to protect the interest of investors and aims at developing the capital markets by enforcing various rules and regulations. This unit will outline the function and guideline of SEBI for the smooth functioning of the capital market. It will also discuss the function and power endowed on SEBI management board. This unit will enable the students to get the knowledge of the role of SEBI in regulating the Indian capital market and will also get an exposure to the meaning of various financial terminology used in capital market.

1.2: SEBI ACT 1992

SEBI is a statutory regulatory body established in 12th April 2012. It monitors and regulates the Indian capital and securities market while ensuring to protect the interests of the investors, formulating regulations and guidelines. The head office of SEBI is at BandraKurla Complex, Mumbai.

Prior to SEBI the stock exchange was governed by the Capital Issues (Control) Act 1947 in India. The capital issue control was administered by the controller of Capital Issue (CCI) according to the principal and policies laid down by the central government. The Narasimham Committee on the reform of financial system in India (1991) recommended the abolition of CCI and wanted SEBI to protect the investor and take over the regulatory function of CCI.

1.3: Functions of SEBI:

SEBI is primarily set up to protect the interests of investors in securities market.

It promotes the development of the securities market and regulates the business

SEBI provides a platform for stockbrokers, sub-brokers, portfolio managers, investment advisers, share transfer agents, bankers, merchant bankers, trustees of trust deeds, registrars, underwriters, and other associated people to register and regulate work

It regulates the operations of depositories, participants, custodians of securities, foreign portfolio investors, and credit rating agencies.

It prohibits insider trading, i.e. fraudulent and unfair trade practices related to the securities market.

It ensures that investors are educated on the intermediaries of securities markets.

It monitors substantial acquisitions of shares and take – over of companies.

SEBI takes care of research and development to ensure the securities market is efficient all the time.

Box -1

The most valuable regulations promoted by SEBI are:

Regulations on the Issue of Capital and Disclosure Requirements, 2009

These regulations helped with the issues related to capital and disclosure by improving the trading in securities of the listed companies and investors in India.

Regulations on Substantial Acquisition of Shares and Takeovers, 2011

These regulations of SEBI were established to solve difficulties related to the legal and fair acquisition of shares and takeovers.

Regulations on Prohibition of Insider Training, 2015

These regulations introduced new provisions for prohibiting the insider training of securities and tries to protect the laws for lawful and fair trading in India.

1.3.1: Authority and Power of SEBI:

SEBI mainly have three powers:

Quasi-Judicial: SEBI has the authority to deliver judgment relating to fraud and other unethical practices in terms of the securities market. This helps to ensure fairness, transparency, and accountability in the securities market.

The preamble of SEBI Act intend that SEBI must keep the interests of common investors on top of all protect them from ponzi schemes, fraud, Insider trading or any other financial conspiracy, and regulate& develop Indian security market.

Recently financial irregularities and frauds have been surfaced by SEBI in Cases like Sardha scam, MCX-Sx, Bank of Rajasthan, & Wipro have been on the radar of SEBI. But SEBI's role in most of the cases has been reactive instead of proactive, may be because frauds are too smart or SEBI has some loopholes in its system. This inconsistency has caused financial loss to A large section of the middle-class SEBI officials' cross investigation has been in the lime light since a long time back. At some occasions, Supreme Court of India has maintained & endorse the autonomy of SEBI by interoperating unwarranted investigations by CBI as ultra-virus at legal and constitutional level.

Quasi Executive: SEBI is empowered to implement the regulations and judgments made and to take legal action against the violators. It is also authorized to inspect Books of accounts and other documents if it comes across any violation of the regulations.

Quasi- Legislative: SEBI reserves the right to frame rules and regulations to protect the interests of the investors. Some of its regulations consist of insider trading regulations, listing obligations, and disclosure requirements. These have been formulated to keep malpractices at bay. Despite the powers, the results of SEBI's functions still have to go through the Securities Appellate Tribunal and the Supreme Court of India.

Box -2

Depository Institutions

In every economy, depositories play an important role in developing the country, as the developing countries don't have enough investments to complete their schemes efficiently. A well-functioning securities market can stabilize economic growth. India needs investment for growth, so they need to improve market efficiency and protect the interests of investors to attract them to invest in our market. So, the capital market needs to improve investment opportunities for investors and take care of their interests and security.

In India, the depository institutions are governed under the Securities and Exchange Board of India (SEBI). The depository must be formed under the Companies Act and must receive a certificate from SEBI. Depositories registered under SEBI are:

- Central Depository Service Limited (CDSL)
- National Securities Depositories Limited (NSDL)

NSDL was established in 1996 by the National Stock Exchange (NSE). NSE introduced the rolling system which helped the investors to receive their payment within 5 days of the sale as it was 8-12 days, before NSE. CDSL was promoted by the Bombay Stock Exchange (BSE).

1.3.2: Capital Market Reforms by SEBI

SEBI has brought into effect the following reforms in the capital market in the last some years:

1. SEBI has issued guidelines to Stock Exchanges to make their governing bodies more broad-based. According to these guidelines, the governing body of a stock exchange should have five elected members, not more than four members nominated by the government or SEBI and three or fewer members nominated as public representatives.
2. SEBI introduced the system of registration of intermediaries, such as brokers and sub-brokers. The registration is on the basis of certain eligibility criteria such as capital adequacy.
3. SEBI has framed rules for making the relationship between client and broker more transparent and also for segregating client and broker accounts.

4. The system of periodical inspection of stock exchanges has been introduced by SEBI. SEBI inspected 8 stock exchanges till January 1993.

5. SEBI has advised stock exchanges to amend the listing agreement to ensure that a listed company furnishes annual statements to them showing variations between financial projections and project utilization of funds made in the offer documents and actuals. This will enable shareholders to make comparisons between performance and promises.

6. SEBI vets the offer document to ensure that all disclosures have been made by the company in the offer document at the time company applies for listing of its securities (i.e., shares and debentures) to the stock exchanges.

7. The offer document of schemes to be launched by Mutual Funds are required to be vetted by SEBI. SEBI has also specified a procedure for calculating and declaring Net Asset Value (NAV) of each Mutual Funds scheme. This would help investors to judge the performance of mutual funds. Mutual funds have also been allowed to underwrite issues, as a part of their investment activity. Regular monitoring of Mutual Funds is undertaken by SEBI to ensure compliance with these regulations.

Box-3

Mutual funds and SEBI:

As far as mutual funds are concerned, SEBI formulates policies and regulates the mutual funds to protect the interest of the investors. SEBI notified regulations for the mutual funds in 1993. Thereafter, mutual funds sponsored by private sector entities were allowed to enter the capital market. The regulations were fully revised in 1996 and have been amended thereafter from time to time. SEBI has also issued guidelines to the mutual funds from time to time to protect the interests of investors. All mutual funds whether promoted by public sector or private sector entities including those promoted by foreign entities are governed by the same set of Regulations. There is no distinction in regulatory requirements for these mutual funds and all are subject to monitoring and inspections by SEBI. The risks associated with the schemes launched by the mutual funds sponsored by these entities are of similar type.

Net Asset Value is the market value of the securities held by the scheme. Since market value of securities changes every day, NAV of a scheme also varies on day to day basis. The NAV per unit is the market value of securities of a scheme divided by the total number of units of the scheme on any particular date. For example, if the market value of securities of a mutual fund scheme is Rs 200 lakhs and the mutual fund has issued 10 lakhs units of Rs. 10 each to the investors, then the NAV per unit of the fund is Rs.20. NAV is required to be disclosed by the mutual funds on a regular basis - daily or weekly - depending on the type of scheme.

8. SEBI has brought merchant banking also under its regularity framework. The merchant bankers are required to follow the code of conduct issued by SEBI in respect of pricing and premium fixation of issues.

9. The abolition of the office of Controller of Capital Issues has led to the removal of control over price and premium of shares to be issued. However, companies can approach capital market, only after clearance by SEBI.

10. SEBI has introduced a code of advertisement for public issues for ensuring fair and truthful disclosures. Companies are required to disclose all material facts and specific risk factors associated with their projects while making public issues.

11. SEBI has issued guidelines for the allotment of new issues. According to the guidelines, preferential allotment is to be made to the extent of 20 per cent for the Mutual Funds, 20 per cent for the domestic financial institutions, 24 per cent for foreign institutional investors and 10 per cent for the issuer company's employees.

The balance 25 per cent is to be issued to the general public. However, 50 per cent of the minimum public offering of 25 per cent of the total issue shall be earmarked for the small investors applying for up to 1000 shares. The unsubscribed portion in either category is fully interchangeable.

12. The practice of making preferential allotment of shares at prices unrelated to the prevailing market price has been stopped and fresh guidelines for this purpose have been issued by SEBI.

13. SEBI has relaxed the guidelines for the issue of bonus shares.

14. SEBI has introduced regulations governing substantial acquisition of shares and takeovers.

15. As a part of the process of establishing transparent rules for trading in stock exchanges, the badla system was banned by SEBI in December 1993.

Box -4

What is Badla system:

It was an arrangement to facilitate rollover of the trades beyond the fortnightly settlement of positions with the exchange. Different exchanges would do it differently dependent on the volume of trade and demand for the rolling over.

It needs to be clarified with an example.

Suppose Mr X sold 200 shares of Hindustan Motors without owning them. He think price was around Rs. 20 per share. On the fortnightly settlement day he told the broker that wish to carry forward the trade. The broker told him not to worry as I would be getting **Badla** payment.

As the Buyers did not take delivery, they had to pay certain carry over charges which were named Badla.

Mr X got about Rs. 0.25 per share. The trade was kept rolling for 3 months and finally bought back for Rs. 18. His profit was Rs. 2.00 in price and about Rs. 3.00 due to Badla payments received.

Please take note that the Badla was fixed by the Exchange based on the total positions in the stock with all the brokers. It was not for individual trade but finally apportioned to all trades and recorded on the contract notes.

Bombay Stock Exchange and Delhi Stock Exchange could fix different Badla amount for the same stock depending on the positions on their exchange.

Badla trading was banned by SEBI in 1993 effective from March 1994. It was again permitted in 1996 with some restrictions and finally banned from July 2001 after introduction of Futures Contracts on NSE in year 2000.

16. SEBI has allowed Foreign Institutional Investors to have an access to Indian capital market after getting registered with it. SEBI registered 286 foreign institutional investors by the January-end 1995.

17. SEBI has notified regulations for primary and secondary market intermediaries, bringing them within its regularity framework.

18. SEBI has taken several initiatives to promote dematerialized trading in securities through the promotion of the network of depositories. This will eliminate the risks of bad delivery and fake or forged shares. The depositories provide a system to record ownership details of

securities in a book entry form without physical handling of securities. Thus, dematerialized trading is paperless trading in securities.

19. SEBI put ban on short sale of securities on June 15, 1998 with a view to containing volatility in share price. It prescribed additional volatility margins (AVM) with effect from July 6, 1998. The daily price band was reduced from 10 per cent to 8 per cent. Weekly 25 per cent band was removed to introduce graded margin system.

Box-5

New Additional Volatility Margin System:

The following is the system of the additional volatility margins which would be applicable to trading in all stock exchange with effect from July 6, 1998. Price Bands The daily price band would be reduced from the current level of 10% to 8%. The existing weekly price band of 25% is being removed and a graded margin system as given below is put in place for volatile securities. Definition of Volatility A security would be considered as volatile if the price of the security varies by plus minus 16% or more in a single trading cycle. For the purpose of computing this price variation, the closing price at the end of each day of the security will be compared with the closing price at the end of the previous settlement. In other words, if $P_n(T+1)$ is a price of a security on the nth day of trading period T+1 and $P_1(T)$ is the price of the security on the last day of trading period 'T' then the security will be volatile if $P_n(T+1) - P_1(T) \geq 16\%$.

20. Derivatives Trading. SEBI has accepted the major recommendations of L.C. Gupta Committee on Derivatives Trading. Under this system, derivatives contracts would be treated as 'Securities'. The derivatives trading, as trading in Stock indices, would provide investors a hedging instrument to manage risks and help in improving the liquidity of secondary markets in India.

Box-6

Derivatives Trading

The term derivative refers to a type of financial contract whose value is dependent on an underlying asset, group of assets, or benchmark. A derivative is set between two or more parties that can trade on an exchange. These contracts can be used to trade any number of assets and carry their own risks. Prices for derivatives derive from fluctuations in the underlying asset. Derivatives are usually leveraged instruments, which increases their potential risks and rewards.

21. SEBI has exempted infrastructure firms from certain norms, while floating a public issue. They would be exempted from making a minimum public offer of 25 per cent of equity, minimum subscription of 90 per cent and five shareholders per Rs. 1 lakh of offer.

22. SEBI has formulated the regulations governing buy-back of shares by Indian companies. Buy-back has been permitted for the purpose of capital restructuring but not for treasury operations.

Box-7

Buyback Period means the period between the date of board of directors' resolution or date of declaration of results of the postal ballot for special resolution, as the case may be, to authorize buyback of shares of the company and the date on which the payment of consideration to shareholders who have accepted the buyback offer is made.

The maximum limit of any **buy-back** has to be 25% or less of the aggregate of paid-up capital and free reserves of the **company**. In respect of the **buy-back** of equity shares in any financial year, the reference to 25% in this regulation has to be construed with respect to its total paid-up equity capital in that financial year.

23. SEBI has given freedom to companies to determine the par value of shares issued by them thereby removing the requirement to issue shares at fixed price value of Rs. 10 and Rs 100.

24. In order to encourage Initial Public Offers (IPOs), the existing SEBI norm for IPO has been relaxed by stipulating "ability to pay" in place of "actual payment of dividend".

Box-8

Initial Public Offers (IPOs)

An initial public offering (IPO) refers to the process of offering shares of a private corporation to the public in a new stock issuance. An IPO allows a company to raise capital from public investors. The transition from a private to a public company can be an important time for private investors to fully realize gains from their investment as it typically includes a share premium for current private investors. Meanwhile, it also allows public investors to participate in the offering.

An IPO is a big step for a company as it provides the company with access to raising a lot of money. This gives the company a greater ability to grow and expand. The increased transparency and share listing credibility can also be a factor in helping it obtain better terms when seeking borrowed funds as well.

1.4: Organizational structure and Management of SEBI

SEBI has a corporate framework comprising of various departments each managed by a department head. There are about 20 departments under SEBI. Some of these departments are corporation finance, economic and policy analysis, debt and hybrid securities, enforcement, human resources, investment management, commodity derivatives market regulation, legal affairs, and more.

The hierarchical structure of SEBI consists of the following

The chairman of SEBI is nominated by the Union Government of India.

Two officers from the Union Finance Ministry will be a part of this structure.

One member will be appointed from the Reserve Bank of India.

Five other members will be nominated by the Union Government of India.

Box-9

Dr. S.A. Dave was the first Chairman of SEBI who was appointed on 10th April 1988. Ajay Tyagi is the present Chairman appointed on 10th February 2017 replacing U K Sinha.

1.4.1: Strengthening of SEBI:

In the January 1995 the government of India promulgated an ordinance to amend SEBI Act, 1992, so as to arm SEBI with additional power for ensuring an orderly development of the capital market and to enhance its ability to protect the interest of the investors. The important features of this ordinance are:

1. To enable SEBI to respond speedily to market conditions and to reinforce its autonomy, SEBI has been empowered to file complaints in courts and to notify its regulations without prior approval of the government.
2. SEBI is now provided with the regulatory powers over companies in insurance of capital, the transfer of securities and other related matters.

3. SEBI is now empowered to impose monetary penalties on capital market intermediaries and other participants for a listed range of violations. The amendment proposes to create adjudicating mechanism within SEBI to deal with cases of appeal against orders of the adjudicating authority.

Earlier the SEBI Act provided for the suspension and cancellation of registration and prosecution of intermediaries which led to the stoppage of business. The new system of monetary penalties constitutes an alternatives mechanism for dealing with capital market violations.

4. While investigating irregularities in the capital markets, SEBI is now given the power to summon the attendance of and call for documents from all categories of market intermediaries, including persons from the securities markets. Likewise, SEBI has now the power to issue directions to all intermediaries and persons connected with securities markets with a view to protect investors or secure the orderly development of securities market.

It was thought that SEBI has all necessary powers to control and regulate the securities market on the one side and effectively protect the interests of the shareholders on the other. However SEBI failed miserably to prevent a small coterie of brokers in Mumbai to hammer the markets in India went through one of the worst and most prolong crisis in their history.

According to securities and exchange board of India (SEBI), currently 34 Foreign Institutional Investors, (FIIs) sub- accounts issue ODIs (Offshore Derivative Instruments) such as participatory notes (PNs). This number was 14 in March 2004. The notional value of PNs outstanding which was at Rs 31, 875 crores (20 percent of the Assets under custody, AUC) of all FIIs in March 2004, increased to Rs 3, 53,484 crores (51.6 per cent of AUC) by August 2007, a sharp increase by 11 times in a short span of time. This implies that more than 50 per cent of the funds are flowing from this anonymous route, a kind of foreign black money flowing to India.

When in 1992, foreign institutional investors (FIIs) were permitted by SEBI, it was assumed that they would make proprietary investments out of their own capital.

But the FIIs started borrowing at low rates of interest and without disclosing the identity of sub- account, assumed massive portions. As a result they could exercise effective control over the Indian stock market.

The 34 brokers have issued offshore derivatives to the tune of about \$100 billion, or almost 10 percent of the country's GDP. When it started PNs made up only a small portion of ownership by foreigners, but this has now assumed alarming proportions.

PNs were discriminatory. While the Indian investors are regulated, PNs were not. In addition to know your customer (KYC) requirement, Indian brokers have to register their clients, giving details of proof of address, PANs etc. The question was raised: why this step-motherly treatment to Indians and red carpet welcome to FIIs who don't even want to be registered and yet participate in the Indian Stock Market. It was pointed out that one should not forget the stock market crisis of 2001, when there was unprecedented flow of foreign money coming from OBCs (Overseas Bodies Corporates). It may be pointed out that PN is no different.

This compelled SEBI to take effective steps in October 2007 to issue directive that only regulated entities can invest through PN route. It formalized a ban on sub-accounts of IFFs from issuing participatory notes (PNs). Foreign investors used accounts in tax havens like Mauritius or the Cayman Islands to trade in shares for their clients. These, designated as sub-accounts, issue participatory notes (PNs) to clients as proof of purchase, thus allowing them to remain anonymous. SEBI has given foreign funds 18 months to close such transactions. There is however, no blanket ban. Registered foreign funds can issue up to 40 percent of their investment in India by using the instrument of PNs.

SEBI's decision to curb illegitimate and massive increase in PNs which assumed menacing proportions has been welcomed by Indian investors. There is no need to feel alarmed that India will henceforth lose foreign funds. We should note the fact that in the world today, funds are in search of markets, and not the other way round. It is hoped that action taken by SEBI will moderate the galloping increase in SENSEX. It is hoped that measures taken by SEBI will be beneficial in long term sustainable growth of the Indian capital market.

Questions to solve:

1. When and why SEBI was established?
2. Mention the most valuable regulation promoted by SEBI.
3. Explain the quasi-judicial, quasi-executive and quasi-legislative functions of SEBI.
4. Discuss the few reforms brought by SEBI in Indian capital market.
5. What is the role of SEBI in formulating policies and regulating the mutual fund?
6. What do you understand by the term derivative trading?

7. Explain the concept of buyback period.
8. Explain the hierarchical structure of SEBI.
9. Discuss some of the additional power given to SEBI in the 1995 amendment of SEBI Act 1992.
10. What makes the SEBI to bring changes in the investment through participatory notes (PNs)?
11. What are the important features of this ordinance of 1995 amend the SEBI Act?

References:

1. https://www.sebi.gov.in/sebi_data/attachdocs/1456380272563.pdf Securities and Exchange Board of India Act, 1992 [As amended by the Securities Laws(Amendment) Act, 2014]
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BLOCK IV : UNIT-II

Paper Name: Economic Legislations

Block 4: Securities and Exchange Board of India Act 1992

- 2.1: Management of SEBI- Power and Function of the board
- 2.2: Registration certificate
- 2.3: Provisions and relating to Finance
- 2.4: Accounts and audit

2.1:Powers and functions of the Board of SEBI:

Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit. Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for—

- 1) regulating the business in stock exchanges and any other securities markets;
- 2) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner;
- 3) Registering and regulating the working of the depositories, participants, custodians of securities, foreign institutional investors, credit rating agencies and such other intermediaries as the Board may, by notification, specify in this behalf.
- 4) registering and regulating the working of venture capital funds and collective investment schemes, including mutual funds;
- 5) Promoting and regulating self-regulatory organizations.
- 6) prohibiting fraudulent and unfair trade practices relating to securities markets;
- 7) promoting investors' education and training of intermediaries of securities markets;
- 8) prohibiting insider trading in securities;
- 9) regulating substantial acquisition of shares and takeover of companies;
- 10) Calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market, intermediaries and self-regulatory organizations in the securities market.
- 11) Calling for information and records from any person including any bank or any other authority or board or corporation established or constituted by or under any Central or State Act which, in the opinion of the Board, shall be relevant to any investigation or inquiry by the Board in respect of any transaction in securities.
- 12) Calling for information from, or furnishing information to, other authorities, whether in India or outside India, having functions similar to those of the Board, in the matters

relating to the prevention or detection of violations in respect of securities laws, subject to the provisions of other laws for the time being in force in this regard.

- 13) Provided that the Board, for the purpose of furnishing any information to any authority outside India, may enter into an arrangement or agreement or understanding with such authority with the prior approval of the Central Government.
- 14) The Board may take measures to undertake inspection of any book, or register, or other document or record of any listed public company which intends to get its securities listed on any recognized stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market.

The Board may, by an order take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:—

- (a) Suspend the trading of any security in a recognized stock exchange;
- (b) Restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;
- (c) Suspend any office-bearer of any stock exchange or self-regulatory organization from holding such position;
- (d) Impound and retain the proceeds or securities in respect of any transaction which is under investigation.
- (e) After passing of an order on an application made for approval by the Judicial Magistrate of the first class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder : Provided that only the bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached.

Management of the Board.

- (1) The Board shall consist of the following members, namely:—
 - (a) A Chairman;
 - (b) Two members from amongst the officials of the Ministry of the Central Government dealing with Finance and administration of the Companies Act, 1956.
 - (c) One member from amongst the officials of the Reserve Bank.
 - (d) Five other members of whom at least three shall be the whole-time members, to be appointed by the Central Government.
- (2) The general superintendence, direction and management of the affairs of the Board shall vest in a Board of members, which may exercise all powers and do all acts and things which may be exercised or done by the Board.

(3) The Chairman shall also have powers of general superintendence and direction of the affairs of the Board and may also exercise all powers and do all acts and things which may be exercised or done by that Board.

(4) The Chairman and members referred to in clauses (a) and (d) of sub-section (1) shall be appointed by the Central Government and the members referred to in clauses (b) and (c) of that sub-section shall be nominated by the Central Government and the Reserve Bank respectively.

(5) The Chairman and the other members referred to in clauses (a) and (d) of sub-section (1) shall

be persons of ability, integrity and standing who have shown capacity in dealing with problems relating to securities market or have special knowledge or experience of law, finance, economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to the Board.

Term of office and conditions of service of Chairman and members of the Board.

The term of office and other conditions of service of the Chairman and the members referred to in clause (d) of sub-section (1) of section 4, the Central Government shall have the right to terminate the services of the Chairman or a member appointed under clause (d) of sub-section (1) of section 4, at any time before the expiry of the period prescribed under sub section (1), by giving him notice of not less than three months in writing or three months' salary and allowances in lieu thereof, and the Chairman or a member, as the case may be, shall also have the right to relinquish his office, at any time before the expiry of the period prescribed under sub-section (1), by giving to the Central Government notice of not less than three months in writing.

Box 1: Additional responsibility of SEBI:

With an aim to enhance the ease of accessibility and usability of data disseminated in public by various data sources in securities market, SEBI has asked market intermediaries to make available such data to users, 'free of charge' both for 'viewing' and for download. Financial markets are traditionally data-rich and data-driven and with ever growing financial markets, the volume and variety of data have also increased manifold over the years and will continue to do so.

SEBI said in a meeting that with increasing size and complexity of financial markets, addressing information asymmetry and having adequately informed investors and multiple stakeholders in the market cannot be over emphasized. Further, given the large variety and volume of information in the markets, the value-added service providers also have a crucial role to play in making such information available to the stakeholders in a more comprehensible form. Therefore, in order to further enhance the quantum as well as the ease of accessibility and usability of data disseminated in public by various data sources in Indian securities market, including market infrastructure institutions (MIIs), SEBI, through its Market Data Advisory Committee, reviewed the extent of free access and usage of data provided in the public domain.

Box 2: The following table give the list of the various department of SEBI

Various departments of SEBI	
1. Corporation Finance Department (CFD)	7. Office of International Affairs (OIA)
2. Establishment Division (ESTB.) and Treasury & Accounts Division (T&A)	8. Department of Economic & Policy Analysis (DEPA)
3. Regional Offices (ROs) and Local Offices (LOs)	9. PACL Committee
Foreign Portfolio Investors & Custodians (FPI&C)	10. Integrated Surveillance Department (ISD)
4. Human Resources Department (HRD)	11. Commodity Derivatives Market Regulation Department (CDMRD)
5. Corporation Finance Investigation Department (CFID)	12. Office of Investor Assistance & Education (OIAE)
6. Facilities Management Division (FMD); Protocol & Security (P&S) and Official Language Division (OLD)	13. Information Technology Department (ITD)
	14. National Institute of Securities Markets (NISM)

2.2: Registration of Certificate provision:

An application for the grant of a certificate of registration as a participant shall be made to the Board in Form E, through each depository in which the applicant proposes to act as a participant, shall be accompanied by the fee specified by SEBI. The depository shall forward to the Board the application in Form E as early as possible, but not later than thirty days along with its recommendations and certifying that the participant complies with the eligibility criteria including adequate infrastructure as provided for in these regulations and the bye- laws of the depository.

The Board may require the applicant, or the depository to which the applicant is to be admitted as a participant, to furnish such further information or clarification as may be considered necessary for the grant of a certificate of registration to the applicant. The applicant or his authorized representative shall, if so required, appear before the Board for personal representation in connection with the grant of a certificate of registration.

For the purpose of grant of certificate of registration, the Board shall take into account all matters which are relevant to or relating to the efficient and orderly functioning of a participant and in particular, whether the applicant complies with the following requirements, namely: -

The applicant belongs to one of the following categories,-

- (i) A public financial institution as defined in section 4A of the Companies Act, 1956 (1 of 1956);
- (ii) A bank included for the time being in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934);
- (iii) A foreign bank operating in India with the approval of the Reserve Bank of India;
- (iv) A state financial corporation established under the provisions of section 3 of the State Financial Corporations Act, 1951 (63 of 1951);
- (v) An institution engaged in providing financial services, promoted by any of the institutions mentioned in sub clause (i), (ii), (iii), (iv) jointly or severally;
- (vi) A custodian of securities who has been granted a certificate of registration by the Board under sub- section (1A) of section 12 of the Act;
- (vii) A clearing corporation of a stock exchange;
- (viii) A stock broker who has been granted a certificate of registration by the Board under sub-section (1) of section 12 of the Act;
- (ix) A non-banking finance company, having a net worth of not less than rupees fifty lakhs:

Grant of certificate of registration:

After considering the application under regulation 16, with reference to the matters specified in regulation 19, if the Board is satisfied that the applicant is eligible for grant of certificate of registration, grant a certificate in Form F. The grant of certificate of registration in Form F shall be subject to the following namely:-

- (a) The participant shall pay the registration fee specified in Part A of the Second Schedule in the manner specified in Part B thereof, within fifteen days of the receipt of intimation from the Board;
- (b) The participant shall comply with the provisions of the Act.
- (c) The depository through which an application for certificate of registration has been forwarded holds a certificate of commencement of business under regulation 14.
- (d) If any information previously submitted by the participant to the Board is found to be false or misleading in any material particular, or if there is any change in such information, the participant shall forthwith inform the Board in writing;
- (e) The participant shall redress the grievances of beneficial owners within thirty days of the date of the receipt of the complaint and keep the depository informed about the number and the nature of redressals.

Box 3 Renewal of certificate of registration

The certificate of registration issued under regulation 20, or renewed under regulation 22 shall be valid for a period of five years from the date of its issue or renewal, as the case may be. Three months before the expiry of the period of validity of a certificate of registration, the participant shall, if it so desires, make an application for renewal in Form E through the depository in which it is a participant. The Board may renew a certificate of registration granted to a participant subject to the conditions of certificate of registration specified in regulation 22.

2.3: Financial Provision:**2.3.1: Grants by the Central Government.**

The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the Board grants of such sums of money as that Government may think fit for being utilised for the purposes of this Act.

There shall be constituted a Fund to be called the Securities and Exchange Board of India General Fund and there shall be credited thereto-

- (a) All grants, fees and charges received by the Board under this Act;
- (b) All sums received by the Board from such other sources as may be decided upon by the Central Government.

The Fund shall be applied for meeting -

- (a) The salaries, allowances and other remuneration of members, officers and other employees of the Board;
- (b) The expenses of the Board in the discharge of its functions under section 11;
- (c) The expenses on objects and for purposes authorized by this Act.

2.3.2: Securities and Exchange Board of India (International Financial Services Centres)

Conditions on investment

(1) In order to make an investment in an alternative investment fund or a mutual fund operating in IFSC, the investor shall be:

- (i) a person resident outside India;

(ii) a non-resident Indian;

(iii) institutional investor resident in India who is eligible under FEMA to invest funds offshore, to the extent of outward investment permitted;

(iv) Person resident in India having a net worth of at least US Dollar one million during the preceding financial year who is eligible under FEMA to invest funds offshore, to the extent allowed in the Liberalized Remittance Scheme of Reserve Bank of India. Provided that investors referred to in clauses (ii) to (iv) may make an investment in an alternative investment fund or a mutual fund operating in IFSC, subject to guidelines of Reserve Bank of India.

(2) Any alternative investment fund or mutual fund operating in IFSC shall accept money from eligible investors only in foreign currency.

(3) Any alternative investment fund or mutual fund operating in IFSC shall be permitted to invest in the following:

(a) Securities which are listed in IFSC;

(b) Securities issued by companies incorporated in IFSC;

(c) Securities issued by companies incorporated in India or companies belonging to foreign jurisdiction Subject to such conditions or guidelines that may be stipulated or issued by the Reserve Bank of India and government of India from time to time. Further, it is clarified that portfolio manager, alternative investment fund or mutual fund shall invest in India through the foreign portfolio investor route.

(4) An asset management company of a mutual fund operating in IFSC shall have a net worth of not less than USD two million which shall be increased to USD ten million within three years of commencement of business in IFSC.

(5) The requirements such as appointment of trustee, custodian, manager, etc., shall be as specified by the Board.

(6) The requirements regarding raising of funds in foreign currency such as minimum investment amount, minimum corpus of fund, disclosures, investment conditions, valuations, types of schemes, professional qualifications, etc., shall be as specified by the board.

2.4: Accounts and Audit.

The Board shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor- General of India.

The accounts of the Board shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Board to the Comptroller and Auditor-General of India.

The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Board shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Board.

The accounts of the Board as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

Question to solve:

1. Discuss some of the power endowed upon SEBI to protect the interest of the investors.
2. Who are the members of SEBI board of directors?
3. Who appoints the chairman of SEBI and what are the qualities required to be appointed as chairman of SEBI.
4. Describe the role of SEBI in ensuring the availability of financial data to the public for up to date information.
5. Explain what are the characteristics required to be an applicant for certificate of registration of SEBI.
6. What is the renewal process of the certificate of registration?
7. Explain the financial provision for SEBI as ensured by Central government.
8. Explain the working of International Financial Service Centers (IFSC) of SEBI.
9. Explain the account and audit process of the SEBI.

References:

1. https://www.sebi.gov.in/sebi_data/attachdocs/1456380272563.pdf Securities and Exchange Board of India Act, 1992 [As amended by the Securities Laws(Amendment) Act, 2014]
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BLOCK IV : UNIT-III

Block 4: Securities Exchange Board of India Act, 1992

Unit 3: Penalties and Adjudication- Securities Appellate tribunal

3.1 Introduction

3.2 Objectives

3.3 Introduction to Penalties And Adjudication

3.4 Establishment, jurisdiction, authority and procedure of appellate tribunal

3.5 Summing up

3.6 References and suggested readings

3.7 Model Questions

3.8 Answers to check your progress

3.1 Introduction

SEBI plays an important role in regulating all the players operating in the Indian capital market. It attempts to protect the interest of investors and aims at developing the capital markets by enforcing various rules and regulations. SEBI is a statutory regulatory body established on the 12th of April, 1992. It monitors and regulates the Indian capital and securities market while ensuring to protect the interests of the investors, formulating regulations and guidelines. The head office of SEBI is at Bandra Kurla Complex, Mumbai. SEBI has a corporate framework comprising of various departments each managed by a department head. There are about 20 departments under SEBI. Some of these departments are corporation finance, economic and policy analysis, debt and hybrid securities, enforcement, human resources, investment management, commodity derivatives market regulation, legal affairs, and more.

3.2 Objectives

This unit attempts to throw light on the law keepers of the Securities Exchange Board of India Act 1992. After going through this chapter, you will be able to:

- Know about role of law keepers and their duties in embracing the Act
- Discuss the power and functions of law keepers for penalty and adjudication issues as per the Act

3.3 Introduction to Penalties And Adjudication

Securities and Exchange Board of India Act 1992, Securities Contracts (Regulation) Act 1956 (SCRA), and Depositories Act 1996, are being amended to streamline adjudication procedures and to provide for penalties for certain infractions.

3.3.1 Penalties And Adjudication

Penalty for failure to furnish information, return, etc.- If any person, who is required under this Act or any rules or regulations made thereunder-

(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less;

(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less

(c) to maintain books of accounts or records, fails to maintain the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

3.3.2 Penalty for failure by any person to enter into agreement with clients.-

If any person, who is registered as an intermediary and is required under this Act or any rules or regulations made thereunder to enter into an agreement with his client, fails to enter into such agreement, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

3.3.3 Penalty for failure to redress investors' grievances- If any listed company or any person who is registered as an intermediary, after having been called upon by the Board in writing, to redress the grievances of investors, fails to redress such grievances within the time specified by the Board, such company or intermediary shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

3.3.4 Penalty for certain defaults in case of mutual funds.- If any person, who is –

(a) required under this Act or any rules or regulations made thereunder to obtain a certificate of registration from the Board for sponsoring or carrying on any collective investment scheme, including mutual funds, sponsors or carries on any collective investment scheme, including mutual funds, without obtaining such certificate of registration, he shall be liable to a penalty of one lakh rupees for each day during which he sponsors or carries on any such collective investment scheme including mutual funds, or one crore rupees, whichever is less.

(b) registered with the Board as a collective investment scheme, including mutual funds, for sponsoring or carrying on any investment scheme, fails to comply with the terms and conditions of certificate of registration, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

(c) registered with the Board as a collective investment scheme, including mutual funds, fails to make an application for listing of its schemes as provided for in the regulations governing

such listing, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

(d) registered as a collective investment scheme including mutual funds fails to despatch unit certificates of any scheme in the manner provided in the regulation governing such despatch, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

(e) registered as a collective investment scheme, including mutual funds, fails to refund the application monies paid by the investors within the period specified in the regulations, he shall be liable to pay a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

(f) registered as a collective investment scheme, including mutual funds, fails to invest money collected by such collective investment schemes in the manner or within the period specified in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

3.3.5 Penalty for failure to observe rules and regulations by an asset management company.- Where any asset management company of a mutual fund registered under this Act, fails to comply with any of the regulations providing for restrictions on the activities of the asset management companies, such asset management company shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

3.3.6 Penalty for failure in case of stock brokers.-

If any person, who is registered as a stock broker under this Act, -

- (a) fails to issue contract notes in the form and in the manner specified by the stock exchange of which such broker is a member, he shall be liable to a penalty not exceeding five times the amount for which the contract note was required to be issued by that broker;
- (b) fails to deliver any security or fails to make payment of the amount due to the investor in the manner within the period specified in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.
- (c) charges an amount of brokerage which is in excess of the brokerage specified in the regulations, he shall be liable to a penalty of one lakh rupees or five times the amount of brokerage charged in excess of the specified brokerage, whichever is higher.

3.3.7 Penalty for insider trading. - If any insider who,- (i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price sensitive information; or (ii) communicates any unpublished price- sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or (iii) counsels, or procures for any other person to deal in any securities of any body corporate

on the basis of unpublished price-sensitive information, shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher.

3.3.8 Penalty for non-disclosure of acquisition of shares and take-overs.-If any person, who is required under this Act or any rules or regulations made thereunder, fails to,- (i) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or

(ii) make a public announcement to acquire shares at a minimum price;

(iii) make a public offer by sending letter of offer to the shareholders of the concerned company; or

(iv) make payment of consideration to the shareholders who sold their shares pursuant to letter of offer. He shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.

3.3.9 Penalty for fraudulent and unfair trade practices.- If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.

3.3.10 Penalty for contravention where no separate penalty has been provided.- Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees.

3.3.10.1 Power to adjudicate- The Board shall appoint any of its officers not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty. While holding an inquiry, the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections.

3.3.11 Factors to be taken into account by the adjudicating officer.-While adjudging quantum of penalty, the adjudicating officer shall have due regard to the following factors, namely: (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; (b) the amount of loss caused to an investor or group of investors as a result of the default; (c) the repetitive nature of the default. Substituted by SEBI Crediting sums realized by way of penalties to Consolidated Fund of India. All sums realised by way of penalties under this Act shall be credited to the Consolidated Fund of India.

Stop to consider

IPO Scam: 2003-2006

The Scam came to limelight when the primary market got manipulated by financiers and market players with the use of benaami DEMAT accounts. Certain entities obtained the IPO shares which was reserved for retail applicants through thousand of benaami DEMAT accounts. Then the shares got transferred to the financiers on the first day of listing. This brings them a huge profit by the price difference between IPO price and Listing Price.

In the year 2005, 'YES Bank' a private entity launched its initial public offering. One of the scammers Roopalben Panchal opened the fake DEMAT account and then raised finances on the shares allotted to her through Bharat Overseas Bank branch. On October 2012 it was found that Purushottam Budhwani was controlling over 5,000 DEMAT accounts.

Himani Patel, funded 61 Benaami applicants and had 635 different DEMAT account and they made 645 multiple application for 96 shares amounting to Rs. 48960/-. The money for the same was routed through 22 different bank accounts in which Himani Patel was the first holder. Thus, on the basis of the allotment each application got 16 shares total numbering to 10160 shares of Suzlon. These shares were off market transferred to Himani Patel's Demat account prior to listing. The shares were sold for more than Rs 839/- compared to the IPO price of Rs.510/-. Therefore Rs. 33,52,636 amount was illegally earned by her. Similarly there was fraud in Jet Airways IPO, NTPC IPO and Tata Consultancy IPO, where more than 10000 fake DEMAT account was found by the SEBI and thus there was a complete scam.

On 12 January, 2006 SEBI issued an ad-interim order wherein it stated that NSDL, and Depository participants being in an agent- principal relationship in terms of the Depositories Act, 1996 are liable for the conduct of their Depository Participants. Also the Depositories are the intermediaries of SEBI so they have the responsibility of protecting the interest of the investors. Thus, SEBI had indicated NSDL as far back as in 2006 for being responsible for not properly monitoring the Depository Participants and thus being responsible for this huge scam. With this the SEBI issued ex- parte ad- interim under Section 19 of the Depositories Act 1996 read with Section 11, 11 B of the Securities and Exchange Board of India Act, for completing the enquiry. The SEBI initiated adjudication proceedings against NSDL under section 15 H of the SEBI Act, 1992 and section 19 H of the Depositories Act 1996. Thus the SEBI levied a monetary penalty of Rs. 5 Crores on NSDL

Source: Dr. Kirit Somaiya, 'Story of DEMAT Scams', 2008

Check your Progress

1. What are the provisions relating to Penalty for non-disclosure of acquisition of shares and take-overs under SEBI Act 1992?

Self Asking Questions

1. What are the provisions relating to Penalty for failure by any person to enter into agreement with clients?

3.4 Establishment, jurisdiction, authority and procedure of appellate tribunal

3.4.1 Establishment of Securities Appellate Tribunals.-

(1) The Central Government shall, by notification, establish one or more Appellate Tribunals to be known as the Securities Appellate Tribunal to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under this Act or any other law for the time being in force

(2) The Central Government shall also specify in the notification referred to in sub-section (1) the matters and places in relation to which the Securities Appellate Tribunal may exercise jurisdiction.

3.4.2 Composition of Securities Appellate Tribunal.

A Securities Appellate Tribunal shall consist of a Presiding Officer and two other Members, to be appointed, by notification, by the Central Government: Provided that the Securities Appellate Tribunal, consisting of one person only, established before the commencement of the Securities and Exchange Board of India (Amendment) Act, 2002, shall continue to exercise the jurisdiction, powers and authority conferred on it by or under this Act or any other law for the time being in force till two other Members are appointed under this section.

3.4.3 Qualification for appointment as Presiding Officer or Member of the Securities Appellate Tribunal

(1) A person shall not be qualified for appointment as the Presiding Officer of a Securities Appellate Tribunal unless he is a sitting or retired Judge of the Supreme Court or a sitting or retired Chief Justice of a High Court. Provided that the Presiding Officer of the Securities Appellate Tribunal shall be appointed by the Central Government in consultation with the Chief Justice of India or his nominee.

(2) A person shall not be qualified for appointment as Member of a Securities Appellate Tribunal unless he is a person of ability, integrity and standing who has shown capacity in

dealing with problems relating to securities market and has qualification and experience of corporate law, securities laws, finance, economics or accountancy. Provided that a member of the Board or any person holding a post at senior management level equivalent to Executive Director in the Board shall not be appointed as Presiding Officer or Member of a Securities Appellate Tribunal during his service or tenure as such with the Board or within two years from the date on which he ceases to hold office as such in the Board.

3.4.4 Tenure of office of Presiding Officer and other Members of Securities Appellate Tribunal

The Presiding Officer and every other Member of a Securities Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. Provided that no person shall hold office as the Presiding Officer of the Securities Appellate Tribunal after he has attained the age of sixty-eight years. Further that no person shall hold office as Member of the Securities Appellate Tribunal after he has attained the age of sixty-two years.

3.4.5 Salary and allowances and other terms and conditions of service of Presiding Officers The salary and allowances payable to and the other terms and conditions of service (including pension, gratuity and other retirement benefits) of the Presiding Officer and any other Member of a Securities Appellate Tribunal shall be such as may be prescribed. Provided that neither the salary and allowances nor the other terms and conditions of service of the Presiding Officer and other Members of a Securities Appellate Tribunal shall be varied to their disadvantage after appointment.

3.4.6 Filling up of vacancies - If, for reason other than temporary absence; any vacancy occurs in the office of the Presiding Officer or any other Member of a Securities Appellate Tribunal, then the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and, the proceedings may be continued before the Securities Appellate Tribunal from the stage at which the vacancy is filled.

3.4.7 Resignation and removal-

(1) The Presiding Officer or any other Member of a Securities Appellate Tribunal may, by notice in writing under his hand addressed to the Central Government, resign his office: Provided that the Presiding Officer or any other Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office, until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

(2) The Presiding Officer or any other Member of a Securities Appellate Tribunal shall not be removed from his office except by an order by the Central Government on the ground of proved misbehaviour or incapacity after inquiry made by a Judge of the Supreme Court, in which the Presiding Officer or any other Member concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of these charges.

(3) The Central Government may, by rules, regulate the procedure for the investigation of misbehaviour or incapacity of the Presiding Officer or any other Member. Orders constituting Appellate Tribunal to be final and not to invalidate its proceedings. No order of the Central Government appointing any person as the Presiding Officer or a Member of a Securities Appellate Tribunal shall be called in question in any manner and no act or proceeding before a Securities Appellate Tribunal shall be called in question in any manner on the ground merely of any defect in the constitution of a Securities Appellate Tribunal.

3.4.8 Staff of the Securities Appellate Tribunal

(1) The Central Government shall provide the Securities Appellate Tribunal with such officers and employees as that Government may think fit.

(2) The officers and employees of the Securities Appellate Tribunal shall discharge their functions under general superintendence of the Presiding Officer.

(3) The salaries and allowances and other conditions of service of the officers and employees of the Securities Appellate Tribunal shall be such as may be prescribed.

3.4.9 Appeal to the Securities Appellate Tribunal

(1) Any person aggrieved-

(a) by an order of the Board made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the rules or regulations made thereunder; or (b) by an order made by an adjudicating officer under this Act, may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Securities Appellate Tribunal from an order made-

(a) by the Board on and after the commencement of the Securities Laws (Second Amendment) Act, 1999

(b) by an adjudicating officer, with the consent of the parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Board or the adjudicating officer, as the case may be, is received by him and it shall be in such form and be accompanied by such fee as may be prescribed. Provided that the Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1), the Securities Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Securities Appellate Tribunal shall send a copy of every order made by it to the Board, the parties to the appeal and to the concerned Adjudicating Officer.

(6) The appeal filed before the Securities Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

3.4.10 Procedure and powers of the Securities Appellate Tribunal

(1) The Securities Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908(5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Securities Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Securities Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908(5 of 1908), while trying a suit, in respect of the following matters, namely: (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses or documents; (e) reviewing its decisions; (f) dismissing an application for default or deciding it ex parte; (g) setting aside any order of dismissal of any application for default or any order passed by it ex parte; (h) any other matter which may be prescribed. (3) Every proceeding before the Securities Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code(45 of 1860), and the Securities Appellate Tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973(2 of 1974).

3.4.11 Right to legal representation-

The appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Securities Appellate Tribunal.

Explanation:- For the purposes of this section,-- (a) "chartered accountant" means a chartered accountant as defined in clause(b) of sub-section(1) of section 2 of the Chartered Accountants Act, 1949(38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act; (b) "company secretary" means a company secretary as defined in clause(c) of subsection(1) of section 2 of the Company Secretaries Act,1980(56 of 1980) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act; (c) "cost accountant" means a cost accountant as defined in clause(b) of subsection(1) of section 2 of the Cost and Works Accountants Act, 1959(23 of 1959) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act; (d) "legal practitioner" means an advocate, vakil or any attorney of any High Court, and includes a pleader in practice.

3.4.12 Limitation

(1)The provisions of the Limitation Act, 1963 (36 of 1963), shall, as far as may be, apply to an appeal made to a Securities Appellate Tribunal. Presiding Officer, Members and staff of

Securities Appellate Tribunals to be public servants. The Presiding Officer, Members and other officers and employees of a Securities Appellate Tribunal shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code(45 of 1860).]

(2) Civil Court not to have jurisdiction. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Officer appointed under this Act or a Securities Appellate Tribunal constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

(3) Appeal to Supreme Court.- Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order. Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Stop to Consider

M/S. MCX BIZ SOLUTIONS AND MR SYED SADAQ

In the matter of M/s. MCX Biz Solutions (hereinafter referred to as “MBS”) SEBI noticed that the entity was soliciting and collecting money from public and was promising high returns. Therefore SEBI undertook preliminary inquiries into the matter and it was observed that MBS is maintaining a website wherein it has claimed to be active in stock trading and commodities trading. It was further observed that on its website MBS had displayed a sub-broker registration certificate showing it to have been issued by SEBI. The certificate was fake and MBS was observed to be not registered with SEBI as represented. Hence vide Order dated November 18, 2013, MBS and its sole proprietor Mr. Syed Sadaq were inter-alia restrained from accessing the securities markets and further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly, or being associated with the securities market in any manner till further directions.

Source: WTM/RKA/MIRSD/46 /2013

Check your Progress

1. Who are the Staff of the Securities Appellate Tribunal under the SEBI Act 1992?

Self Asking Questions

1. List the powers of the Securities Appellate Tribunal under SEBI Act 1992.

3.5 Summing up

1. If any insider who,- (i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price sensitive information; or (ii) communicates any unpublished price- sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or (iii) counsels, or procures for any other person to deal in any securities of any body corporate on the basis of unpublished price-sensitive information, shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher.
2. If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.
3. Factors to be taken into account by the adjudicating officer.-While adjudging quantum of penalty, the adjudicating officer shall have due regard to the following factors, namely: (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; (b) the amount of loss caused to an investor or group of investors as a result of the default; (c) the repetitive nature of the default. Substituted by SEBI Crediting sums realized by way of penalties to Consolidated Fund of India. All sums realised by way of penalties under this Act shall be credited to the Consolidated Fund of India.

3.6 References and suggested readings

1. Bare Act SEBI Act 1992

3.7 Model Questions

1. What are the provisions relating to right to appeal to Securities Appellate Tribunal against refusal of stock exchange to list securities of public companies?
2. List the provisions for penalty for insider trading?
3. What are the factors to be taken into account by the adjudicating officer?
4. What are the qualifications for appointment as Presiding Officer or Member of the Securities Appellate Tribunal?
5. What are the provisions for penalty for certain defaults in case of mutual funds?

3.8 Answers to check your progress

1. If any person, who is required under this Act or any rules or regulations made thereunder, fails to,- (i) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or
(ii) make a public announcement to acquire shares at a minimum price;
(iii) make a public offer by sending letter of offer to the shareholders of the concerned company; or
(iv) make payment of consideration to the shareholders who sold their shares pursuant to letter of offer. He shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.

2. Staff of the Securities Appellate Tribunal

- (1) The Central Government shall provide the Securities Appellate Tribunal with such officers and employees as that Government may think fit.
- (2) The officers and employees of the Securities Appellate Tribunal shall discharge their functions under general superintendence of the Presiding Officer.
- (3) The salaries and allowances and other conditions of service of the officers and employees of the Securities Appellate Tribunal shall be such as may be prescribed.

BLOCK V : UNIT-I

PREVENTION OF MONEY LAUNDERING ACT, 2002: DEFINITION- OFFENCES- PUNISHMENT FOR MONEY LAUNDERING–ATTACHMENT OF PROPERTIES

- 1.1 Introduction
- 1.2 Objectives
- 1.3 Definitions
- 1.4 Offences
- 1.5 Punishment for money laundering
- 1.6 Attachment of properties
- 1.7 Summing Up
- 1.8 References and Suggested Readings
- 1.9 Model Questions
- 1.10 Answers to Check Your Progress

1.1 Introduction

The Prevention of Money Laundering Bill was passed by both the Houses of Parliament and received the assent of the President on 17th January, 2003. The Prevention of Money Laundering Act, 2002, came into force in India on 1st July, 2005 and is applicable to the whole of India. The objective of this Act is to prevent money-laundering while providing for confiscation of property either derived from, or involved in, money-laundering and for any other matter connected therewith or incidental thereto.

1.2 Objectives

This unit is an attempt to understand the money laundering activities and its legal implications. After studying this unit you will be able to –

- Describe the key terms and definitions for understanding the context of the Act.
- Elaborate the activities identified as offences and punishment for such activities.
- Explain the procedure and provisions for attachment of properties for money laundering.

1.3 Definitions

The various terms in this Act have been defined in Sec 2 of The Prevention of Money Laundering Act, 2002.

Adjudicating Authority means ‘an Adjudicating Authority appointed under sub-section (1) of section 6’.

Appellate Tribunal means ‘the Appellate Tribunal 2[referred to in] section 25’.

Assistant Director means ‘an Assistant Director appointed under sub-section (1) of section 49’

Attachment means ‘prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III’.

Authorised person means ‘an authorised person as defined in clause (c) of section 2 of the Foreign Exchange Management Act, 1999. Section 2(c) of the Foreign Exchange Management Act (FEMA) states that ‘authorized person’ means ‘an authorized dealer, money changer, off-shore banking unit, or any other person authorized under Sec 10(1) to deal in foreign exchange and foreign securities’.

The categories of ‘Authorised Persons’ are as follows:

Category	Entities	Permitted activities
Authorized Dealer Category I	Commercial Banks, State Co-operative Banks, Urban Co-operative Banks	All current and capital account transactions as per RBI directions issued from time to time
Authorized Dealer Category II	Upgraded FFMCs, Co-operative Banks, Regional rural Banks (RRBs) and Others	Specified non-trade related current account transactions and all activities permitted to FFMC
Authorized Dealer Category III	Select Financial and Other Institutions	Transactions incidental to the foreign exchange
Full Fledged Money Changers (FFMC)	Department of Post, Urban Co-operative Banks, Other FFMC	Purchase of foreign exchange and sale for private and business visits abroad.

Banking company means ‘a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies and includes any bank or banking institution referred to in section 51 of that Act’.

Bench means ‘a Bench of the Appellate Tribunal’.

Beneficial owner means ‘an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person’.

Chairperson means ‘the Chairperson of the Appellate Tribunal’.

Chit fund company means ‘a company managing, conducting or supervising, as foreman, agent or in any other capacity, chits as defined in section 2 of the Chit Funds Act, 1982’.

Client means ‘a person who is engaged in a financial transaction or activity with a reporting entity and includes a person on whose behalf the person who engaged in the transaction or activity, is acting’.

STOP TO CONSIDER

Authorised Dealer is segregated into four categories according to which they are permitted to operate differently. Banking companies and other financial institutions may be permitted to function as authorized dealer.

Co-operative bank shall have the same meaning as assigned to it in clause (*dd*) of section 2 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961. As per Sec 2(dd), “co-operative bank” means ‘a State Co-operative bank, a Central cooperative bank and a primary co-operative bank’.

Corresponding law means ‘any law of any foreign country corresponding to any of the provisions of this Act or dealing with offences in that country corresponding to any of the scheduled offences’.

Dealer has the same meaning as assigned to it in clause (*b*) of section 2 of the Central Sales Tax Act, 1956. As per Sec 2(b) “dealer” means any person who, carries on (whether regularly or otherwise, the business of buying, selling, supplying or distributing goods, directly or indirectly, for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes –

- (i) a local authority, a body corporate, a company, any cooperative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business;
- (ii) a factor, broker, commission agent, del credere agent, or any other mercantile agent, by whatever name called, and whether of the same description as herein before mentioned or not, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal whether disclosed or not; and
- (iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal.

STOP TO CONSIDER

Any person can be a dealer under this Act, who is engaged in either buy-sell or supply of goods in whatever manner either for cash or kind.

Deputy Director means ‘a Deputy Director appointed under sub-section (*I*) of section 49’.

Director or Additional Director or Joint Director means ‘a Director or Additional Director or Joint Director, as the case may be, appointed under sub-section (*I*) of section 49’.

Financial institution means ‘a financial institution as defined in clause (c) of section 45-1 of the Reserve Bank of India Act, 1934 and includes a chit fund company, a housing finance institution, an authorized person, a payment system operator, a non-banking financial company and the Department of Posts in the Government of India’.

Housing finance institution shall have the meaning as assigned to it in clause (d) of section 2 of the National Housing Bank Act, 1987. As per Sec 2 (d) "housing finance institution" includes every institution, whether incorporated or not, which primarily transacts or has, as one of its principal objects, the transacting of the business of providing finance for housing, whether directly or indirectly.

Intermediary means -

- i. a stock-broker, share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser or any other intermediary associated with securities market and registered under section 12 of the Securities and Exchange Board of India Act, 1992; or
- ii. an association recognised or registered under the Forward Contracts (Regulation) Act, 1952 or any member of such association; or
- iii. intermediary registered by the Pension Fund Regulatory and Development Authority; or
- iv. a recognised stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956.

Investigation includes ‘all the proceedings under this Act conducted by the Director or by an authority authorised by the Central Government under this Act for the collection of evidence.

Member means ‘a Member of the Appellate Tribunal and includes the Chairperson’.

Money-laundering has the meaning assigned to it in section 3 of the Act. In common parlance, money laundering can be sensed as the practice of making money gained through criminal means, by way of concealment; or possession; or acquisition; or use; or projecting as untainted property; or claiming as untainted property, in any manner whatsoever.

Non-banking financial company shall have the same meaning as assigned to it in clause (f) of section 45-I of the Reserve Bank of India Act, 1934. As per Sec 45-I (f), ‘non-banking financial company’ means -

- (i) a financial institution which is a company;
- (ii) a non-banking institution which is a company, and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;

- (iii) such other non-banking institution or class of such institutions, as the Bank may, with the previous approval of the Central Government and by notification in the Official Gazette, specify;

STOP TO CONSIDER

As per RBI Act 1934, Reserve Bank of India (RBI) has the powers to regulate and control the Non-Banking Financial Companies and can exercise surveillance, supervise, inspect, issue directions, lay down policies and regulate the Non-Banking Financial Companies (NBFC's).

Notification means 'a notification published in the Official Gazette'.

Offence of cross border implications means -

- (i) any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person transfers, in any manner, the proceeds of such conduct or part thereof to India; or
- (ii) any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India.

Payment system means 'a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them.' It includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations'.

Payment system operator means 'a person who operates a payment system and such person includes his overseas principal.'

For the purposes of Payment system operator, the Overseas principal means -

- In the case of an individual, such individual residing outside India, who owns or controls or manages, directly or indirectly, the activities or functions of payment system in India;
- In the case of a Hindu undivided family, Karta of such Hindu undivided family residing outside India who owns or controls or manages, directly or indirectly, the activities or functions of payment system in India;
- In the case of a company, a firm, an association of persons, a body of individuals, an artificial juridical person, whether incorporated or not, such company, firm, association of persons, body of individuals, artificial juridical person incorporated or registered outside India or existing as such and which owns or controls or manages, directly or indirectly, the activities or functions of payment system in India;]

Person includes -

- a) an individual,
- b) a Hindu undivided family,

- c) a company,
- d) a firm,
- e) an association of persons or a body of individuals, whether incorporated or not,
- f) every artificial juridical person not falling within any of the preceding sub-clauses, and
- g) any agency, office or branch owned or controlled by any of the above persons mentioned in the preceding sub-clauses;

STOP TO CONSIDER

The definition of 'person' under this Act is the same as 'person' is defined under the Income Tax Act, 1961 except for the agency, office or branch owned or controlled by the 'person'.

Person carrying on designated business or profession means -

- (a) a person carrying on activities for playing games of chance for cash or kind, and includes such activities associated with casino;
- (b) Inspector-General of Registration appointed under section 3 of the Registration Act, 1908 (16 of 1908) as may be notified by the Central Government;]
- (c) real estate agent, as may be notified by the Central Government;
- (d) dealer in precious metals, precious stones and other high value goods, as may be notified by the Central Government;
- (e) person engaged in safekeeping and administration of cash and liquid securities on behalf of other persons, as may be notified by the Central Government; or
- (f) person carrying on such other activities as the Central Government may, by notification, so designate, from time to time;

Check Your Progress

- Question 1. Who is an authorized person?
- Question 2. What do you understand by a banking company?
- Question 3. What does the term attachment mean under the Act?

Precious metal means 'gold, silver, platinum, palladium or rhodium or such other metal as may be notified by the Central Government'.

Precious stone means 'diamond, emerald, ruby, sapphire or any such other stone as may be notified by the Central Government'.

Prescribed means 'prescribed by rules made under this Act'.

Proceeds of crime means 'any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property, or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad'.

STOP TO CONSIDER

In this regard, "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.

Property means ‘any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located’.

In this context, “property” includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences.

Real estate agent means ‘a real estate agent as defined in clause (88) of section 65 of the Finance Act, 1994’. As per Sec 65(88), “Real estate agent” means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant.

Records include ‘the records maintained in the form of books or stored in a computer or such other form as may be prescribed’.

Reporting entity means ‘a banking company, financial institution, intermediary or a person carrying on a designated business or profession’.

Schedule means ‘the Schedule to this Act’.

STOP TO CONSIDER

The major Acts covered under the ‘schedule’ are:

(a) Indian Penal Code, 1860; (b) NDPS Act, 1985; (c) Unlawful Activities (Prevention) Act, 1967; (d) Prevention of Corruption Act, 1988; (e) Customs Act, 1962; (f) SEBI Act, 1992; (g) Copyright Act, 1957; (h) Trade Marks Act, 1999; (i) Information Technology Act, 2000; (j) Explosive Substances Act, 1908; (k) Wild Life (Protection) Act, 1972; (l) Passport Act, 1967; (m) Environment Protection Act, 1986; (n) Arms Act, 1959.

Scheduled offence means -

- (i) the offences specified under Part A of the Schedule; or
- (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or
- (iii) the offences specified under Part C of the Schedule.

Special court means ‘a Court of Session designated as Special Court under sub-section (1) of section 43’.

Transfer includes ‘sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien’.

Value means ‘the fair market value of any property on the date of its acquisition by any person, or if such date cannot be determined, the date on which such property is possessed by such person’.

Any reference, in this Act or the Schedule, to any enactment or any provision thereof shall, in relation to an area in which such enactment or such provision is not in force, be construed as a reference to the corresponding law or the relevant provisions of the corresponding law, if any, in force in that area.

1.4 Offences [Sec 3]

Any party shall be considered guilty of offence of money laundering attempts to indulge directly or indirectly, in any process or activity connected with the proceeds of crime. He may be involved, either directly or indirectly, and assists the same act knowingly or is involved in the process knowingly.

The activities which may lead to such offence may be any of the following -

- concealment; or
- possession; or
- acquisition; or
- use; or
- projecting as untainted property; or
- claiming as untainted property, in any manner whatsoever;

The process or activity in relation to such proceeds of crime is a continuous activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by performing any of the activities listed above.

1.5 Punishment for money laundering [Sec 4]

Any party found to commit the offence of money-laundering shall be punishable with rigorous imprisonment up to three years which may extend to seven years and shall also be subject to fine.

STOP TO CONSIDER

If an offence of money laundering is committed by a company, then every person in charge of and responsible for the conduct of the business of the company at the time of such contravention as well as the company, will be deemed to be guilty and will be liable to be proceeded against and punished accordingly.

1.6 Attachment of properties [Sec 5]

The provisions relating to attachment of properties have been dealt with and are presented as follows:

(1) The Director or any other officer authorised by the Director (not below the rank of Deputy Director) is the authorized personnel or authority with regard to attachment of properties. If the authorized authority has reason to believe that any person is in possession of any proceeds of crime, and such proceeds of crime may be concealed, transferred or dealt with in any manner resulting in frustrating any proceedings relating to confiscation of such proceeds of crime on the basis of material in his possession, he may, by issuing an order in writing, attach such property provisionally up to one hundred and eighty days from the date of the order, as prescribed:

Such order of attachment shall be made only in relation to the scheduled offence on the basis of a report forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or on filing of a complaint by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for understanding the scheduled offence or a similar report or complaint has been made or filed under the corresponding law of any other country:

Any property of any person may be attached under this section if there seems sufficient reason that if such property involved in money-laundering is not attached immediately, it may result in frustrating any proceeding under this Act.

While determining the period of one hundred and eighty days, the period during which the proceedings is halted by the High Court is excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.

2. The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment, forward a copy of the order, along with the material in his possession to the Adjudicating Authority, in a sealed envelope, in the prescribed manner and such Adjudicating Authority shall keep such order and material for such period as prescribed.
3. Every order of attachment made will be terminated after the expiry of the specified period or on the date of an order made according to section 8, whichever is earlier.
4. Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached from such enjoyment. 'Person interested' includes all persons claiming or entitled to claim any interest in the property.
5. The Director or any other officer, who provisionally attaches any property for the causes listed earlier, shall file a complaint stating the facts of such attachment before the Adjudicating Authority within a period of thirty days from such attachment.

Check your Progress

Question 4. What is scheduled offence?

Question 5. What is considered as 'offence' under this Act?

Question 6. How is an offence punishable under this Act?

Question 7. Who are covered under "persons carrying on a designated business or profession"?

Self-Asking Questions

Question 1. Is there any difference between 'person' as defined by the Prevention of Money Laundering Act, 2002 and Income Tax Act, 1961? Justify your answer.

Question 2. What is the relevance of 'overseas principal' regarding payment system operator? Elaborate.

Question 3. Under what circumstances does the authorized authority ask for attachment of property? Explain.

1.7 Summing Up

- ❖ The Prevention of Money Laundering Act, 2002 is an Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto
- ❖ It extends to the whole of India.
- ❖ The activities which may be considered as offence under this Act may be any of the following - concealment; or possession; or acquisition; or use; or projecting as untainted property; or claiming as untainted property.
- ❖ Such offence of money-laundering shall be punishable with rigorous imprisonment up to three years which may extend to seven years and shall also be subject to fine.
- ❖ The order of attachment, on committing of an offence shall be made only in relation to the scheduled offence.
- ❖ Any property of any person may be attached under this section if there seems sufficient reason that if such property involved in money-laundering is not attached immediately, it may result in frustrating any proceeding under this Act.
- ❖ Every order of attachment made will be terminated after the expiry of the specified period or on the date of an order made according to section 8, whichever is earlier.

1.8 References and Suggested Readings

Bare Act. Prevention of Money Laundering Act, 2002.

Taxmann. 2019. Guide To Prevention of Money Laundering Act, 2002. Taxmann Publications.

1.9 Model questions

1. When did the Prevention of Money Laundering Act, 2002 come into force?
2. Does the Act extend to the whole of India?
3. What is the object of Prevention of Money Laundering Act, 2002?
4. Which agency administers the Prevention of Money Laundering Act, 2002?
5. What is money laundering?
6. How does money laundering occur?
7. What is the offence of money laundering?
8. What are proceeds of crime?
9. What is a scheduled offence?
10. Who can investigate a case of money laundering?

11. What does 'property' mean? Are intangible assets also included?
12. What is the punishment for the offence of money laundering?
13. Who are covered under "persons carrying on a designated business or profession"?

1.10 Answers to *Check Your Progress*.

1. An 'authorized person' means 'an authorized dealer, money changer, off-shore banking unit, or any other person authorized under Sec 10(1) to deal in foreign exchange and foreign securities'.
2. Banking company means 'a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies and includes any bank or banking institution referred to in section 51 of that Act'.
3. Attachment means 'prohibition of transfer, conversion, disposition or movement of property
4. Scheduled offence means the offences specified under Part A of the Schedule; or the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or the offences specified under Part C of the Schedule.
5. The activities which are considered as offence under this Act may be in any of the following modes - concealment; or possession; or acquisition; or use; or projecting as untainted property; or claiming as untainted property.
6. The PMLA prescribes rigorous imprisonment for at least 3 (three) years which may extend up to 7 (seven) years and also a fine. If the offence of money laundering is related to the Narcotic Drugs and Psychotropic Substances Act, 1985, the rigorous imprisonment may extend up to 10 (ten) years.
7. The person carrying on designated business or profession includes -
 - (a) a person carrying on activities for playing games of chance for cash or kind, and includes such activities associated with casino;
 - (b) Inspector-General of Registration appointed under section 3 of the Registration Act, 1908 (16 of 1908) as may be notified by the Central Government;]
 - (c) real estate agent, as may be notified by the Central Government;
 - (d) dealer in precious metals, precious stones and other high value goods, as may be notified by the Central Government;
 - (e) person engaged in safekeeping and administration of cash and liquid securities on behalf of other persons, as may be notified by the Central Government; or
 - (f) person carrying on such other activities as the Central Government may, by notification, so designate, from time to time;

BLOCK V : UNIT-II

Adjudicating Authorities- Banking Companies and Financial Institutions to Maintain Records- Summons Searches and Seizures

Unit Structure:

- 2.1 Introduction
- 2.2 Objectives
- 2.3 Adjudicating authorities
 - 2.3.1 Composition, Powers etc.
 - 2.3.2 Staff of Adjudicating authorities
 - 2.3.3 Procedure of Adjudication
- 2.4 Banking Companies and Financial Institutions and intermediaries
 - 2.4.1 Access to information. Sec 12A
 - 2.4.2 Enhanced due diligence. Sec 12AA.
 - 2.4.3 Procedure and manner of furnishing information by reporting entities.
- 2.5 Summons, searches and seizures
 - 2.5.1 Power of survey. [Sec 16]
 - 2.5.2 Search and seizure. [Sec 17]
 - 2.5.3 Search of persons.
 - 2.5.4 Power to arrest. [Sec 19]
 - 2.5.5 Retention of property. [Sec 20]
 - 2.5.6 Retention of records. [Sec 21]
 - 2.5.7 Presumption as to records or property in certain cases. [Sec 22]
 - 2.5.8 Presumption in inter-connected transactions. [Sec 23]
 - 2.5.9 Burden of proof. [Sec 24]
- 2.6 Summing Up
- 2.7 References and Suggested Readings
- 2.8 Model Questions
- 2.9 Answers to Check Your Progress

2.1 Introduction

The Prevention of Money-laundering Act, 2002 is divided into different chapters covering various provisions for operationality of the Act. Chapter III of the Act deals with the provisions relating to Adjudication and Adjudicating Authorities for prevention of money laundering. While the obligations of Banking companies, financial institutions and intermediaries are provided in Chapter IV of the Act along with Summons, searches and seizures prescribed in Chapter V.

2.2 Objectives

This unit focuses on specific portions of the Prevention of Money-laundering Act, 2002 relating to Adjudication, Financial intermediaries and summons etc. After completion of this unit, you will be able to –

- Elaborate the powers of adjudicating authorities and the procedure of adjudication relating to money laundering.
- Highlight the duties of record keeping by the Banking Companies and Financial Institutions and intermediaries
- Showcase the situations and procedure involving summons, searches and seizures relating to records and properties in relation to money laundering.

2.3 Adjudicating Authorities

Authority means the moral or legal right or ability to control. A person in authority is someone with official responsibility for a particular area of activity. In order to execute any law or provisions of an Act, authorities play an instrumental role.

2.3.1 Composition, powers, etc.

The Central Government shall, by notification, appoint an Adjudicating Authority to exercise jurisdiction, powers and authority conferred by or under this Act. An Adjudicating Authority shall consist of a Chairperson and two other Members (appointed by the Central Government) having experience in the field of (i) law, (ii) administration, (iii) finance or accountancy.

However, such member shall not be qualified for appointment in the field of law, unless he is (a) qualified for appointment as District Judge; or (b) has been a member of the Indian Legal Service and has held a post in Grade I of that service;

Further, he shall also not be qualified for appointment in the field of finance, accountancy or administration unless he possesses the prescribed qualifications.

The jurisdiction of the Adjudicating Authority may be exercised by Benches constituted by the Chairperson of the Adjudicating Authority with one or two Members as the Chairperson of the Adjudicating Authority;

The Benches of the Adjudicating Authority shall ordinarily sit at New Delhi and at any other places as the Central Government may specify by notification after consultation with the Chairperson. The central government also specifies the jurisdictional area for each Bench of the Adjudicating Authority

The Chairperson has the power to transfer a Member from one Bench to another Bench. He may also transfer a case from one bench to another, as he deems appropriate, based on the hearing, be it at any stage.

The duration for holding office by the Chairperson and every Member is for a term of five years or up to a maximum age of sixty five years from the date on which he enters upon his office.

The salary and allowances payable and other terms and conditions of service of the Member shall be as prescribed and shall not be varied to his disadvantage after appointment.

The Central Government may appoint another person to fill the vacancy (for reasons other than temporary absence) and the proceedings may be continued before the Adjudicating Authority from the stage at which the vacancy is filled in.

The Chairperson or any other Member may resign from office to the Central Government in writing, but he cannot relinquish his office unless permitted by the Central Government and may be required to continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest. However, the Central Government may, only after giving necessary opportunity of hearing, may remove he Chairperson or any other Member from office.

Vacancy caused in the office of the Chairperson on account of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson of the Adjudicating Authority until the date on which a new Chairperson has been duly appointed. The same shall be applicable in case of vacancy caused by temporary reasons like illness etc. until the former resumes duties.

The Adjudicating Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Adjudicating Authority shall have powers to regulate its own procedure.

STOP TO CONSIDER

An Adjudicating Authority shall consist of a Chairperson and two other Members (appointed by the Central Government) having experience in the field of (i) law, (ii) administration, (iii) finance or accountancy.

The jurisdiction of the Adjudicating Authority may be exercised by Benches. Benches are constituted by the Chairperson of the Adjudicating Authority with one or two Members as the Chairperson of the Adjudicating Authority.

2.3.2 Staff of Adjudicating Authorities.

Each Adjudicating Authority is provided with such officers and employees as the Central Government may think fit. These staff will discharge their functions under the general superintendence of the Chairperson of the Adjudicating Authority. The salaries and allowances and other conditions of service of the officers and employees of the Adjudicating Authority shall be as prescribed.

2.3.3 Procedure of Adjudication.

The process of adjudication may be initiated on receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18. On the basis of such receipt, the Adjudicating Authority may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized or frozen under section 17 or section 18, provided the Adjudicating Authority has reason to believe that such person has committed an offence under section 3 or is in possession of proceeds of crime. He is required to present the evidence on which he relies and other relevant information and particulars, and to show

cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government. If such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

After considering the reply to the notice issued by the Adjudicating Authority, the aggrieved party shall be provided with a hearing, and record a finding whether all or any of the properties referred to in the notice issued are involved in money-laundering after taking into account all relevant materials placed on record before him.

The Adjudicating Authority may confirm the attachment of the property under Sec 5(1) or retention or freezing of property, if he thinks that any property is involved in money-laundering. A record should be maintained whereupon such attachment or retention or freezing of the seized or frozen property or record shall continue during investigation for a period up to 365 days. The record shall be final after an order of confiscation is passed under relevant provisions.

The Director or any other officer authorised by him shall forthwith take the possession of the property attached or frozen in the prescribed manner after confirmation of the order of attachment. However if it is not possible to take possession of a property frozen then, the order of confiscation shall have the same effect as if the property had been taken possession of. Further, the Special Court may pass appropriate orders regarding confiscation or release of the property, as the case may be, on the occasion of the death of the accused.

STOP TO CONSIDER

Where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in the prescribed manner, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering; only if the Special Court is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering.

Check Your Progress

Question 1. Who constitutes adjudicating authority?

Question 2. State the provision for vacancy in the office of the chairperson of adjudicating authority.

Question 3. How long does it take for the adjudicating authority to serve a notice on receipt of a complaint or relevant information?

2.4 Banking Companies, Financial Institutions and Financial Intermediaries

Every reporting entity needs to maintain records of all transactions, including information relating to transactions which need to be furnished to the Director within prescribed time in such manner as to enable it to reconstruct individual transactions. Records of documents should be maintained which can act as evidence regarding identity of the clients and

beneficial owners plus account files and business correspondence relating to its clients. Every such information should be kept confidential and shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later. The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this Chapter.

2.4.1 Access to information. Sec 12A

The Director may call for from any records and any additional information as he considers necessary for the purposes of this Act from the reporting entity. This shall be furnished within the specified time and manner and shall be kept confidential.

2.4.2 Enhanced due diligence. Sec 12AA.

The reporting entities must verify the identity of the clients undertaking such specified transaction by authentication under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 in the prescribed manner.

They must take additional steps to examine the ownership and financial position, including sources of funds of the client, in the prescribed manner with due record for the purpose behind conducting the specified transaction and the intended nature of the relationship between the transaction parties.

Where the client fails to comply with the required conditions, the reporting entity shall not allow the specified transaction to be carried out. In case of any suspicion or indication of involvement of proceeds of crime, the reporting entity shall increase the future monitoring of the business relationship with the client, including greater scrutiny or transactions in the prescribed manner.

The information obtained while applying the enhanced due diligence measures as per specification shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

STOP TO CONSIDER

The identity of the clients undertaking the specified transactions must be authenticated under Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. The ownership and financial position, including sources of funds of the client, also the purpose behind conducting the specified transaction and the intended nature of the relationship between the transaction parties must be strictly authenticated.

2.4.3 Procedure and manner of furnishing information by reporting entities.

The Central Government may, in consultation with the Reserve Bank of India, prescribe the procedure and the manner of maintaining and furnishing information by a reporting entity

under Sec 7[section 11A, sub-section (I) of section 12 and sub-section (I) of section 12AA] for the purpose of implementing the provisions of this Act.

2.5 Summons, Searches And Seizures

2.5.1 Power of survey. [Sec 16]

If any authority suspects that an offence has been committed he may enter any place within his assigned area or any extended area assigned to him by such other authority. He must have a reason to believe that such act of offence has been committed in the specified area and the proprietor, or employee or any other assigned person should assist him the facility to inspect such records as he may require and which may be available at such place. He should also aid him in the necessary facility to check or verify the proceeds of crime or any transaction related to proceeds of crime which may be found therein; and also furnish any information useful for, or relevant to, any proceedings under this Act.

STOP TO CONSIDER

For this purpose, a place, where an act which constitutes the commission of the offence is carried on, shall also include any other place, whether any activity is carried on therein or not, in which the person carrying on such activity states that any of his records or any part of his property relating to such act are or is kept

The authority should forward a copy of the reasons so recorded along with material in his possession, to the Adjudicating Authority in a sealed envelope, in the manner as may be prescribed after completion of survey

The authority performing the survey may—

- (i) place marks of identification on the records inspected by him and make or cause to be made extracts or copies there from,
- (ii) make an inventory of any property checked or verified by him, and
- (iii) record the statement of any person present in the place which may be useful for, or relevant to, any proceeding under this Act.

2.5.2 Search and seizure. [Sec 17]

When the Director or the authorized officer suspects the involvement of a person in acts of money-laundering or in possession of any proceeds of crime involved in money-laundering, or in possession of any records relating to money-laundering or in possession of any property related to crime then, he may authorize search of any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept. He may also break open the lock of any door, box, locker, safe, almirah or other receptacle where the keys are not available. He is also authorized to seize any record or property found as a result of such search. He may place marks of identification on such record or make or cause to be made extracts or copies therefrom and make a note or an inventory of such record or property. He may, himself or through an officer subordinate perform the said activities and

also examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act.

If any record or property cannot be seized, the authorised officer may make an order to freeze such property. This means the property cannot be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned. The authorised authority shall forward a copy of the reasons so recorded along with material in his possession to the Adjudicating Authority in a sealed envelope immediately after search and seizure or after issuance of the freezing order.

The authority may enter and search the building or place of such evidence and seize it if he is satisfied that any evidence obtained during survey under section 16 may be concealed or tampered with.

The authority must file an application, requesting for retention of records or property seized or for continuation of the order of freezing served before the Adjudicating Authority within a period of thirty days from such seizure or freezing.

2.5.3 Search of persons.

By the general or special order of the Central Government, if the authorized authority, has reason to believe that any person has secreted about his person or in anything under his possession, ownership or control, any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, then he may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act. He should forward a copy of the reasons so recorded along with material in his possession to the Adjudicating Authority in a sealed envelope, in the prescribed manner. The authority shall take the person to be searched within twenty-four hours to the nearest Gazetted Officer or a Magistrate. The authority shall not detain the person for more than twenty-four hours prior to taking him before the Gazetted Officer, or the Magistrate.

STOP TO CONSIDER

The period of twenty-four hours shall exclude the time necessary for the journey undertaken to take such person to the nearest Gazetted Officer, superior in rank to him, or Magistrate's Court.

The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge such person but otherwise shall direct that search be made. Before making the search, under the directions of the Gazetted Officer or the Magistrate, the authority shall call upon two or more persons to attend and witness the search, and the search shall be made in the presence of such persons. A list of record or property seized needs to be prepared in the course of the search and obtain the signatures of the witnesses on the list.

The authority shall record the statement of the person searched in respect of the records or proceeds of crime found or seized in the course of the search. The authority, seizing any

record or property shall file an application requesting for retention of such record or property, before the Adjudicating Authority within a period of thirty days from such seizure.

Check Your Progress

Question 4. What should the reporting entities consider while verifying for specified transactions?

Question 5. When the retained or seized or frozen property needs to be confiscated after a search, in what duration should the application for such confiscation be passed by the authority?

Question 6 What are the rights of persons being searched in course of search under this Act?

2.5.4 Power to arrest. [Sec 19]

If the Director, Deputy Director, Assistant Director or any other authorised officer has the reason to believe that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest. This shall be authorised by the Central Government by general or special order. A copy of the order along with the material in his possession should be forwarded immediately to the Adjudicating Authority in the prescribed manner. The person arrested shall be taken to a Special Court or Judicial Magistrate or a Metropolitan Magistrate within twenty-four hours excluding the time necessary for the journey from the place of arrest to the Special Court or Magistrate's Court.

2.5.5 Retention of property. [Sec 20]

Any property which has been seized or section 18 or frozen for the purposes of adjudication may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such property was seized or frozen, as the case may be. A copy of the order along with the material in his possession should be forwarded to the Adjudicating Authority in the prescribed manner.

On the expiry of the period, the property shall be returned to the person from whom such property was seized or whose property was ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such property beyond the said period. While doing so he has to satisfy himself whether the property is *prima facie* involved in money-laundering and the property is required for the purposes of adjudication under section 8.

After passing the order of confiscation Special Court, shall direct the release of all property other than the property involved in money-laundering to the person from whom such property was seized or the persons entitled to receive it. However, the release of any such property may be withheld for a period of ninety days from the date of receipt of such order, if he is of the opinion that such property is relevant for the appeal proceedings under this Act.

2.5.6 Retention of records. [Sec 21]

If the Investigating Officer or any other officer authorised by the Director in this behalf has reason to believe that the records which have been seized or frozen are required to be retained for any inquiry under this Act, such records may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such records were seized or frozen, as the case may be. Copies of records are entitled to the person from whom records are seized or frozen.

On the expiry of the period, the records shall be returned to the person from whom such records were seized or whose records were ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such records beyond the said period.

STOP TO CONSIDER

The Adjudicating Authority should ensure that the records are required for the purposes of adjudication before authorising the retention or continuation of freezing of such records beyond the period specified.

After passing of an order of confiscation, the Adjudicating Authority shall direct the release of the records to the person from whom such records were seized. Such order of release may be withheld for a period of ninety days from the date of receipt of such order, if he is of the opinion that such record is relevant for the appeal proceedings under this Act.

2.5.7 Presumption as to records or property in certain cases. [Sec 22]

During a survey, if any record or property is found in the possession or control of a person or is produced or frozen under this Act, it shall be presumed that—

- (i) such records or property belong or belongs to such person;
- (ii) the contents of such records are true; and
- (iii) the signature and every other part of such records which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a record, stamped, executed or attested, that it was executed or attested by the person by whom it purports to have been so stamped, executed or attested.

Where any records have been received from any place outside India which duly authenticated by such authority or person and in the prescribed manner, the Special Court, the Appellate Tribunal or the Adjudicating Authority, as the case may be, shall—

- (a) presume, that the signature and every other part of such record which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting; and in the case of a record executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;
- (b) admit the document in evidence, notwithstanding that it is not duly stamped if such document is otherwise admissible in evidence.

2.5.8 Presumption in inter-connected transactions. [Sec 23]

Where money-laundering involves two or more inter-connected transactions and one or more such transactions is or are proved to be involved in money-laundering, then for the purposes of adjudication or confiscation it is presumed that the remaining transactions form part of such inter-connected transactions.

2.5.9 Burden of proof. [Sec 24]

In case of a person who is charged with the offence of money-laundering under this Act, the Authority or Court shall presume that such proceeds of crime are involved in money-laundering, unless proved otherwise, and in case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.

Self-Asking Questions

Question 1. Are the retained properties and records returned to the person from whom it is taken? If so, what is the procedure?

Question 2. In the conduct of an inspection, does the authorized official have the power to make arrest? Make your case.

Question 3. There are certain presumptions prescribed regarding records and properties under special cases. Elaborate.

2.6 Summing Up

- ❖ Adjudicating Authority shall consist of a Chairperson and two other Members (appointed by the Central Government) having experience in the field of (i) law, (ii) administration, (iii) finance or accountancy.
- ❖ The duration for holding office by the Chairperson and every Member is for a term of five years or up to a maximum age of sixty-five years from the date on which he enters upon his office.
- ❖ The Adjudicating Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Adjudicating Authority shall have powers to regulate its own procedure.
- ❖ Where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in the prescribed manner, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering; only if the Special Court is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering.

- ❖ The identity of the clients undertaking the specified transactions must be authenticated under Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. The ownership and financial position, including sources of funds of the client, also the purpose behind conducting the specified transaction and the intended nature of the relationship between the transaction parties must be strictly authenticated.
- ❖ When the Director or the authorized officer suspects the involvement of a person in acts of money-laundering. He may authorize search of any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept. He is also authorized to seize any record or property found because of such search.
- ❖ If the Director, Deputy Director, Assistant Director, or any other authorised officer has the reason to believe that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
- ❖ The Adjudicating Authority should ensure that the records are required for the purposes of adjudication before authorising the retention or continuation of freezing of such records beyond the period specified.
- ❖ After passing of an order of confiscation, the Adjudicating Authority shall direct the release of the records to the person from whom such records were seized. Such order of release may be withheld for a period of ninety days from the date of receipt of such order, if he is of the opinion that such record is relevant for the appeal proceedings under this Act.
- ❖ During a survey, if any record or property is found in the possession or control of a person or is produced or frozen under this Act, it shall be presumed that— (i) such records or property belong or belongs to such person; (ii) the contents of such records are true; and (iii) the signature and every other part of such records which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a record, stamped, executed or attested, that it was executed or attested by the person by whom it purports to have been so stamped, executed or attested.

2.7 References and Suggested Readings

Bare Act. Prevention of Money Laundering Act, 2002.

Taxmann. 2019. Guide To Prevention of Money Laundering Act, 2002. Taxmann Publications.

2.8 Model Questions

1. Who constitutes an adjudicating authority under PMLA? What are the qualifications required?
2. What do you understand by Benches of Adjudicating Authority?
3. Describe the powers of Adjudicating Authority.
4. Elaborate the procedure of Adjudication under PMLA.
5. Explain the procedure and manner of furnishing information by reporting entities.
6. State the power of authority in case of a survey.
7. Explain the provisions relating to search and seizure under PMLA.
8. Discuss the provisions concerning retention of property under Sec 20 and retention of records under Sec 21.
9. Under PMLA, there are some presumptions regarding records or property in certain cases. Explain.

2.9 Answers to Check Your Progress

1. An Adjudicating Authority consists of a Chairperson and two other Members (appointed by the Central Government) having experience in the field of (i) law, (ii) administration, (iii) finance or accountancy.
2. Vacancy caused in the office of the Chairperson on account of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson of the Adjudicating Authority until the date on which a new Chairperson has been duly appointed. The same shall be applicable in case of vacancy caused by temporary reasons like illness etc. until the former resumes duties.
3. On receipt of a complaint or relevant information, the Adjudicating Authority may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached
4. The identity of the clients undertaking the specified transactions must be authenticated under Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. The ownership and financial position, including sources of funds of the client, also the purpose behind conducting the specified transaction and the intended nature of the relationship between the transaction parties must be strictly authenticated.
5. The authority must file an application, requesting for retention of records or property seized or for continuation of the order of freezing served before the Adjudicating Authority within a period of thirty days from such seizure or freezing.
6. The rights of persons being searched in course of search under this Act are as follows:
 - (i) Where an authority is about to search any person, he shall, if such person so requires, take 15 such person within twenty-four hours to the nearest Gazetted Officer, superior in rank to him, or a Magistrate.
 - (ii) If the requisition is made, the authority shall not detain the person for more than twenty-four hours prior to taking him before the Gazetted Officer, superior in rank to him, or the Magistrate referred to in that sub-section.

- (iii) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge such person but otherwise shall direct that search be made.
- (iv) Search shall be made in the presence of two or more persons.
- (v) No female shall be searched by anyone except a female.

BLOCK V : UNIT-III

Special Courts- Authorities- Reciprocal Arrangement for Assistance in Certain Matters and Procedure for Attachment and Confiscation of Property

Unit Structure:

- 3.1 Introduction
- 3.2 Objectives
- 3.3 Special courts
 - 3.3.1 Offences triable by Special Courts.
 - 3.3.2 Application of Code of Criminal Procedure, 1973 to proceedings before Special Court.
 - 3.3.3 Appeal and revision.
- 3.4 Authorities under Act.
 - 3.4.1 Appointment and powers of authorities and other officers. [Sec 49]
 - 3.4.2 Powers of authorities regarding summons, production of documents and to give evidence
 - 3.4.3 Jurisdiction of authorities.
 - 3.4.4 Power of Central Government to issue directions, etc.
 - 3.4.5 Empowerment of certain officers.
 - 3.4.6 Certain officers to assist in inquiry, etc.
- 3.5 Reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property
 - 3.5.1 Letter of request to a contracting State in certain cases.
 - 3.5.2 Assistance to a contracting State in certain cases.
 - 3.5.3 Reciprocal arrangements for processes and assistance for transfer of accused persons
- 3.6 Attachment, seizure and confiscation, etc., of property in a contracting State or India.
- 3.7 References and Suggested Readings
- 3.8 Model Questions
- 3.9 Answers to Check Your Progress

3.1 Introduction

Chapter VII of the Act deals with the provisions relating to special courts for legislations and offences within the jurisdiction of the Act. The authorities under this Act are contained in Chapter VIII contains the authorities under this Act while Chapter IX deals with Reciprocal arrangements for processes and assistance for transfer of accused persons.

3.2 Objectives

This unit focuses on specific portions of the Prevention of Money-laundering Act, 2002 relating to Special Courts, Authorities and Reciprocal arrangements for processes and assistance for transfer of accused persons. After completion of this unit, you will be able to –

- Elaborate the offences triable by the Special Courts, cognizable and non-bailable offences relating to money laundering.

- Highlight the appointment, powers, jurisdiction and duties of the authorities under this Act.
- Describe the various agreements of foreign countries and arrangements for processes and assistance for transfer of accused persons.

3.3 Special Courts.

The Central Government designates one or more Courts of Session as Special Court or Special Courts or such area or areas or for such case or class or group of cases as may be specified in the notification trial of offence punishable under section 4. Such Special Court shall also try an offence with which the accused may be charged, other than the one covered by the provisions of this Act, but under the Code of Criminal Procedure, 1973 at the same trial.

3.3.1 Offences triable by Special Courts. [Sec 44]

Any offence punishable under this Act or a scheduled offence connected to the offence is triable by the Special Court constituted for the area in which the offence has been committed. Special Court may take cognizance of offence without the accused being committed to it for trial only if no offence of money-laundering is made out requiring filing of such complaint after conclusion of investigation. A closure report is submitted by the concerned authority in this regard to the Special court.

If a complaint of the scheduled offence of money laundering is brought to a court other than Special Court, it shall commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

The trial should be held by the Special Court in accordance with the provisions of the Code of Criminal Procedure, 1973 as it applies to a trial before a Court of Session.

STOP TO CONSIDER

The jurisdiction of the Special Court is not dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial.

The complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.

“High Court” means the High Court of the State in which a Sessions Court designated as Special Court was functioning immediately before such designation.

Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of

that section as if the reference to “Magistrate” in that section includes also a reference to a “Special Court” designated under section 43.

3.3.2 Application of Code of Criminal Procedure, 1973 to proceedings before Special Court. [Sec 46]

The provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bails or bonds), shall apply to the proceedings before a Special Court. The Special Court shall be deemed to be a Court of Session and the persons conducting the prosecution before the Special Court, shall be deemed to be a Public Prosecutor. The Central Government may also appoint for any case or class or group of cases a Special Public Prosecutor.

A person who has been practicing as an advocate for not less than seven years, under the Union or a State, requiring special knowledge of law only shall be qualified to be appointed as a Public Prosecutor or a Special Public Prosecutor.

3.3.3 Appeal and revision. [Sec 47]

The High Court may exercise, so far as may be applicable, all the powers conferred by Chapter XXIX or Chapter XXX of the Code of Criminal Procedure, 1973 (2 of 1974), on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

3.4 Authorities under Act. [Sec 48]

There shall be the following classes of authorities for the purposes of this Act, namely:—

- (a) Director or Additional Director or Joint Director,
- (b) Deputy Director,
- (c) Assistant Director, and
- (d) such other class of officers as may be appointed for the purposes of this Act.

Check Your Progress

Question 1 What is a Special Court under this Act?

Question 2 What offences can be triable under a Special Court?

Question 3. Do the Code of Criminal Procedure, 1973 apply to a trial before a Court of Session?

Question 4. Name the various Authorities under Act.

3.4.1 Appointment and powers of authorities and other officers. [Sec 49]

The appointment of persons as the authorities under this Act may be appointed by the Central Government and may exercise the powers and discharge the duties conferred or imposed on it under this Act.

The Central Government may also authorise the Director or an Additional Director or a Joint Director or a Deputy Director or an Assistant Director appointed under Sec 49(1) to appoint other authorities below the rank of an Assistant Director.

3.4.2 Powers of authorities regarding summons, production of documents and to give evidence, etc. [Sec 50]

The Director has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit with regard to :-

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any officer of a reporting entity and examining him on oath;
- (c) compelling the production of records;
- (d) receiving evidence on affidavits;
- (e) issuing commissions for examination of witnesses and documents; and
- (f) any other matter which may be prescribed.

The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon any person whose attendance he considers necessary during the course of any investigation or proceeding under this Act. The summoned are bound to attend the same and state the truth and produce such documents as may be required. All such proceeding shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

The authorized officer (Director, Additional Director, Joint Director, Deputy Director or Assistant Director) may impound and retain in his custody any records produced before him in any proceedings under this Act for such period, as he thinks fit.

But an Assistant Director or a Deputy Director should not impound any records without recording his reasons for so doing; or retain in his custody any such records for a period exceeding three months, without obtaining the previous approval of the Joint Director.

STOP TO CONSIDER

The classes of authorities under this Act are — (a) Director or Additional Director or Joint Director, (b) Deputy Director, (c) Assistant Director, and (d) other appointed class of officers. The Director, Additional Director, Joint Director, Deputy Director or Assistant Director has the power to summon any person whose attendance he considers necessary during the course of any investigation or proceeding under this Act.

The provisions of the Code of Criminal Procedure, 1973 are applicable to the proceedings before a Special Court.

3.4.3 Jurisdiction of authorities. [Sec 51]

The authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, to such authorities by or under this Act or the rules framed thereunder in accordance with such directions as the Central Government may issue for the exercise of powers and performance of the functions by all or any of the authorities.

While issuing the directions or orders, the Central Government may have regard to any one or more of the following criteria, namely:—

- (a) territorial area;
- (b) classes of persons;
- (c) classes of cases; and
- (d) any other criterion specified by the Central Government in this behalf.

3.4.4 Power of Central Government to issue directions, etc. [Sec 52]

The Central Government may issue such orders, instructions and directions to the authorities, from time to time, for the proper administration of this Act. The authorities and all other persons employed in execution of this Act shall observe and follow such orders, instructions and directions of the Central Government:

However, such orders, instructions or directions shall not be issued so as to—

- (a) require any authority to decide a particular case in a particular manner; or
- (b) interfere with the discretion of the Adjudicating Authority in exercise of his functions.

3.4.5 Empowerment of certain officers. [Sec 53]

The Central Government may, empower an officer (not below the rank of Director of the Central Government or of a State Government) to act as an authority under this Act. However, it may empower an officer below the rank of Director if the officer of the rank of the Director or above is not available in a particular area.

3.4.6 Certain officers to assist in inquiry, etc. [Sec 54]

The following officers and concerned persons are empowered and required to assist the authorities in the enforcement of this Act, which are as follows:

- (a) officers of the Customs and Central Excise Departments;
- (b) officers appointed under Section 5(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985;
- (c) income-tax authorities under Section 117(1) of the Income-tax Act, 1961;
- (d) members of the recognised stock exchange referred to in clause (f) of section 2 and the officers of the stock exchanges recognised under section 4 of the Securities Contracts (Regulation) Act, 1956;
- (e) officers of the Reserve Bank of India constituted under Section 3(1) of the Reserve Bank of India Act, 1934;
- (f) officers of Police;
- (g) officers of enforcement appointed under Section 36(1) of the Foreign Exchange Management Act, 1999;
- (h) officers of the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992;

- officers of the Insurance Regulatory and Development Authority established under section 3 of the Insurance Regulatory and Development Authority Act, 1999;
 - officers of the Forward Markets Commission established under section 3 of the Forward Contracts (Regulation) Act, 1952;
 - officers and members of the recognised association recognised under section 6 of the Forward Contracts (Regulation) Act, 1952;
 - officers of the Pension Fund Regulatory and Development Authority;
 - officers of the Department of Posts in the Government of India;
 - Registrars or Sub-Registrars appointed by the State Governments under section 6 of the Registration Act, 1908;
 - registering authority empowered to register motor vehicles under Chapter IV of the Motor Vehicles Act, 1988;
 - officers and members of the Institute of Chartered Accountants of India constituted under section 3 of the Chartered Accountants Act, 1949;
 - officers and members of the Institute of Cost and Works Accountants of India constituted under section 3 of the Cost and Works Accountants Act, 1959;
 - officers and members of the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980.
- (i) officers of any other body corporate constituted or established under a Central Act or a State Act;
- (j) such other officers of the Central Government, State Government, local authorities or reporting entities as the Central Government may, by notification, specify, in this behalf.

STOP TO CONSIDER

The Central Government while issuing the directions or orders should keep in consideration any one or more of the following criteria, namely:— (a) territorial area; (b) classes of persons; (c) classes of cases; and (d) any other criterion specified by the Central Government.

3.5 Reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property [Sec 55 & 56]

Sec 55 of this Act defines the following terms, unless the context otherwise requires,

(a) “contracting State” means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise;

(b) “identifying” includes establishment of a proof that the property was derived from, or used in the commission of an offence under section 3;

(c) “tracing” means determining the nature, source, disposition, movement, title or ownership of property.

Under Sec 56 the Central Government may enter into an agreement with the Government of any country outside India for (a) enforcing the provisions of this Act; and (b) exchange of information for the prevention of any offence under this Act or under the corresponding law in force in that country or investigation of cases relating to any offence under this Act.

It may also make such provisions necessary for implementing the agreement by way of notification in the Official Gazette. The Central Government may also necessitate such conditions, exceptions or qualifications to a contracting State with which reciprocal arrangements have been made via the same notification.

3.5.1 Letter of request to a contracting State in certain cases. [Sec 57]

The Special Court may issue a letter of request to a court or an authority in the contracting State competent to deal with such request to—

- (i) examine facts and circumstances of the case,
- (ii) take such steps as the Special Court may specify in such letter of request, and
- (iii) forward all the evidence so taken or collected to the Special Court issuing such letter of request.

This may be pursued if an application is made to a Special Court by the Investigating Officer or any officer superior in rank to the Investigating Officer during the course of an investigation and he is of the opinion that such evidence may be available in any place in a contracting State. The Special Court issues to request only after being satisfied of the same. The letter of such request shall be transmitted as the Central Government may specify. Any statement recorded or document or thing received in this regard is considered to be the evidence collected during the course of investigation.

3.5.2 Assistance to a contracting State in certain cases. [Sec 58]

The Central Government may forward such letter of request received to the Special Court or to any authority under the Act as it thinks fit for execution of such request in accordance with the provisions of this Act or, as the case may be, any other law for the time being in force.

When the Special Court finds that the offence of money-laundering has not taken place or the property in India is not involved in money-laundering, the Special Court may, on an application moved by the concerned person or the Director, after notice to the other party, order release of such property to the person entitled to receive it.

If the trial cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Central Government shall forward the letter of request from a court or authority in a contracting State requesting for confiscation or release of property, as the case may be, to the Director to move an application before the Special Court and upon such application the Special Court shall pass appropriate orders regarding confiscation or release of such property involved in the offence of money-laundering.

3.5.3 Reciprocal arrangements for processes and assistance for transfer of accused persons [Sec 59]

The Special Court shall send summons or warrant in duplicate, to such Court, Judge or Magistrate through such authorities, as notified by the Central Government and that Court, Judge or Magistrate, as the case may be, shall cause the same to be executed. Such summons or warrant may be in relation to an offence punishable under section 4 and as per the desire of such Special Court relating to –

- (a) a summons to an accused person, or
- (b) a warrant for the arrest of an accused person, or
- (c) a summons to any person requiring him to attend and produce a document or other thing or to produce it, or
- (d) a search warrant,

Where the person transferred to India is a prisoner in a contracting State, the Special Court in India shall ensure that the conditions subject to which the prisoner is transferred to India are complied with and such prisoner shall be kept in such custody subject to such conditions as the Central Government may direct in writing.

STOP TO CONSIDER

In order to enforce the provisions of this Act and facilitate exchange of information for the prevention of any offence under this Act, the Central Government may enter into an agreement with the Government of any country outside India.

The Special Court may issue a letter of request to a court or an authority in the contracting State competent to deal with such request for the following reasons namely,– (a) to examine facts and circumstances of the case, (b) to take such steps as the Special Court may specify in such letter of request, and (c) to forward all the evidence so taken or collected to the Special Court issuing such letter of request.

Check Your Progress

Question 5. What are the various areas of concern while issuing directions or orders

Question 6. State the reasons for which a Special Court will issue a letter of request to an authority in contracting state

Question 7. Name the various officers of the Securities and Exchange Board of India who can assist as authorities under this Act.

Question 8. What happens when the Special Court cannot conduct a trial by reason of death?

3.6 Attachment, seizure and confiscation, etc., of property in a contracting State or India. [Sec 60]

Where the Director has made an order for attachment of any property (on account of money laundering practices) or for freezing or where an Adjudicating Authority has made an order relating to a property in this regard or where a Special Court has made an order of confiscation relating to such property and such property is suspected to be in a contracting

State, the Special Court, may issue a letter of request to a court or an authority in the contracting State for execution of such order on an application by the Director or the Administrator appointed.

Where a letter of request is received by the Central Government from a court or so requesting attachment, seizure, freezing or confiscation of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence committed in that contracting State, the Central Government may forward such letter of request to the Director, as it thinks fit, for execution in accordance with the provisions of this Act.

Where on closure of the criminal case or conclusion of trial in a criminal court outside India under the corresponding law of any other country, such court finds that the offence of money-laundering under the corresponding law of that country has been committed, the Special Court shall, on receipt of an application from the Director for execution of confiscation order that such property involved in money-laundering or which has been used for commission of the offence of money-laundering stand confiscated to the Central Government after giving notice to the affected persons.

On receipt of a letter of such request, the Director shall direct any authority under this Act to take all steps necessary for tracing and identifying such property. The steps may include any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account in any bank or public financial institutions or any other relevant matters.

All the provisions of this Act relating to attachment, adjudication, confiscation and vesting of property in the Central Government contained in Chapter III and survey, searches and seizures contained in Chapter V shall apply to the property in respect of which letter of request is received from a court or contracting State for attachment or confiscation of property.

When any property in India is confiscated as a result of execution of a request from a contracting State in accordance with the provisions of this Act, the Central Government may either return such property to the requesting State or compensate that State by disposal of such property on mutually agreed terms that would take into account deduction for reasonable expenses incurred in investigation, prosecution or judicial proceedings leading to the return or disposal of confiscated property.

As per Sec 61, every letter of request, summons or warrant, received by the Central Government from, and every letter of request, summons or warrant, to be transmitted to a contracting State under this Chapter shall be transmitted to a contracting State or, as the case may be, sent to the concerned Court in India and in such form and in such manner as the Central Government may, by notification, specify in this behalf.

Check Your Progress

Question 9. Whether the properties involved in money laundering located in India can be confiscated, where the offence of money laundering has been committed outside India?

Question 10. Whether the property involved in money laundering and located in the Contracting State can also be attached or seized?

Self-Asking Questions

Question 1. Is there any specific requirement for being eligible to act as a Public Prosecutor under this Act? Elaborate.

Question 2. The Power of Central Government to issue directions, orders etc is limited. Do you agree? Give justification.

Question 3. The provisions relating to Chapter III and V are also applicable with regard to attachment or confiscation of property for a contracting state. Comment.

3.7 Summing Up

- ❖ The Central Government designates one or more Courts of Session as Special Court or Special Courts or such area or areas or for such case or class or group of cases as may be specified in the notification trial of offence punishable under section 4.
- ❖ Any offence punishable under this Act or a scheduled offence connected to the offence is triable by the Special Court constituted for the area in which the offence has been committed. The trial should be held by the Special Court in accordance with the provisions of the Code of Criminal Procedure, 1973 as it applies to a trial before a Court of Session.
- ❖ The classes of authorities under this Act are — (a) Director or Additional Director or Joint Director, (b) Deputy Director, (c) Assistant Director, and (d) other appointed class of officers.
- ❖ The Director has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit with regard to :-
 - discovery and inspection;
 - enforcing the attendance of any person, including any officer of a reporting entity and examining him on oath;
 - compelling the production of records;
 - receiving evidence on affidavits;
 - issuing commissions for examination of witnesses and documents; and
 - any other matter which may be prescribed.
- ❖ The Director, Additional Director, Joint Director, Deputy Director or Assistant Director has the power to summon any person whose attendance he considers necessary during the course of any investigation or proceeding under this Act. The authorized officer may impound and retain in his custody any records produced before him in any proceedings under this Act for such period, as he thinks fit.
- ❖ The Central Government may enter into an agreement with the Government of any country outside India for (a) enforcing the provisions of this Act; and (b) exchange of information for the prevention of any offence under this Act or under the corresponding law in force in that country or investigation of cases relating to any offence under this Act.

- ❖ The Special Court may issue a letter of request to a court or an authority in the contracting State competent to deal with such request to—
 - examine facts and circumstances of the case,
 - take such steps as the Special Court may specify in such letter of request, and
 - forward all the evidence so taken or collected to the Special Court issuing such letter of request.
- ❖ If the trial cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Central Government shall forward the letter of request from a court or authority in a contracting State requesting for confiscation or release of property, as the case may be, to the Director to move an application before the Special Court and upon such application the Special Court shall pass appropriate orders regarding confiscation or release of such property involved in the offence of money-laundering.
- ❖ The Special Court shall send summons or warrant in duplicate, to such Court, Judge or Magistrate through such authorities, as notified by the Central Government and that Court, Judge or Magistrate, as the case may be, shall cause the same to be executed. Such summons or warrant may be in relation to an offence punishable under section 4 and as per the desire of such Special Court relating to –
 - a summons to an accused person, or
 - a warrant for the arrest of an accused person, or
 - a summons to any person requiring him to attend and produce a document or other thing or to produce it, or
 - a search warrant,
- ❖ Where a letter of request is received by the Central Government from a court or so requesting attachment, seizure, freezing or confiscation of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence committed in that contracting State, the Central Government may forward such letter of request to the Director, as it thinks fit, for execution in accordance with the provisions of this Act.
- ❖ When any property in India is confiscated as a result of execution of a request from a contracting State in accordance with the provisions of this Act, the Central Government may either return such property to the requesting State or compensate that State by disposal of such property on mutually agreed terms that would take into account deduction for reasonable expenses incurred in investigation, prosecution or judicial proceedings leading to the return or disposal of confiscated property.

3.8 References and Suggested Readings

Bare Act. Prevention of Money Laundering Act, 2002.

Taxmann. 2019. Guide To Prevention of Money Laundering Act, 2002. Taxmann Publications.

3.9 Model Questions

1. What is a Special Court under this Act?
2. What offences can be triable under a Special Court?
3. Do the Code of Criminal Procedure, 1973 apply to a trial before a Court of Session?
4. Who can be a public prosecutor or Special Public Prosecutor?
5. What will happen if the Court, which has taken cognizance of the scheduled offence is other than the Special Courts under PMLA (which has taken cognizance of the complaint of the offence of money laundering)?
6. Name the various Authorities under Act.
7. Who appoints persons as the authorities under this Act?
8. What are the powers conferred upon the directors under this Act?
9. What are the various areas of concern while issuing directions or orders
10. Name a few officers to assist the authorities in the enforcement of this Act
11. What is contracting state?
12. What will happen to the attached properties after conclusion of Trial for the offence of money laundering?
13. What is the mechanism to obtain evidence required in connection with investigation into an offence or proceedings under the Act if such evidence may be available in any place in a contracting State?
14. State the reasons for which a Special Court will issue a letter of request to an authority in contracting state
15. What kind of Assistance is provisioned to a contracting State under Sec 58?
16. Can a Special Court send summon or warrant? Discuss.
17. Discuss the provisions of attachment, seizure and confiscation, etc., of property in a contracting State or India under Sec 60.

3.10 Answers to *Check Your Progress*

1. The Central Government designates one or more Courts of Session as Special Court or Special Courts or such area or areas or for such case or class or group of cases as may be specified in the notification trial of offence punishable under section 4.
2. Any offence punishable under this Act or a scheduled offence connected to the offence is triable by the Special Court constituted for the area in which the offence has been committed. The trial should be held by the Special Court in accordance with the provisions of the Code of Criminal Procedure, 1973 as it applies to a trial before a Court of Session.
3. Yes, the provisions of the Code of Criminal Procedure, 1973 is applicable to a trial before a Court of Session.
4. The various classes of authorities under this Act are — (a) Director or Additional Director or Joint Director, (b) Deputy Director, (c) Assistant Director, and (d) other appointed class of officers.

5. The Central Government while issuing the directions or orders should keep in consideration any one or more of the following criteria, namely -(a) territorial area; (b) classes of persons; (c) classes of cases; and (d) any other criterion specified by the Central Government.
6. The Special Court may issue a letter of request to a court or an authority in the contracting State competent to deal with such request to—
 - a. examine facts and circumstances of the case,
 - b. take such steps as the Special Court may specify in such letter of request, and
 - c. forward all the evidence so taken or collected to the Special Court issuing such letter of request.
7. The officers of the Securities and Exchange Board of India who are authorized to assist for enforcement of this Act are as under:
 - officers of the Insurance Regulatory and Development Authority established under section 3 of the Insurance Regulatory and Development Authority Act, 1999;
 - officers of the Forward Markets Commission established under section 3 of the Forward Contracts (Regulation) Act, 1952;
 - officers and members of the recognised association recognised under section 6 of the Forward Contracts (Regulation) Act, 1952;
 - officers of the Pension Fund Regulatory and Development Authority;
 - officers of the Department of Posts in the Government of India;
 - Registrars or Sub-Registrars appointed by the State Governments under section 6 of the Registration Act, 1908;
 - registering authority empowered to register motor vehicles under Chapter IV of the Motor Vehicles Act, 1988;
 - officers and members of the Institute of Chartered Accountants of India constituted under section 3 of the Chartered Accountants Act, 1949;
 - officers and members of the Institute of Cost and Works Accountants of India constituted under section 3 of the Cost and Works Accountants Act, 1959;
 - officers and members of the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980.
8. If the trial cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Central Government shall forward the letter of request from a court or authority in a contracting State requesting for confiscation or release of property, as the case may be, to the Director to move an application before the Special Court and upon such application the Special Court shall pass appropriate orders regarding confiscation or release of such property involved in the offence of money-laundering.
9. The properties involved in money laundering located in India, where the offence of money laundering has been committed outside India, can be ordered to be confiscated by the Special Court/Adjudicating Authority on an application moved to the Special Court/ Adjudicating Authority [Section 58B & 62A].

10. Yes. In such cases, after issue of an order for attachment of any property made under Section 5 or freezing under Section 17(1A) or confirmation of attachment by Adjudicating Authority under Section 8 or confiscation by Special Court under Section 8, the Special Court, on an application by the Director or the Administrator may issue a Letter of Request to a court or an authority in the Contracting State for execution of such order as per the provisions of corresponding law of that country [Section 60(1)]

BLOCK VII : UNIT-I
RIGHT TO INFORMATION: PRELIMINARY

Right to Information and obligation of public authority

Unit Structure :

- 1.1 Introduction
- 1.2 Objectives
- 1.3 Main Body: Section one
- 1.4 Main Body: Section two
- 1.4 Summing up
- 1.5 References and Suggested Readings
- 1.6 Possible Questions

1.1 Introduction

The Right to information is a corollary of our right to know which on the other hand, is a derivative of the right to freedom of speech and expression. In a democracy, citizens are granted certain rights and these rights are to be protected and preserved. Therefore, measures must be taken so that the citizens can enjoy their rights. And public authorities which have got the responsibility to work for the people must, therefore, be responsive and their activities transparent. The concept of good governance demands that transparency in the activities of public authorities is maintained and the right to information is preserved for the cause of democracy. In India, the Parliament passed the Freedom of Information Act in 2002 which was replaced by the Right to Information Act, 2005. This enables an Indian citizen to seek information from public authority.

1.2 Objectives

After going through this unit, you will be able to know:

- a. the meaning of the right to know and the right to information;
- b. the provisions of the Right to Information Act , 2005;
- c. the obligation of the public authorities under the Act of 2005.

1.3 Main Body: Section one

Right to Information

An essential feature of democracy is an informative citizenry. A democracy will be meaningful only when the citizens participate in the governance of the state. They can participate well when they are adequately informed of the workings of the government and its administration. So, they must know and should have access to information of the public authorities. And such information should be provided by the governments regarding the authorities working under it. This is important for ensuring a transparent, responsive and accountable government.

The United Nations General Assembly in 1946 passed a resolution declaring “ Freedom of Information” as a basic human right and maintained that the preservation of it is important for all other rights which the UN wants to guarantee to every human being. In 1948, the UN adopted the Universal Declaration on Human Rights which in Article 19 mentioned,” everyone has right to freedom of opinions without interference and to seek, review and impart information and ideas through any media and regardless of any frontier”. In 2000, the UN adopted “ United Nations Principles on Freedom of Information” – to ensure maximum openness to government information in accordance with international standards and practices.

In India, the right to information is regarded as a fundamental right under the Constitution of India and is an integral part of the right to freedom of speech and expression under Article 19 (1)(a) and the right to life and personal liberty under Article 21.

The assertion for the right to information as a specific and explicit right started in India in early 1990 in Rajasthan when Mazdoor Kisan Shakti Sangsthan members fought for their wages during famine and transparency in records. In 1997, the governments in Tamil Nadu and Goa enacted the Right to Information Acts. Subsequently, many states had enacted their RTI acts before it was taken up at the central level.

At the central level, the Freedom of Information Bill, 2000 was introduced in the Parliament and Freedom of Information Act was enacted to promote transparency in government activity. However, as no such notification for enactment of this Act was issued, so, it remained unoperative.

In the meantime, the National Commission to Review the Working of the Constitution headed by Mr. Justice M.N. Venkatachaliah, submitted its report on March 31, 2002 which emphasized on the right to information, “ Right to information should be guaranteed and needs to be given real substance”.

In 2004, the UPA government came to power by promising to provide a progressive, participatory and meaningful Right to Information Law. Accordingly, a National Advisory Council enacted the Right to Information Bill in 2004. The Bill was passed by both the Houses of the Parliament in May, 2005 and received President’s assent. The Right to Information Act in India came into force in October 12, 2005.

This Act has been enacted with the following main objectives:

1. To provide to the citizens access to information under the control of the public authorities;
2. To ensure transparency and accountability in the working of public authority;
3. To provide for corruption free and accountable government offices;
4. To ensure that the authorities declared as public authorities, disclose information to public;
5. To appoint Public Information Officers and Appellate Authority in government offices;
6. To assign responsibility on the Public Information Officers of disclosing information;
7. To make Public Information Officers liable where he violates the provisions of the Act;
8. To enable an aggrieved citizen to file first appeal against the Public Information Officer before the Appellate Authority of that public authority;
9. To constitute the Central Information Commission and the State Information Commission;
10. To ensure the aggrieved citizen to file second appeal against Public Information Officer before the Central Information Commission or the State Information Officer.

It is to be noted that under Section 3 of the Right to Information Act, 2005, only the citizens are conferred the “Right to Information”. A citizen, according to Part II of the Constitution that deals with “citizenship”, only be a natural born person and not even by implication includes a legal or juridical person, can have access to information from public authority in India.

Stop to consider

What would have happened to Indian democracy if the right to information was not provided by the Indian Constitution

Check your Progress

Q.1 What do you understand by right to know?

Q.2 What does the Universal Declaration on Human Rights mention about the right to information?

Self Asking Question

Do you think that the Constitution of India can be regarded as a progressive constitution as it provides for the right to know?

1.4 Main Body: Section two

Obligation of Public Authority

As per this Act, a public authority is one which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly –

- a) by the Central Government or the Union Territory administration, the appropriate government is the Central Government;
- b) by the State Government, the appropriate government is the state government.

The obligations which the public authorities have been given can be discussed in the following way:

- a) every public authority shall maintain all its records duly catalogued and indexed in a manner and form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerized within a reasonable time and subject to availability of resources;
- b) every public authority shall publish within one hundred and twenty days from the enactment of this Act, the particulars of its organization, functions, and duties, powers and duties of its officers and employees, the procedure followed in the decision making process, including channels of supervision and accountability, the norms set by it for the discharge of its functions, the rules, regulations, instructions

manuals and records held by it or under its control, the particulars of any arrangement that exists for consultation with or representation by the members of the public in relation to the formulation of its policy or implementation thereof, etc.;

- c) every public office shall publish all relevant facts while formulating important policies or announcing the decisions which affect people;
- d) every public office shall provide reasons for its administrative or quasi-judicial decisions to affected persons.

It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of Section 4(1)(b) to provide as much information to the public at regular intervals through various means of communications including internet, so that the public have minimum resort to the use of this Act to obtain information. Therefore, such information must be provided through various means of communications such as print or electronic media including internet.

Every information under Section 4(1) shall be disseminated widely and in such form and manner which is easily accessible to the public.

All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be accessible to the extent possible in the electronic format with Central Information Officer or State Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

Stop to consider

Is it not necessary that the private as they work in public should also come under the RTI Act?

Check your Progress

Q.3 What is the public authority under the RTI Act, 2005?

Q.4 Mention any two objectives of public authority in India.

Self Asking Question

Has the RTI Act, 2005 been able to satisfy the Indian citizens?

1.5 Summing up

The right to information is very important for a citizen living in a democracy. Democracy will be meaningless if the citizens do not have access to information of the government authorities. They must know and have information regarding the workings of the government from the public offices. The Universal Declaration on Human Rights in Article 19 mentions, "everyone has right to seek, review and impart information and ideas through any media and regardless of any frontier". In India, the right to information is regarded as a fundamental right under the Constitution of India . The Right to Information Act, in India came into force in October 12, 2005 which provides access to Indian citizens to any information of public authorities.

1.6 References and Suggested Readings

Chakrabarty, B. 2012. Public Administration in a Globalizing World, in Prakash Chand. SAGE Publications India Pvt. Ltd., New Delhi.

Massey, I.P. 2017. Administrative Law. Eastern Book Company, Lucknow.

Rattan, J. 2020. Right to Information Act,2005. Bharat Law House Pvt. Ltd., New Delhi.

Takwani, C.K. 2021. Lectures on Administrative Law. Eastern Book Company, Lucknow.

1.7 Possible Questions

1. Discuss the objectives of the RTI Act, 2005.
2. What is a public authority according to the RTI Act, 2005 ?
3. Mention the obligations of public authorities under the RTI Act, 2005.

1.8 Answers to Check your Progress

Answer to Q. No. 1

The Right to Know is a basic human right. It refers to the right of a citizen to have information from the public authorities regarding their workings. A citizen can participate in the governance of the state only when he/she is adequately informed.

Answer to Q. No. 2

In 1948, the UN adopted the Universal Declaration on Human Rights which in Article 19 mentioned, " everyone has right to freedom of opinions without interference and to seek, review and impart information and ideas through any media and regardless of any frontier".

Answer to Q. No.3

As per the RTI Act,25, a public authority is one which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly –

- c) by the Central Government or the Union Territory administration, the appropriate government is the Central Government;
- d) by the State Government, the appropriate government is the state government.

Answer to Q. No. 4

Two obligations which the public authorities have, are:

- a) every public authority shall maintain all its record duly catalogued and indexed in a manner and form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerized within a reasonable time and subject to availability of resources;
- b) every public authority shall publish within one hundred and twenty days from the enactment of this Act , the particulars of its organization, functions, and duties, powers and duties of its officers and employees, the procedure followed in the decision making process, including channels of supervision and accountability, the norms set by it for the discharge of its functions, the rules, regulations, instructions manuals and records held by it or under its control, the particular of any arrangement that exists for consultation with or representation by the members of the public in relation to the formulation of its policy or implementation thereof, etc.

BLOCK VII : UNIT-II

CENTRAL INFORMATION COMMISSION, STATE INFORMATION COMMISSION, POWERS AND FUNCTIONS OF INFORMATION COMMISSIONS, APPEALS AND PENALTIES

Unit Structure :

- 2.1 Introduction
- 2.2 Objectives
- 2.3 Main Body: Section one
 - 2.3.1 Powers and Functions
- 2.4 Main Body: Section Two
- 2.5 Main Body: Section Three
 - 2.5.2 Appeals and Penalties
- 2.6 Summing up
- 2.7 References and Suggested Readings
- 2.9 Answers to check your progress

2.1 Introduction

The Right to Information Act, 2005, has provided for the Central Information Commission and the State Information Commissions in order to facilitate the process of providing information required by the citizens. They are to work as autonomous bodies without any interference or direction from outside. They are to consist of one Chief Information Commissioner and such other Information Commissioners, not exceeding ten, as may be deemed necessary.

2.2 Objectives

After reading this unit, you will be able to know:

- i) the composition and powers and functions of the Central Information Commission;
- ii) the composition and powers and functions of the State Information Commission;
- iii) the provisions of appeals and penalties under the RTI Act, 2005.

2.3 Main Body: Section one

Central Information Commission

The Central Information Commission is constituted under Section 12(1) of the Right to Information Act, 2005. It is established by the Central Government by notification in the Official Gazette. It consists of the Central Chief Information Commissioner and such other Central Information Commissioners, not exceeding ten, as is necessary.

The Chief Information Commissioner and other Information Commissioners are appointed by the President on the recommendation of a committee consisting of – (a) the Prime Minister, who shall be the Chairperson of the Committee, (b) the Leader of the Opposition in the Lok Sabha and where the Leader of the Opposition in the House of the People has not been recognized as such, the Leader of the single largest group in Opposition, (c) a Union Cabinet Minister to be nominated by the Prime Minister.

As per Section 13(1) of the RTI Act, 2005 and as has been amended in 2019, the Chief Information Commissioner shall hold office for such a term as may be prescribed by the Central Government and shall not be eligible for reappointment. Section 13(2) mentions that every Information Commissioner shall hold office for (i) such term as may be prescribed by the Central Government or (ii) till he attains the age of sixty five years – whichever is earlier and shall not be eligible for reappointment as Information Commissioner.

The Chief Information Commissioner or an Information Commissioner may, at any time, by writing under his hand addressed to the President, resign from his office. They can also be removed from office by an order of the President on the ground of misbehavior or incapacity. For this, the President of India will submit a report after conducting an inquiry on the matter.

2.3.1 Powers and Functions

The Central Information Commission shall exercise all such functions mentioned under Section 18-20 of the RTI Act without any direction from any outside authority.

As per the provisions of the Act, every public authority shall designate as many officers as the Central Public Information Officers or the State Public Information Officers , as the case may be, in all administrative units or offices under it as may be necessary to provide information to persons requesting for information under this Act.

Every Central Public Information Officer shall deal with requests from persons seeking information and render reasonable assistance to such persons. He may also seek the assistance of any other officer as he or she considers it necessary for the proper discharge of his/her duties.

In providing information, the following procedures should be adopted –

- (i) any person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means accompanied with prescribed fees,
- (ii) the applicant is not required to give any reason for requesting the information or any other personal details except that which may be necessary for contacting him,
- (iii) if a Public Information Officer who has received the application finds that such information is held by another public authority or the subject matter of which is connected with the functions of another public authority, then he/she may transfer the application to such public authority,
- (iv) the Central Information Officer on receipt of a request under Section 6, shall as expeditiously as possible and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons mentioned in the Sections 8 and 9,
- (v) if the Central Information Officer fails to provide information within the specified time, then it shall be deemed to have refused the request,
- (vi) when a decision is taken to provide information on payment of any further fee representing the cost of providing the information, then the Central Public Information Officer shall send an intimation to the person making the request,
- (vii) when access to the records or a part thereof is required to be provided under this Act and the person to whom access is to be provided is sensorily disabled, then the Central Public Information Officer has to make measures to provide such information,
- (viii) when the information demanded is related to a third party or has been supplied by a third party and has been treated as confidential by the third party and the Central Public Information Officer intends to disclose such information or record or part thereof, then the Central Public Information Officer shall, within five days from the receipt of the request, give a written notice to such third party,

- (ix) information is provided in the form in which it is requested unless it would disproportionately divert the resources of the public authority.

Stop to Consider

Is the establishment of Information Commissions enough for guaranteeing Indian citizens the right to know and information ?

Check Your Progress

Q. No. 1 How the Chief Information Commissioner and other Information Commissioners are appointed?

Q. No. 2 Mention five important procedures adopted by the Chief Public Information Officer while providing information.

Self Asking Question

With the provisions included in the RTI Act, 2005, have the Information Commissions been able to work independently?

2.4 Main Body: Section Two

The State Information Commission

Every state government shall constitute the State Information Commission and such commission will exercise the powers and functions assigned to it by the RTI Act, 2005.

The State Information Commission shall consist of (i) the State Chief Information Commissioner and (ii) such number of State Information Commissioners, not exceeding ten, as may be deemed necessary.

The State Chief Information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a committee consisting of (a) the Chief Minister, who shall be the Chairperson of the Committee, (b) the leader of opposition in the Legislative Assembly and where the leader of opposition in the Legislative Assembly has not been recognized as such, the leader of the single largest group in opposition, (c) a cabinet minister to be nominated by the Chief Minister.

The general superintendence, direction and management of the affairs of the State Information Commission shall vest in the State Chief Information Commissioners who shall be assisted by the State Information Commissioners and may exercise all such powers and do all such acts and things which may be exercised or done by the State Information Commission autonomously without being subjected to directions by any other authority under this Act. The State Chief Information Commissioner being the head, exercises general superintendence, direction and management of the affairs of the State Information Commission.

The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or a Member of the Legislative Assembly of any state or union territory as the case may be or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

The State Chief Information Commissioner and the State Information Commissioners shall hold office for such term as may be prescribed by the Central Government or till they attain the age of 65 years whichever is earlier.

The headquarters of the State Information Commission shall be at such a place in the state as the State Government may, by notification, in the Official Gazette specify and the State Information Commission may, with the previous approval of the State Government, establish offices at other places in the state.

2.5 Main Body: Section Three

Powers and Functions of the Information Commissions, Appeals and Penalties

2.5.1 Powers and Functions of the Information Commissions

It shall be the duty of the Central Information Commission or the State Information Commission, as the case may be, to receive and inquire into a complaint from any person who has been unable to submit a request for information under the Right to Information Act, 2005 to a Central Public Information Officer or the State Public Information Officer.

If the Central Information Commissioner or the State Information Commissioner, as the case may be, is satisfied that there are reasonable grounds to inquire into the matter, it may initiate an inquiry in respect thereof. While conducting an inquiry, the Information Commissions has the power to sit as a Civil Court.

Irrespective of anything inconsistent contained in any other Act of Parliament or State Legislature, the Information Commissioners may, during the inquiry of any complaint under this Act, examine any record to which this Act applies which is under the control of the public authority and no such record may be withheld from it on any ground.

The Central and State Information Commissioners do not receive applications directly for providing information. First Application is to be filed before the Public Information Officer of a public authority and if there is any grievance against that public authority, then a citizen has the right to make a complaint directly to the Central or State Information Commission. Regarding complaint, the Central Information Commission or the State Information Commission are independent in their respective spheres and the State Information Commission is not subordinate to the Central Information Commission. Therefore, the Central Information Commission cannot issue direction to the State Information Commission.

Whenever any order has to be passed against any person or institution by the Information Commissions, reasonable opportunity of being heard must be given to such person or institution.

2.5.2 Appeals and Penalties

Under Section 19 of the RTI Act,2005, the First Appeal can be made by any person who has given an application to seek some information under Section 6 and (a) does not receive a decision within the time specified or (b) is aggrieved by a decision of the Central Public Information Officer or the State Public Information Officer, as the case may be, within thirty days from the expiry of such period or from the receipt of such a decision, prefer an appeal to such officer who is senior in rank to the Central Public Information Officer or the State Public Information Officer in each public authority. The First Appellate Authority is an officer senior in rank to the Central Public Information Officer.

The second appeal lies with the Central and State Information Commission against the order of CPIO and SPIO respectively. The second appeal against the decision under Section 19(1) shall lie within ninety days from the date on which the decision should have been made or

was actually received, with the Central or State Information Commission. Any person aggrieved by an order passed by the First Appellate Authority or by non-disposal of his appeal by the First Appellate Authority may file an appeal to the Commission.

The decision of the Central Information Commission or the State Information Commission as the case may be, shall be final and binding. No further appeal can be filed against the order of the Central Information Commission and the State Information Commission. However, an appellant or a complainant or respondent may make an application to the Chief Information Commissioner for a special leave to appeal or review of a decision or order of the case and he must mention the grounds of such a request. The Chief Information Commissioner on receipt of such request may consider and decide a matter as he thinks fit.

While deciding an appeal, the Central Information Commission or the State Information Commission, has the power to –

- (a) require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including – providing access to information, appointing a Central Public Information Officer or a State Public Information Officer, publishing certain information or categories of information, making necessary changes to its practices in relation to the maintenance, management and destruction of records, enhancing the provision of training on the right to information for its officials, providing for an annual report,
- (b) require the public authority to compensate the complainant for any loss or other detriment suffered,
- (c) impose any of the penalties provided under this Act, and
- (d) reject the application.

The jurisdiction and power of the Chief Information Commissioner as provided under the Act is restricted to the provisions of the Act. He has the power to direct for supplying of information and he may in some cases, if the information is not correctly supplied, proceed to direct for correction of such information and to supply the same. The Central or the State Information Commission is empowered to conduct, inquire and direct the public authority to provide information to citizens.

Under Section 20(1), penalty of two hundred and fifty rupees for each day of default is imposed when the Central or the State Information Commission comes to know that the

Central Information Officer or the State Information Officer as the case may be, has, without any reasonable ground - (a) refused to receive an application for information, or (b) not furnished information within the specified time, or (c) malafidely denied the request for information, or (d) knowingly given incorrect, incomplete or misleading information, or (e) destroyed information which was the subject of the request, or (f) obstructed in any manner in furnishing information.

Under Section 20(2), disciplinary action can also be taken against the Central Public Information Officer or the State Public Information Officer.

Stop to Consider

Does Section 19 of the RTI Act, 2005 provide adequate opportunities for appeal?

Check Your Progress

Q. No. 3 How many members are there in the State Information Commission?

Q. No. 4 Discuss the powers and functions of the Information Commissions.

Self Asking Questions

Are the provisions for penalties for default by the Public Information Officers adequate to make them responsible?

2.6 Summing up

As per the provisions of the Right to Information Act, 2005, the Central Information Commission and the State Information Commission have been established by notification in the Official Gazette of India. It is also provided that every public authority shall designate as many officers as the Central Public Information Officers or the State Public Information Officers as the case may be, in all administrative units or offices under it as may be necessary to provide information to persons requesting for information under this Act.

The Central and the State Information Commissions do not receive applications directly for providing information. First Application is to be filed before Public Information Officer of a public authority and if there is any grievance against that authority, then a citizen has the right to make a complaint directly to the Central or the State Information Commission.

Section 20(1) and 20(2) provide for penalties and disciplinary action against default or neglect by the Central Public Information Officers and the State Public Information Officers.

2.7 References and Suggested Readings

Chakrabarty, B. 2012. Public Administration in a Globalizing World, in Prakash Chand. SAGE Publications India Pvt. Ltd., New Delhi.

Massey, I.P. 2017. Administrative Law. Eastern Book Company, Lucknow.

Rattan, J. 2020. Right to Information Act, 2005. Bharat Law House Pvt. Ltd., New Delhi.

Takwani, C.K. 2021. Lectures on Administrative Law. Eastern Book Company, Lucknow.

2.8 Model Questions

1. Write a comprehensive note on the Central Information Commission.
2. Write a comprehensive note on the State Information Commission.
3. write a note on the provisions of appeals and penalties provided in the RTI Act, 2005.

2.9 Answers to check your progress

Answer to Q.No. 1

The Chief Information Commissioner and other Information Commissioners are appointed by the President on the recommendation of a committee consisting of – (a) the Prime Minister, who shall be the Chairperson of the Committee, (b) the Leader of the Opposition in the Lok Sabha and where the Leader of the Opposition in the House of the People has not been recognized as such, the Leader of the single largest group in Opposition, (c) a Union Cabinet Minister to be nominated by the Prime Minister.

Answer to Q.No. 2

In providing information, the following procedures should be adopted –

- (i) any person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means accompanied with prescribed fees,
- (ii) the applicant is not required to give any reason for requesting the information or any other personal details except that which may be necessary for contacting him,

- (iii) if a Public Information Officer who has received the application finds that such information is held by another public authority or the subject matter of which is connected with the functions of another public authority, then he/she may transfer the application to such public authority,
- (iv) the Central Information Officer on receipt of a request under Section 6, shall as expeditiously as possible and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons mentioned in the Sections 8 and 9,
- (v) if the Central Information Officer fails to provide information within the specified time, then it shall be deemed to have refused the request.

Answer to Q.No. 3

The State Information Commission shall consist of (i) the State Chief Information Commissioner and (ii) such number of State Information Commissioners, not exceeding ten, as may be deemed necessary.

Answer to Q. No. 4

Powers and Functions of the Information Commissions

It shall be the duty of the Central Information Commission or the State Information Commission, as the case may be, to receive and inquire into a complaint from any person who has been unable to submit a request for information under the Right to Information Act, 2005 to a Central Public Information Officer or the State Public Information Officer.

If the Central Information Commissioner or the State Information Commissioner, as the case may be, is satisfied that there are reasonable grounds to inquire into the matter, it may initiate an inquiry in respect thereof. While conducting an inquiry, the Information Commissions has the power to sit as a Civil Court.

Irrespective of anything inconsistent contained in any other Act of Parliament or State Legislature, the Information Commissioners may, during the inquiry of any complaint under this Act, examine any record to which this Act applies which is under the control of the public authority and no such record may be withheld from it on any ground.

The Central and State Information Commissioners do not receive applications directly for providing information. First Application is to be filed before the Public Information Officer of a public authority and if there is any grievance against that public authority, then a citizen has the right to make a complaint directly to the Central or State Information Commission. Regarding complaint, the Central Information Commission or the State Information Commission are independent in their respective spheres and the State Information Commission is not subordinate to the Central Information Commission. Therefore, the Central Information Commission cannot issue direction to the State Information Commission.

Whenever any order has to be passed against any person or institution by the Information Commissions, reasonable opportunity of being heard must be given to such person or institution.