

**FEMA Provisions in respect of Repatriation of Salary to the Home Country  
by the EXPAT employees of subsidiaries of the Foreign Companies in India**

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**A. BACKGROUND**

- 1.1 In this article we are analyzing the applicable provisions of Foreign Exchange Management Act, 1999 (“**FEMA**”) in respect of the payment of salaries to EXPAT Employees by Wholly Owned Subsidiaries (“**WOS**”) of foreign companies and their remittance abroad to the respective home countries.
- 1.2 We are proceeding to deal with the following issues in our endeavor to focus on the most prevalent situations in the industry in the context of remittances by EXPAT employees of Indian subsidiaries.

**B. ISSUES**

- 2.1 Can the salary of EXPATS (employees in the WOS) be directly credited to their foreign currency accounts abroad by the Indian WOS of the foreign company?
- 2.2 What is the implication in case the tax paid salary after statutory deductions (in Indian Rupees) is credited by the Indian WOS to a bank account maintained by such EXPAT in India & thereafter the same is remitted by him to the respective home country?
- 2.3 If any condition is inadvertently compromised (eg. remittance of full salary to an account abroad), what are the penal consequences and exposure under the applicable provisions?

**C. ANALYSIS**

3. *Remittance of salary by the Indian WOS directly to the EXPAT Employee’s account abroad*

- 3.1 In case where the salary of EXPAT employee is directly credited to the foreign currency account the same will be covered under the Foreign Exchange Management (Foreign Currency Accounts By a Person Resident in India<sup>1</sup>) Regulations, 2000. These regulations generally deal with various types of Foreign Currency Accounts which can be opened in India and abroad.
- 3.2 Regulation 7 of these regulations deal with opening, holding and maintaining a Foreign Currency Account outside India. Regulation 7(8) which is relevant in this regard is extracted as under:-

*“(8) A national of a foreign State resident in India being an employee of a foreign company or a citizen of India employed by a foreign company outside India and in either case on deputation to the office/branch/subsidiary/joint venture in India of such foreign company may open, hold and maintain a foreign currency account with a bank outside India and receive the salary payable to him for the services rendered to the office/branch/subsidiary/joint venture in India of such foreign company, by credit to such account:*

***Provided that,***

- (i) the amount to be credited to such account shall not exceed 75 per cent of the salary accrued to or received by such person from the foreign company;*
- (ii) the remaining salary shall be paid in rupees in India;*
- (iii) income-tax chargeable under the Income-tax Act, 1961 is paid on the entire salary as accrued in India.”*

- 3.3 The following points emerge from the perusal of Regulation 7(8):-
- (a) A Foreign National;
  - (b) Resident in India;
  - (c) Being an Employee of a Foreign Company who is on deputation to a subsidiary of such Foreign Company in India;
  - (d) May open, hold and maintain a Foreign Currency Account with a Bank abroad;
  - (e) **And receive the Indian salary by credit to such account;**
  - (f) Such credit to the account not to exceed 75% of the salary accrued/received from the Foreign Company.
  - (g) Remaining 25% of salary to be paid in Indian Rupees;
  - (h) Income Tax to be paid on the entire salary (accrued/received in India);
- 3.4 Therefore, the Foreign Exchange Law of India clearly recognizes that an Indian subsidiary of a Foreign Company can have EXPAT Executives for managing its India operations and also provides the legal frame work within which the repatriation of

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<sup>1</sup> For the purposes of present analysis we are assuming that the EXPATS concerned are Persons Resident In India in terms of FEMA

their salaries can be made by the Indian Subsidiary Company, which is amply clear on perusal of the aforesaid provision.

**4. Remittance by the EXPAT of the tax paid salary received from the Indian WOS to his home country abroad**

4.1 In case the tax paid salary (in Indian Rupees) is credited by the WOS to the account of such EXPAT employee maintained in India and thereafter the same is remitted to the respective home country by such EXPAT, the same to our understanding will be classified as a Current Account transaction under FEMA.

4.2 Under Section 2 (j) of FEMA, 'Current Account Transaction' has been defined as under:

*(j) "current account transaction" means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes,*

- (i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business,*
- (ii) payments due as interest on loans and as net income from investments,*
- (iii) **remittances for living expenses of parents, spouse and children residing abroad,** and*
- (iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children;*

4.3 A perusal of the definition provides that the remittance abroad will be allowed if the same is meant for covering the living expenses of parents, spouse & children living abroad. If the Indian WOS credits the salary (in Indian Rupees) to the account of the EXPAT employee after deducting & settling the income tax and other statutory liabilities arising thereon, in such a scenario the same may be remitted to the respective home country by the EXPAT employee as per the provisions of section 2(j) clause (iii) of FEMA. These current account transactions are governed by the Foreign Exchange Management (Current Account Transactions) Rules, 2000 ("**Current Account Transactions Rules**").

4.4 Rule 5 of the said Current Account Transactions Rules provides that no person shall draw foreign exchange for a transaction included in Schedule-III, without prior approval of the Reserve Bank of India. The said Rule 5 is extracted as under:-

***"Prior approval of Reserve Bank***

*5. No person shall draw foreign exchange for a transaction included in the Schedule III without prior approval of the Reserve Bank.*

*Provided that this Rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.”*

Therefore, the general rule is that prior permission of RBI is required for remittances under this head, unless the payment is made out of the funds held in RFC Account of the remitter.

4.5 The relevant portion of the contents of Schedule-III are reproduced as under:

*7. Remittance for maintenance of close relatives abroad,*

*[(i) 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.]*

*(ii) exceeding US\$ 100,000 per year per recipient, in all other cases.*

*Explanation : for the purpose of this item, a person resident in India on account of his [employment or deputation of] a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years, is a resident but not permanently resident.]*

4.6 It is clear from the abovementioned rule that a foreign resident who is not permanently resident and who is on deputation to a subsidiary can remit his entire net salary (excluding taxes, contributions to PF and other statutory deductions) abroad for maintenance of his family without any prior permission from RBI. The Explanation clarifies that such person shall be considered as a person resident in India but not permanently resident only if the EXPAT is in employment/deputation to the Indian subsidiary either for a specific duration (any length of duration) or for a specific job or assignment not exceeding 3 years. However if the EXPAT is in regular employment of the Indian subsidiary for an unspecified period then the provisions provide that he can remit only a sum upto US\$ 1,00,000 per person per annum without any prior permission from RBI. If such remittances exceed the above limits then specific prior permissions from RBI are required.

**5. Penal Provisions for Contravention of the above regulations**

5.1 Since the aforesaid Regulations and Rules are formulated in terms of powers conferred under Foreign Exchange Management Act, 1999 any contravention of these attracts the Penal Provisions provided in the Act.

5.2 Section 13 of the FEMA dealing with penalties reads as under:-

*“13. (1) 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.*

*(2) Any Adjudicating authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.*

**Explanation.** – *For the purposes of this sub-section, “property” in respect of which contravention has taken place, shall include-*

- (a) deposits in a bank, where the said property is converted into such deposits;*
- (b) Indian currency, where the said property is converted into that currency;*
- and*
- (c) any other property which has resulted out of the conversion of that property”*

5.3 A perusal of the aforesaid Section 13 clearly shows that any contravention of regulations shall attract (upon adjudication) a penalty upto thrice the amount involved in such contravention (where quantifiable) or upto Rs. 2 lakhs (where not quantifiable). Further in respect of continuing contraventions a daily penalty upto Rs. 5,000/- per day can also be imposed. Furthermore the Adjudicating Authority can also order confiscation of the currency involved and can also order bringing back into India of any currency which has been wrongly remitted outside India.

**D. CONCLUSIONS**

- 6.1 The salary of such EXPATS can be directly credited by the Indian subsidiary to their foreign currency accounts abroad subject to the following conditions:-
- a) A maximum of 75% of the salary accrued/paid to such EXPAT employee can be credited in such Foreign Currency Account abroad.
  - b) The balance 25% of the salary must mandatorily be paid in Indian Rupees.
  - c) Income Tax as per the provisions of The Income Tax Act, 1961 has to be paid on the entire salary accrued/paid to such EXPAT employee in India.
- 6.2 In case the tax paid salary is credited (in Indian Rupees) to the bank account of such EXPAT employee in India by the WOS, the same can be remitted without any prior permission by the EXPAT employee to the respective home country to the extent of his net salary (excluding taxes, contributions to PF and other statutory deductions) for maintenance of his family abroad, if such EXPAT is either on deputation or for a specified period (irrespective of length) or any specified job or assignment for a period not exceeding 3 years. However, if such EXPAT is in regular employment of the WOS for an unspecified period then he can only remit upto US\$ 100,000 per annum without any prior permission from RBI. For any remittances above the limit prior permission of RBI would become mandatory.
- 6.3 Section 13 of FEMA clearly shows that any contravention of regulations shall attract a penalty upto thrice the amount involved in such contravention (where quantifiable) or upto Rs. 2 lakhs (where not quantifiable). Further in respect of continuing contraventions a daily penalty upto Rs. 5,000/- per day (after the first day during which the contravention continues) can be imposed. Furthermore the Adjudicating Authority can also order confiscation of the currency involved and can also order bringing back into India of any currency which has been wrongly remitted outside India.