HC-KAR

NC: 2026:KHC:50422
WP No. 16763 of 2026
C/W WP No. 7283 of 2026

CNR: KAHC010371552026

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF SEPTEMBER, 2026

BEFORE

THE HON'BLE MR. JUSTICE SURAJ GOVINDARAJ

WRIT PETITION NO. 16763 OF 2026 (GM-RES)

C/W

WRIT PETITION NO. 7283 OF 2026 (GM-FE)

IN W.P.NO.16763/2026
BETWEEN

GENPACT INDIA PVT. LTD.,
A COMPANY REGISTERED UNDER
THE PROVISIONS OF THE COMPANIES ACT, 2013,
HAVING ITS REGISTERED OFFICE AT 12A,
GROUND FLOOR, PRAKASH DEEP BUILDING,
7, TOLSTOY MARG, NEW DELHI 110001.
REPRESENTED BY ITS AUTHORIZED REPRESENTATIVE
MR. ATUL DHAWAN
EMAIL: atul.dhawan@genpact.com
Ph.No. +91 9811763063

... PETITIONER

(BY SRI. UDAYA HOLLA, SENIOR COUNSEL FOR
SRI. ANIND THOMAS,
SRI. VIJAYENDRA PRATAPSINGH,
MISS. PRERNA PONNAPPA,
SRI. VINUDEEP K.,
SRI. KUSHAGRA JAIN., ADVOCATES)

AND

1. THE ASSISTANT DIRECTOR
   DIRECTORATE OF ENFORCEMENT
   BENGALURU ZONAL OFFICE,

HMT MACHINE TOOLS LIMITED PREMISES,
BENGALURU COMPLEX,
JALAHALLI,
BENGALURU- 560 013

2. DIRECTORATE OF ENFORCEMENT
HMT MACHINE TOOLS LIMITED PREMISES,
BENGALURU COMPLEX,
JALAHALLI,
BENGALURU- 560 013
REPRESENTED BY ITS
ASSISTANT DIRECTOR

....RESPONDENTS

(BY SRI. N. VENKATARAMAN, ASGI &
SRI. ARVIND KAMATH., ASGI FOR
SRI. MADHU N. RAO., CGC)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE A WRIT OF CERTIORARI OR ANY OTHER APPROPRIATE WRIT, ORDER, OR DIRECTION QUASHING AND SETTING ASIDE THE IMPUGNED COMMUNICATION DATED 13.01.2026 BEARING NO. T-3/BGZO/91/2021/11891 ISSUED BY RESPONDENT NO. 1, DENYING THE NO-OBJECTION CERTIFICATE APPLIED FOR BY THE PETITIONER UNDER RULE 10 OF THE FOREIGN EXCHANGE MANAGEMENT (OVERSEAS INVESTMENT) RULES, 2022 (ANNEXURE-A) AND ETC.

IN W.P.NO.7283/2026
BETWEEN

GENPACT INDIA PVT. LTD.,
A COMPANY REGISTERED UNDER
THE PROVISIONS OF THE COMPANIES ACT, 2013,
HAVING ITS REGISTERED OFFICE AT 12A,
GROUND FLOOR, PRAKASH DEEP BUILDING,
7, TOLSTOY MARG, NEW DELHI 110001.
REPRESENTED BY ITS AUTHORIZED REPRESENTATIVE
MR. ATUL DHAWAN
EMAIL: atul.dhawan@genpact.com
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... PETITIONER

(BY SRI. ARVIND DATAR, SENIOR COUNSEL FOR

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AND

1. THE ASSISTANT DIRECTOR
   DIRECTORATE OF ENFORCEMENT
   BENGALURU ZONAL OFFICE,
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   JALAHALLI,
   BENGALURU- 560 013

....RESPONDENTS

(BY SRI. N. VENKATARAMAN, ASGI &
SRI. ARVIND KAMATH., ASGI FOR
SRI. MADHU N. RAO., CGC)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED ORDER BEARING NO. 1/2026 DTD. 03.02.2026 PASSED BY THE R-1 ASSISTANT DIRECTOR, DIRECTORATE OF ENFORCEMENT IN FILE NO. F.NO.T-3/BGZO/91/2021/12050 (ANNX-A).AND ETC.

THESE WRIT PETITIONS COMING ON FOR ORDERS AND HAVING BEEN RESERVED FOR ORDERS ON 08.09.2026, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE SURAJ GOVINDARAJ

CAV ORDER

1. The petitioner in **W.P.No.16763/2026** is before this Court seeking for the following reliefs:

   a. *Issue a Writ of Certiorari or any other appropriate writ, order, or direction quashing and setting aside the impugned communication dated 13.01.2026 Bearing No. T-3/BGZO/91/2021/11891 issued by respondent no. 1, denying the No-Objection Certificate applied for by the petitioner under rule 10 of the Foreign Exchange Management (Overseas Investment) Rules, 2022 (Annexure-A);*

   b. *Issue a Writ of Certiorari or any other appropriate writ, order, or direction under Articles 226 and 227 of the Constitution of India, quashing all proceedings initiated and/or emanating from File No. F. NO. T-3/BGZ0/91/2021/12050, (Annexure-K) on account of inordinate delay, and contrary to settled principles of law as expounded by the Hon'ble Supreme Court of India in Union Of India v. Citi bank, N.A. (2022)19scc 188;*

   c. *Issue a Writ of Mandamus or any other appropriate writ, order, or direction under Article 226 of the Constitution of India, directing the respondents to issue an NOC-permitting the petitioner to make the proposed overseas investment of USD 100 million in Genpact Global (IFSC) pvt. Ltd. for the purpose of establishing a global/regional corporate treasury centre;*

   d. *Grant the petitioner such other reliefs as this Hon'ble Court may deem fit and proper.*

2. The petitioner in **W.P.No.7283/2026** is before this Court seeking for the following reliefs:

> *a. Issue a writ of certiorari by quashing the impugned order bearing no. 1/2026 dtd. 03.02.2026 passed by the R-1 Assistant Director, Directorate of Enforcement in File No. F.NO.T-3/BGZO/91/2021/12050 (Annx-A);*
>
> *b. Issue a writ of prohibition against the Respondents prohibiting the Respondents from passing any further seizure orders under section 37A of the Foreign Exchange Management Act, 1999 against the petitioner, i.e. Genpact India Private Limited;*
>
> *c. Issue a direction / mandamus directing the Respondents to release the property situated at DLF City, Phase V, Sector 53 Gurgaon, Haryana-122022 owned by the Petitioner.*
>
> *d. Grant the petitioner such other reliefs as this Hon'ble Court may deem fit and proper.*

3. The facts in both the petitions are more or less the same, except that they diverge later on depending on the relief that has been sought for.

4. ***The facts in WP No.7283 of 2026;***

4.1. The petitioner is a Company (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***Genpact India or New Genpact India***") registered under the provisions of the Companies Act, 2013, carrying on the business of providing advanced technology services, business process outsourcing services, and solutions to global clients by reimagining finance, supply chain, and other operational claims to achieve their work in a more efficient manner.

4.2. Respondent No.1 is the Assistant Director, Directorate of Enforcement (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***Assistant Director***").

4.3. Respondent No.2 is the Directorate of Enforcement (hereinafter referred to, for the sake of convenience, brevity and identification, as "***ED or Enforcement Directorate***").

4.4. Genpact India Ltd., was incorporated on 30.10.1996, as a private company with unlimited liability till January 2015 (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***Old Genpact India***"). The equity shares of Old Genpact India were owned by Headstrong Consulting (Singapore) Pte. Ltd. (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***Headstrong Singapore***") [now, Genpact Consulting (Singapore) Pte Ltd.] (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***Genpact Singapore***") to an extent of 95% of the shareholding and Genpact India Holdings, Mauritius (hereinafter referred to, for the sake of convenience, brevity, and identification, as ***"Genpact Mauritius"***) owning approximately 5% of the shares.

4.5. On 10.02.2005, Empower Research Knowledge Services Pvt. Ltd. (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***Empower India***") was incorporated in India as a Private Limited Company. On 03.10.2011, Empower India was acquired by the Genpact Group through Headstrong Singapore (now Genpact Singapore). It is contended that in 2014, Genpact Group determined that it should restructure its Indian operations for a variety of business reasons, and, given the existence of multiple Indian subsidiaries, it planned to consolidate them into a Single Indian Entity owned by a Singapore Holding Company. Empower India was identified as an entity for consolidation of Indian operations. For this, Empower India needed funds to acquire Genpact India and other Indian entities.

4.6. On 27.01.2015, Headstrong Singapore (now Genpact Singapore), which is a holding Company for two Indian Companies. In that, Headstrong held 95% of the shares in Genpact India and 100% of shares in Empower India., borrowed approximately USD 660 million, from Morgan Stanley Senior Funding Inc. (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***Morgan Stanley***") and another USD 77.50 million approximately INR 476.34 crores from its holding company.

4.7. The said amount was infused into Empower India vide subscription of shares under the 100% automatic route for Foreign Direct Investment (hereinafter referred to, for the sake of convenience and brevity, as "**FDI**"). In pursuance of the receipt of the said capital, Empower India, from and out of the said funds, acquired 49% of the shares of Old Genpact India, namely 44 % of the shares held by

Headstrong Singapore and approximately 5% held by Genpact Mauritius. As regards this, Empower India remitted total consideration of USD 737.50 million (approximately INR 4528 crores), with USD 660 million paid to Headstrong Singapore and USD 77.50 million paid to Genpact Mauritius.

4.8. Headstrong Singapore repaid the loan taken from Morgan Stanley on 30.01.2015 from the funds received from the sale of 45% of shares of Old Genpact India to Empower India.

4.9. On 09.03.2015, Genpact Luxembourg SARL (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***Genpact Luxembourg***") was registered as a Foreign Portfolio Investor (hereinafter referred to, for the sake of convenience and brevity, as "**FPI**") by the Securities Exchange Board of India (hereinafter referred to, for the sake of convenience and brevity, as "**SEBI**").

4.10. On 23.03.2015, Genpact Global Holdings Bermuda Ltd. (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***Genpact Bermuda***") borrowed USD

737.50 million from Morgan Stanley, which was infused by Genpact Bermuda into Genpact Luxembourg as a short-term loan, which was settled by Genpact Luxembourg to Genpact Bermuda by issuance of shares.

4.11. On 25.03.2015, Empower India issued 4,600 Series I-rated, listed, redeemable Non-Convertible Debentures (hereinafter referred to, for the sake of convenience and brevity, as "**NCDs**") to Genpact Luxembourg at a face value of INR 1,00,00,000 (Rupees One Crore only), carrying a coupon rate of 11% per annum. The amounts in relation thereto, namely INR 4600 crores were remitted by Genpact Luxembourg to Empower India in Indian rupees.

4.12. It is claimed that the investment made by Genpact Luxembourg was for the acquisition and merger of Indian Operating Entities into Empower India. It is further claimed that the Genpact Group was positioning Empower India to become a large business with huge potential.

4.13. Empower India acquired the remaining 51% of the shares of Old Genpact India from

Headstrong Singapore from and out of the amounts received on account of the issuance of the NCDs, on account of which Old Genpact India became a wholly owned subsidiary of Empower India.

4.14. It is on account of the above transactions that Old Genpact India became a wholly owned subsidiary of Empower India. Subsequently, the Indian Entities including Empower India, Genpact India, and other subsidiaries namely M/s Felix Software Solutions Private Limited, M/s Genpact Infrastructure (Bubaneshwar) Private Limited, M/s Genpact India Business Processing Private Limited, M/s Genpact Infrastructure (Jaipur) Private Limited, M/s NGEN Media Services Private Limited and Pharmalink Consulting Operations Private Limited, had filed a scheme for amalgamation for approval before the High Court of Telangana, which was approved on 17.08.2015 by the Hon'ble High Court of Telangana and High Court of Andhra Pradesh. Some of the companies being registered in Delhi, the scheme of amalgamation was approved by the Hon'ble Delhi High Court on 18.03.2016.

Thereafter, the name of Empower India, with whom all the Indian subsidiaries, including Old Genpact India, were amalgamated, changed its name from Empower India to Genpact India Ltd., (i.e., the New Genpact India), which repaid the amounts covered under the NCDs to Genpact Luxembourg between 2018 and 2023 against the NCDs.

4.15. In the meanwhile, on 02.08.2017, the Assessing Officer under the Income Tax Department (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***AOIT***") issued a notice to Genpact Singapore (Earlier Headstrong Singapore) calling upon Genpact Singapore to submit copies of the acknowledgement for filing return of income along with the Income Tax Return and Form No. 3CEB for the year ending 31.03.2015.

4.16. On 12.10.2018, the merged entity namely New Genpact India had sought for issuance of an interpretative letter from the SEBI under paragraph 5 of the Informal Guidance Scheme, 2003, pertaining to the NCDs issued by erstwhile Empower India to Genpact Luxembourg, which was replied to on 30.11.2018, stating that there was no violation of the induced restriction norms for the proceeds raised on the issues of NCDs.

4.17. On 12.12.2018, the Assistant Commissioner of Income Tax (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***ACIT***") passed an Assessment Order, wherein the returned income was accepted as NIL. The Assessment Order was adjudicated over the transaction in question, and a review was undertaken by the Transfer Pricing Officer (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***TPO***"), where no adverse inference was drawn by the TPO in respect of the said transactions. On 27.09.2019, a letter was issued by Reserve Bank of India (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***RBI***") to the ED flagging importers/exporters who have availed advance inwards/outward remittances exceeding INR 100 crores. But had failed to submit shipping bills and documents for over a year.

4.18. In pursuance of which, the ED had initiated an investigation regarding the said import and export of goods. In the year 2021, the ED initiated an investigation under the Foreign Exchange Management Act, 1999 ("***FEMA***") in respect of the petitioner on the basis of the aforesaid RBI letter dated 27.09.2019.

4.19. On 30.03.2021, an order was passed by the Commissioner of Income Tax ("***CIT***") under Section 263 of the Income Tax Act, 1961 (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***IT Act***") holding that the Assessment Order in respect of Genpact Singapore was erroneous and prejudicial to the interest of the revenue, cancelled the Assessment Order, directing the AO to properly investigate the claims made by the assessee regarding exemption of transaction under the IT Act and under the India-Singapore Double Taxation Avoidance Agreement ("**India-Singapore *DTAA***"), as also directing the AO to pass a fresh Assessment Order after considering all such heads of income of the assessee.

4.20. The said order having been challenged by the petitioner before the Income Tax Appellate Tribunal (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***ITAT***"). On 13.06.2022, the ITAT, in ITA No.501/DEL/2021, set aside the order of the CIT, dated 30.03.2021 restoring the Assessment Order of AOIT by holding that the subject transaction was duly considered and examined.

4.21. On 31.05.2023, a compounding application was filed by New Genpact India with the RBI for compounding of delay in reporting of allotment of shares in Form FC-GPR, relating to delay in reporting receipt of foreign inward remittances towards subscription of equity in the year 2015, which was allowed by the RBI and compounded the contravention for delay by way of order dated 22.11.2023.

4.22. The CIT had challenged the order of the ITAT before the Hon'ble Delhi High Court in ITA No.103 of 2023, which came to be dismissed by the Hon'ble Delhi High Court on 11.12.2024. The CIT has challenged the order of the Hon'ble

Delhi High Court before the Hon'ble Supreme Court in SLP(C).No.025934 of 2026 wherein notice has been ordered, though no stay has been granted.

4.23. The ED having initiated the investigation, an order came to be passed on 03.02.2026 by the Assistant Director, ED, vide order bearing No.1 of 2026, seizing the property of the petitioner namely, that situated in DLF City, Phase No.V, Sector 53, Gurgaon, Haryana 122022, owned by the petitioner under Section 37A of the FEMA. It is a said order of the Assistant Director which is challenged in WP No.7283 of 2026.

5. ***<u>Facts in WP No.16763 of 2026;</u>***

5.1. On 22.08.2022, the Foreign Exchange Management (Overseas Investment) Rules, 2022 (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***OI Rules***") came to be notified, replacing the earlier regime under Regulations 6(2)(iii) of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004.

5.2. In terms of Rule 10 of the OI Rules, a person or entity under investigation by certain authorities, including the Directorate of Enforcement, is required to obtain a No-Objection Certificate prior to making a financial commitment outside India.

5.3. In the year 2025, Genpact India incorporated Genpact Global (IFSC) Private Limited (hereinafter referred to, for the sake of convenience, brevity, and identification, as the ***"Gift City Entity***") as its wholly owned subsidiary in the Gujarat International Finance Tec-City, Special Economic Zone, Gujarat (hereinafter referred to, for the sake of convenience, brevity, and identification, as the ***"Gift City***"), which is managed by the International Financial Services Centres Authority ("***IFSCA"***). On an application made by New Genpact India, the IFSCA granted the Gift City Entity provisional registration as a finance company on 15.09.2025 for carrying out Global/Regional Corporate Treasury Centre activities, subject to the entity being capitalised within six (6) months. The Gift City Entity is envisaged to be engaged in treasury activities such as lending, cash pooling, and investments for various group entities of Genpact located outside India.

5.4. Since Genpact India had earlier received summons from the Enforcement Directorate. Genpact India on 26.11.2025 made an application (hereinafter referred to, for the sake of convenience, brevity, and identification, as the "***NOC application***") under Rule 10 of the OI Rules seeking for No Objection from the ED for investment of USD 100 million in Gift City Entity for the purpose of establishing a global treasury center to provide cash pooling and lending services to group entities located outside India.

5.5. On 13.01.2026, the Assistant Director, ED, rejected Genpact India's NOC application, which is what is challenged in WP No.16763 of 2026.

Petitioner's arguments in WP 7283/2026.

6. Sri.Arvind Datar, Learned Senior Counsel appearing for Genpact India in WP No. 7283 of 2026, would submit that:

6.1. At the outset, he submits that the Section 37A Order relates to the NCD transaction in March 2015 and not the equity transaction in January 2015.

6.2. Section 37A of the FEMA came into force on 09.09.2015, which was much after the transactions referred to in the notice i.e., from January to March 2015. The transaction was completed by 25.03.2015. His submission is that once the transaction had been completed by 25.03.2015, Section 37A of FEMA, which came into force on 09.09.2015, could not have been retrospectively applied to the petitioner in respect of those concluded transactions.

6.3. His submission is that Section 37A of FEMA, being a substantive disability-imposing provision, cannot have retrospective application, and in this regard, he relies upon the decision of a co-ordinate bench of this Court in ***Canara Bank Vs. Commissioner of Customs,***[1] more particularly paragraphs 2, 3, 6, 15 and 20 thereof which are reproduced hereunder for easy reference;

[1] WP No.10895/2023 dt. 10.06.2024

2. *The material on record discloses that for the purpose of availing two housing loans in sums of Rs.1,70,00,000/- and Rs.1,24,00,000/-, from the petitioner – Bank, the 3rd respondent mortgaged the schedule property along with the other property on 20.02.2015 by way of registered Memorandum of Title Deeds and letter handing over title deeds of the properties. Since the 3rd respondent defaulted in repayment of loan, the loan accounts were classified as 'NPA' by the petitioner – Bank. It is contended that when the petitioner – Bank was contemplated initiation of proceedings under the SARFAESI Act, 2002, it learnt that the 2nd respondent had seized the schedule property for alleged offences said to have been committed by the 3rd respondent under the provisions of the Foreign Exchange Management Act, 1999 (for short 'the FEMA') and passed the impugned order dated 31.03.2022 directing seizure of the schedule property and other properties of the 3rd respondent.*

3. *It is contended that the petitioner submitted a representation dated 29.07.2022 to the 2nd respondent requesting release / cancellation of the attachment / seizure, to which, the 2nd respondent issued a reply dated 04.08.2022 intimating the petitioner that a petition under Section 37A(2) of FEMA had already been filed by the 2nd respondent before the competent authority and objections may be submitted by the petitioner before the authority. In pursuance of the same, petitioner submitted a representation / objections dated 23.08.2022 to the 1st respondent – Commissioner and since no decision has been taken by him and the order of seizure continues to subsist in respect of the schedule property, petitioner is before this Court by way of the present petition.*

6. *In addition to reiterating the various contentions urged in the petition and referring to the material on record, learned Senior counsel for the petitioner has made the following submissions:-*

(i) That by virtue of Section 26E of the SARFAESI Act, the petitioner being a secured creditor, the debt due to the petitioner shall have priority and prevail over all other debts

/ dues including all revenues, taxes, cesses and other rates payable to the respondents 1 and 2 and the provisions of the SARFAESI Act overrides the provisions of the FEMA, since both are special laws and SARFAESI Act is a subsequent enactment, which would prevail over FEMA which was an earlier enactment.

(ii) That the impugned order was passed under Section 37A of the FEMA which was inserted vide Central Act No.20 of 2015 w.e.f. 09.09.2015, while the mortgage created in favour of the petitioner –Bank was prior / earlier thereto i.e., on 20.05.2015 and consequently, Section 37A of FEMA was neither applicable nor could be invoked in relation to the schedule property which had been mortgaged in favour of the petitioner –Bank much prior / earlier to Section 37A being inserted in FEMA and coming into force for the purpose of the present case.

(iii) That by virtue of Section 31B of the Recovery of Debts and Bankruptcy Act, 1993 (for short 'the RDBI Act'), which applies to proceedings under the SARFAESI Act, the rights of the secured creditors viz., petitioner – Bank to realise secured debts due and payable to them by sale of assets, over which security interest is created shall prevail and shall be paid in priority over all other debts/ dues including Government dues viz., revenues, taxes, cesses and rates due to the respondents 1 and 2.

(iv) That the impugned seizure order dated 31.03.2022 passed under Section 37A(1) of the FEMA is illegal, arbitrary and without jurisdiction or authority of law and the same deserves to be quashed.

In support of his submissions, learned Senior counsel relied upon the following judgments:-

(i) SBICAP Ventures Ltd, Vs. Joint Director, Directorate of Enforcement (Bengaluru Zonal Office) and others- W.P.No.1360/2023 dated 20.03.2023(Bombay);

(ii) Solidaire India Ltd., Vs Fairgrowth Financial Services and others – (2001) 3 SCC 71;

(iii) Assistant Commissioner vs. Indian Overseas Bank – 2016 SCC Online MAD 10030.

15. *A perusal of the material on record will indicate that the schedule property had been mortgaged in favour of the petitioner – Bank on 20.02.2015; it is an undisputed fact that Section 37A of the FEMA came into force w.e.f. 09.09.2015 by virtue of Act No.20 of 2015, under which, Section 37A was inserted into the FEMA; the said provisions of Section 37A being substantive in character clearly cannot be construed or treated as being retrospective or retroactive in operation and the same cannot be made applicable to the schedule property which had undisputedly been mortgaged in favour of the petitioner – Bank prior to Section 37A of the FEMA coming into force; to put it differently, Section 37A, under which the impugned order has been passed by the 2nd respondent being prospective in nature and operation, the said provision could not have been invoked by the 2nd respondent for the purpose of passing the impugned order of seizure / attachment in relation to the schedule property which had undisputedly stood mortgaged in favour of the petitioner – Bank prior to Section 37A coming into force and consequently, the said provision was not applicable to the schedule property and the 2nd respondent did not have jurisdiction or authority of law to invoke or apply Section 37A of the FEMA for the purpose of passing the impugned order which deserves to be quashed on this ground also.*

20. *Insofar as the contention as regards availability of equally efficacious and alternative remedy by way of an appeal under Section 37A(5) of the FEMA is concerned, in the light of the findings recorded by me hereinbefore that the impugned order is without jurisdiction or authority of law and the same is not only illegal and arbitrary but also contrary to the provisions contained in the SARFAESI Act and RDBI Act and consequently, mere availability of a remedy by way of an appeal cannot be construed or treated as denuding this Court of its jurisdiction under Article 226 of the Constitution of India and the said contention of the respondents 1 and 2 in this regard cannot be accepted.*

6.4. By relying on ***Canara Bank***, he submits that a co-ordinate Bench of this Court had set aside an order passed under Section 37A of the FEMA insofar as it affected a property which had been mortgaged in favour of the secured creditor in February 2015, prior to Section 37A being brought into force on 09.09.2015. According to him, the Co-ordinate Bench held that Section 37A, being substantive in character, could not be applied retrospectively so as to affect a security interest created prior to the coming into force of the said provision.

6.5. He further submits that the decision in **Canara Bank** has attained finality, the same having not been challenged by the Directorate of Enforcement, and consequently the said decision is binding upon the respondents and is required to be followed in the present proceedings.

6.6. It is therefore contended that, in the present case, since the NCD transaction relating to Empower India stood completed in March 2015, i.e. prior to Section 37A of FEMA coming into force on 09.09.2015, the said provision could not subsequently be invoked so as to subject the property/security interest arising from the said transaction to seizure or attachment. According to him, permitting Section 37A to operate in such circumstances would amount to giving retrospective operation to a substantive provision, contrary to the principle recognised by this Court in ***Canara Bank***.

6.7. He relies upon the decision of the Hon'ble Supreme Court in ***Berger Paints India Ltd vs. CIT,***[2] more particularly paragraph 14 thereof, which is reproduced hereunder for easy reference;

> ***14.*** *The decision in Lakhanpal National Ltd. case [(1986) 162 ITR 240 (Guj)] which clearly laid down the interpretation of Section 43-B was followed by the judgments of Madras High Court and Bombay High Court and was again followed by the decision of the Special Bench of the Income Tax Appellate Tribunal, none of which have been challenged. In these circumstances, the principle laid down in Union of India v. Kaumudini Narayan Dalal , CIT v. Narendra Doshi and CIT v. Shivsagar Estate clearly applies. We see no "just cause" as would justify departure from the principle. Hence, in our view, the Revenue could not have been allowed to challenge the principle laid down in Lakhanpal National Ltd. case which was followed by the inspecting Assistant Commissioner in the case of the assessee in the three assessment years in question. We are, therefore, of the view that the Commissioner, the Income Tax Appellate Tribunal and the Calcutta High Court erred in permitting the Revenue to raise*

[2] (2004) 12 SCC 42

a contention contrary to what was laid down by the Gujarat High Court in Lakhanpal National Ltd. case. This decision has been subsequently followed by the decisions of the Bombay High Court in CIT v. Bharat Petroleum Corpn. Ltd. and the Madras High Court in Chemicals and Plastics India Ltd. v. CIT as well as the decision of the Special Bench in Indian Communication Network (P) Ltd. v. CIT which have all remained unchallenged.

6.8. By relying on ***Berger Paints***, he submits that where a particular legal principle has been laid down by the jurisdictional High Court and the said view has not been challenged before the higher forum, the ED cannot be permitted to take a contrary stand in a subsequent matter. The principle enunciated by the Hon'ble Supreme Court in ***Berger Paints*** assumes particular significance in the present case, since the issue of retrospectivity of Section 37A has already been considered and decided by a Co-ordinate Bench of this Court in ***Canara Bank***, and there is no subsequent decision of a superior Court or any other legally sustainable basis warranting departure from the said view. The ED, according to him, cannot adopt a contrary position in the present proceedings merely because the factual setting is different.

6.9. He accordingly submits that both the equity transaction, which culminated in January 2015, and the borrowing by way of NCDs, which culminated in March 2015, stood completed prior to Section 37A of the FEMA coming into force on 09.09.2015. Consequently, the rights and interests arising out of or crystallised pursuant to the said transactions could not, according to him, subsequently be subjected to proceedings under Section 37A by giving the provision retrospective operation. He therefore contends that the invocation of Section 37A in respect of the aforesaid transactions is impermissible in law and is contrary to the principle laid down in ***Canara Bank***, which, in his submission, the ED is bound to follow.

6.10. If at all the allegations by the ED are that the same was in violation of the FEMA, action is required to be initiated under Section 4 of the FEMA and not under Section 37A of FEMA. There is no cause of action post the issuance of the NCDs on 25.03.2015. In this regard, he relies upon the decision of the Hon'ble Supreme Court in ***State of Bihar vs. Deokaran***

Nenshi,[3] more particularly paragraphs 8, 9 and 10 thereof, which are reproduced hereunder for easy reference;

> ***8.*** *In Emperor v. Karsandas [AIR 1942 Bom 326 : 203 IC 592 : 44 Cr LJ 120] the question was as to the proper construction of Section 390 sub-section (1) of the Bombay City Municipal Act, 1888. That sub-section provided that no person shall newly establish in any premises any factory, in which it was intended that steam, water or other mechanical power should be employed, without the previous permission of the Commissioner, nor shall any person work or allow to be worked any such factory without such permission. The sub-section thus laid down two distinct offences: (1) establishing a new factory in which mechanical power was intended to be used without the permission, and (2) working such a factory in which mechanical power was intended to be used without permission. The High Court held that the first offence would be completed when a new factory was established without permission, an offence completed once and for all, while the other offence would be committed whenever such a factory without the permission was worked, that is, on every day that it was worked without the permission. The High Court observed that though the expression "continuing offence" was not a very happy expression, it was very often used. A person may not continuously work such a factory. He might work it one day and not work it the next day, and then resume its working once again. Therefore, the proper meaning to be attached to such an offence was that whenever he worked such a factory he committed an offence. The distinction between the two kinds of offences lay between an act which constituted an offence once and for all and an act which continued, and therefore, constituted a fresh offence every time on which it continued. Similarly, in State v. Bhiwandiwala [AIR 1955 Bom 161 : ILR 1955 Bom 192 : 56 Cr LJ 666] three offences were charged against the respondent: (1) failure to submit a written notice of occupation of his factory as*

[3] (1972) 2 SCC 890

required by Section 7(1) of the Factories Act, 1948, (2) failure to submit an application for registration and grant of licence as required by Section 6 of the Act read with Rule 4 of the Bombay Factories Rules, 1950, and (3) for using the premises as a factory without a licence. The High Court held that the first two offences were offences completed on failure to submit the notice and the application for registration and licence, and a complaint in respect of them would be barred if it was lodged beyond the period of three months from the date of the offence under Section 106 of the Act. But a prosecution in respect of the third offence would not be so barred as that offence was a continuing offence in the sense that using the premises as a factory without registration and licence was an offence committed every time that the premises were used as a factory. Likewise, in Bihar v. J.P. Singh [1963 BLJR 782] the High Court of Patna held that conducting a restaurant without having it registered and without maintaining registers required by the Bihar Shops and Establishments Act, 8 of 1954, and the Rules framed thereunder were continuing offences as every time a restaurant was run without its being registered and without maintaining the requisite registers was an offence, and therefore, the period of limitation under Section 36 of the Act would being to run from the date of the occurrance of each of the defaults. See also State v. Laxmi Narain [AIR 1957 All 343 : 1957 Cr LJ 615 : 1958 All WR (HC) 281] .

9. *Regulation 3 read with Section 66 of the Mines Act makes failure to furnish annual returns for the preceding year by the January 21, of the succeeding year an offence. The language of Regulation 3 clearly indicates that an owner, manager etc. of a mine would be liable to the penalty if he were to commit an infringement of the Regulation and that infringement consists in the failure to furnish returns on or before January 21, of the succeeding year. The infringement, therefore, occurs on January 21, of the relevant year and is complete on the owner failing to furnish the annual returns by that day. The Regulation does not lay down that the owner, manager etc. of the mine concerned would be guilty of an offence if he continues to carry on the mine without furnishing the returns or that the offence continues until the requirement of Regulation 3 is* *complied with. In other words, Regulation 3 does not render a continued disobedience or non-compliance of it an offence. As in the case of a construction of a wall in violation of a rule of a bye-law of a local body, the offence would be complete once and for all as soon as such construction is made, a default occurs in furnishing the returns by the prescribed date. There is nothing in Regulation 3 or in any other provision in the Act or the Regulations which renders the continued non-compliance an offence until its requirement is carried out,*

***10.** The High Court, in our view, was right in holding that the complaint was time barred as the offence in question fell within the substantive part of Section 79 of the Act and not under the Explanation attached to it. The appeal, therefore, must fail and is dismissed.*

6.11. His submission by relying on ***Deokaran Nenshi's*** case is that where an act constituting an alleged violation is complete upon the occurrence of the relevant transaction, such violation cannot be treated as a continuing offence merely because its consequences may continue thereafter. According to him, the issuance of the NCDs on 25.03.2015 constituted a completed transaction and, if the allegation of the ED is that the said transaction was in violation of the FEMA, the alleged contravention stood complete with the issuance of the NCDs and cannot be treated as a continuing contravention so as to attract a provision which came into force subsequently.

6.12. He submits that there is, therefore, no cause of action arising subsequent to 25.03.2015 which could independently attract the provisions of Section 37A of the FEMA. The mere continuance of the consequences of the transaction, or the continued existence of the rights or obligations arising therefrom, cannot, according to him, convert a completed transaction into a continuing contravention. In the absence of any subsequent act constituting a fresh or continuing contravention, the ED cannot rely upon the subsequent enactment of Section 37A to initiate proceedings in respect of a transaction which had already been completed prior to 09.09.2015.

6.13. He accordingly submits that if the case of the ED is that the issuance of the NCDs itself constituted a violation of the FEMA, the alleged contravention was complete on 25.03.2015 and the proceedings, if otherwise maintainable, would have to be founded upon the statutory provision applicable to such contravention at that point of time, including Section 4 of the FEMA, and not upon Section 37A, which was introduced subsequently. Section 37A, according to him, cannot be employed by characterising the continuing existence or effect of a completed transaction as a continuing contravention, in the absence of any statutory provision making such continued state of affairs an independent or continuing violation.

6.14. He further submits that the principle laid down in ***Deokaran Nenshi*** is applicable in the present case because the distinction is not merely one of limitation but goes to the existence and timing of the alleged contravention itself. Where the statutory obligation is breached by a specific and identifiable act, and the breach is complete upon the commission of that act, the subsequent continuation of its consequences does not, in the absence of statutory language to that effect, give rise to a fresh cause of action on each succeeding day. Applying that principle, the issuance of the NCDs on 25.03.2015 cannot, according to him, be converted into a continuing contravention merely because the NCDs continued to remain outstanding thereafter.

6.15. On this basis, he submits that the invocation of Section 37A of the FEMA in the present case is unsustainable, both because the transaction in question preceded the coming into force of Section 37A and because no subsequent act or transaction giving rise to an independent contravention under Section 37A has been identified by the ED.

6.16. He submits that NCDs borrowing is also akin to the creation of a mortgage, as was dealt by a co-ordinate bench of this Court in ***Canara Bank***'s case, which he reiterates was completed much prior to 09.09.2015. The mortgage continued to be with ***Canara Bank*** even on the day the Section 37A of FEMA order was passed by ED. Despite this, this Court had quashed the said order, stating that Section 37A of FEMA would not be applicable to a transaction which occurred prior to 09.09.2015. Thereby holding that Section 37A of FEMA was prospective in operation. He reiterates that once the NCDs borrowing stood completed, ED had no jurisdiction or authority in law to invoke and apply Section 37A of the FEMA.

6.17. His submission is that a jurisdictional fact is a fact that must exist before an authority can assume jurisdiction before proceeding with a particular matter. That is a fact on which an agency like the ED can exercise jurisdiction. As the said fact did not exist as on 09.09.2015, the ED could not have exercised any jurisdiction retrospectively.

6.18. In this regard, he relies on the decision of the Hon'ble Supreme Court in ***Arun Kumar vs. Union of India,***[4] more particularly paragraphs 73, 74, 75, 76, 84 and 85 thereon which is reproduced hereunder for easy reference;

> ***73.*** *It is, therefore, clear that before Section 17(2)(ii) can be invoked or pressed into service and before calculation of concession as per Rule 3 is made, the authority exercising power must come to a positive conclusion that it is a concession. "Concession", in our judgment is, thus a foundational, fundamental or jurisdictional fact.*
>
> ***74.*** *A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by*

[4] (2007) 1 SCC 732

erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.

75. *In Halsbury's Laws of England, it has been stated:*

"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive."

76. *The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction.*

84. *From the above decisions, it is clear that existence of "jurisdictional fact" is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of "jurisdictional fact", it can decide the "fact in issue" or "adjudicatory fact". A wrong decision on "fact in issue" or on "adjudicatory fact" would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present.*

85. *In our opinion, the submission of Mr Salve is well founded and deserves to be accepted that "concession" under clause (ii) of sub-section (2) of Section 17 of the Act is a "jurisdictional fact". It is only when there is a "concession" in the matter of rent respecting any accommodation provided by an employer to his employee that the mode, method or manner as to how such concession can be computed arises. In other words, concession is a "jurisdictional fact"; method of fixation of amount is "fact in issue" or "adjudicatory fact". If the assessee contends that there is no "concession", the authority has to decide the said question and record a finding as to whether there is "concession" and the case is*

> *covered by Section 17(2)(ii) of the Act. Only thereafter the authority may proceed to calculate the liability of the assessee under the Rules. In our considered opinion, therefore, in spite of the legal position that Rule 3 is intra vires, valid and is not inconsistent with the provisions of the parent Act under Section 17(2)(ii) of the Act, it is still open to the assessee to contend that there is no "concession" in the matter of accommodation provided by the employer to the employee and hence the case did not fall within the mischief of Section 17(2)(ii) of the Act.*

6.19. By relying on ***Arun Kumar***, he submits that the existence of a jurisdictional fact is a condition precedent to the exercise of statutory power. If such foundational fact does not exist, the authority cannot assume jurisdiction merely by proceeding to determine the merits of the matter. He submits that the ED was therefore required, at the threshold, to establish the existence of the facts necessary to attract Section 37A of the FEMA before exercising the power of seizure thereunder.

6.20. He further submits that the question whether the transactions in question fall within the scope of Section 37A is a jurisdictional issue and not merely an adjudicatory or factual issue. In the absence of the necessary jurisdictional facts, the ED could not have invoked Section 37A or proceeded to pass an order thereunder.

6.21. He further submits that Section 37A of the FEMA requires the authorised officer to record, in writing, the reasons to believe that the conditions for invoking the provision are satisfied before passing an order of seizure. According to him, the reasons must be contained in the seizure order itself, and cannot be supplemented later by oral submissions made before the Court. Therefore, any ground or reason not recorded in the seizure order cannot be treated as forming part of the reasons to believe, and the oral submissions advanced by the learned ASGI cannot be relied upon to sustain the order under Section 37A.

6.22. He relies upon the decision of the Hon'ble Supreme Court in ***Sri Nisha vs. Enforcement Directorate,***[5] more particularly paragraph 30 thereof, which is reproduced hereunder for easy reference;

> ***30.*** *The controversy in the present cases is more appropriately examined within the framework of sub-sections (1) to (3) of Section 37A. A plain reading of Section 37A(1) indicates that the power of seizure is predicated upon the existence of a "reason to believe" that foreign exchange, foreign security or immovable*

[5] 2026 SCC OnLine SC 517

property situated outside India is suspected to have been held in contravention of Section 4. Such satisfaction by the Authorised Officer at the stage of preliminary seizure under Sub-section (1) is only tentative and is expressly subject to scrutiny under Sub-sections (2) and (3), wherein the Competent Authority is required to independently examine whether the reasons recorded justify continuation of the seizure. The exercise undertaken by the Competent Authority is thus not an empty formality, but a substantive evaluation of whether the material on record is sufficient to sustain even a prima facie inference of contravention in relation to foreign exchange. In the present case, upon such evaluation, the Competent Authority declined to confirm the seizure by a well-reasoned order, thereby indicating that the material did not meet even this preliminary threshold. The refusal to confirm the seizure, therefore, reflects a considered finding that the foundational requirement of a "reason to believe" was not satisfied on the material available.

6.23. By relying on ***Sri Nisha***, he submits that the power of seizure under Section 37A(1) is conditional upon the existence of a recorded "reason to believe" that the property is held in contravention of Section 4 of the FEMA. Such satisfaction must be based on the material available to the Authorised Officer and must precede the seizure. He submits that the reasons recorded in the seizure order must disclose the basis for such satisfaction and cannot be supplemented by reasons subsequently advanced before this Court.

Therefore, the oral submissions made by the learned ASGI cannot cure any deficiency in the reasons recorded in the order under Section 37A.

6.24. His submission is also that for the purpose of this petition, this Court would have to only examine the reasons contained in the order passed under Section 37A of FEMA, and nothing more than that can be looked into, and the reasons in that order would have to stand the test of Section 37A of FEMA. On that ground, he submits that the seizure order fails to disclose and/or provide reasons to believe satisfying the ingredients for contravention of Section 4 of FEMA, and in the absence of valid reasons to believe, the seizure order, being without jurisdiction, is required to be set aside by this Court.

6.25. He relies upon the decision of the Hon'ble Supreme Court in ***Ravinder Kumar vs. State of Haryana,***[6] more particularly paragraphs 12 to 14 thereof, which are reproduced hereunder for easy reference;

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[6] 2024 SCC OnLine SC 2495

12. *The question is what meaning can be assigned to the expression "has reason to believe". Section 26 of the Penal Code, 1860 defines the expression "reason to believe", which reads thus:*

"26. "Reason to believe".— *A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise."*

In the case of Aslam Mohammad Merchant v. Competent Authority[1], this Court had an occasion to interpret the same expression. In paragraph 41, this Court held thus:

"41. *It is now a trite law that whenever a statute provides for "reason to believe", either the reasons should appear on the face of the notice or they must be available on the materials which had been placed before him."*

However, interpretation of the expression will depend on the context in which it is used in a particular legislation. In some statutes like the present one, there is a power to initiate action under the statute if the authority has reason to believe that certain facts exist. The test is whether a reasonable man, under the circumstances placed before him, would be propelled to take action under the statute. Considering the object of the 1994 Act, the expression "reason to believe" cannot be construed in a manner which would create a procedural roadblock. The reason is that once there is any material placed before the Appropriate Authority based on which action of search is required to be undertaken, if the action is delayed, the very object of passing orders of search would be frustrated. Therefore, what is needed is that the complaint or other material received by the appropriate authority or its members should be immediately made available to all its members. After examining the same, the Appropriate authority must expeditiously decide whether there is a reason to believe that an offence *under the 1994 Act has been or is being committed. The Appropriate Authority is not required to record reasons for concluding that it has reason to believe that an offence under the 1994 Act has been or is being committed. But, there has to be a rational basis to form that belief. However, the decision to take action under sub-section (1) of Section 30 must be of the Appropriate Authority and not of its individual members.*

***13.** Under the notification dated 7th November 2013, the Appropriate Authority for the district consists of the Civil Surgeon, the District Program Officer of the Women and Child Development Department, and the District Attorney. The Civil Surgeon is the Chairman of the appropriate authority. Looking at the object of sub-section (1) of Section 30 and the express language used therein, only the Chairman or any other member acting alone cannot authorise search under subsection (1) of Section 30. It must be a decision of the Appropriate Authority. If a single member of the Appropriate Authority authorises a search, it will be completely illegal being contrary to sub-section (1) of Section 30. If the law requires a particular thing to be done in a particular manner, the same shall be done in that manner only. In the present case, going by the affidavit filed by Dr. Virender Yadav, the Chairman of the District Appropriate Authority cum-Civil Surgeon, Gurugram, the decision to conduct a search by appointing three officers by order dated 27th April 2017 was only his decision purportedly taken in his capacity as the Chairman of the Appropriate Authority. Admittedly, the other two members of the appropriate authority are not parties to the said decision. The Civil Surgeon has given the excuse of urgency. The Appropriate authority doesn't need to have a physical meeting. The Civil Surgeon could have held a video meeting with the other two members. However, when a video meeting is held, every member must be made aware* *of the complaint or the material on which a decision will be made. It was a matter of a few minutes.*

***14.** Therefore, in the facts of the case, no legal decision was made by the Appropriate Authority in terms of sub-section (1) of Section 30 to search for the appellant's clinic. As stated earlier, sub-section (1) of Section 30 provides a safeguard by laying down that only if the Appropriate Authority has reason to believe that an offence under the 1994 Act has been committed or is being committed that a search can be authorized. In this case, there is no decision of the Appropriate Authority, and the decision to carry out the search is an individual decision of the Civil Surgeon, who was the Chairman of the concerned Appropriate Authority. Therefore, the action of search is itself vitiated.*

6.26. By relying on ***Ravinder Kumar***, his submission is that the expression “reason to believe” requires a rational and sufficient basis in the material available to the authority. The power can be exercised only by the authority vested with such power and not on the basis of the individual view of an officer, unless the statute so permits. He therefore submits that, in the present case, the statutory requirement of a “reason to believe” must be satisfied by the competent authority on the basis of the material before it, and any exercise of power without such satisfaction would be without jurisdiction.

6.27. Without prejudice to the above, he submits that the seizure order is based substantially on the findings in the Income Tax proceedings and the alleged loss of revenue. Since the Hon'ble Delhi High Court has restored the order of the Assessing Officer, he submits that the said findings can no longer form the basis for action under the FEMA.

6.28. He further submits that, during the hearing, the ED has sought to rely upon certain flowcharts to justify the seizure, though these do not form part of the Section 37A order. According to him, the validity of the order must be tested on the reasons recorded therein and cannot be supplemented or improved upon by way of affidavits or oral submissions. The ED, therefore, cannot rely upon grounds which were not part of the reasons recorded when the seizure order was passed.

6.29. He relies upon the decision of the Hon'ble Supreme Court in ***Mohinder Singh Gill vs.***

Chief Election Commissioner,[7] more particularly paragraph 8 thereof, which is reproduced hereunder for easy reference;

> ***8.*** *The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji, 1951 SCC 1088 : AIR 1952 SC 16] :*
>
> *"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."*
>
> *Orders are not like old wine becoming better as they grow older.*
>
> *a caveat*

6.30. By relying on ***Mohinder Singh Gill***, his submission is that the validity of the seizure order has to be tested on the reasons stated

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[7] AIR 1978 SC 851

therein and not on reasons subsequently sought to be supplied by the ED during arguments. The authority exercising the statutory power must stand by the reasons which formed the basis of its decision at the time the order was passed. It cannot, after the order is challenged, supplement or improve the same by referring to additional material, filing affidavits, producing flowcharts or advancing new grounds during the course of hearing.

6.31. He submits that, in the present case, the reasons recorded in the seizure order substantially proceed on the findings in the Income Tax proceedings and the alleged loss of revenue. If those findings no longer survive in view of the subsequent decision of the Hon'ble Delhi High Court restoring the order of the Assessing Officer, the ED cannot replace that basis by relying upon a different set of facts or inferences during the hearing. This Court is required to examine whether the order was valid on the basis of the reasons and material which existed and were relied upon when the order was made.

6.32. He further submits that the flowcharts now relied upon by the ED were neither referred to nor made part of the reasons recorded in the seizure order. They therefore cannot be treated as the basis for the "reason to believe" required under Section 37A. To permit the ED to rely upon such material at the stage of hearing, according to him, would amount to permitting the authority to supplement an otherwise deficient order and would defeat the requirement that the statutory satisfaction must exist at the time of exercise of the power.

6.33. He accordingly submits that the seizure order must stand or fall on the reasons contained in it. This Court cannot sustain the order by accepting an explanation subsequently offered by the ED as to what the officer intended to consider, nor can fresh grounds advanced by the learned ASGI be treated as forming part of the original order. If the reasons recorded in the order do not disclose a lawful basis for the formation of the requisite "reason to believe", the subsequent material or explanation cannot cure that defect.

6.34. He relies on Section 4 of the FEMA which reads as under:

> ***4. Holding of foreign exchange, etc.***—*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.*

6.35. Referring to the language of Section 4, he submits that the provision is directed against the acquisition, holding, ownership, possession or transfer of the specified assets by a person resident in India. According to him, the provision therefore requires the existence of such foreign exchange, foreign security or immovable property outside India and an act of acquisition, holding, ownership, possession or transfer in relation to it. A transaction which does not result in any of these acts cannot, according to him, by itself constitute a contravention of Section 4.

6.36. Thus, his submission is that Empower India, now New Genpact India, did not transfer any foreign exchange outside India and, therefore, Section 4 of the FEMA is not attracted. Since the ED alleges that foreign exchange was transferred outside India, the burden is on the ED to establish such transfer.

6.37. He submits that the NCD transaction involved payment in Indian Rupees to Genpact Luxembourg, a SEBI-registered FPI, and the subsequent payments made by Genpact India between 2018 and 2023 were also made in Indian Rupees within India. According to him, these transactions do not amount to acquiring, holding, owning, possessing or transferring foreign exchange, foreign security or immovable property outside India, as contemplated by Section 4.

6.38. He further submits that Genpact Luxembourg, being a Luxembourg entity registered as an FPI with SEBI, was entitled to invest funds in India in Indian Rupees and to repatriate the amounts received in accordance with the applicable procedure. The fact that Genpact Luxembourg subsequently repatriated the amounts received from New Genpact India cannot, according to him, amount to a transfer of foreign exchange outside India by either Empower India or New Genpact India. Consequently, in the absence of any act by either of them falling within Section 4, the foundational requirement for invoking Section 37A is absent and the seizure order cannot be sustained.

6.39. His submission is also that Section 4 does not apply to Headstrong Singapore (now 'Genpact Singapore') or Genpact Luxembourg, both of whom are non-resident entities, since Section 4 applies only to Indian residents. And as such any transaction involving non-resident with other non-resident cannot be subject matter of an alleged Section 4 contravention. There is a fundamental jurisdictional error in exercise of jurisdiction by the ED. Be that as it may, he submits that no action can be taken against the petitioner for any alleged violation by Headstrong Singapore(now 'Genpact Singapore') or Genpact Luxembourg against the petitioner, who is an Indian resident who has not transferred any foreign exchange outside India.

6.40. He submits that the seizure order refers to NCD borrowings of INR 4,600 crores and repayment of the principal along with interest of INR 3,035 crores, aggregating to approximately INR 7,635 crores. According to the ED, the transaction resulted in the creation of an artificial liability of INR 4,600 crores and a corresponding artificial liability towards interest. He disputes this contention and submits that the NCD borrowing and the subsequent payment of interest were genuine transactions, duly undertaken and recorded in the ordinary course. He therefore submits that there was no artificial liability and, in any event, the transactions did not involve any contravention of Section 4 of the FEMA.

6.41. His submission is that borrowing of foreign exchange is also distinct inasmuch as borrowing is covered under Section 6(3) of the FEMA, which is reproduced hereunder for easy reference:

> ***6. Capital account transactions.***
>
> *(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 which are permissible;*

(b) the limit up to which foreign exchange shall be admissible for such transactions:

Provided that the Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary course of business.

(3) Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, by regulations, prohibit, restrict or regulate the following

(a) transfer or issue of any foreign security by a person resident in India;

(b) transfer or issue of any security by a person resident outside India;

(c) transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;

(d) any borrowing or lending in foreign exchange in whatever form or by whatever name called;

(e) any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;

(f) deposits between persons resident in India and persons resident outside India;

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

(h) transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;

(i) acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;

(j) giving of a guarantee or surety in respect of any debt, obligation or other liability incurred

(i) by a person resident in India and owed to a person resident outside India; or

(ii) by a person resident outside India.

(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.

6.42. He submits that borrowing in foreign exchange, as well as borrowing in Indian Rupees between a person resident in India and a person resident outside India, is specifically dealt with under Section 6(3) of the FEMA. In particular, Section 6(3)(e) empowers the Reserve Bank to regulate or restrict borrowing or lending in Rupees between a person resident in India and a person resident outside India. According to him, the NCD transaction in question falls within this specific provision and cannot, therefore, be treated as a transaction prohibited under Section 4.

6.43. He submits that although Section 6(3) was omitted with effect from 15.10.2019, it was in force when the NCD transaction took place in March 2015. Section 6(3)(e) did not prohibit borrowing in Rupees between a resident and a non-resident; it only contemplated its regulation by the Reserve Bank. The NCD borrowing, having been undertaken under the applicable regulatory framework and RBI directions, was therefore a transaction specifically recognised under the FEMA.

6.44. He further submits that Section 4 itself begins with the words "*save as otherwise provided in this Act*". Thus, where a transaction is specifically dealt with under another provision of the FEMA, Section 4 cannot be invoked independently to prohibit that transaction. Since borrowing in Rupees between a resident and a non-resident was specifically provided for under Section 6(3)(e), the NCD borrowing, according to him, cannot constitute a contravention of Section 4. Consequently, the foundational requirement for invoking Section 37A is absent.

6.45. He submits that the NCDs were listed on the Bombay Stock Exchange ("**BSE**"), were denominated in Indian Rupees, and the consideration was received by Empower India, the predecessor of Genpact India, in Rupees from an Indian bank account of Genpact Luxembourg. According to him, the transaction therefore did not involve any transfer of foreign exchange outside India and falls outside Section 4 of the FEMA. He submits that the ED has incorrectly characterised the borrowing of INR 4,600 crores as a "transfer" merely to bring the transaction within Section 4. Borrowing is separately dealt with under Section 6, and cannot be treated as a transfer for the purpose of invoking Section 37A. He therefore submits that the NCD transaction, having been entirely carried out in India, does not satisfy the jurisdictional facts necessary for exercise of power under Section 37A.

6.46. Without prejudice, he submits that if any contravention is alleged, the appropriate provision is Section 37 of the FEMA, which contemplates adjudication, and not Section 37A, which permits seizure in the circumstances specified therein. Since the NCD borrowing was permissible under the FEMA and the applicable RBI regulatory framework, there was no contravention of Section 4 to attract Section 37A. The ED, according to him, has invoked a provision which has no application to the transaction in question and the proceedings are therefore liable to be quashed.

6.47. He submits that the NCD borrowing was undertaken in accordance with the applicable law and the regulatory framework prescribed by the RBI. Once the transaction was legally permissible and was carried out in accordance with the applicable requirements, it cannot subsequently be characterised as a contravention of the FEMA so as to invoke the coercive power under Section 37A.

6.48. He relies on **Foreign Exchange Management (Transfer or Issue of security by a person**

resident outside India) Regulations 2000 ["FEMA 2000"], more particularly Regulations 4 and 5 thereof, which are reproduced hereunder for easy reference:

> ***4. Restriction on an Indian entity to issue security to a person resident outside India or to record a transfer of security from or to such a person in its books :-***
>
> *Save as otherwise provided in the Act or Rules or Regulations made thereunder, an Indian entity shall not issue any security to a person resident outside India or shall not record in its books any transfer of security from or to such person:*
>
> *Provided that the Reserve Bank may, on an application made to it and for sufficient reasons, permit an entity to issue any security to a person resident outside India or to record in its books transfer of security from or to such person, subject to such conditions as may be considered necessary.*
>
> ***5. Permission for purchase of shares by certain persons resident outside India :-***
>
> *(1) A person resident outside India (other than a citizen of Bangladesh or Pakistan or Sri Lanka) or an entity outside India, whether incorporated or not, (other than an entity in Bangladesh or Pakistan) , may purchase shares or convertible debentures of an Indian company under Foreign Direct Investment Scheme, subject to the terms and conditions specified in Schedule 1.*
>
> *(2) A registered Foreign Institutional Investor (FII) may purchase shares or convertible debentures of an Indian company under the Portfolio Investment Scheme, subject to the terms and conditions specified in Schedule 2.*

(3) A non-resident Indian or an overseas corporate body may purchase shares or convertible debentures of an Indian company –

(i) on a stock exchange under the Portfolio Investment Scheme, subject to the terms and conditions specified in Schedule 3; or/and

(ii) on non-repatriation basis other than under Portfolio Investment Scheme, subject to the terms and conditions specified in Schedule 4.

(4) A non-resident Indian or an overseas corporate body or a registered FII may purchase securities, other than shares or convertible debentures of an Indian company, subject to the terms and conditions specified in Schedule 5.

6.49. By referring to Regulations 4 and 5 of FEMA 2000, he submits that the regulatory framework itself permitted a person resident outside India, including a registered FPI, to invest in NCD issued by an Indian company, subject to the prescribed conditions. He submits that the NCDs issued by Empower India to Genpact Luxembourg were therefore not, by their very nature, prohibited transactions under FEMA. The fact that Genpact Luxembourg was a registered FPI and invested in Rupee-denominated securities of an Indian company supports, according to him, the legality of the transaction under the applicable FEMA framework.

6.50. He further submits that Regulation 4 prohibits an Indian entity from issuing securities to a person resident outside India only " … *save as otherwise provided … 11*" under the Act, Rules or Regulations. Thus, where the issue of securities to a non-resident is permitted under the applicable FEMA regulations, such issue cannot be treated as a contravention merely because the investor is resident outside India. The NCD transaction, having been undertaken within the regulatory framework governing such investment, therefore cannot be brought within Section 4 so as to invoke Section 37A.

6.51. He also refers to **APDIR Circular No. 89 [1.03.2012]**, more particularly paragraph 2 thereof which is reproduced hereunder for easy reference:

> ***2.*** *SEBI has, vide their circular CIR/IMD/FIIC/18/2010 dated November 26, 2010, issued instructions on the revised allocation of investment limits to FIIs. In terms of paragraph 8 of the circular, SEBI has allowed FIIs to invest in 'to be listed' debt securities. Accordingly, it has been decided that SEBI registered FIIs/sub-accounts of FIIs can now invest in primary issues of Non-Convertible Debentures (NCDs)/ bonds only if listing of such bonds / NCDs is committed to be done within 15 days of such investment. In case the NCDs/bonds issued to the SEBI registered FIIs*

/ sub-accounts of FIIs are not listed within 15 days of issuance to the SEBI registered FIIs / sub-accounts of FIIs, for any reason, then the FII/sub-account of FII shall immediately dispose of these bonds/NCDs either by way of sale to a third party or to the issuer and the terms of offer to FIIs / sub-accounts should contain a clause that the issuer of such debt securities shall immediately redeem / buyback the said securities from the FIIs/sub-accounts of FIIs in such an eventuality.

6.52. By referring to APDIR Circular No. 89 dated 01.03.2012, he submits that the regulatory framework expressly permitted SEBI-registered FIIs to invest in primary issues of NCDs and bonds, subject to the requirement that the securities be listed within the prescribed period. According to him, the circular therefore recognises and permits investment by a registered FII in Rupee-denominated NCDs issued by an Indian entity.

6.53. He submits that Genpact Luxembourg, being a registered FPI, was entitled to invest in the NCDs issued by Empower India in accordance with the applicable FEMA and SEBI framework. The NCD transaction was thus a permitted investment transaction and not a prohibited transfer of foreign exchange outside India. Consequently, the transaction could not constitute a contravention of Section 4 so as to provide the jurisdictional basis for invoking Section 37A of the FEMA.

6.54. He refers to **APDIR Circular No.7 [16.07.2022],** more particularly paragraph 2 thereof, which is reproduced hereunder for easy reference:

> *2. In terms of paragraphs 4(b)(i) and 4(b)(ii) of the Directions, short-term investments by an FPI in government securities (Central Government securities, including Treasury Bills and State Development Loans) and corporate bonds shall not exceed 30% of the total investment of that FPI in any category. It has been decided that investments by FPIs in government securities and corporate bonds made between July 08, 2022 and October 31, 2022 (both dates included) shall be exempted from the limit on short-term investments till maturity or sale of such investments.*

6.55. By referring to APDIR Circular No. 7 dated 16.07.2022, he submits that the RBI Directions expressly recognise and regulate investments by FPIs in government securities and corporate bonds, continuing the regulatory framework in force since 2012. According to him, the circular reinforces that an FPI's investment in Indian debt securities is a recognised and regulated transaction under FEMA and is not, by itself, prohibited.

6.56. He submits that the investment made by Genpact Luxembourg, being an FPI, in the NCDs issued by Empower India must therefore be considered in the context of the FEMA and RBI framework governing FPI investments. The mere fact that the investor was a non-resident, or that the amounts were subsequently repatriated, cannot, according to him, convert an otherwise permitted investment into a contravention of Section 4 so as to attract Section 37A of the FEMA.

6.57. By relying upon the aforesaid provisions and circulars, he submits that the NCD transaction satisfied all the applicable requirements. The NCDs issued by Genpact India were Rupee-denominated and subscribed by Genpact Luxembourg, a SEBI-registered FPI. The NCDs were listed on the stock exchange within 15 days of allotment, on 31.03.2015, and had a maturity period exceeding three years, as required under the applicable RBI framework. The subscription amount was received by

Empower India and, upon redemption, repaid by New Genpact India to Genpact Luxembourg in Indian Rupees. There was no payment or transfer of foreign currency in the course of the borrowing or its repayment. He therefore submits that the transaction was undertaken in accordance with the applicable FEMA, SEBI and RBI framework and did not attract Section 4 of the FEMA or the power of seizure under Section 37A.

6.58. He further submits that the NCD transaction was examined by the RBI even before it was undertaken. The petitioner, through its representatives and consultants, had approached the RBI on a no-name basis and placed the particulars of its business and the proposed NCD issuance before it. In this regard, he refers to the email dated 05.11.2014 sent by Deloitte to Mr. Mohanty of the RBI, produced as Annexure-B to the writ petition. Pursuant thereto, Mr. Mohanty, by his communication dated 07.01.2015 addressed to Deloitte, produced as Annexure-D, indicated that the proposed transaction was permissible under the applicable framework.

6.59. He submits that, thereafter, Empower India sought a name-based clarification from the RBI regarding the NCD borrowing by its letter dated 12.12.2015. The RBI, by its letter dated 15.02.2016, considered the contours of the NCD borrowing and clarified, inter alia, that the NCDs were required to have a minimum maturity period of three years. According to him, apart from the said requirement, the transaction as disclosed by Empower India to the RBI was accepted as permissible under the applicable regulatory framework.

6.60. He therefore submits that the NCD borrowing was undertaken after obtaining regulatory clarification from the RBI and in accordance with the FEMA, SEBI and RBI framework applicable to the transaction. He further submits that matters concerning regulation of foreign exchange and capital account transactions under FEMA fall within the statutory domain of the RBI. Having placed the complete contours of the proposed transaction before the RBI and having received the aforesaid clarifications, Empower India was entitled to proceed on the basis that the transaction was permissible.

6.61. His submission is that the ED cannot, on the same set of facts, disregard the clarification and regulatory position communicated by the RBI and subsequently contend that the transaction constituted a contravention of FEMA. According to him, unless the ED identifies a specific provision of FEMA or the applicable regulations which was violated notwithstanding the RBI's clarification, it cannot substitute its own view for that of the regulatory authority and invoke Section 37A. He therefore submits that, the NCD transaction having been undertaken in accordance with the applicable law and the regulatory framework considered by the RBI, there was no contravention of Section 4 so as to confer jurisdiction upon the ED to exercise the power under Section 37A.

6.62. He relies upon the decision of the Hon'ble Supreme Court in ***LIC v. Escorts Ltd***.,[8] more particularly paragraphs 63, 64 and 84 thereof,

[8] (1986) 1 SCC 264

which are reproduced hereunder for easy reference:

63. *We have already extracted Section 29(1) and we notice that the expression used is "general or special permission of the Reserve Bank of India" and that the expression is not qualified by the word "previous" or "prior". While we are conscious that the word "prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1). On the other hand, the indications are all to the contrary. We find, on a perusal of the several, different sections of the very Act, that the Parliament has not been unmindful of the need to clearly express its intention by using the expression "previous permission" whenever it was thought that "previous permission" was necessary. In Sections 27(1) and 30, we find that the expression "permission" is qualified by the word "previous" and in Sections 8(1), 8(2) and 31, the expression "general or special permission" is qualified by the word "previous", whereas in Sections 13(2), 19(1), 19(4), 20, 21(3), 24, 25, 28(1) and 29, the expressions "permission" and "general or special permission" remain unqualified. The distinction made by Parliament between permission simpliciter and previous permission in the several provisions of the same Act cannot be ignored or strained to be explained away by us. That is not the way to interpret statutes. The proper way is to give due weight to the use as well as the omission to use the qualifying words in different provisions of the Act. The significance of the use of the qualifying word in one provision and its non-use in another provision may not be disregarded. In our view, the Parliament deliberately avoided the qualifying word previous in Section 29(1) so as to invest the Reserve Bank of India with a certain degree of elasticity in the matter of granting permission to non-resident companies to purchase shares in Indian companies. The object of the Foreign Exchange*

Regulation Act, as already explained by us, undoubtedly, is to earn, conserve, regulate and store foreign exchange. The entire scheme and design of the Act is directed towards that end. Originally the Foreign Exchange Regulation Act, 1947 was enacted as a temporary measure, but it was placed permanently on the Statute Book by the Amendment Act of 1957. The Statement of Objects and Reasons of the 1957 Amendment Act expressly stated, "India still continues to be short of foreign exchange and it is necessary to ensure that our foreign exchange resources are conserved in the national interest". In 1973, the old Act was repealed and replaced by the Foreign Exchange Regulation Act, 1973, the long title of which reads: "An Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency and bullion, for the conservation of foreign exchange resources of the country and the proper utilisation thereof in the interest of the economic development of the country." We have already referred to Section 76 which emphasises that every permission or licence granted by the Central Government or the Reserve Bank of India should be animated by a desire to conserve the foreign exchange resources of the country. The Foreign Exchange Regulation Act is, therefore, clearly a statute enacted in the national economic interest. When construing statutes enacted in the national interest, we have necessarily to take the broad factual situations contemplated by the Act and interpret its provisions so as to advance and not to thwart the particular national interest whose advancement is proposed by the legislation. Traditional norms of statutory interpretation must yield to broader notions of the national interest. If the legislation is viewed and construed from that perspective, as indeed it is imperative that we do, we find no difficulty in interpreting "permission" to mean "permission", previous or subsequent, and we find no justification whatsoever for limiting the expression "permission" to "previous previous'" only. In our view, what is necessary is that the permission of the Reserve

Bank of India should be obtained at some stage for the purchase of shares by non-resident companies.

64. *An argument which was strenuously pressed before us by Shri F.S. Nariman, learned Senior Advocate for the company, was that the very schema of the Act shows that the permission contemplated by Section 29(1) could only be previous permission, notwithstanding the circumstance that the word "previous'" does not qualify the expression "general or special permission" in Section 29(1) though it does in several other provisions. According to Sri Nariman, the Act was designed not merely to attract but also to regulate the inflow of foreign exchange. That was why, he said, the provisions were very stringent. We have no hesitation in agreeing with Mr Nariman that while the inflow of foreign exchange is welcomed by the Act, the inflow is also subject to stringent checks as otherwise in no time the economy of the country will be swamped with foreign money and taken over by giant multinationals. But that really does not affect the interpretation of the expression "permission" in Section 29(1). The Reserve Bank of India is not bound to give ex post facto permission whenever it is found that business has been started or shares have been purchased without its previous permission. In such cases, wherever the Reserve Bank of India suspects an oblique motive, we presume that the Reserve Bank of India will not only refuse permission but will further resort to action under Sections 50, 61 and 63, not merely punish the offender but also confiscate the property involved. We do not think that the scheme of the Act makes previous permission imperative under Section 29(1) though the failure to obtain prior permission may expose the foreign investor to prosecution, penalty, conviction and confiscation if permission is ultimately refused. Even if permission is granted, it may be made conditional. The expression "special permission" is wide enough to take within its stride a "conditional permission", the condition being relevant to the purpose of the statute, in this case, the conservation and regulation of foreign exchange. For example, ex post facto permission may be granted* *subject to the condition that the person purchasing the shares will not be entitled to repatriation benefits.*

84. *On an overall view of the several statutory provisions and judicial precedents to which we have referred we find that a shareholder has an undoubted interest in a company, an interest which is represented by his shareholding. Share is movable property, with all the attributes of such property. The rights of a shareholder are (i) to elect directors and thus to participate in the management through them; (ii) to vote on resolutions at meetings of the company; (iii) to enjoy the profits of the company in the shape of dividends; (iv) to apply to the court for relief in the case of oppression; (v) to apply to the court for relief in the case of mismanagement; (vi) to apply to the court for winding up of the company; (vii) to share in the surplus on winding up. A share is transferable but while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term, with all the rights of a shareholder, only when the transfer is registered in the company's register. A transfer effective between the transferor and the transferee is not effective as against the company and persons without notice of the transfer until the transfer is registered in the company's register. Indeed until the transfer is registered in the books of the company the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares. However, on the transfer of shares, the transferee becomes the owner of the beneficial interest though the legal title continues with the transferor. The relationship of trustee and "cestui que trust" is established and the transferor is bound to comply with all the reasonable directions that the transferee may give. He also becomes a trustee of the dividends as also of the right to vote. The right of the transferee "to get on the register" must be exercised with due diligence and the principle of equity which makes the transferor a constructive trustee does not extend to a case where a transferee takes no active* *interest "to get on the register". Where the transfer is regulated by a statute, as in the case of a transfer to a non-resident which is regulated by the Foreign Exchange Regulation Act, the permission, if any, prescribed by the statute must be obtained. In the absence of the permission, the transfer will not clothe the transferee with the right "to get on the register" unless and until the requisite permission is obtained. A transferee who has the right to get on the register, where no permission is required or where permission has been obtained, may ask the company to register the transfer and the company who is so asked to register the transfer of shares may not refuse to register the transfer except for a bona fide reason, neither arbitrarily nor for any collateral purpose. The paramount consideration is the interest of the company and the general interest of the shareholders. On the other hand, where, for instance, the requisite permission under the FERA is not obtained, it is open to the company and, indeed, it is bound to refuse to register the transfer of shares of an Indian company in favour of a non-resident. But once permission is obtained, whether before or after the purchase of the shares, the company cannot, thereafter, refuse to register the transfer of shares. Nor is it open to the company or any other authority or individual to take upon itself or himself, thereafter, the task of deciding whether the permission was rightly granted by the Reserve Bank of India. The provisions of the Foreign Exchange Regulation Act are so structured and woven as to make it clear that it is for the Reserve Bank of India alone to consider whether the requirements of the provisions of the Foreign Exchange Regulation Act and the various rules, directions and orders issued from time to time have been fulfilled and whether permission should be granted or not. The consequences of non-compliance with the provisions of the Act and the Rules, orders and directions issued under the Act are mentioned in Sections 48, 50, 56 and 63 of the Act. There is no provision of the Act which enables an individual authority outside the Act or determine for his own or its own purpose whether the Reserve Bank was right or wrong in granting permission* *under Section 29(1) of the Act. As we said earlier, under the scheme of the Act, it is the Reserve Bank of India that is constituted and entrusted with the task of regulating and conserving foreign exchange. If one may use such an expression, it is the "custodian-general" of foreign exchange. The task of enforcement is left to the Directorate of Enforcement, but it is the Reserve Bank of India and the Reserve Bank of India alone that has to decide whether permission may or may not be granted under Section 29(1) of the Act. The Act makes it its exclusive privilege and function. No other authority is vested with any power nor may it assume to itself the power to decide the question whether permission may or may not be granted or whether it ought or ought not to have been granted. The question may not be permitted to be raised either directly or collaterally. We do not, however, rule out the limited class of cases where the grant of permission by the Reserve Bank of India may be questioned, by an interested party in a proceeding under Article 226 of the Constitution, on the ground that it was mala fide or that there was no application of the mind or that it was opposed to the national interest as contemplated by the Act, being in contravention of the provisions of the Act and the Rules, orders and directions issued under the Act. Once permission is granted by the Reserve Bank of India, ordinarily it is not open to anyone to go behind the permission and seek to question it. It is certainly not open to a company whose shares have been purchased by a non-resident company to refuse to register the shares even after permission is obtained from the Reserve Bank of India on the ground that permission ought not to have been granted under the FERA. It is necessary to remind ourselves that the permission contemplated by Section 29(1) of the Foreign Exchange Regulation Act is neither intended to nor does it impinge in any manner on any legal right of the company or any of its shareholders. Conversely neither the company nor any of its shareholders is clothed with any special right to question any such permission.*

6.63. By relying on ***LIC v. Escorts Ltd.,*** he submits that where the statutory scheme entrusts a particular function to a specified authority, another authority cannot assume that function or sit in appeal over its exercise. In the context of foreign exchange regulation, the Hon'ble Supreme Court held that the RBI is entrusted with determining whether the requirements of the foreign exchange law, rules, directions and orders have been fulfilled and whether the requisite permission ought to be granted. Once such permission is granted, it is ordinarily not open to another authority to go behind it or question its correctness collaterally.

6.64. Applying this principle, he submits that the NCD transaction was placed before the RBI, which examined its terms and issued the communications dated 07.01.2015 and 15.02.2016. The ED, being the enforcement authority, cannot, according to him, assume the RBI's regulatory function and independently conclude that the same transaction was impermissible under FEMA. The question whether the transaction complied with the applicable FEMA and RBI framework was within the regulatory domain of the RBI.

6.65. He further submits that ***LIC v. Escorts Ltd.*** recognises only a limited scope for questioning a permission granted by the RBI, such as where it is alleged to be mala fide, based on non-application of mind, or contrary to the Act and the applicable rules, orders or directions. In the absence of any such allegation or finding, the ED cannot disregard the RBI's clarification and, on the same facts, treat the NCD transaction as a contravention of FEMA for the purpose of invoking Section 37A.

6.66. He submits that the regulatory, clarificatory and other powers under the FEMA are vested in the RBI and, once the RBI has considered and permitted a transaction, the ED cannot go behind such permission and independently question its validity. He further submits that the NCD borrowing was also disclosed to SEBI through an interpretative letter concerning the maturity period. SEBI thereafter issued an informal guidance dated 30.11.2018, confirming that there was no violation of the applicable restriction norms in respect of the proceeds raised by the petitioner through the issuance of NCDs to Genpact Luxembourg.

6.67. As regards the issuance of shares, he submits that the shares do not form part of the seizure order passed under Section 37A of the FEMA. Nevertheless, he submits that the petitioner seeks to place the complete position before this Court and does not seek to avoid any proceedings or transaction in which it is involved. Insofar as the purchase of shares of Headstrong Singapore in Old Genpact India by Empower India is concerned, he submits that the transaction was found to be at arm's length and acceptable by the Assessing Officer and the Transfer Pricing Officer. The same finding was thereafter affirmed by the ITAT and subsequently by the Hon'ble Delhi High Court.

6.68. In this regard he relies on the decision of the Hon'ble Delhi High Court in ***Commissioner Of Income Tax (International Taxation) v. Genpact Consulting Singapore Pte Ltd***[9] , more particularly paragraphs 9, 10, 11 and 12

[9] ITA 103/2023 Dated 11.12.2024

thereof, which are reproduced hereunder for easy reference:

__9.__ Quite apart from the view which the Tribunal has come to express, we find that the order of the Commissioner is clearly rendered unsustainable on a more fundamental plane. As is evident from the extracts of the order passed in revision, the principal allegation appears to have been that the device adopted by Genpact India was intended to avoid the payment of DDT as contemplated under Section 115-O*. Undisputedly, that dividend would have to be one which would have been declared by Genpact India. We are, however, and in the present case, concerned with an assessment proposed to be made in the hands of Headstrong HCS, now known as Genpact Consulting Pte. We thus find ourselves unable to appreciate how a perceived liability in the hands of Genpact India could be viewed or considered as being relevant for the purposes of formation of opinion that the assessment of Genpact Consulting was erroneous and prejudicial to the Revenue.*

__10.__ Before us, the appellants have failed to establish that even if the view as expressed by the Commissioner were assumed to be correct, any additional tax liability would have been foisted upon Genpact Consulting.

__11.__ We take note of an identical position which obtained in the case of **Genpact Luxembourg S.A.R.L. vs. Assistant Commissioner of Income Tax, Circle *1(3)(1)***, *International Taxation, New Delhi and Anr.9 and which had assailed the initiation of* Section 148 *proceedings. Dealing with identical allegations which had come to be levelled against that assessee, we had while allowing that writ petition observed as follows: -*

"9. As is evident from a reading of the initial notice under Section 148A(b)*, the respondents had taken the stand that the interest income derived from the NCDs floated by GIPL had not been appropriately offered to tax on*

account of mischaracterization of income. By the time the Section 148A(d) *order came to be passed, the respondents sought to buttress their case of proposed reassessment on an order under* Section 263 *of the Act passed by the CIT (IT) in the case of Headstrong Consulting Singapore Pte. Ltd. The principal allegation now laid was that although the funds were taken out in the form of interest payments, they were in fact liable to be declared as dividend and subjected to DDT.*

10. It is in the aforesaid backdrop that Mr. Jolly had contended that there is an evident and manifest variation between the reasons 2024 SCC OnLine Del 5514 which had been originally recorded in the notice dated 11 March 2022 and the final order passed by the respondents disposing of the objections of the petitioner on 29 March 2022.

11. The ineffaceable connect which must exist between the reasons initially disclosed proposing reassessment and which constitute the basis for formation of opinion with respect to escapement of income and the final decision to commence reassessment, was an aspect which was duly highlighted by us in our judgment in ATS Infrastructure Limited v. Assistant Commissioner of Income Tax Circle *1(1). We had in that decision observed as follows:--*

xxxx xxxx xxxx

***12.** Quite apart from the above, the impugned proceedings are liable to be quashed on a more fundamental ground. Undisputedly, the petitioner had offered the interest income to tax in terms of the provisions contained in* Section 194LD *of the Act. The ultimate order under* Section 148A(d)*, however, alleges that the remittance in fact, constituted dividend and which was liable to be taxed in terms of* Section 115-O *of the Act.*

6.69. By relying on ***Genpact Consulting Singapore Pte Ltd*** he submits that the transaction relating to the acquisition of shares has already been examined by the Hon'ble Delhi High Court in proceedings initiated by the Income Tax Department against Genpact Consulting Singapore Pte. Ltd., formerly known as Headstrong Consulting Singapore. The Hon'ble Delhi High Court, while examining the allegation that the transaction was structured to avoid liability towards Dividend Distribution Tax ("**DDT**"), held that a perceived tax liability in the hands of Genpact India could not be treated as relevant for forming an opinion that the assessment of Genpact Consulting Singapore was erroneous and prejudicial to the interests of the Revenue.

6.70. He submits that the aforesaid finding is relevant to the present proceedings since the ED has relied upon the Income Tax proceedings and the alleged loss of revenue arising from the transaction. According to him, when the Hon'ble Delhi High Court has already held that the alleged liability of Genpact India could not be attributed to or used as a basis for action against Genpact Consulting Singapore, the same allegation cannot now be relied upon by the ED to support the seizure proceedings under Section 37A of the FEMA.

6.71. He further submits that the Hon'ble Delhi High Court also took note of the earlier decision concerning Genpact Luxembourg S.A.R.L., where the Income Tax Department had sought to reopen the assessment on the allegation that interest paid on the NCDs was, in substance, dividend liable to DDT. The Court found a material variation between the reasons initially recorded and the basis subsequently relied upon for the proposed reassessment. He submits that the same principle applies here: the ED must establish the basis for its action from the reasons recorded in the Section 37A order and cannot rely upon a different case subsequently developed during the proceedings.

6.72. His submission is that the transaction relating to shares has been dealt by the Hon'ble Delhi High Court which related to the proceedings initiated by the income tax department against

Genpact Singapore (earlier Headstrong Singapore) and the Hon'ble Delhi High Court has come to a categorical conclusion that a liability in the hands of Genpact India could not be viewed or considered as being relevant for the purpose of formation of opinion that the assessment of Genpact Consulting Singapore was erroneous and prejudicial to the revenue.

6.73. He submits that the interest paid by Genpact India to Genpact Luxembourg in respect of the NCD borrowing was treated as interest payable to a non-resident entity and tax was accordingly deducted at source. The relevant provision, namely Section 194LD of the Income Tax Act, 1961, is reproduced hereunder for ease of reference:

> ***194LD. Income by way of interest on certain bonds and Government securities.***
>
> *(1) Any person who is responsible for paying to a person being a Foreign Institutional Investor or a Qualified Foreign Investor, any income by way of interest referred to in sub-section (2), shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of five per cent.*

(2) The income by way of interest referred to in sub-section (1) shall be the interest payable on or after the 1st day of June, 2013 but before the 1st day of June, 2015 in respect of investment made by the payee in—

(i) a rupee denominated bond of an Indian company ; or

(ii) a Government security:

***Provided** that the rate of interest in respect of bond referred to in clause (i) shall not exceed the rate as may be notified by the Central Government in this behalf.*

Explanation.—For the purpose of this section,—

(a) "Foreign Institutional Investor" shall have the meaning assigned to it in clause (a) of the Explanation to section 115AD;

(b) "Government security" shall have the meaning assigned to it in clause (b) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(c) "Qualified Foreign Investor" shall have the meaning assigned to it in the Circular No. Cir/IMD/DF/14/2011, dated the 9th August, 2011, as amended from time to time, issued by the Securities and Exchange Board of India, under section 11 of the Securities and Exchange Board of India Act, 1992 (15 of 1992).

6.74. He submits that this aspect was dealt with by the Hon'ble Delhi High Court in the case of ***Genpact Luxembourg SARL v. Assistant Commissioner of Income Tax*** [WP(C). 7784 of 2022] vide its decision dated 08.08.2024. The relevant paragraphs 2, 12, 13, 14, 15 and 16 are reproduced hereunder for easy reference:

> ***2.*** *As would be evident from the initial notice under Section 148A(b) dated 11 March 2022, the respondents had taken the position that on perusal of the information available with the Department, it appeared that interest income derived from Non-convertible Debentures3 floated by Genpact India Private Limited4 had not been appropriately offered to tax due to mischaracterization of income. The petitioner was consequently called upon to show cause why an amount of INR 5,06,00,00,000/- should not be treated as income having escaped assessment.*
>
> ***12.*** *Quite apart from the above, the impugned proceedings are liable to be quashed on a more fundamental ground. Undisputedly, the petitioner had offered the interest income to tax in terms of the provisions contained in* Section 194LD *of the Act. The ultimate order under* Section 148A(d)*, however, alleges that the remittance in fact, constituted dividend and which was liable to be taxed in terms of* Section 115-O *of the Act.*
>
> ***13.*** Section 115-O*, insofar as it is relevant for our purposes, is extracted hereinbelow:-*
>
> *"115-O. Tax on distributed profits of domestic companies.--[(1) Notwithstanding anything contained in any other provision of this Act and subject to the provisions of this section, in addition to the income tax chargeable in respect of the total income of a domestic company for any assessment year, any amount declared, distributed or paid by such company by way of dividends (whether interim or otherwise) on or after the 1st day of April, 2003 [but on or before the 31st day of March, 2020], whether out of current*

or accumulated profits shall be charged to additional income tax (hereafter referred to as tax on distributed profits) [at the rate of fifteen per cent] :] [Provided that in respect of dividend referred to in sub-clause (e) of clause (22) of Section 2*, this sub-section shall have effect as if for the words "fifteen per cent.", the words "thirty per cent." Had been substituted;] [(1-A) The amount referred to in sub-section (1) shall be reduced by,--*

[(i) the amount of dividend, if any, received by the domestic company during the financial year, if such dividend is received from its subsidiary and,--

(a) where such subsidiary is a domestic company, the subsidiary has paid the tax which is payable under this section on such dividend; or

(b) where such subsidiary is a foreign company, the tax is payable by the domestic company under Section 115-BBD *on such dividend:*

Provided that the same amount of dividend shall not be taken into account for reduction more than once;] (ii) the amount of dividend, if any, paid to any person for, or on behalf of, the New Pension System Trust referred to in clause (44) of Section 10*. Explanation.-- For the purposes of this sub-section, a company shall be a subsidiary of another company, if such other company, holds more than half in nominal value of the equity share capital of the company.] [(1-B) For the purposes of determining the tax on distributed profits payable in accordance with this section, any amount by way of dividends referred to in sub-section (1) as reduced by the amount referred to in sub-section (1-A) [hereafter referred to as net distributed profits], shall be increased to such amount as would, after reduction of the tax on such increased amount at the rate specified in sub-section (1), be equal to the net distributed profits:] [Provided that this sub-section shall not apply in respect of dividend referred to in sub-clause (e) of clause (22) of* Section 2*.]"*

> ***14.*** *As is plainly evident from a reading of that provision, DDT is liable to be paid by the company which declares, distributes or pays the same. The petitioner herein was merely the recipient of the interest income and it was thus, clearly not the entity which had either declared or paid the dividend. Viewed in that context, even if the payment were to be assumed to be dividend, the liability to pay tax thereon could have only been foisted upon the company which had declared, distributed or paid the same. That in the facts of the present case and even if the allegation laid by the respondents were to be accepted would have been GIPL.*
>
> ***15****. We also note that the issues emanating from the order of the CIT (IT) under* Section 263 *of the Act presently forms subject matter of challenge in Commissioner of Income Tax (International Taxation)-2 Vs. Genpact Consulting Singapore Pte Ltd. (Earlier known as Headstrong Consulting Pte. Ltd.)10. While issues relating to the merits and the validity of the view taken by the CIT (IT) would have to be examined in that pending appeal, the same would clearly not sustain the action for reassessment which is impugned herein.*
>
> ***16.*** *We accordingly allow the instant writ petition and quash the impugned notice under* Section 148A(b) *dated 11 March 2022, impugned order under* Section 148A(d) *dated 29 March 2022 and the consequential notice issued under* Section 148 *dated 30 March 2022.*

6.75. By relying on ***Genpact Luxembourg SARL*** he submits that, in respect of the interest payments made by New Genpact India to Genpact Luxembourg for the financial year 2017–2018, the returns were initially accepted by the Income Tax Department. Subsequently, the assessment was reopened under Sections 147 and 148 of the Income Tax Act on the premise that the amount paid by New Genpact India was not, in substance, interest in the hands of Genpact Luxembourg and that the underlying NCD borrowing was a sham transaction. The amount was consequently sought to be assessed in the hands of Genpact Luxembourg under the head "Income from Other Sources".

6.76. By relying upon ***Genpact Luxembourg S.A.R.L.,*** he submits that the subsequent proceedings proceeded on a different characterisation of the very same payment. While the payment had initially been treated as interest income and subjected to the applicable tax treatment under Section 194LD of the Income Tax Act, the order under Section 148A(d) alleged that the remittance was, in fact, dividend liable to tax under Section 115-O. The Hon'ble Delhi High Court held that, under Section 115-O, the liability to pay DDT is upon the domestic company which declares, distributes or pays the dividend. Genpact

Luxembourg, being merely the recipient, could not be made liable for such tax. Even assuming that the payment constituted dividend, the liability could only be upon the company which had declared, distributed or paid it, namely, Genpact India.

6.77. He submits that on this basis the Hon'ble Delhi High Court quashed the notice under Section 148A(b) dated 11.03.2022, the order under Section 148A(d) dated 29.03.2022 and the consequential notice under Section 148 dated 30.03.2022. Thus, the subsequent attempt to alter the character of the payment from interest to dividend did not sustain the reassessment proceedings against Genpact Luxembourg.

6.78. He submits that the decision is material to the present proceedings since the seizure order under Section 37A of FEMA also relies, at least in part, upon the Income Tax proceedings and the allegations concerning the character of the NCD transaction and the payments made thereunder. The Income Tax proceedings relied upon by the Enforcement Directorate having been quashed, they cannot, by themselves, be treated as establishing a contravention of Section 4 of FEMA or as furnishing the jurisdictional facts necessary for exercise of power under Section 37A.

6.79. He further submits that the Income Tax proceedings themselves proceeded on different characterisation of the same transaction, initially treating the payment as interest and subsequently alleging that the NCD borrowing was sham and that the payment was, in substance, dividend. Such subsequent change in characterisation, particularly when the reassessment proceedings founded upon it have been quashed, cannot by itself establish a contravention of FEMA. The Enforcement Directorate was required to independently establish the ingredients of Section 4 and the jurisdictional facts necessary for invoking Section 37A, and could not rely merely upon an Income Tax proceeding which had itself been quashed.

6.80. The submission of Learned Senior Advocate Sri. Arvind Datar is that the proceedings initiated against Genpact Singapore (earlier Headstrong

Singapore) having been quashed by the ITAT in ITA No.501/DEL/2021 by order dated 13.06.2022 and the proceedings under Section 263 of the IT Act having been quashed by the Hon'ble Delhi High Court in ***Commissioner of Income Tax(International Taxation) v Genpact Consulting Singapore Pte Ltd*** [ITA 103 of 2023] and the proceedings initiated against Genpact Luxembourg under Section 148A(d) having been quashed by a Division Bench of the Hon'ble Delhi High Court in ***Genpact Luxembourg SARL v Assistant Commissioner of Income Tax(International Taxation)*** [WP 7784 of 2022], those orders are equally applicable to the present matter and as such, Despite the orders of the Hon'ble Delhi High Court, the ED could not have reopened the matters. He submits that the manner in which the respondent No.1 has dealt with the orders of a Constitutional Court, namely the Hon'ble Delhi High Court, in the impugned order, leaves much to be desired and in a restrained manner he submits that the respondent No.1 could not have made the comments in the Section 37A order by stating that the order passed by the Hon'ble Delhi High Court was on technicality and not on merits.

6.81. His submission firstly is that it was for the Income Tax Department to have challenged the orders of the Hon'ble Delhi High Court, which was not so challenged. The Income Tax department accepted the said orders. It is only after the ED initiated the enquiry that the Income Tax Department has challenged the Order of the Hon'ble Delhi High Court before the Hon'ble Supreme Court.

6.82. His submission is that, as far as he is aware, it is only the Order relating to ***Genpact Consulting Singapore,*** (earlier Headstrong Consulting Singapore), which is challenged before the Hon'ble Supreme Court relating to the issuance of shares. Insofar as the issuance of NCD, which was a matter relating to ***Genpact Luxembourg SARL***, in WP No.7784 of 2022, the said order of the Hon'ble Delhi High Court has not been challenged by the Income Tax Department and has been accepted by the said department.

6.83. Thus, his submission is that only the order under Section 263 of the IT Act has been challenged. The orders under Section 148A(d) have been accepted by the Income Tax Department, and as such, the ED cannot attack the said orders of the Hon'ble Delhi High Court in the ***Genpact Luxembourg SARL*** matter without the IT Department having challenged them. Thus, he submits that the Order under Section 37A of FEMA, being related only to the NCD, that is issued to ***Genpact Luxembourg SARL***, the order in that matter of the Hon'ble Delhi High Court not having been challenged by the IT department, the ED could not have issued any notice and or taken any action under Section 37A of FEMA, which would be in contravention of the decision of the Hon'ble Delhi High Court in WP No.7784 of 2022.

6.84. His submission is that the ED could not have taken a contrary stand to the decision of the Hon'ble Delhi High Court in a transaction which is 11 years old and has been approved by the RBI, SEBI and the IT department, by not challenging the order in WP No.7784 of 2022. His submission is that the investigation, having been commenced on the basis of communication issued by RBI as regards reconciliation of exports, which is an offence under Section 4 of the FEMA, had nothing to do with the transaction of the petitioner and, as such, under the guise of the letter issued by RBI to the ED, the ED would not have jurisdiction over the transaction of the petitioner.

6.85. He relies upon the decision of the Hon'ble Supreme Court in ***Sivanandan C.T. v. High Court of Kerala***[10], more particularly paragraph 44 thereof which is reproduced hereunder for easy reference:

> *44. In a constitutional system rooted in the rule of law, the discretion available with public authorities is confined within clearly defined limits. The primary principle underpinning the concept of rule of law is consistency and predictability in decision-making. A decision of a public authority taken without any basis in principle or rule is unpredictable and is, therefore, arbitrary and antithetical to the rule of law. [S.G. Jaisinghani v. Union of India, 1967 SCC OnLine SC 6] The rule of law promotes fairness by stabilising the expectations of citizens from public authorities. This was also considered in a recent decision of this Court in SEBI v. Sunil Krishna Khaitan [SEBI v. Sunil Krishna Khaitan, (2023) 2 SCC 643] , wherein it was observed that regularity and predictability are hallmarks of good regulation and governance. [SEBI v. Sunil Krishna*

[10] (2024) 3 SCC 799

Khaitan, (2023) 2 SCC 643] This Court held that certainty and consistency are important facets of fairness in action and non-arbitrariness : (Sunil Krishna Khaitan case [SEBI v. Sunil Krishna Khaitan, (2023) 2 SCC 643] , SCC pp. 678-79, paragraph59)

"59. … Any good regulatory system must promote and adhere to principle of certainty and consistency, providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. [Union of India v. Raghubir Singh, (1989) 2 SCC 754. Also see, The Nature of the Judicial Process, Benjamin N. Cardozo, p. 33:"I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another."(emphasis supplied)] … This does not mean that the regulator/authorities cannot deviate from the past practice, albeit any such deviation or change must be predicated on greater public interest or harm. This is the mandate of Article 14 of the Constitution of India which requires fairness in action by the State, and non-arbitrariness in essence and substance. Therefore, to examine the question of inconsistency, the analysis is to ascertain the need and functional value of the change, as consistency is a matter of operational effectiveness."

(emphasis supplied)

6.86. By relying on ***Sivanandan***, his submission is that consistency and predictability in the action of public authorities are essential facets of the rule of law and fairness under Article 14 of the

Constitution. A person who undertakes a transaction in accordance with the regulatory framework and on the basis of the position communicated or accepted by the competent statutory authorities is entitled to expect that the same transaction will not subsequently be treated as impermissible by another authority without a principled basis for such departure.

6.87. He submits that, in the present case, the NCD transaction was undertaken after approaching the Reserve Bank of India and complying with the applicable regulatory framework. The transaction was also subjected to examination in the Income Tax proceedings, where the payments were initially treated as interest arising from the NCDs. The subsequent attempt to characterise the same transaction differently, including as a sham borrowing or as something other than interest, has already been considered in the proceedings before the Hon'ble Delhi High Court referred to hereinabove.

6.88. He submits that the Enforcement Directorate, while exercising power under Section 37A of

FEMA, cannot disregard the regulatory and factual position that prevailed when the transaction was undertaken and, without identifying any intervening change in law or circumstance, adopt a contrary characterisation of the very same transaction. Such a departure, particularly when the transaction had been disclosed to and considered by the concerned regulatory authorities, must have a rational and legally sustainable basis.

6.89. He further submits that ***Sivanandan C.T.*** does not mean that a public authority is forever bound by its past practice; however, any departure must be founded on a valid and discernible basis and cannot be arbitrary. In the present case, there is no such changed circumstance or intervening legal development relied upon in the seizure order which could justify treating the NCD transaction, earlier dealt with within the applicable regulatory and tax framework, as constituting a contravention of Section 4 of FEMA.

6.90. According to him, the contrary stand adopted by the Enforcement Directorate, without addressing the regulatory permissions, clarifications and treatment of the transaction by the concerned authorities, defeats the requirement of certainty and predictability in regulatory action. It consequently cannot, by itself, furnish a rational basis for formation of the "reason to believe" required under Section 37A of FEMA.

6.91. He submits that the investigation by the Enforcement Directorate has remained pending since 2021, pursuant to the letter issued by the Reserve Bank of India on 27.09.2019, in respect of a transaction which is more than eleven years old. Despite the passage of considerable time, no complaint has been filed by the Enforcement Directorate seeking adjudication of any alleged contravention under FEMA.

6.92. He submits that, in the absence of any complaint having been filed for adjudication under FEMA, there was no justification for resorting to the pre-emptive power of seizure under Section 37A. According to him, Section 37A cannot be invoked merely to keep the property under seizure while the substantive adjudicatory proceedings contemplated under FEMA have not even been initiated. In the facts of the present case, there was no immediate or imminent circumstance warranting such pre-emptive action.

6.93. He further submits that the petitioner has at all times cooperated with the investigation conducted by the Enforcement Directorate and has made itself available to the authorities. There is, therefore, no apprehension that the petitioner would abscond, remove itself from the jurisdiction of the authorities or otherwise frustrate any proceedings that may be initiated under FEMA.

6.94. He submits that the petitioner has a substantial and established business presence in India, involving business operations running into thousands of crores of rupees and employment of lakhs of persons. In such circumstances, the apprehension underlying a pre-emptive seizure is wholly misplaced. The petitioner is firmly within the jurisdiction of the Indian authorities and there is no question of it being beyond the reach of any proceedings that may be lawfully initiated.

6.95. He submits that the seizure of the petitioner's head office is, therefore, wholly disproportionate to the object sought to be achieved. The seizure directly interferes with the petitioner's business operations and deprives it of the use of its principal place of business, despite the investigation relating to a transaction more than eleven years old and despite the petitioner having cooperated with the investigation. Such an exercise, according to him, assumes a punitive character even before the alleged contravention has been adjudicated.

6.96. He accordingly submits that, in the absence of any immediate necessity for protective or pre-emptive action, the continued seizure of the petitioner's head office cannot be justified merely on the ground that an investigation is pending. The extraordinary power under Section 37A must be exercised for the purpose for which it is conferred and only where its statutory conditions are satisfied. In the present case, the long passage of time, the absence of adjudication proceedings, the petitioner's continued cooperation and its established presence in India demonstrate that there was neither necessity nor proportionality in resorting to seizure of the head office.

6.97. He relies on the decision of the Hon'ble Supreme Court in ***Standard Chartered Bank v. Ministry of Home Affairs***[11], more particularly paragraphs 30, 31, 32 thereof, which are reproduced hereunder for easy reference:

> ***30.*** *Now adverting to the facts of the present case, we find that this is not a case where the delay can be laid at the doorstep of the appellants, nor is it a case of mere passive lapse of time, rather, the record discloses a chronicle of persistent and unexplained inaction on the part of the respondent - complainant itself, spanning virtually the entire life of these proceedings. The complaint came to be instituted on 30.05.2002 for a transaction said to have taken place as far back as in 1991-1992, unaccompanied by a single supporting document, and cognizance was taken and summons issued on that very date. Yet, remarkably, the summons so issued were not even collected by the respondent - complainant for service for almost 2 years thereafter, and it was only sometime in 2004 that the respondent - complainant first came forward to collect the summons.*
>
> ***31.*** *Thereafter, for a further period of 8 years, that is, from 2004 to 2012, the summons, although issued from*

[11] 2026 SCC OnLine SC 1368

time to time, yet could not be got served upon the accused by the respondent - complainant, save in the case of the appellant no. 1, Standard Chartered Bank, whose counsel had entered an appearance on 16.08.2005. Through this entire decade, the proceedings remained frozen at the stage of issue of process, with the respondent - complainant itself remaining absent on numerous occasions. Notably, the court record entry dated 12.08.2005 records that even when the summons returned unserved, the respondent - complainant took no further steps whatsoever, such as moving an application for issuance of a non-bailable warrant, a course it eventually chose to adopt only on 28.05.2012, i.e., almost 7-8 years after the summons had first come back unserved. It was in this backdrop that the High Court, in the impugned order dated 22.03.2012, was constrained to describe the delay as "highly deplorable" and directed the trial court to conclude the entire trial within one-month. Still, even this direction met the same fate. The court record entry dated 30.05.2012 records that when fresh notices were issued by the Magistrate's court, the respondent - complainant declined to collect the same for service upon the accused, notwithstanding that it was already in possession of the accused's updated addresses from the record of the High Court itself. It was only on 28.05.2012 that the notices were handed over to the respondent - complainant, and service was thereafter effected on 05.06.2012.

***32**. Even thereafter, neither the respondent - complainant nor the accused appeared before the Magistrate's court, with the result that the one-month period fixed by the High Court lapsed without the trial having even commenced in earnest, compelling the Magistrate to write to the High Court on 08.06.2012 seeking an extension, which was duly granted on 29.06.2012, extending the outer limit to 6-months. Despite this further indulgence, the respondent - complainant continued to remain absent right up to the filing of the present appeals. On this chronology, therefore, the question that the decisions discussed above require us to ask, namely, who is responsible for the delay, admits of only one answer - at every stage at which the proceedings could have been* *carried further, it was virtually the prosecution that failed to act with even ordinary diligence and failed to take further steps wherever needed. The respondent - complainant could have filed the application for issuance of a non-bailable warrant long back, well before 2012, since the summons had returned unserved on multiple occasions over the years, but chose not to do so, and for what special reasons, nobody knows.*

6.98. By relying on ***Standard Chartered Bank***, his submission is that while mere passage of time by itself may not invalidate proceedings, prolonged and unexplained inaction on the part of the authority is a relevant circumstance in determining whether the subsequent exercise of extraordinary statutory power is justified. In the present case, the transaction in question is more than eleven years old and the investigation by the Enforcement Directorate has been pending since 2021. Despite the considerable passage of time, no complaint has been filed for adjudication of the alleged contravention under FEMA.

6.99. He submits that the very fact that the alleged contravention relates to a transaction more than a decade old, while the Enforcement Directorate has had the matter under investigation for several years, militates against the existence of any immediate or emergent circumstance warranting seizure under Section 37A. Had there been any genuine apprehension that the property would be removed, alienated or otherwise placed beyond the reach of the authorities, such apprehension ought to have manifested itself contemporaneously and not after the lapse of several years.

6.100. He submits that the power of seizure under Section 37A is a pre-emptive measure and cannot be exercised as a matter of routine or merely because an investigation remains pending. Where the authority has allowed the matter to remain under investigation for years without initiating adjudication proceedings, it cannot, without demonstrating a subsequent change in circumstances or an immediate necessity, invoke the extraordinary power of seizure in respect of an eleven-year-old transaction.

6.101. He further submits that the petitioner has throughout cooperated with the investigation and has remained within the jurisdiction of the Indian authorities. There is no allegation that the petitioner has attempted to alienate the property, remove itself from the jurisdiction or otherwise frustrate the proceedings. In these circumstances, the prolonged delay, absence of adjudication proceedings and continued cooperation of the petitioner demonstrate that there was no necessity for resorting to pre-emptive seizure.

6.102. He accordingly submits that the chronology of events itself demonstrates the absence of urgency which could justify the exercise of power under Section 37A. The seizure, having been effected after such prolonged inaction and in the absence of any intervening circumstance demonstrating an immediate apprehension of frustration of the proceedings, is therefore disproportionate and cannot be sustained merely on the ground that an investigation is still pending.

6.103. He relies on the decision of the Hon'ble Supreme Court in ***Union of India v. Citi Bank***[12], more particularly paragraphs 19 to 24

[12] (2022) 19 SCC 188

thereof, which are reproduced hereunder for easy reference:

> ***19.*** *It is a settled proposition of law that when the proceedings are required to be initiated within a particular period provided under the statute, the same are required to be initiated within the said period. However, where no such period has been provided in the statute, the authorities are required to initiate the said proceeding within a reasonable period. No doubt that what would be a reasonable period would depend upon the facts and circumstances of each case.*
>
> ***20.*** *Reference in this respect could be made to the judgment given by a three-Judge Bench of this Court in State of Gujarat v. Patil Raghav Natha [State of Gujarat v. Patil Raghav Natha, (1969) 2 SCC 187] , wherein this Court has held thus : (SCC p. 193, paragraph11)*
>
> *"11. The question arises whether the Commissioner can revise an order made under Section 65 at any time. It is true that there is no period of limitation prescribed under Section 211, but it seems to us plain that this power must be exercised in reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order which is being revised."*
>
> *(emphasis supplied)*
>
> ***21.*** *In State of M.P. v. Bani Singh [State of M.P. v. Bani Singh, 1990 Supp SCC 738 : 1991 SCC (L&S) 638] , this Court found that the departmental proceedings initiated in the year 1987 for the alleged irregularities that took place between the years 1975-1977 could not be permitted to be continued as it would be unfair and unreasonable.*
>
> ***22.*** *In Union of India v. Citedal Fine Pharmaceuticals [Union of India v. Citedal Fine Pharmaceuticals, (1989) 3 SCC 483 : 1989 SCC (Tax) 464] , validity of Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, which did not provide for a period of limitation for initiating proceedings for recovery of*

escaped duty, was challenged. This Court in the said case observed [Union of India v. Citedal Fine Pharmaceuticals, (1989) 3 SCC 483 : 1989 SCC (Tax) 464] thus : (SCC p. 487, paragraph6)

"6. The learned counsel appearing for the respondents urged that Rule 12 is unreasonable and violative of Article 14 of the Constitution, as it does not provide for any period of limitation for the recovery of duty. He urged that in the absence of any prescribed period for recovery of the duty as contemplated by Rule 12, the officer may act arbitrarily in recovering the amount after lapse of long period of time. We find no substance in the submission. While it is true that Rule 12 does not prescribe any period within which recovery of any duty as contemplated by the rule is to be made, but that by itself does not render the rule unreasonable or violative of Article 14 of the Constitution. In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period, would depend upon the facts of each case. Whenever a question regarding the inordinate delay in issuance of notice of demand is raised, it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case notice of demand for recovery was made within reasonable period. No hard-and-fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case."

(emphasis supplied)

***23.** In Mohd. Kavi Mohamad Amin v. Fatmabai Ibrahim [Mohd. Kavi Mohamad Amin v. Fatmabai Ibrahim, (1997) 6 SCC 71] , suo motu proceedings were initiated in September 1976 by the mamlatdar questioning the validity of sale deeds executed in December 1972. In the said case, this Court, after noticing the earlier decisions on the issue, observed thus : (SCC pp. 72-73, paragraph2)*

> *"2. … where no time-limit is prescribed for exercise of a power under a statute it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. We are satisfied that in the facts and circumstances of the present case, the suo motu power under Section 84-C of the Act was not exercised by the Mamlatdar within a reasonable time."*
>
> *(emphasis supplied)*
>
> ***24.** Admittedly, in the present cases, the alleged transactions had taken place during Financial Years 1992 and 1993. Show-cause notices for the said transactions were issued in the year 2002 and that too just before the sunset period of FERA was to expire i.e. on 1-6-2002. We are therefore of the considered view that show-cause notices and the proceedings continued thereunder are liable to be set aside on this short ground.*

6.104. By relying upon ***Citi Bank***, he submits that merely because the statute does not prescribe a period of limitation for exercise of a particular power, the authority is not entitled to exercise such power at any time. The power must be exercised within a reasonable period, and what constitutes a reasonable period has to be determined having regard to the facts and circumstances of each case. He submits that the Hon'ble Supreme Court has applied this principle even in proceedings arising under FERA and has quashed the proceedings solely on the ground of inordinate delay, without examining the merits of the alleged contravention.

6.105. He submits that the principle laid down in ***Citi Bank*** squarely applies to the present case. The transaction alleged to constitute the contravention is more than eleven years old, while the investigation by the Enforcement Directorate has itself remained pending since 2021. Despite having knowledge of the transaction and having sufficient opportunity to initiate appropriate proceedings, no complaint for adjudication of the alleged contravention under FEMA has been filed till date.

6.106. He submits that there is no explanation in the seizure order for the extraordinary delay in proceeding against a transaction of such vintage, nor is there any material to demonstrate that any subsequent event created an apprehension requiring immediate protective action. The circumstances are therefore materially different from a case where a recent transaction or a newly discovered act necessitates prompt intervention.

6.107. He further submits that the delay assumes greater significance in the context of Section 37A, since the power exercised thereunder is pre-emptive in nature. If the authorities have permitted the matter to remain under investigation for several years without initiating adjudication proceedings, the mere pendency of investigation cannot, without more, furnish justification for subsequently resorting to seizure of property in respect of an eleven-year-old transaction.

6.108. He submits that the petitioner has throughout cooperated with the investigation and has remained within the jurisdiction of the Indian authorities. There is no allegation that the petitioner has attempted to alienate the property, remove itself from the jurisdiction or otherwise obstruct the proceedings. Consequently, there was neither any justification for the delay nor any emergent circumstance warranting the extraordinary measure of seizure.

6.109. He accordingly submits that, applying the principle laid down in ***Citi Bank***, the exercise of power under Section 37A after such an inordinate and unexplained lapse of time, in the absence of any demonstrated urgency or intervening circumstance, is not a reasonable exercise of statutory power. The seizure order is therefore liable to be set aside on the ground of delay alone, without it being necessary to enter into the merits of the alleged FEMA contravention.

6.110. His submission on the basis of all the above arguments is that the Writ Petition in WP No. 7283 of 2026 is required to be allowed and the reliefs sought for to be granted.

<u>Petitioner's arguments in WP 16763/2026.</u>

7. Sri. Udaya Holla, learned Senior Counsel appearing for the petitioner in WP No.16763/2026, is that:

7.1. Genpact India incorporated a wholly owned subsidiary, namely, Genpact Global (IFSC) Private Limited ("**Gift City Entity**"), on 07.05.2025 in the GIFT Special Economic Zone, Gujarat ("**GIFT City**"). He submits that, for the purposes of FEMA, RBI and the applicable regulatory framework, the Gift City Entity is treated as a non-resident entity. The Gift City Entity was established to function as the Genpact group's global treasury centre for cash pooling and lending to overseas group entities forming part of the Genpact group. No financing activity is proposed to be undertaken in relation to any Indian entity, and its activities are confined to the overseas group entities.

7.2. He submits that the International Financial Services Centres Authority ("**IFSCA**") granted provisional registration to the Gift City Entity as a finance company on 15.09.2025, subject, inter alia, to infusion of minimum paid-up capital of USD 0.2 million within six months, i.e., by March 2026, failing which the provisional registration would lapse.

7.3. He submits that in terms of Rule 10 of the Foreign Exchange Management (Overseas Investment) Rules, 2022 (hereinafter referred to, for the sake of convenience, brevity, and identification, as "***OI Rules***"), a person or entity under investigation by certain authorities, including the Directorate of Enforcement, is required to obtain a No-

Objection Certificate prior to making a financial commitment outside India. Rule 10 is reproduced hereunder for easy reference:

> ***10. No Objection Certificate****.– (1) Any person resident in India who,–*
>
> *(i) has an account appearing as a non-performing asset; or*
>
> *(ii) is classified as a wilful defaulter by any bank; or*
>
> *(iii) is under investigation by a financial service regulator or by investigative agencies in India, namely, the Central Bureau of Investigation or Directorate of Enforcement or Serious Frauds Investigation Office,*
>
> *shall, before making any financial commitment or undertaking disinvestment under these rules or the Foreign Exchange Management (Overseas Investment) Regulations, 2022, obtain a No Objection Certificate from the lender bank or regulatory body or investigative agency by making an application in writing to such bank or regulatory body or investigative agency concerned:*
>
> *Provided that where the lender bank or regulatory body or investigative agency concerned fails to furnish the certificate within sixty days from the date of receipt of such application, it may be presumed that there was no objection to the proposed transaction.*
>
> *(2) The No Objection Certificate issued under sub-rule (1) shall be addressed by the lender bank or regulatory body or investigative agency concerned to the designated AD bank with an endorsement to the applicant.*

7.4. Genpact India made such an application to the Enforcement Directorate for permission to make the said investment. Simultaneously, an application was made to IFSCA for an extension of time to make such investment. IFSCA, by its communication dated 30.03.2026, granted a one-time extension up to 15.09.2026 for making the required capital infusion.

7.5. He submits that the said extension is a one-time extension and that no further extension would be available. Consequently, if the required remittance is not made by 15.09.2026, the provisional registration of the Gift City Entity would lapse. This would place the very establishment and functioning of the Gift City Entity in jeopardy and, in turn, adversely affect the proposed global cash-pooling and treasury operations of the Genpact group.

7.6. He further submits that Genpact India is the sole shareholder of the Gift City Entity and, therefore, the required paid-up capital can be infused only by Genpact India. The capital requirement cannot be satisfied by an infusion from any other entity of the Genpact group. The proposed remittance is thus necessary to preserve the provisional registration and enable the Gift City Entity to commence and carry on the activities for which it was established.

7.7. He accordingly submits that the present proceedings have an immediate and practical consequence for the Gift City Entity. Unless Genpact India is permitted to make the required capital infusion within the extended period granted by IFSCA, the provisional registration would lapse on 15.09.2026, notwithstanding that the Gift City Entity has been established and provisionally registered for the specific purpose of undertaking the group's global treasury and cash-pooling activities.

7.8. He refers to regulation 3(5)(i) read with Schedule Sl.No. 3 of the **International Financial Services Authority (Finance Company) Regulation, 2021,** which is reproduced hereunder for easy reference:

> *3(5)(i) In case the applicant is seeking registration as a „Finance Company", it shall have and maintain minimum owned fund, depending on the activity proposed to be undertaken by it, as specified in* ***Schedule*** *of these regulations, or such other higher amount as may be specified by the Authority.*

7.9. The Schedule is reproduced hereunder for easy reference:

SCHEDULE

[See regulation 3(1), 3(4)(i) and 3(4)(ii)]

<table>
<tr><th>No.</th><th>Activity</th><th>Minimum Owned Fund Requirement</th><th>Exempted Regulations, if any</th></tr>
<tr><td>1</td><td>Undertaking only operating lease transactions for aircraft lease</td><td>USD 0.2 mn or equivalent amount in any other freely convertible currency</td><td rowspan="5">Regulation (4) and Regulation (8) subject. to the following:

(i) To have a Board approved prudential policy

(ii) Fit and Proper criteria set out by the Authority</td></tr>
<tr><td>2</td><td>Undertaking one or more of the non-core activities</td><td rowspan="3">USD 0.2 mn or equivalent amount in any other freely convertible currency or any such amount as may be required to seek specific registration for a proposed non-core activity.</td></tr>
<tr><td>3</td><td>Undertaking to act as facilitators or core activities as and when permitted by the Authority</td></tr>
<tr><td>4</td><td>Undertaking any of the permissible activities, if operating</td></tr>
<tr><td>5</td><td>Undertaking one or more core activities with or without non-core activities.</td><td>USD 3 mn or equivalent amount in any other freely convertible currency.</td></tr>
<tr><td>6</td><td>Undertaking specialised activities with or without core or non-core activities</td><td>USD 5 mn or equivalent amount in any other freely convertible currency.</td><td>None</td></tr>
</table>

7.10. His submission is that Foreign Exchange Management (Borrowing and Lending) Regulation 2018 prohibits a resident in India from borrowing or lending any foreign exchange to a person resident in or outside India and in this regard, he relies upon Regulation 3 thereof, which is reproduced hereunder for easy reference:

> ***3. Prohibition to Borrow or Lend.***
>
> *Save as otherwise provided in the Act, Rules or Regulations made thereunder, no person resident in India shall borrow or lend in foreign exchange from or to a person resident in or outside India and no person resident in India shall borrow in rupees from, or lend in rupees to, a person resident outside India:*
>
> *Provided that the Reserve Bank may, for sufficient reasons, permit a person resident in India to borrow or lend in foreign exchange from or to a person resident in or outside India and/or permit a person resident in India to borrow in rupees from, or lend in rupees to, a person resident outside India.*
>
> *Explanation. - Use of Credit Card (a) in India by a person resident outside India or (b) outside India by a person resident in India shall not be deemed as borrowing or lending in Indian Rupee/foreign exchange.*

7.11. He submits that, after incorporation of the Gift City Entity on 07.05.2025, the petitioner applied to the Enforcement Directorate on 26.11.2025 for a No Objection Certificate ("**NOC**") to make an investment of USD 100 million in the Gift City Entity. The application was made in compliance with Rule 10 of the Overseas Investment Rules, which requires a person resident in India, who is under investigation by a financial regulator or an investigating agency, including the Enforcement Directorate, and who proposes to make a financial commitment to a foreign entity, to obtain a written NOC from the concerned investigating agency.

7.12. He submits that Rule 10 requires the concerned agency to issue the NOC or communicate its objection within the prescribed period of 60 days. According to him, the consequence contemplated under the Rule is that, if no such response is received within the prescribed period, the applicant is entitled to proceed on the basis that there is no objection to the proposed transaction. The application having been made on 26.11.2025, the prescribed period expired on 25.01.2026. However, shortly before expiry of the said period, the Enforcement Directorate, by letter dated 13.01.2026, rejected the NOC application.

7.13. He submits that, despite having retained the application for the substantial period preceding the rejection, the Enforcement Directorate neither sought any clarification from the petitioner nor called upon it to furnish any further material before rejecting the application. And more importantly, the letter dated 13.01.2026 contains no reasons for such rejection, his submission is that if any clarification was required it would have been provided if only asked for, without seeking and clarification an order of rejection without reason ought not to have been passed is his submission.

7.14. He submits that the rejection is wholly unreasoned and does not disclose the factual basis on which the NOC was refused, the material considered by the Enforcement Directorate, any finding of risk arising from the proposed investment, or any nexus between the pending investigation and the proposed investment of USD 100 million in the Gift City Entity.

7.15. He submits that the requirement of recording reasons assumes particular significance in the present case, since the proposed investment is a substantial financial commitment and the refusal of the NOC has the direct consequence of preventing Genpact India from infusing the capital required for the Gift City Entity. In the absence of reasons, the petitioner is unable to ascertain the basis of the decision or effectively challenge the same.

7.16. He accordingly submits that the absence of reasons in the rejection letter goes to the root of the decision-making process. A statutory authority exercising power which directly affects the petitioner's right to make a permitted financial commitment is required to disclose the basis for its decision. The unreasoned rejection, according to him, is therefore arbitrary and contrary to the principles of natural justice and fair decision-making.

7.17. He relies upon the decision of the Hon'ble Delhi High Court in ***Times Internet Ltd. v. Enforcement Directorate***[13] , more particularly paragraphs 15, 16, 17, 20, 22, 23, 25, 27, 28, 29 and 30 which are reproduced hereunder for easy reference:

> ***15.*** *On 22nd August, 2022, in exercise of powers under Sections 46 of FEMA, 1999 the Central Government notified the new FEMA OI Rules, 2022. This was done to streamline the existing provisions, expand the scope of overseas investments as well as simplify the procedures for obtaining approvals for such transactions. These Rules superseded the earlier Regulations on overseas investment - i.e., the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004, and Foreign Exchange Management (Acquisition and Transfer of Immovable Property outside India) Regulations, 2015.*
>
> ***16.*** *To operationalize these new rules, the RBI, as the sectoral regulator, issued delegated legislations in the form of the Foreign Exchange Management (Overseas Investment) Regulations, 2022[19] vide Notification no. FEMA No. 400/2022-RB as well as Foreign Exchange Management (Overseas Investment) Directions, 2022[20], which were issued to all Category-I Authorised Dealer Banks vide RBI Circular No. 12, dated 22nd August 2022. These delegated legislations introduced clarity and uniformity in the overseas investment regime, with an emphasis on enabling bona fide business activities while maintaining safeguards against potential misuse.*
>
> ***17.*** *Rule 9 of the FEMA OI Rules, 2022, allows overseas investment by Indian entities by way of financial commitments for "bona fide business activity", either directly, through a step-down subsidiary or through a*

[13] 2024 SCC OnLine Del 8937

special purpose vehicle; subject to the limits and conditions laid down in the applicable FEMA OI Rules, 2022 and FEMA OI Regulations, 2022. Under the Explanation of sub-rule (1) of Rule 9, the phrase "bona fide business activity" has been explained to mean, any business activity permissible under any law in India and in the host country or jurisdiction, as the case may be.

20. *Rule 10 of FEMA OI Rules, 2022, stipulates the condition for obtaining a No Objection Certificate (NOC) under specific circumstances such as - the person resident in India being under investigation by any financial regulators or investigative agencies such as the ED, CBI, or SFIO. Specifically, Rule 10(2) mandates that persons specified in Rule 10(1) must seek an NOC in writing from the relevant agency. The agency is required to either furnish the NOC or state its objection within 60 days of receiving the application. In the absence of a response within this timeframe, the Rules provide for a presumption of no objection, facilitating the proposed transaction. Importantly, the NOC is to be addressed to the designated Authorised Dealer (Bank), with a copy endorsed to the applicant.*

22. *In the instant case, since the ED had issued summons to the Petitioners in the year 2021, in relation to the alleged violations of FEMA, 1999, the Petitioners sought to comply with the new FEMA regime and requirement under Rule 10 of FEMA OI Rules, 2022. Accordingly, Petitioners applied for the requisite NOC which was rejected by ED. The reasons attributed for rejection in the impugned communications issued to the Petitioners are identically worded and read as follows:*

"Sir,

Sub:-Rejection of NoC in respect of M/s Times Internet Limited (TIL)-reg.

Kind reference is invited to the application dated 28.08.2023 received from M/s Times Internet Limited (TIL) regarding request to issue NOC under Rule 10 of

Foreign Exchange Management (Overseas Investment) rules, 2022.

2. In this regard, it is informed that proposal regarding "Issue NOC" in this case is hereby rejected by Competent Authority.

Yours truly,

Bedabrata Roy Choudhary

Assistant Director, HIU(2)(1)(2)"

[Emphasis added]

23. *The impugned communications do not disclose any substantive reason for rejecting the NOC. A rejection of such import, devoid of any rationale or justification, is arbitrary and falls afoul of the principles of natural justice. In the opinion of the Court, such a rejection without disclosing any reasons, is liable to be set aside on this ground alone. Nonetheless, the Respondents have, during these proceedings, sought to substantiate the rejection by citing allegations of irregularities in prior ODI transactions, particularly concerning overvaluation and potential siphoning of foreign exchange. Thus, it is considered appropriate for this Court to examine these allegations, notwithstanding the absence of reasons in the impugned communications.*

25. *While the Respondent's denial of the NOC is ostensibly rooted in pblic interest - to prevent valuable foreign exchange from being taken out of the country - yet this rationale fails to withstand judicial scrutiny. The issuance of summons under Section 37(1) of FEMA, 1999, over three years ago, without any subsequent initiation of formal proceedings or adjudication against TIL or its parent company, Bennet Coleman, raises serious questions. Investigations lingering in limbo for such an extended period cannot serve as a tool to indefinitely impede a company's legitimate business activities. The justification offered — that the value of the Land and Building assets of the company, amounting to*

INR 451.96 Crores, falls short of the INR 912 Crores required under Section 37A of FEMA, 1999 — is unpersuasive. This explanation does little to excuse the inaction in advancing the investigation or initiating proceedings. Nothing prevented the Respondent from confronting the Petitioners with specific charges and affording them an opportunity to respond. Thus, the ongoing investigation, devoid of any tangible progress or launch of proceedings, cannot ipso facto justify the denial of an NOC, particularly when the Petitioners have sought to comply with regulatory requirements in good faith.

***27.** The refusal to grant an NOC must be predicated on clear, cogent, and rational reasons. Mere issuance of summons, absent any formal finding of contravention under Section 4 of FEMA, 1999, or violations of Sections 131 and 132 of the Income Tax Act, 1961, does not meet this threshold. Furthermore, the Court also finds merit in the contention of the Petitioner that the penalty for violations of the provisions of FEMA, 1999 are fiscal in nature and under Section 13 of FEMA, the fiscal penalty would be three times the amount so invested or INR 2 Lakhs in cases where the invested amount is not quantified. On the other hand, the denial of NOC by ED in the present case, has completely restricted the Petitioners from remitting money abroad to its subsidiaries. The prolonged investigation without any conclusion, coupled with a lack of action under FEMA, is insufficient to justify the denial of the Petitioners' right to make further investments. The Petitioners have a legitimate expectation of conducting their business unhindered, particularly in the absence of definitive findings against them. In sum, mere issuance of summons under Section 37(1) of FEMA, 1999, without any finding of contravention under Section 4 of FEMA, 1999, and the alleged non-compliance with the provisions of Section 131 and 132 of the Income Tax Act, 1961, cannot be a valid ground for denial of the NOC.*

***28.** It must also be noted that it is the Authorised Dealer (bank) who have to ensure that the person making the overseas investment has complied with the conditions prescribed in the FEMA OI Rules, Regulations and*

Directions. In fact, in the FEMA OI Directions, 2022, under Clause 27, it is provided that the AD shall render themselves liable for penal action under Section 11 and 13 of FEMA, 1999, in case they facilitate remittances without obtaining the requisite documents. Furthermore, it is also important to take note of Section 10(5) of FEMA, 1999, under which, before undertaking any transaction in foreign exchange the authorised person has to reasonably satisfy themselves that the transaction will not involve and is not designed for contravention of any provision of the Act/Rules/Regulations. These regulatory provisions will continue to apply notwithstanding the issuance of LOC and therefore, safeguard the interest of the State.

29. *The Respondents have thus not demonstrated the contravention of FEMA, 1999 with clear basis, in order to deny the NOC. There must be a nexus between the alleged contravention and the proposing investment which has not been established in the present case. Since the Petitioners have, in good faith, complied with regulatory requirements, it is unreasonable to subject them to indefinite uncertainty.*

30. *Accordingly, the present writ petitions are allowed with the following directions:*

(i) In W.P.(C) 15242/2023, the impugned rejection letter dated 30th October, 2023, is hereby quashed. TIL is free to approach the Authorised Dealer for remittance of investment abroad, as sought in their application dated 28th August, 2023 under UIN-NDWAZ20070182. The said remittance shall be processed on its own merits, as per the applicable rules and regulations under FEMA, 1999.

(ii) Likewise W.P.(C) 15471/2023, the impugned rejection letter dated 15th November, 2023, is also quashed. Bennet Coleman is free to approach the Authorised Dealer for remittance of investment abroad, as sought in their application dated 15th September, 2023 under UIN-BYWAZ20150706. The said remittance shall be processed on its own merits, as per the applicable rules and regulations under FEMA, 1999.

7.18. By relying on ***Time's Internet***, his submission is that the Hon'ble Delhi High Court has held that rejection of an application for NOC under Rule 10 of the FEMA OI Rules must be supported by clear, cogent and rational reasons. A communication which merely states that the NOC has been rejected by the competent authority, without disclosing the basis for such rejection, is arbitrary and contrary to the principles of natural justice.

7.19. He submits that the Hon'ble Delhi High Court has further held that there must be a nexus between the alleged contravention and the proposed investment. The mere existence of an investigation, or issuance of summons in relation to an alleged FEMA contravention, cannot by itself justify denial of an NOC, particularly where no finding of contravention has been recorded and no adjudication proceedings have been initiated. The Hon'ble Delhi High Court has also held that a prolonged investigation without tangible progress or initiation of proceedings cannot be used to indefinitely impede legitimate business activities.

7.20. He submits that the present case stands on an even stronger footing. The rejection letter dated 13.01.2026 contains no reasons whatsoever. It does not disclose the material considered by the Enforcement Directorate, the alleged risk arising from the proposed investment, any finding of contravention, or the basis on which the proposed investment of USD 100 million in the Gift City Entity is considered objectionable. Consequently, there is not merely an absence of a sufficient nexus; there is no disclosed reason from which such nexus can even be ascertained.

7.21. He submits that the absence of nexus is also apparent from the chronology. The investigation relates to a transaction of March 2015, whereas the Gift City Entity was incorporated only on 07.05.2025, more than a decade thereafter. The proposed investment is for establishing and capitalising a separate treasury and cash-pooling entity in GIFT City for undertaking financing activities exclusively with overseas Genpact group entities. There is, therefore, no disclosed connection between the proposed investment and the transaction of March 2015 which is the subject matter of the investigation.

7.22. He further submits that the Hon'ble Delhi High Court, in ***Times Internet Ltd***., also took note of the fact that the concerned petitioners had sought to comply with the regulatory requirements in good faith and that the continuing investigation, without any formal finding or initiation of adjudication proceedings, could not be used to indefinitely restrict their legitimate business activities. The same principle applies here, particularly when the petitioner has itself approached the Enforcement Directorate and sought the requisite NOC in compliance with Rule 10 of the FEMA OI Rules.

7.23. He submits that the Enforcement Directorate was a party to the proceedings in ***Times Internet Ltd.*** and, therefore, cannot adopt a position inconsistent with the principles laid down therein without distinguishing the present case on facts or demonstrating any material circumstance warranting a different approach. While the said decision may have persuasive value before this Court, the Enforcement Directorate, having been a party to the said proceedings, cannot disregard the principles governing its own exercise of statutory power merely because the present proceedings are before a different High Court.

7.24. He accordingly submits that the rejection dated 13.01.2026 is unsustainable on both counts identified in ***Times Internet Ltd****.:* first, it contains no reasons whatsoever; and second, there is no disclosed nexus between the alleged FEMA contravention under investigation and the proposed investment in the Gift City Entity.

7.25. The rejection is therefore arbitrary and liable to be set aside, particularly when its consequence is to prevent the petitioner from making the capital infusion within the time stipulated by IFSCA, thereby placing the provisional registration of the Gift City Entity in jeopardy.

7.26. He submits that the scheme of Rule 10 of the FEMA OI Rules itself indicates that there is no absolute prohibition against an entity under investigation making an overseas investment. The requirement is only that, in the circumstances specified in the Rule, a No Objection Certificate ("NOC") be obtained from the concerned investigating agency. The Rule further contemplates a deemed no objection where the application is not acted upon within the prescribed period. According to him, this indicates the legislative intent that an investigation by itself does not operate as a bar to overseas investment and that the NOC can be refused only where there are cogent reasons for doing so or where the proposed investment is shown to adversely affect the interests of the country.

7.27. He submits that, in the present case, the investigation has remained pending since 2021, when the Reserve Bank of India addressed the Enforcement Directorate, and has not culminated in any adjudication or other proceedings even after nearly five years. There is no indication as to when the investigation is likely to be concluded. A pending investigation of such duration, according to him, cannot by itself constitute a ground to prevent Genpact India from carrying on its legitimate business activities or from making an investment otherwise permissible under the FEMA OI Rules.

7.28. He submits that the communication dated 13.01.2026 merely states that *"the request regarding issuance of NOC, has been rejected by the competent authority, and the same is being intimated for information and necessary action".* Such communication discloses no reason whatsoever for rejection. It does not identify the alleged contravention, disclose the material considered, indicate any risk arising from the proposed investment, or establish any nexus between the pending investigation and the investment proposed to be made in the Gift City Entity. He therefore submits that the rejection is arbitrary and, having regard to the complete absence of reasons, is manifestly arbitrary.

7.29. He further submits that the Enforcement Directorate cannot seek to cure the absence of reasons in the rejection letter by supplying reasons during the course of these proceedings.

The validity of the order has to be examined on the basis of the reasons contained in the order itself. Reasons which were not recorded or communicated when the decision was taken cannot subsequently be introduced by way of affidavit, explanation or oral submissions.

7.30. He submits that the attempt on behalf of the Enforcement Directorate to rely upon the seizure order dated 03.02.2026 to justify the earlier rejection dated 13.01.2026 is impermissible. The two orders arise under different statutory provisions and operate in different fields. The application under Rule 10 of the FEMA OI Rules was required to be considered independently on the basis of the material relevant to the proposed overseas investment, whereas the seizure order under Section 37A of FEMA concerns the exercise of a distinct statutory power in relation to the alleged contravention. The subsequent seizure order cannot retrospectively supply reasons which were absent when the NOC application was rejected.

7.31. He submits that the distinction is particularly significant in the present case since the seizure order under Section 37A was passed only on 03.02.2026, whereas the NOC was rejected on 13.01.2026. The reasons, if any, emerging from the seizure order were therefore not the reasons on which the NOC application was rejected. To read the subsequent seizure order into the earlier rejection would amount to permitting the Enforcement Directorate to retrospectively supplement or antedate the reasons for its decision, which is impermissible.

7.32. He reiterates that Rule 10 required the Enforcement Directorate to either issue the NOC or state its objection within the prescribed period of 60 days. The application having been made on 26.11.2025, the said period expired on 25.01.2026. According to him, an order merely stating that the NOC application has been rejected, without communicating the reasons for such objection, does not satisfy the statutory requirement of stating the objection contemplated under Rule 10. The subsequent attempt to furnish reasons cannot cure that defect after expiry of the prescribed period.

7.33. He submits that the consequence is not merely that the matter should be remitted to the Enforcement Directorate for passing a fresh order with reasons. Since the statutory period contemplated under Rule 10 had expired and no valid objection setting out reasons had been communicated within that period, he submits that the statutory consequence of deemed no objection must follow. A remand at this stage would effectively permit the Enforcement Directorate to defeat the time-bound mechanism prescribed by Rule 10 by supplying reasons after the prescribed period.

7.34. He accordingly submits that the rejection dated 13.01.2026 is liable to be set aside as an unreasoned and arbitrary order. The subsequent seizure order dated 03.02.2026 cannot be read into or relied upon to sustain the earlier rejection. Since the statutory period under Rule 10 has also expired, he submits that the petitioner is entitled to proceed on the basis that there is no objection to the proposed investment in the Gift City Entity.

7.35. He also relies upon the decision of the Hon'ble Supreme Court in ***Mohinder Singh Gill v. Chief Election Commissioner***, paragraph 8 thereof, which has been reproduced earlier and submits that reasons cannot be supplied through affidavits or otherwise to cure an order that was initially devoid of reasons.

7.36. He submits that the proposed investment in the Gift City Entity is a bona fide business investment and is otherwise permissible under law. It is neither a prohibited transaction nor an act constituting an offence. The investment is proposed for carrying on the petitioner's regular business activities through the Gift City Entity, which has been established as the group's global treasury centre. In the absence of any material demonstrating that the proposed investment would prejudice the pending investigation or facilitate any further contravention of law, there was no justification for withholding the NOC.

7.37. He submits that the Enforcement Directorate has also failed to consider the civil and commercial consequences flowing from rejection of the NOC. The refusal prevents Genpact India from making the capital infusion required for the Gift City Entity and consequently places its provisional registration and proposed business operations in jeopardy. The decision therefore has direct civil consequences for the petitioner. Such consequences, according to him, attract the requirement of fair procedure and adherence to the principles of natural justice, notwithstanding that Rule 10 of the OI Rules does not expressly prescribe a separate opportunity of hearing.

7.38. He further submits that the seizure order dated 03.02.2026 has been stayed by this Court in W.P. No.7283/2026. The said seizure order, therefore, cannot be relied upon as an independent justification for rejection of the NOC. In any event, the seizure order relates to an alleged transaction of March 2015 and there is no nexus between that transaction and the proposed investment in the Gift City Entity, which was incorporated only on 07.05.2025.

7.39. He submits that the NOC application and the proceedings under Section 37A arise from distinct factual and statutory considerations and are required to be independently considered. The subsequent seizure order cannot be used to retrospectively supply reasons for the rejection of the NOC dated 13.01.2026, particularly when the seizure order itself was passed after the rejection and has been stayed by this Court.

7.40. He accordingly submits that the rejection of the NOC cannot be sustained either on the basis of the pending investigation or by reference to the subsequent seizure order. There being no disclosed reason demonstrating that the proposed investment is unlawful, would prejudice the investigation, or has any nexus with the transaction of March 2015, the petitioner submits that the NOC ought to have been granted in accordance with the scheme and object of Rule 10 of the OI Rules.

7.41. He relies upon the decision of the Hon'ble Supreme Court in ***A.K. Kraipak v. Union of India***[14], more particularly paragraph 17

[14] (1969) 2 SCC 262

thereof, which is reproduced hereunder for easy reference:

> ***"17.*** *This takes us to the question whether the principles of natural justice apply to administrative proceedings similar to that with which we are concerned in these cases. According to the learned Attorney General those principles have no bearing in determining the validity of the impugned selections. In support of his contention he read to us several decisions. It is not necessary to examine those decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding. The question how far the principles of natural justice govern administrative enquiries came up for consideration before the Queen's Bench Division In re H.K. (An Infant). [(1967) 2 QB 617 at p. 630] Therein the validity of the action taken by an Immigration Officer came up for consideration. In the course of his judgment Lord Parker C.J. observed thus:*
>
> *"But at the same time, I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the*

> *decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially."*

7.42. By relying on ***A.K. Kraipak***, he submits that the principles of natural justice are not confined to judicial or quasi-judicial proceedings and extend to administrative action where the decision has civil consequences. The essential requirement is that the authority must act fairly, having regard to the nature of the power exercised and the consequences of the decision.

7.43. He submits that the rejection of the NOC in the present case has direct and substantial civil and commercial consequences for Genpact India. The refusal prevents the petitioner from making the proposed investment in its wholly owned subsidiary and consequently places the provisional registration and proposed business operations of the Gift City Entity in jeopardy. The decision therefore cannot be regarded as a purely administrative formality having no consequence for the petitioner.

7.44. He submits that, in these circumstances, fairness required the Enforcement Directorate to disclose the basis on which the NOC was proposed to be refused and to afford the petitioner an opportunity to address any material or objection which was sought to be relied upon against the proposed investment. This requirement assumes greater significance where, as in the present case, the rejection letter itself discloses no reason for the decision.

7.45. He accordingly submits that the absence of any reasons in the rejection dated 13.01.2026, coupled with the failure to afford the petitioner an opportunity to address the basis for such rejection, renders the decision contrary to the principles of natural justice and fair administrative action recognised in ***A.K. Kraipak***.

7.46. He also relies upon the decision in ***Sivanandan C.T. v. High Court of Kerala***[15], more particularly paragraph 44 thereof which is reproduced hereunder for easy reference:

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[15] (2024) 3 SCC 799

"44. *In a constitutional system rooted in the rule of law, the discretion available with public authorities is confined within clearly defined limits. The primary principle underpinning the concept of rule of law is consistency and predictability in decision-making. A decision of a public authority taken without any basis in principle or rule is unpredictable and is, therefore, arbitrary and antithetical to the rule of law. [S.G. Jaisinghani v. Union of India, 1967 SCC OnLine SC 6] The rule of law promotes fairness by stabilising the expectations of citizens from public authorities. This was also considered in a recent decision of this Court in SEBI v. Sunil Krishna Khaitan [SEBI v. Sunil Krishna Khaitan, (2023) 2 SCC 643] , wherein it was observed that regularity and predictability are hallmarks of good regulation and governance. [SEBI v. Sunil Krishna Khaitan, (2023) 2 SCC 643] This Court held that certainty and consistency are important facets of fairness in action and non-arbitrariness : (Sunil Krishna Khaitan case [SEBI v. Sunil Krishna Khaitan, (2023) 2 SCC 643] , SCC pp. 678-79, paragraph59)*

"59. … Any good regulatory system must promote and adhere to principle of certainty and consistency, providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. [Union of India v. Raghubir Singh, (1989) 2 SCC 754. Also see, The Nature of the Judicial Process, Benjamin N. Cardozo, p. 33:"I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another."(emphasis supplied)] … This does not mean that the regulator/authorities cannot deviate from the past practice, albeit any such deviation or change must be predicated on greater public interest or harm. This is the mandate of Article 14 of the Constitution of India which requires fairness in action

by the State, and non-arbitrariness in essence and substance. Therefore, to examine the question of inconsistency, the analysis is to ascertain the need and functional value of the change, as consistency is a matter of operational effectiveness."

(emphasis added)"

7.47. By relying on ***Sivanandan C.T.,*** his submission is that the exercise of discretion by a public authority must be founded upon a discernible principle or rule. A decision taken without any rational basis is unpredictable and arbitrary and is consequently contrary to the rule of law and the requirement of fairness under Article 14 of the Constitution of India.

7.48. Learned Senior Counsel further submits that consistency and predictability in decision-making are essential requirements of non-arbitrariness. If an authority seeks to depart from a settled or consistently followed course of action, such departure must be supported by a rational basis and cannot be made arbitrarily or without justification.

7.49. He also reiterates that the earlier transaction in the year 2015 has been cleared by three regulators namely the RBI, SEBI and Income Tax Department, who are the concerned regulatory Authorities. The regulatory authorities, having cleared the transaction, did not find any fault in the said transaction. The enforcement Authority, namely ED, cannot find fault with it since there is nothing which is required to be enforced in respect of a transaction approved by the concerned regulators.

7.50. As regards the investment, he submits that the proposed investment in Gift City Entity would provide employment and generate income, thereby adding to the economic activity of India, benefiting the citizens of India as well as the exchequer on account of the tax that it would generate. Apart from the various income and other businesses that it would generate.

7.51. He submits that from the year 2015, despite the payments having been made, which is sought to be found fault with by the ED and even after the said payments have been made, the business of Genpact India has only grown, adding to the employment generated, contribution to the exchequer as well as increasing the foreign exchange reserves.

7.52. His submission is that Genpact India in the FY year 2014-15 had 42,000 employees and in FY 2025-26 it has 1,01,000. The revenue in FY 2014-15 was 4,814 crores, and in FY 2025-2026 it is 15,484 crores, which indicates steady progress in the business of Genpact India. When there is a positive contribution by Genpact India to the economy, he submits that the contention of learned ASGI that there was no economic contribution by way of investment is negated by the facts on record.

7.53. He submits that 100 million dollars would be invested in Gift City Entity to render Global Treasury Centre operations serving Genpact entities outside India by providing cash pooling and lending services exclusive to overseas group companies, with no services being rendered by the said Gift City Entity to Genpact entities in India. All the services are being rendered abroad; there is no connection to the transaction being investigated by ED for the purpose of rejecting NOC under Rule 10 of the

OI Rules, there must be a clear link between the alleged violation being investigated and the proposed investment now to be made; there being no such link, the ED could not have refused the NOC, is his submission.

7.54. His submission is that the manner in which the Enforcement Directorate has acted amounts to an exercise of the powers vested in it to prevent Genpact India from making a business investment, though no such power is contemplated either under Rule 10 of the FEMA OI Rules or under FEMA. The mere fact that an entity or person is under investigation does not, according to him, prevent such entity or person from carrying on its ordinary business activities or making investments otherwise permissible in law.

7.55. He submits that Rule 10 itself recognises this position. The Rule applies precisely in cases where an investigation is pending and requires an NOC to be obtained before the proposed overseas investment is made. It does not create an absolute prohibition on investment by a person under investigation. On the contrary, the provision contemplates that an NOC may be granted notwithstanding the pendency of investigation and further provides for a deemed no objection where the application is not acted upon within the prescribed period. Therefore, according to him, the pendency of the investigation cannot, by itself, constitute a ground for rejection of the NOC.

7.56. He submits that the pre-emptive power of seizure available to the Enforcement Directorate under Section 37A of FEMA operates in a different field and can be exercised only when the statutory conditions contained therein are satisfied. Section 37A cannot be imported into the consideration of an application under Rule 10, nor can the pendency of an investigation or the existence of a seizure order under Section 37A be treated as an automatic ground for refusing an NOC under Rule 10. The challenge to the seizure order itself is the subject matter of W.P. No.7283/2026, in which the matter has been argued by Sri Arvind Datar, learned Senior Counsel.

7.57. Sri Udaya Holla, learned Senior Counsel, submits that the Enforcement Directorate has sought to supplement the reasons for rejection only through the statement of objections and during the course of arguments. The contention that reasons could not be disclosed on the ground that the investigation is ongoing, according to him, cannot justify an otherwise unreasoned order, particularly in view of the principles laid down by the Hon'ble Delhi High Court in ***Times Internet Ltd.***

7.58. He submits that the assertion that the proposed capital investment in the Gift City Entity would prejudice or endanger the investigation is unsupported by any material placed before this Court. Neither the rejection letter nor the subsequent statement of objections discloses how the proposed investment would obstruct the investigation, prejudice recovery, facilitate any further contravention or otherwise adversely affect the interests of the State. There is, therefore, no disclosed nexus between the pending investigation relating to the transaction of March 2015 and the proposed investment in an entity incorporated only on 07.05.2025.

7.59. He further submits that Genpact India has succeeded in the proceedings initiated under Section 263 as well as Sections 147 and 148 of the Income Tax Act and that there is no criminal proceeding pending against Genpact India, apart from the present investigation by the Enforcement Directorate. The petitioner, according to him, cannot be treated as having committed a contravention merely because an investigation remains pending. The approach of the Enforcement Directorate, in treating the petitioner as guilty before completion of the investigation or any adjudication of the alleged contravention, is contrary to the principles governing fair administrative action.

7.60. He submits that no nexus between the proposed investment and the investigation has been identified even during the course of the hearing. The investigation concerns a transaction of March 2015, whereas the Gift City Entity was incorporated more than a decade thereafter on 07.05.2025 for the specific purpose of functioning as the Genpact group's global treasury centre. In the absence of any material establishing a connection between the two, the rejection of the NOC is arbitrary.

7.61. He submits that the consequences of the rejection are also wholly disproportionate. The petitioner is required, in the first instance, to infuse USD 0.2 million as the minimum paid-up capital and pay the registration fee of USD 12,500 within the time stipulated by IFSCA. The proposed balance investment of USD 99.8 million need not be made at this stage and, according to the petitioner, would be made only after obtaining appropriate orders from this Court. If even the initial investment is prevented, the provisional registration of the Gift City Entity is liable to lapse, thereby adversely affecting the business interests of Genpact India and the Genpact group.

7.62. He invokes the doctrine of proportionality and submits that the adverse consequences of refusing the NOC bear no reasonable proportion to the object sought to be achieved by the pending investigation. The investigation concerns a transaction of March 2015, more than a decade old, whereas the proposed investment relates to a business entity incorporated in 2025 for carrying out legitimate treasury activities. No material has been shown to demonstrate that permitting the limited initial investment would prejudice the investigation.

7.63. He further submits that the proposed initial payments would be made only towards the capitalisation and registration of the Gift City Entity and would be made to the concerned Government/regulated entity. The amounts would not be transferred to a third party or otherwise placed beyond the reach of the Indian authorities. Further, no business activity would be undertaken by the Gift City Entity except in accordance with the permissions and directions of the competent authorities and the orders of this Court. The apprehension of siphoning of funds or detriment to the exchequer is therefore, according to him, unfounded.

7.64. He submits that the present writ petition has to be considered independently of W.P. No.7283/2026. The challenge in the present proceedings is to the rejection of the NOC under Rule 10 of the FEMA OI Rules, whereas the seizure order under Section 37A is the subject matter of the other proceedings. The validity of the rejection dated 13.01.2026 must therefore be tested on the basis of Rule 10 and the reasons, if any, contained in that order, and not by importing the contents or reasoning of the subsequent seizure order.

7.65. As regards the suggestion of the learned ASGI that the matter may be remitted to the Enforcement Directorate for providing an opportunity of hearing and passing a reasoned order, he submits that such a remand would serve no useful purpose. The Enforcement Directorate has already taken a position against the petitioner and has sought, in the present proceedings, to justify the rejection on grounds which were not stated in the impugned communication. According to him, permitting a remand in these circumstances would enable the authority to retrospectively formulate reasons for an order which was originally passed without reasons.

7.66. He submits that the petitioner does not seek permission to make the entire proposed investment of USD 100 million at this stage. In view of the approaching deadline of 15.09.2026, the petitioner presently seeks only to make the minimum capital infusion of USD 0.2 million and pay the registration fee of USD 12,500. The balance investment of USD 99.8 million would be made only upon obtaining appropriate orders from this Court.

7.67. He accordingly submits that the rejection of the NOC is an unreasoned and disproportionate exercise of power, unsupported by any demonstrated nexus between the proposed investment and the pending investigation. The pendency of an investigation cannot, by itself, be converted into an indefinite restraint on the petitioner's legitimate business activities. In the absence of reasons satisfying the requirements of Rule 10, and having regard to the statutory scheme, the prolonged pendency of the investigation and the limited nature of the immediate investment proposed, he submits that the writ petition deserves to be allowed and the reliefs sought granted.

7.68. In this regard, he relies upon the decision of the Hon'ble Supreme Court in ***Siemens Ltd. v. State of Maharashtra***[16], more particularly paragraphs 9, 10 and 11 thereof, which are reproduced hereunder for easy reference:

> ***"9.*** *Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of U.P. v. Brahm Datt Sharma , Special Director v. Mohd. Ghulam Ghouse and Union of India v. Kunisetty Satyanarayana, but the question herein has to be considered from a different angle viz. when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. (See K.I. Shephard v. Union of India.) It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice.*
>
> ***10.*** *The said principle has been followed by this Court in V.C., Banaras Hindu University v. Shrikant] , stating: (SCC p. 60, paras 48-49)*
>
> *"48. The Vice-Chancellor appears to have made up his mind to impose the punishment of dismissal on the*

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[16] (2006) 12 SCC 33

respondent herein. A post-decisional hearing given by the High Court was illusory in this case.

49. In K.I. Shephard v. Union of India this Court held: (SCC p. 449, paragraph16)

'It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose.' "

(See also Shekhar Ghosh v. Union of India and Rajesh Kumar v. D.C.I.T.)

***11.** A bare perusal of the order impugned before the High Court as also the statements made before us in the counter-affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable."*

7.69. By relying on ***Siemens India***, his submission is that a writ petition is maintainable even at the stage of a notice or preliminary decision where the action of the statutory authority is not merely tentative but reflects a premeditated decision. The principle is that where the authority has already made up its mind and the subsequent opportunity of hearing is only a formality, remanding the matter for a fresh hearing would serve no useful purpose. This

Court is therefore required to examine whether the authority has approached the matter with an open mind or has already determined the issue sought to be reconsidered.

7.70. In the present case, he submits that the rejection of the petitioner's application dated 26.11.2025 by communication dated 13.01.2026 is not a tentative decision requiring further consideration. The rejection was made without disclosing any reasons, without identifying any material showing how the proposed investment would prejudice the investigation, and without pointing out any nexus between the proposed investment and the transaction under investigation. When the matter was challenged, the ED sought to supply the reasons through its objections and submissions before this Court, including by relying upon matters which did not form part of the impugned communication.

7.71. He submits that, in these circumstances, a direction to the ED to reconsider the application after providing a hearing would serve no fruitful purpose. The ED has already taken the position that the investment cannot be permitted and is now seeking to justify that conclusion by furnishing reasons which were not contained in the impugned decision. Such a course would, according to him, amount to permitting the authority to make a fresh decision after this Court has found the original decision to be unsustainable, rather than reviewing a decision which was made on the basis of disclosed reasons.

7.72. He further submits that ***Siemens Ltd*****.** is particularly relevant to the submission of the learned ASGI that the matter may be remitted to the ED for a fresh hearing and a reasoned order. Where the circumstances demonstrate that the authority has already formed its view, a post-decisional or subsequent hearing cannot be treated as an adequate substitute for a decision taken fairly and with an open mind. He therefore submits that remand in the present case would be an empty formality and that the impugned rejection deserves to be set aside rather than remitted for reconsideration.

7.73. He also relies upon the decision in ***K.I. Shephard v. Union of India***[17], more particularly paragraph 16 thereof, which is reproduced hereunder for easy reference:

> ***"16.*** *We may now point out that the learned Single Judge of the Kerala High Court had proposed a post-amalgamation hearing to meet the situation but that has been vacated by the Division Bench. For the reasons we have indicated, there is no justification to think of a post-decisional hearing. On the other hand the normal rule should apply. It was also contended on behalf of the respondents that the excluded employees could now represent and their cases could be examined. We do not think that would meet the ends of justice. They have already been thrown out of employment and having been deprived of livelihood they must be facing serious difficulties. There is no justification to throw them out of employment and then give them an opportunity of representation when the requirement is that they should have the opportunity referred to above as a condition precedent to action. It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose."*

7.74. By relying on ***K.I. Shephard***, his submission is that where a decision has already been taken, a subsequent opportunity to make a representation cannot ordinarily cure the denial of a hearing which was required to precede the decision. The reason is that, once an authority has formed its view, there is a natural tendency

[17] (1987) 4 SCC 431

to sustain the decision already taken, and a subsequent representation may therefore serve no fruitful purpose.

7.75. He submits that the same principle applies in the present case. The petitioner's application dated 26.11.2025 was rejected by the ED by communication dated 13.01.2026 without disclosing any reasons or material indicating why the proposed investment would prejudice the investigation. The ED has thereafter sought to justify the rejection before this Court by referring to matters which do not form part of the impugned communication. Thus, according to him, the ED has already formed its view against permitting the investment and is now attempting to sustain that view by supplying reasons after the decision.

7.76. He therefore submits that directing the petitioner to once again approach the same authority for a hearing would not meet the ends of justice. Such a course would effectively permit the ED to formulate and record reasons after the event and thereafter reconsider a decision which it has already defended before this Court. In the circumstances, a post-decisional hearing would be an empty formality and would not cure the fundamental defect in the manner in which the impugned decision was taken.

7.77. Lastly, he submits that even according to the ED, apart from the transactions of the year 2015, there is no other transaction being enquired into or investigated. Thus, there is a clear and categorical admission that investigations are in respect of a 10-year-old matter which is highly belated, there being no reason for such delay made out by the ED.

7.78. In this regard, he also relies upon the decision of the Hon'ble Supreme Court in ***Union of India v. Citi Bank***[18], more particularly paragraphs 19, 20, 21, 22, 23, 24 thereon, which are reproduced hereunder for easy reference:

> ***19.*** *It is a settled proposition of law that when the proceedings are required to be initiated within a particular period provided under the statute, the same are required to be initiated within the said period. However, where no such period has been provided in the statute, the authorities are required to initiate the*

[18] (2022) 19 SCC 188

said proceeding within a reasonable period. No doubt that what would be a reasonable period would depend upon the facts and circumstances of each case.

20. *Reference in this respect could be made to the judgment given by a three-Judge Bench of this Court in State of Gujarat v. Patil Raghav Natha [State of Gujarat v. Patil Raghav Natha, (1969) 2 SCC 187] , wherein this Court has held thus : (SCC p. 193, paragraph11)*

"11. The question arises whether the Commissioner can revise an order made under Section 65 at any time. It is true that there is no period of limitation prescribed under Section 211, but it seems to us plain that this power must be exercised in reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order which is being revised."

(emphasis supplied)

21. *In State of M.P. v. Bani Singh [State of M.P. v. Bani Singh, 1990 Supp SCC 738 : 1991 SCC (L&S) 638] , this Court found that the departmental proceedings initiated in the year 1987 for the alleged irregularities that took place between the years 1975-1977 could not be permitted to be continued as it would be unfair and unreasonable.*

22. *In Union of India v. Citedal Fine Pharmaceuticals [Union of India v. Citedal Fine Pharmaceuticals, (1989) 3 SCC 483 : 1989 SCC (Tax) 464] , validity of Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, which did not provide for a period of limitation for initiating proceedings for recovery of escaped duty, was challenged. This Court in the said case observed [Union of India v. Citedal Fine Pharmaceuticals, (1989) 3 SCC 483 : 1989 SCC (Tax) 464] thus : (SCC p. 487, paragraph6)*

"6. The learned counsel appearing for the respondents urged that Rule 12 is unreasonable and violative of Article 14 of the Constitution, as it does not provide for any period of limitation for the recovery of duty. He

urged that in the absence of any prescribed period for recovery of the duty as contemplated by Rule 12, the officer may act arbitrarily in recovering the amount after lapse of long period of time. We find no substance in the submission. While it is true that Rule 12 does not prescribe any period within which recovery of any duty as contemplated by the rule is to be made, but that by itself does not render the rule unreasonable or violative of Article 14 of the Constitution. In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period, would depend upon the facts of each case. Whenever a question regarding the inordinate delay in issuance of notice of demand is raised, it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case notice of demand for recovery was made within reasonable period. No hard-and-fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case."

(emphasis supplied)

23. *In Mohd. Kavi Mohamad Amin v. Fatmabai Ibrahim [Mohd. Kavi Mohamad Amin v. Fatmabai Ibrahim, (1997) 6 SCC 71] , suo motu proceedings were initiated in September 1976 by the mamlatdar questioning the validity of sale deeds executed in December 1972. In the said case, this Court, after noticing the earlier decisions on the issue, observed thus : (SCC pp. 72-73, paragraph2)*

"2. … where no time-limit is prescribed for exercise of a power under a statute it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. We are satisfied that in the facts and circumstances of the present case, the suo motu power under Section 84-C of the Act was not exercised by the Mamlatdar within a reasonable time."

(emphasis supplied)

> ***24.*** *Admittedly, in the present cases, the alleged transactions had taken place during Financial Years 1992 and 1993. Show-cause notices for the said transactions were issued in the year 2002 and that too just before the sunset period of FERA was to expire i.e. on 1-6-2002. We are therefore of the considered view that show-cause notices and the proceedings continued thereunder are liable to be set aside on this short ground.*

7.79. By relying on ***Citi Bank***, his submission is that even where no period of limitation is prescribed, statutory power must be exercised within a reasonable period, having regard to the facts of each case. He submits that the present transaction is more than eleven years old, the investigation has been pending since 2021 pursuant to the RBI communication dated 27.09.2019, and no adjudication proceedings or complaint under FEMA have been initiated. The petitioner has also cooperated with the investigation.

7.80. He submits that there is no allegation of any intervening circumstance or imminent risk of alienation or removal of property warranting pre-emptive seizure at this stage. In these circumstances, the prolonged and unexplained delay assumes significance, and exercise of the drastic power under Section 37A, after such lapse of time, is unreasonable and disproportionate.

7.81. He also relies upon the decision of the Hon'ble Supreme Court in ***Standard Chartered Bank v. Enforcement Officer, Ministry of Home Affairs***[19], more particularly paragraphs 30, 31, 32, 33, 34 and 35, which are reproduced hereunder for easy reference:

> ***30.*** *Now adverting to the facts of the present case, we find that this is not a case where the delay can be laid at the doorstep of the appellants, nor is it a case of mere passive lapse of time, rather, the record discloses a chronicle of persistent and unexplained inaction on the part of the respondent - complainant itself, spanning virtually the entire life of these proceedings. The complaint came to be instituted on 30.05.2002 for a transaction said to have taken place as far back as in 1991-1992, unaccompanied by a single supporting document, and cognizance was taken and summons issued on that very date. Yet, remarkably, the summons so issued were not even collected by the respondent - complainant for service for almost 2 years thereafter, and it was only sometime in 2004 that the respondent - complainant first came forward to collect the summons.*
>
> ***31.*** *Thereafter, for a further period of 8 years, that is, from 2004 to 2012, the summons, although issued from time to time, yet could not be got served upon the accused by the respondent - complainant, save in the*

[19] 2026 SCC OnLine SC 1368

case of the appellant no. 1, Standard Chartered Bank, whose counsel had entered an appearance on 16.08.2005. Through this entire decade, the proceedings remained frozen at the stage of issue of process, with the respondent - complainant itself remaining absent on numerous occasions. Notably, the court record entry dated 12.08.2005 records that even when the summons returned unserved, the respondent - complainant took no further steps whatsoever, such as moving an application for issuance of a non-bailable warrant, a course it eventually chose to adopt only on 28.05.2012, i.e., almost 7-8 years after the summons had first come back unserved. It was in this backdrop that the High Court, in the impugned order dated 22.03.2012, was constrained to describe the delay as "highly deplorable" and directed the trial court to conclude the entire trial within one-month. Still, even this direction met the same fate. The court record entry dated 30.05.2012 records that when fresh notices were issued by the Magistrate's court, the respondent - complainant declined to collect the same for service upon the accused, notwithstanding that it was already in possession of the accused's updated addresses from the record of the High Court itself. It was only on 28.05.2012 that the notices were handed over to the respondent - complainant, and service was thereafter effected on 05.06.2012.

***32.** Even thereafter, neither the respondent - complainant nor the accused appeared before the Magistrate's court, with the result that the one-month period fixed by the High Court lapsed without the trial having even commenced in earnest, compelling the Magistrate to write to the High Court on 08.06.2012 seeking an extension, which was duly granted on 29.06.2012, extending the outer limit to 6-months. Despite this further indulgence, the respondent - complainant continued to remain absent right up to the filing of the present appeals. On this chronology, therefore, the question that the decisions discussed above require us to ask, namely, who is responsible for the delay, admits of only one answer - at every stage at which the proceedings could have been carried* *further, it was virtually the prosecution that failed to act with even ordinary diligence and failed to take further steps wherever needed. The respondent - complainant could have filed the application for issuance of a non-bailable warrant long back, well before 2012, since the summons had returned unserved on multiple occasions over the years, but chose not to do so, and for what special reasons, nobody knows.*

33. *Equally telling is the conduct of the respondent - complainant in the period following the High Court's time-bound directions. Given a clear window of one-month to conclude the trial, the respondent - complainant's response was to refuse to even collect the notices meant for service upon the accused. This compelled the trial court to seek an extension, which the High Court granted, allowing a further 6-months. Yet the record shows that the respondent - complainant continued to remain absent right through this extended period, and indeed, right up to the filing of the present appeals before us. Such conduct, persisting even after two express directions of the High Court fixing outer time-limits for completion of the trial, cannot be explained away as systemic delay or administrative constraint. In our opinion, it reflects a want of diligence and unwillingness to prosecute the appellants further.*

34. *In view of all that is stated above, we are of the considered view that this is a fit case warranting the exercise of the inherent powers of this Court to bring these proceedings to an end. The complaint itself, as stated earlier, is not supported by any documentary evidence and rests upon an alleged opportunity notice under Section 61(2) of FERA. The respondent - complainant have, till date, not been able to produce the same or even date it with any precision. It is pertinent to mention that 23-years have now elapsed since the institution of the complaint, and over three decades since the transaction it concerns, without the trial having progressed beyond the stage of service of summons. To permit the respondent - complainant to continue in such circumstances would be to allow the* *appellants to remain, in the words of this Court in Kailash Chandra Kapri (supra), in a state of suspended animation indefinitely.*

35. *We accordingly hold that the complaint bearing Criminal Case Nos. 1503-1504 of 2002, and the summoning order dated 30.05.2002 issued therein, are liable to be quashed as against the appellants herein only. We accordingly pass such order.*

7.82. By relying on ***Standard Chartered Bank***, he submits that there is prolonged, unexplained and attributable inaction on the part of the prosecution or investigating agency, resulting in the proceedings remaining pending without meaningful progress, such conduct assumes significance in considering whether the proceedings should be permitted to continue.

7.83. Learned Senior Counsel submits that criminal proceedings cannot be allowed to continue indefinitely, particularly where the delay is not attributable to the accused and the prosecuting agency has failed to act with reasonable diligence. In such circumstances, continued pendency keeps the accused in a state of uncertainty and amounts to keeping the proceedings in a state of suspended animation.

7.84. It is therefore submitted that, where the record demonstrates that the investigating or prosecuting authority had sufficient opportunity to take the necessary steps but failed to do so without any satisfactory explanation, and the proceedings have consequently remained pending for an unduly long period, the inherent jurisdiction of this Court can be exercised to bring such proceedings to an end.

7.85. He submits that the present case stands on a similar footing. The transaction in question is more than eleven years old, the investigation has been pending since 2021, and no adjudication proceedings or complaint under FEMA have been initiated. The petitioner has also cooperated with the investigation. There is no allegation of any intervening circumstance or conduct on the part of the petitioner which necessitated the exercise of the power under Section 37A at this stage.

7.86. He therefore submits that, in the absence of any explanation for the prolonged inaction or any demonstrated urgency warranting pre-emptive seizure, the exercise of such drastic power at this belated stage is unreasonable and disproportionate. The continued proceedings, in such circumstances, would subject the petitioner to prolonged uncertainty and cannot be sustained merely on the ground that the investigation remains pending.

7.87. On the basis of all the above submissions, he submits that W.P.No.16763/2026 is required to be allowed and the reliefs sought for are granted.

Arguments on Behalf of Respondent – Enforcement Directorate in WP 7283 of 2026.

8. Shri N Venkataraman, Learned Additional Solicitor General of India, submits as follows:

8.1. It is contended that a writ remedy under Article 226 can be resorted to only when there is a breach of fundamental right, violation of principle of natural justice, the Authority has exercised jurisdiction in excess of its jurisdiction, there is challenge to the vires of a statute or delegated legislation.

8.2. The decision in ***Radha Krishan Industries v. State of Himachal Pradesh***[20], more particularly paragraphs 27 and 28 thereof has been relied upon, which is reproduced hereunder for easy reference:

> ***"27.*** *The principles of law which emerge are that:*
>
> ***27.1.*** *The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.*
>
> ***27.2.*** *The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.*
>
> ***27.3.*** *Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.*
>
> ***27.4.*** *An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.*
>
> ***27.5.*** *When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.*

[20] 2021 SCC OnLine SC 334

> ***27.6.*** *In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.*
>
> ***28.*** *These principles have been consistently upheld by this Court in Chand Ratan v. Durga Prasad , Babubhai Muljibhai Patel v. Nandlal Khodidas Barot and Rajasthan SEB v. Union of India among other decisions."*

8.3. By relying on ***Radha Krishan Industries***, it is sought to be contended that the availability of an alternative statutory remedy bars the exercise of jurisdiction under Article 226 of the Constitution. It is only if there is a violation of the principles of natural justice or the order or proceedings are wholly without jurisdiction, the High Court may exercise its writ jurisdiction.

8.4. Reliance is placed on the decision of the Hon'ble Supreme Court in ***Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others***[21], more particularly paragraph 6 thereof, which is reproduced hereunder for easy reference:

> ***"6.*** *We are constrained to dismiss these petitions on the short ground that the petitioners have an equally efficacious alternative remedy by way of an appeal to the Prescribed Authority under sub-section (1) of Section 23 of the Act,*

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[21] (1983) 2 SCC 433

then a second appeal to the Tribunal under sub-section (3)(a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act. In Raleigh Investment Company Limited v. Governor-General in Council [AIR 1947 PC 78 : (1947) 74 IA 50 : 231 IC 1] Lord Uthwatt, J. in delivering the judgment of the Board observed that in the provenance of tax where the Act provided for a complete machinery which enabled an assessee to effectively raise in the courts the question of the validity of an assessment denied an alternative jurisdiction to the High Court to interfere. It is true that the decision of the Privy Council in Raleigh Investment Company case [AIR 1947 PC 78 : (1947) 74 IA 50 : 231 IC 1] was in relation to a suit brought for a declaration that an assessment made by the Income Tax Officer was a nullity, and it was held by the Privy Council that an assessment made under the machinery provided by the Act, even if based on a provision subsequently held to be ultra vires, was not a nullity like an order of a court lacking jurisdiction and that Section 67 of the Income Tax Act, 1922 operated as a bar to the maintainability of such a suit. In dealing with the question whether Section 67 operated as a bar to a suit to set aside or modify an assessment made under a provision of the Act which is ultra vires, the Privy Council observed:

"In construing the section it is pertinent, in their Lordships' opinion, to ascertain whether the Act contains machinery which enables an assessee effectively to raise in the courts the question whether a particular provision of the Income Tax Act bearing on the assessment made is or is not ultra vires. The presence of such machinery, though by no means conclusive, marches with a construction of the section which denies an alternative jurisdiction to inquire into the same subject-matter."

8.5. By relying on ***Titaghur Paper Mills Co. Ltd***., it is sought to be contended that where the statute provides a complete and efficacious mechanism for redressal, the aggrieved party should ordinarily pursue the statutory remedy rather than invoke the writ jurisdiction of the High Court under Article 226 of the Constitution. The principle of exhaustion of alternative remedies is therefore sought to be applied to the present proceedings on the ground that FEMA provides a statutory remedy against the impugned order.

8.6. He submits that the issues which arise for consideration are twofold:

8.6.1. Whether the ED had reasons to believe to pass the order under Section 37A(1) of FEMA bearing *prima facie* findings indicating contravention of Section 4 of FEMA. If the answer to that question is in the affirmative, then the sufficiency of the reasons cannot be gone into and the writ petition deserves to be dismissed.

8.6.2. Whether the NOC request by Genpact India is rightly rejected since it bears a direct nexus with the scope and ambit of investigation and *prima facie* the request is premised on sending money out of the

Country, the very same *modus operandi* being under investigation.

8.7. He submits that all the submissions made by him are *prima facie* and ought not to be taken as a pre-decided submission on the part of the ED. The matter being under investigation, the endeavour through his submission is for the investigation to go on. The finding would ultimately depend on the investigation carried out.

8.8. He relies on Section 37A of the FEMA, which is reproduced hereunder for easy reference:

> ***37A. Special provisions relating to assets held outside India in contravention of section 4***.—*(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."

8.9. By relying upon sub-section (1) of Section 37A of FEMA, he submits that the provision empowers the Authorised Officer, upon receipt of information or otherwise, to exercise the power of seizure where he has reason to believe that any foreign exchange, foreign security or immovable property situated outside India is suspected to have been held in contravention of Section 4.

8.10. He submits that the Authorised Officer is required to record the reasons for such belief in writing and, upon being so satisfied, may seize the value equivalent, situated within India, of such foreign exchange, foreign security or immovable property.

8.11. He submits that the power under Section 37A(1) is thus exercisable on the basis of the satisfaction of the Authorised Officer arising from the information or material available to him. The provision does not require the alleged contravention under Section 4 to have been finally adjudicated before the power of seizure can be exercised.

8.12. He further submits that the order of seizure is subject to the statutory safeguard contained in sub-section (2). The Authorised Officer is required to place the order of seizure, along with the relevant material, before the Competent Authority appointed by the Central Government, being an officer not below the rank of Joint Secretary to the Government of India, within thirty days from the date of seizure.

8.13. He submits that sub-section (3) provides for independent consideration by the Competent Authority. The Competent Authority is required to dispose of the matter within 180 days from the date of seizure, either by confirming or setting aside the seizure, after affording an opportunity of hearing to the representatives of the Directorate of Enforcement as well as the aggrieved person.

8.14. He submits that the scheme of Section 37A consequently provides for an initial exercise of power by the Authorised Officer, followed by scrutiny and determination by the Competent Authority. The seizure under Section 37A is therefore subject to the safeguards and subsequent determination contemplated under sub-sections (2) and (3).

8.15. He submits that an aggrieved person has a further statutory remedy under sub-section (5), whereby an appeal may be preferred to the Appellate Tribunal against an order passed by the Competent Authority. According to him, the statutory scheme thus provides successive safeguards against an erroneous seizure.

8.16. He therefore submits that the writ petition is premature inasmuch as what is being challenged is only a seizure order passed under Sub-Section (1) of Section 37A. This would have to be confirmed or set aside by the Competent Authority, while doing so, the Competent Authority would provide a hearing to the petitioner.

8.17. His submission is that the entire procedure not having been completed, the petition has filed is not only premature but also filed without availing the remedy provided under the statute itself which is much more than alternate remedy. The seizure order is required to be automatically placed before the competent Authority, which he submits has already been placed, and it is for the competent authority to pass orders within 180 days, which the authority could not do since the above proceedings are pending before this Court and this Court had stayed the seizure order.

8.18. His submission is that there is a statutory appeal to the Appellate Tribunal under Sub-Section (5) of Section 37A in the event of the competent Authority confirming the order of seizure. None of these having been availed of by the petitioner, he again reiterates that the above petition is premature and the petitioner ought to be relegated to the remedies provided under the statute.

8.19. He relies upon a Coordinate Bench decision of this Court in ***Xiaomi Technology India Private Limited V. Union of*** **India**[22] more particularly paragraph 23 thereof, which is reproduced hereunder for easy reference:

> *"**23.** Whether the Authorised Officer had reason to believe that any foreign exchange situated outside India*

[22] W.P.No.9182/2022 dated 05.07.2022

is suspected to have been held in contravention of Section 4 or reasons recorded by the Authorised Officer would be sufficient to initiate action under Section 37-A of FEMA, are to be considered by the Competent Authority. At this stage, examining sufficiency of reason or otherwise under Article 226 of the Constitution of India would prejudice the case of either of the parties. It is best left to the Competent Authority to examine the same when it considers the entire issue under sub-Section (3) of Section 37-A of FEMA."

8.20. By relying on ***Xiaomi Technology India Private Limited***, his submission is that a Coordinate Bench of this Court has held that the question whether the Authorised Officer had the requisite reason to believe that the specified foreign asset was suspected to have been held in contravention of Section 4, as also whether the reasons recorded by the Authorised Officer are sufficient to initiate action under Section 37A, are matters which are required to be considered by the Competent Authority under sub-section (3) of Section 37A. He submits that, at this stage, examination by this Court under Article 226 of the Constitution as to the sufficiency of the reasons or the material relied upon would prejudice the case of either party and, therefore, such examination is best left to the Competent Authority.

8.21. He submits that Section 37A itself provides a complete statutory mechanism under which the seizure order, together with the relevant material, is placed before the Competent Authority, who is required to independently consider the matter after affording an opportunity of hearing to the aggrieved person and the representatives of the ED and either confirm or set aside the seizure. The statutory scheme, according to him, therefore does not contemplate an examination of the sufficiency of the reasons recorded by the Authorised Officer at the initial stage under Article 226.

8.22. He submits that the petitioner cannot seek an adjudication by this Court on the sufficiency or adequacy of the material relied upon by the Authorised Officer when the statute has specifically entrusted such consideration to the Competent Authority. The writ jurisdiction, according to him, ought not to be converted into a parallel examination of the merits of the seizure proceedings when the statutory process under Section 37A(3) is yet to be completed.

8.23. He further submits that the decision in ***Xiaomi Technology India Private Limited*** is directly applicable to the present case, as the Coordinate Bench declined to examine at the writ stage whether the Authorised Officer had sufficient reason to believe or whether the reasons recorded by him were adequate to initiate action under Section 37A. Following the said decision, he submits that the present Court should likewise leave those questions to be considered by the Competent Authority.

8.24. Without prejudice to his preliminary objection as to the maintainability of the writ petition, he submits that the present case does not fall within the recognised exceptions warranting interference under Article 226. According to him, the Authorised Officer had jurisdiction under Section 37A, the order was passed after recording reasons in writing, and the same was based upon relevant material. The dispute raised by the petitioner is essentially with regard to the sufficiency, interpretation and appreciation of that material, which, according to him, ought to be considered in the statutory proceedings before the Competent Authority.

8.25. He therefore submits that the seizure order should not be interdicted at this stage and that the petitioner ought to place its objections, including its challenge to the reasons recorded and the material relied upon, before the Competent Authority in terms of Section 37A(3), which is the authority statutorily entrusted with deciding whether the seizure is to be confirmed or set aside.

8.26. His submission is that, at this stage, his endeavour is only to demonstrate that the action taken by the Authorities is ex facie within the statutory framework. The question whether the material relied upon ultimately establishes a contravention of Section 4, or whether the seizure is liable to be confirmed or set aside, is a matter which falls for consideration by the Competent Authority under sub-section (3) of Section 37A. According to him, this Court, while exercising jurisdiction under Article 226, need not undertake a final examination of the merits of the allegations at this stage.

8.27. He submits that the power under Section 37A is available where the Authorised Officer has reason to believe that any foreign exchange, foreign security or immovable property situated outside India is suspected to have been held in contravention of Section 4. The exercise of the power is therefore linked to the statutory prohibition contained in Section 4 and to the satisfaction of the Authorised Officer on the basis of the material available to him.

8.28. By referring to Section 4, he submits that the prohibition is expressed in terms of the acts of a person resident in India "acquiring, holding, owning, possessing or transferring" foreign exchange, foreign security or immovable property situated outside India. According to him, the use of the expressions "hold", "own" and "possess" is significant, since these are not acts confined to the point in time when the asset was originally acquired or transferred. Where an asset has been acquired or transferred in contravention of the statutory prohibition and continues thereafter to be held, owned or possessed outside India, the contravention, according to him, continues so long as that state of affairs continues.

8.29. He submits that Section 4 must therefore be understood not merely with reference to the original transaction by which the foreign exchange came to be situated outside India, but also with reference to its continued holding or possession thereafter. According to him, the fact that the initial transaction may have occurred at an earlier point of time does not, by itself, bring the matter outside the scope of Section 4 if the foreign exchange continues to be held outside India in circumstances amounting to a contravention.

8.30. He submits that, on this interpretation, the contravention cannot necessarily be characterised as a single and completed event. It may arise from a series of transactions by which foreign exchange is moved or dealt with and may continue thereafter by reason of the foreign exchange being held, owned or possessed outside India. Consequently, according to him, the subsequent state of affairs is relevant while considering the existence of a contravention for purposes of Section 37A.

8.31. Applying the above principle to the present case, he submits that foreign exchange was transferred by Empower/Genpact India to various entities and continues to be held by those entities outside India. According to him, it is not necessary, for the purpose of invoking Section 37A, to confine the examination to the date of the original transfer. The continued holding of the foreign exchange outside India constitutes, according to him, a continuing contravention of Section 4 and provides the necessary basis for exercise of the power under Section 37A.

8.32. He submits that this aspect is also relevant to the petitioner's contention that the underlying transactions are of 2015 and that Section 37A came into force only subsequently. According to him, if the foreign exchange continues to be held outside India in contravention of Section 4, the relevant contravention is not exhausted with the original transaction and the subsequent continuance of the prohibited state of affairs can be taken into consideration while exercising the power under Section 37A.

8.33. His submission, however, is that it is not necessary for this Court, at this stage, to finally determine whether the alleged transactions in fact constitute a contravention of Section 4. The question for consideration, according to him, is whether the Authorised Officer had the statutory power and jurisdiction to invoke Section 37A and whether the seizure order is ex facie within the scope of that provision. The final determination as to whether the material establishes the alleged contravention is, according to him, required to be left to the Competent Authority.

8.34. He submits that the distinction between jurisdiction to initiate the action and ultimate proof of the alleged contravention is material. According to him, the existence of material giving rise to the requisite reason to believe is sufficient for the Authorised Officer to initiate action under Section 37A. Whether that material ultimately warrants confirmation of the seizure is a matter for consideration under Section 37A(3). This Court, according to him, ought not to substitute its assessment of the material for that of the statutory authorities at this preliminary stage.

8.35. He further submits that the seizure order itself is a detailed order running into 95 pages. It sets out the transactions examined, the material relied upon, the conclusions reached by the Authorised Officer and the reasons for invoking Section 37A. According to him, the order is self-contained and the ED is not seeking to supplement or supplant the reasons recorded therein through its pleadings or oral submissions.

8.36. He submits that this Court is therefore not faced with a case where the Authorised Officer has acted without recording reasons or without reference to any material. On the contrary, according to him, the reasons and material are contained in the seizure order itself. The petitioner's challenge, in substance, is to the manner in which the material has been appreciated and to the conclusions drawn from it, which, according to him, are matters appropriately examined by the Competent Authority.

8.37. On the merits of the material, he submits that the transactions undertaken by the Genpact group are not merely matters giving rise to a possible suspicion. According to him, the sequence, structure, speed and time-frame of the transactions disclose a concerted arrangement having the effect of moving funds outside India in a manner contrary to the applicable law.

8.38. He submits that the transactions have to be examined not in isolation but as a connected series of transactions. According to him, the manner in which the transactions were structured, the entities through which they were routed, the timing of the transactions and the subsequent movement of funds are relevant circumstances from which the Authorised Officer was entitled to draw the requisite inference under Section 37A.

8.39. He further submits that the structure adopted resulted in more money ultimately going out of India than the amount which had initially come into India. According to him, this could not have occurred as a consequence of a genuine commercial transaction and was achieved by creating an artificial loan liability. He submits that the alleged loan did not represent a genuine commercial liability and that the transactions purportedly undertaken pursuant to such liability did not result in any corresponding benefit to the Indian entities or to the country.

8.40. According to him, the creation of the artificial loan and the subsequent movement of funds pursuant thereto form part of the overall modus adopted by the Genpact group. The Authorised Officer was therefore entitled to examine the substance and effect of the entire arrangement rather than each transaction as an isolated event. On that basis, he submits that the material available before the Authorised Officer was sufficient to form the requisite reason to believe for invoking Section 37A.

8.41. He therefore submits that the petitioner's challenge effectively seeks an adjudication on the disputed factual and financial aspects of the transactions at the stage of the initial seizure itself. Such an exercise, according to him, would overlap with the statutory determination entrusted to the Competent Authority under Section 37A(3). The appropriate course, according to him, would be to permit the statutory process to continue and leave the petitioner to urge all its objections before the Competent Authority.

8.42. He submits that on 27.01.2015, Morgan Stanley extended a loan of USD 660 million to Headstrong Singapore (now Genpact Singapore), which is a holding Company for two Indian Companies. In that, Headstrong Singapore held 95% of the shares in old Genpact India and 100% of shares in Empower India. The remaining 5% of Genpact India was held by Genpact Mauritius.

8.43. He submits that Old Genpact India was a Company having substantial business operations generating significant free reserves. Empower India was a paper Company with no business operations, held no assets of consequence and had a book value of only INR 40 crores.

8.44. He submits that Genpact Group has taken out money from India in two phases.

8.45. In the First Phase on 28.01.2015, an amount of USD 660 million was received by Headstrong Singapore (now Genpact Singapore) from Morgan Stanley along with additional USD 77.5 million was infused as Foreign Direct Investment (FDI) into Empower India by Headstrong Singapore (now Genpact Singapore), which in Indian Rupees is approximately equivalent to INR 4528 crores.

8.46. On the same day i.e. 28.01.2015, Empower India migrated the entire amount of money received as FDI from Headstrong Singapore (now Genpact Singapore) in two tranches of transactions.

8.46.1. **Tranche 1-** Empower India paid 660 million USD to Headstrong Singapore amounting to INR 4050 crores for purchase of 44% of shares of Old Genpact India which were held by Headstrong Singapore.

8.46.2. **Tranche 2-** Empower India paid 77.5 million USD to Genpact Mauritius amounting to approximately INR 476 Crores as regards which Genpact Mauritius sold 5% of the shares held by it in Old Genpact India to Empower.

8.47. He submits that the sequence of transactions assumes significance when the movement of funds is examined on a day-to-day basis. On 28.01.2015, the very day on which the amount was received by Empower India, the entire amount was transferred by Empower India towards acquisition of 49% shareholding in Old Genpact India. The said 49% comprised 44% shares divested by Headstrong Singapore (now Genpact Singapore) and 5% shares divested by Genpact Mauritius.

8.48. He submits that the subsequent transaction on 30.01.2015 is equally significant. Within two days of the aforesaid transfer, Headstrong Singapore (now Genpact Singapore) repaid USD 660 million to Morgan Stanley from the monies received from Empower India as consideration for the sale of its 44% shareholding in Old Genpact India.

8.49. He points out that Headstrong Singapore (now Genpact Singapore) continues to hold 100% of the shareholding in Empower India.

8.50. According to him, the aforesaid sequence cannot be viewed as independent and unrelated transactions. He submits that ex facie the seller of the 44% shareholding, namely Headstrong Singapore (now Genpact Singapore), provided the funds to Empower India, which was the purchaser of the very same shareholding. Thus, according to him, the person ultimately receiving the consideration for the sale of shares had, in substance, provided the funds enabling the purchaser to make that payment.

8.51. He submits that this circularity in the movement of funds raises a serious question as to whether the amount paid by Empower India represented genuine consideration arising from an independent commercial transaction. According to him, if the seller itself provides the funds to the purchaser for acquiring the seller's shares, the apparent payment of consideration does not represent an independent infusion of value but merely facilitates the movement of the same funds through different entities and transactions.

8.52. He submits that the chronology is particularly relevant. The amount was received by Empower India on 28.01.2015; the entire amount was utilised on the same day for acquisition of shares; and, within two days, the seller utilised the consideration so received to repay its liability to Morgan Stanley. According to him, the proximity in time and the inter-connected nature of these transactions disclose a circular movement of funds rather than an ordinary acquisition of shares supported by an independent source of consideration.

8.53. He therefore submits that the transaction, viewed as a whole, amounts to round-tripping. According to him, round-tripping cannot be understood in a narrow sense as requiring funds first to leave India and thereafter return to India. The substance of the transaction, according to him, is equally relevant where funds are brought into India in the form of FDI and are immediately moved out of India through another transaction without remaining in India or resulting in any corresponding creation of value.

8.54. He submits that, in the present case, although Headstrong Singapore (now Genpact Singapore) is stated to have infused FDI into Empower India, the funds did not remain with Empower India even for a day. The entire amount received was utilised on the very same day for acquiring shares from entities within the Genpact group, and the consideration received by Headstrong Singapore was thereafter used to discharge its liability to Morgan Stanley. According to him, the economic effect was therefore materially different from an ordinary FDI transaction in which foreign capital remains available to the Indian entity for its business, capital expenditure, expansion or other productive purposes.

8.55. He further submits that the transaction must be considered together with the loan obtained from Morgan Stanley on 27.01.2015. That loan was repaid on 30.01.2015, within three to four days. According to him, the timing of the borrowing, the infusion of funds into Empower India, the immediate utilisation of the funds for acquisition of shares, and the subsequent repayment of Morgan Stanley from the sale proceeds are all connected events and cannot be examined in isolation.

8.56. He submits that the effect of the arrangement was that Morgan Stanley's funds were effectively utilised for a period of only a few days in facilitating the transaction. According to him, the funds were presented as FDI upon being brought into India, but were immediately deployed towards acquisition of shares and thereafter found their way back to the foreign group entity, which used the amount to repay the external borrowing. He submits that this sequence is relevant to ascertain the true nature and purpose of the arrangement.

8.57. He submits that there was, therefore, no corresponding economic benefit or augmentation of productive capital in India commensurate with the amount shown as FDI. According to him, the transaction did not result in the funds being utilised for establishing or expanding an Indian business, creating capital assets or strengthening the operations of an Indian entity. Instead, the immediate movement of the funds enabled one group entity to acquire shares from another group entity and enabled the selling entity to discharge its borrowing from Morgan Stanley.

8.58. He submits that the fact that the transactions were undertaken through formally distinct legal entities cannot, at this stage, prevent the Authorities from examining the substance and economic effect of the arrangement. According to him, the relevant consideration is the complete flow of funds and the relationship between the entities involved. When the transactions are examined together, the circularity of the funds and the absence of any corresponding inflow of value into India, according to him, provide sufficient basis for the Authorised Officer to entertain the requisite belief under Section 37A.

8.59. He further submits that the FDI framework is intended to facilitate genuine investment and the inflow of capital into India. It is not intended, according to him, to permit an arrangement under which funds are brought into India only momentarily and are thereafter moved out through an inter-connected transaction, without creating any corresponding economic value in India.

8.60. He submits that, in the present case, the description of the transaction as FDI cannot, by itself, conclude the matter. The Authorities are entitled to examine whether the transaction, notwithstanding its form, achieved the substantive object of an investment in India or was structured merely as a mechanism for routing funds through an Indian entity. According to him, the immediate movement of the entire amount, the commonality of the group entities, the sale of shares by Headstrong Singapore, the repayment to Morgan Stanley within two days and the continued ownership of Empower India by Headstrong Singapore are relevant circumstances in this regard.

8.61. He therefore submits that the material relied upon by the Authorised Officer has to be viewed cumulatively. No single transaction, according to him, is required to be examined in isolation when the allegation itself concerns a structured arrangement involving several inter-connected transactions. The sequence of events, the timing of the fund movements and the ultimate destination and utilisation of the funds, according to him, justify the inference that the transaction was not a genuine infusion of FDI but a structured arrangement resulting in circular movement of funds and removal of value from India.

8.62. His submission is that the aforesaid circumstances, taken together, provide a reasonable basis for the Authorised Officer to invoke Section 37A. He submits that whether the petitioner's explanation ultimately establishes that the transactions were genuine, commercially justified and compliant with FEMA is a matter for adjudication by the Competent Authority. At the present stage, according to him, this Court needs to only consider whether the material disclosed in the seizure order was capable of giving rise to the requisite belief and whether the exercise of power was ex facie within the statutory framework.

8.63. He submits that the second Phase has to be examined not merely with reference to the fact that approximately INR 4,600 crores were received by Empower India under the NCDs, but with reference to the manner in which the funds were immediately utilised and ultimately moved out of India.

8.64. On 25.03.2015, Morgan Stanley advanced USD 737.5 million to Genpact Bermuda as an interest-bearing dollar loan at 2% per annum. The entire amount was transferred on the same day by Genpact Bermuda to Genpact Luxembourg, which, in turn, subscribed to 4,600 NCDs issued by Empower India, each having a face value of INR 1 crore.

8.65. He submits that, therefore, the funds originating from the Morgan Stanley loan entered India in the form of a subscription to the NCDs issued by Empower India. Empower India thereby became liable to Genpact Luxembourg for approximately INR 4,600 crores, together with the interest payable on the NCDs. However, the funds did not remain with Empower India or get deployed in its business.

8.66. He submits that on the very same day, i.e. 25.03.2015, the entire INR 4,600 crores received by Empower India was transferred to Headstrong Singapore (now Genpact Singapore) towards acquisition of the remaining 51% shareholding in Genpact India. Thus, according to him, the entire amount which had entered India under the NCD transaction left the possession of Empower India on the same day.

8.67. He further submits that the movement of the funds thereafter completes the circular chain. On 26.03.2015, Headstrong Singapore transferred the entire amount received from Empower India to Genpact Bermuda, which, on the same day, utilised the amount towards repayment of the USD 737.5 million loan obtained from Morgan Stanley.

8.68. According to him, the same funds which had originated as a foreign loan, and which had thereafter been brought into India as an NCD investment, ultimately went back towards repayment of the very foreign borrowing from which the funds had originated, within two days.

8.69. He submits that, viewed in this manner, there was no substantive retention of the NCD proceeds in India. The amount came into India, remained with Empower India only for the time required to complete the share acquisition, and immediately moved out of India. The transaction therefore, according to him, created the appearance of an inflow of approximately INR 4,600 crores into India without the corresponding economic benefit ordinarily associated with such an inflow.

8.70. He submits that the consequence of the transaction for Empower India was materially different. While the NCD proceeds themselves were immediately transferred out, Empower India was left with a liability of approximately INR 4,600 crores in favour of Genpact Luxembourg. The liability was not extinguished merely because the proceeds had been utilised for the acquisition of shares. According to him, Empower India continued to remain liable for repayment of the NCD principal and, in the meantime, for payment of interest thereon @ 11% per annum, which was later on reduced to 9.5% per annum.

8.71. He submits that this distinction between the movement of the funds and the liability created in India is important. According to him, the money raised through the NCDs was not utilised by Empower India for expansion of its business, acquisition of productive assets, working capital, capital expenditure or any other activity which would result in a corresponding benefit to the Indian entity. Instead, the entire amount was transferred to a foreign group entity towards acquisition of shares.

8.72. He submits that, consequently, the NCD transaction did not result in Empower India having the benefit of the INR 4,600 crores which it had ostensibly borrowed. The amount was immediately passed on, whereas the liability arising from the borrowing continued to remain on the books of Empower India.

According to him, the only continuing economic consequence to Empower India was the debt obligation and the interest liability arising from the NCDs.

8.73. He submits that the payment of interest assumes significance in this context. According to him, while the principal amount raised under the NCDs was immediately moved out of India, Empower India was thereafter required to make periodic payments towards principal and interest on that principal. Thus, according to him, the transaction had the effect of leaving the Indian entity with a continuing financial liability in respect of funds which had not been retained or utilised by it in India.

8.74. He submits that the transaction therefore cannot be viewed as a conventional foreign investment or borrowing merely by looking at the initial receipt of money in India. According to him, this Court must also consider what happened to the money immediately thereafter. In the present case, the entire amount was transferred on the same day towards acquisition of shares, and the consideration thereafter moved through the group structure and was ultimately used to repay the Morgan Stanley borrowing.

8.75. He further submits that the immediate outflow assumes greater significance because the recipient of the consideration for the acquisition of shares was itself a foreign group entity. Thus, according to him, the funds which came into India from Genpact Luxembourg did not represent capital which was retained by Empower India, but were immediately transferred to another foreign group entity in connection with the acquisition of shares in Genpact India.

8.76. He submits that the transaction consequently produced two distinct results: first, the funds which were shown as having been brought into India did not remain in India; and second, Empower India was left with a substantial liability towards the NCD subscriber. According to him, the combination of these two features is relevant in determining the substance of the arrangement.

8.77. He submits that the same feature is also evident from the first phase. There too, according to him, the amount received by Empower India was immediately utilised for acquisition of shares and thereafter the funds moved back to the foreign group. In the second phase, the pattern was repeated through the NCD structure, with the additional feature that the Indian entity was left with the NCD principal and interest liability.

8.78. He submits that the two phases must therefore be examined as parts of one overall arrangement by which Empower India acquired 100% of Old Genpact India. Empower India, according to him, had a net worth of approximately INR 40 crores, whereas Genpact India had a turnover exceeding INR 4,724 crores. According to him, the financial position of Empower India demonstrates that it did not possess independent resources to undertake such acquisition and that the funds required for the acquisition were arranged through the interconnected transactions described above.

8.79. He submits that the fact that the NCD proceeds were received in Indian currency does not, by itself, answer the question as to the substance of the transaction. According to him, the relevant consideration is the origin of the funds, the entities through which they moved, the purpose for which they were brought into India, the immediate utilisation thereof, their subsequent movement outside India and the liability ultimately left with the Indian entity.

8.80. According to him, the entire chain demonstrates that the funds were effectively brought into India for the limited purpose of facilitating the acquisition of the remaining shares of Genpact India and were thereafter moved out to discharge the foreign borrowing. The NCD structure, according to him, therefore served as an intermediate mechanism for routing the funds through Empower India while simultaneously creating a substantial loan liability in India.

8.81. He submits that the transaction must also be considered from the standpoint of the benefit, if any, that accrued to India. According to him, merely routing funds through an Indian entity cannot be equated with a genuine inflow of capital where the entire amount is immediately transferred outside India and no corresponding capital or productive asset is created or retained in India. The relevant question, according to him, is the ultimate economic effect of the transaction and not merely the form in which the funds entered India.

8.82. He therefore submits that the fact that approximately INR 4,600 crores came into India cannot be considered in isolation. According to him, the material circumstances are that the amount came into India, was immediately transferred out towards acquisition of shares, subsequently moved through the foreign group structure, and ultimately went towards repayment of the Morgan Stanley loan, while Empower India continued to bear the NCD principal and interest liability.

8.83. He submits that this pattern, coupled with the absence of any substantive utilisation of the NCD proceeds in India, provides the basis for the ED's allegation that the NCD liability was artificial and formed part of the overall arrangement for movement of funds. According to him, the transaction therefore cannot be characterised merely on the basis of its documentation as a genuine borrowing without examining the actual flow and end-use of the funds.

8.84. He submits that these circumstances, taken cumulatively with the first phase, provided relevant material before the Authorised Officer for forming the requisite belief under Section 37A. Whether the petitioner's explanation ultimately establishes the genuineness and commercial substance of the transactions, according to him, is a matter for consideration by the Competent Authority in the proceedings under Section 37A(3).

8.85. He submits that, after completion of the second phase of the transaction, a scheme of amalgamation was proposed, which was sanctioned by the High Court of Telangana and Andhra Pradesh vide order dated 17.08.2015 and subsequently by the Delhi High Court vide order dated 18.03.2016. Pursuant to the scheme, the entities, including Old Genpact India, were amalgamated into Empower India and the resultant company was named Genpact India.

8.86. He submits that the amalgamation assumes significance in examining the ultimate effect of the transactions. Prior to the aforesaid transactions, the free reserves of Old Genpact India were available with Old Genpact India itself. Following the amalgamation, those free reserves became available to the resultant Genpact India, which also inherited the liability arising from the NCD transaction undertaken by Empower India. According to him, the transaction therefore resulted in an entity which had substantial free reserves without any liability being placed in a position to discharge a liability which had been created in the course of the acquisition of its own shares.

8.87. He submits that Empower India had a book value of approximately INR 40 crores and was not carrying on any substantial business operations or holding assets of consequence, whereas Genpact India had substantial business operations and free reserves of approximately INR 8,000 crores. According to him, Empower India did not have the independent financial capacity to acquire Genpact India and the acquisition was made possible only through the interconnected funding arrangements forming the subject matter of the two phases.

8.88. He submits that, pursuant to the second phase, Empower India incurred an NCD liability of approximately INR 4,600 crores in favour of Genpact Luxembourg. The liability carried interest at 11% per annum, subsequently reduced to 9.5% with effect from 01.12.2020. According to him, the significance of the transaction is that the NCD proceeds themselves were not retained or deployed by Empower India for its business in India. The entire amount was immediately transferred towards acquisition of the remaining 51% shareholding in Genpact India.

8.89. He submits that, after the amalgamation, the free reserves of old Genpact India became available to Empower India on amalgamation and this to new Genpact India after the name change, which thereafter discharged the NCD liability. According to him, this resulted in the free reserves which were already available in India being utilised over a period of time to repay a liability which had been created as part of the arrangement by which Empower India acquired old Genpact India.

8.90. He further submits that the liability was not confined to repayment of the principal amount. Genpact India was also required to make substantial interest payments to Genpact Luxembourg. According to him, between 2018 and 2023, approximately INR 7,800 crores were paid by Genpact India to Genpact Luxembourg towards repayment of the NCD principal and interest. Thus, according to him, the consequence of the arrangement was the eventual movement of substantial amounts of the free reserves of the Indian company to the foreign group entity, thus foreign exchange.

8.91. He submits that the economic effect of the transaction has to be considered against the manner in which the funds had originally moved. Approximately INR 4,600 crores came into India through the NCD subscription by Genpact Luxembourg. However, the entire amount was immediately transferred by Empower India towards acquisition of the remaining 51% shares of Genpact India. The funds therefore did not remain available to Empower India for any business purpose in India.

8.92. He submits that the subsequent movement of the same funds completes the chain. The amount paid by Empower India to Headstrong Singapore (now Genpact Singapore) was transferred on the following day to Genpact Bermuda and was thereafter utilised to repay the USD 737.5 million borrowing obtained from Morgan Stanley. Thus, according to him, the money which originated from Morgan Stanley passed through the various Genpact entities, came into India through the NCD structure, immediately left India towards acquisition of shares and ultimately returned to Morgan Stanley.

8.93. He submits that the Morgan Stanley borrowing and the NCD subscription cannot therefore be viewed as two independent commercial transactions. According to him, they were successive stages in the movement of the same funds and formed part of one integrated arrangement.

8.94. The sequence was: Morgan Stanley to Genpact Bermuda; Genpact Bermuda to Genpact Luxembourg; Genpact Luxembourg to Empower India against subscription to NCDs; Empower India to Headstrong Singapore towards acquisition of shares; Headstrong Singapore to Genpact Bermuda; and Genpact Bermuda back to Morgan Stanley.

8.95. According to him, the fact that different legal entities and different financial instruments were used at the various stages does not alter the actual movement of the money. He submits that the funds remained within the same group of interconnected entities and, within a period of approximately two days, travelled through the entire chain and the world and returned to the original lender. He therefore characterises the arrangement as round-tripping of funds.

8.96. He submits that the same pattern is evident in the first phase. In that phase also, funds were brought into Empower India and were immediately utilised for acquisition of 49% of the shareholding in Genpact India. According to him, the consideration thereafter reached the foreign group entity. The second phase substantially replicated the same structure, except that the funds were introduced through the NCD mechanism and resulted in the creation of a substantial liability in India.

8.97. He submits that the two phases must therefore be viewed cumulatively. In the first phase, Empower India acquired 49% of Genpact India; in the second phase, it acquired the remaining 51%. Thus, through the two phases, Empower India became the 100% shareholder of Genpact India. According to him, neither acquisition was funded from any substantial independent financial resources of Empower India.

8.98. He submits that the financial disparity between the entities is itself a relevant circumstance. Empower India had a book value of approximately INR 40 crores, whereas Genpact

India had a turnover exceeding INR 4,724 crores and free reserves of approximately INR 8,000 crores. According to him, an entity with such limited financial capacity acquiring the entirety of a substantially larger operating company demonstrates the importance of examining the source, movement and ultimate utilisation of the funds used for the acquisition.

8.99. He submits that the NCD transaction assumes further significance because the funds received against the NCDs were not utilised for the purposes ordinarily associated with borrowing by an Indian operating entity. The amount was transferred on the same day towards acquisition of shares, and the Indian entity was thereafter left with the repayment and interest obligations under the NCDs. According to him, the borrowing therefore created a liability in India without the corresponding borrowing proceeds being retained or deployed for the benefit of the Indian business.

8.100. He submits that this is also reflected in the subsequent repayment. The principal amount of approximately INR 4,600 crores and the interest payable thereon were ultimately discharged from the resources of the resultant Genpact India. Genpact Luxembourg, upon receiving the repayment, was able to repatriate the amounts in foreign currency. According to him, the ultimate consequence was that funds which had been available as free reserves in India were transferred to the foreign entity and were ultimately repatriated as US dollars.

8.101. He submits that, therefore, the arrangement had a two-fold effect. Firstly, the funds which came into India under the NCD transaction did not remain in India but were immediately utilised for acquisition of shares and thereafter moved out of India. Secondly, the transaction left behind a substantial liability in India, which was subsequently discharged from the free reserves of the resultant Genpact India together with interest.

8.102. He submits that, but for the NCD liability, the free reserves of the erstwhile Genpact India would have continued to remain available in India for deployment or investment within India. According to him, the creation of the

NCD liability provided the mechanism through which those reserves could subsequently be transferred to Genpact Luxembourg under the description of repayment of a loan and payment of interest.

8.103. He therefore submits that the transaction cannot be examined merely by asking whether the NCDs were formally issued or whether money was formally received in India. According to him, the relevant enquiry is into the complete chain of transactions, including the source of the funds, their immediate utilisation, the repayment of the original foreign borrowing, the creation of the NCD liability, the amalgamation and the subsequent discharge of that liability from the free reserves of the Indian company.

8.104. He submits that the fact that the Morgan Stanley loan was repaid within a few days, while the NCD liability continued for several years, is a further circumstance supporting the ED's case. According to him, a short-term foreign borrowing was effectively replaced by a long-term liability in India, even though the funds raised through the NCDs were immediately transferred out of India and were not retained for any independent business purpose.

8.105. He submits that the subsequent payment of approximately INR 7,800 crores between 2018 and 2023 cannot be divorced from the manner in which the liability was originally created. According to him, the subsequent payments represent the eventual economic consequence of the arrangement put in place in March 2015. The fact that the outflow occurred over several years does not, according to him, sever the connection between the original transaction and the eventual movement of funds.

8.106. He submits that the two phases, viewed as a whole, therefore disclose a common pattern: funds were brought into India, immediately deployed towards acquisition of old Genpact India, the funds thereafter moved out of India, while the Indian entity was left with a substantial liability; following amalgamation, that liability was ultimately discharged from the free reserves of the Indian operating company, resulting in substantial remittances to Genpact Luxembourg.

8.107. He submits that this structure, according to the ED, resulted in the appearance of an inflow of foreign capital into India without the corresponding retention or deployment of that capital in India. Instead, the funds facilitated the acquisition of an Indian company and the subsequent liability enabled the movement of substantial amounts of the Indian company's free reserves to the foreign group entity.

8.108. He submits that these circumstances, taken cumulatively, constitute sufficient material to warrant investigation into whether the transactions resulted in a contravention of Section 4 of FEMA. According to him, the investigation is not confined to the formal documentation of the individual transactions but necessarily extends to their inter se relationship, source and destination of funds and ultimate economic effect.

8.109. He submits that, at the present stage, this Court is not required to finally determine whether the transactions constitute a contravention of Section 4. The limited question, according to him, is whether the material discloses ex facie circumstances warranting investigation and whether the Authorised Officer had jurisdiction to invoke Section 37A. All explanations and defences of the petitioner, according to him, remain available for consideration in the statutory proceedings.

8.110. He therefore submits that the investigation ought not to be interdicted at this stage. According to him, the transactions involve substantial movement of funds, an interconnected series of transactions across jurisdictions, creation of a significant liability in India and subsequent remittance of substantial amounts to a foreign entity. In such circumstances, according to him, the ED is required to complete its investigation and this Court ought not to substitute its assessment of the transactions for that of the statutory authorities at the threshold stage.

8.111. He refers to Section 4 of FEMA which has been reproduced hereunder for easy reference;

> ***4. Holding of foreign exchange, etc****.—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.*

8.112. By relying on Section 4, he submits that the requirement of Section 4 of FEMA has been satisfied by the fact that Genpact India is a resident of India and foreign exchange payments have been made outside India. An amount equivalent to INR 7800 crores was remitted out of India between 2018 and 2023 by Genpact India to Genpact Luxembourg that payment has been taken outside India, and now Foreign Exchange is situated outside India. Genpact Luxembourg having received the remittances from Genpact India for a fictitious purpose, having no commercial substance, continues to represent and hold the assets of Genpact India outside India. All of them belong to the same group, his submission is also that Genpact India continues to hold foreign exchange situate outside India through Genpact Luxembourg both of which entities cannot be treated as two different entities. Genpact Luxembourg being used as a device to circumvent the statutory prohibition under Section 4 of FEMA.

8.113. He refers to Form 8-K filed by Genpact Ltd. before the Securities and Exchange Commission USA on 27.01.2015, more particularly Item No.1.01 and Item No.2.03 which are extracted hereunder for easy reference;

> ***Item 1.01. Entry into a Material Definitive Agreement**.*
>
> *On January 27, 2015, Genpact Limited ("Gerard"), and its indirect, wholly-owned subsidiaries Headstrong Consulting (Singapore) Pre Ltd. a limited Liability corporation incorporated under the laws of Singapore ("Headstrong Singapore"), and Genpact Global Holdings (Bermuda) Limited, an exempted limited liability company organized under the laws of Bermuda ("Genpact Bermuda" and, together with Headstrong Singapore, the "Borrowers"), entered into a credit agreement (the "Credit Agreement") an borrowers with Morgan Stanley Senior Funding Inc, as lender, The Credit Agreement provides for new credit facilities in an aggregate amount of $672.5 million, consisting of a $660 million term loan facility with Headstrong Singapore and a $12.5 million term loan facility with Genpact Bermuda. Each of the facilities was repaid on January 30, 2015.*
>
> *Borrowings under the Credit Agreement (together with currently expected additional borrowings to be made on substantially similar terms under a separate credit agreement with Morgan Stanley Senior Funding, Inc., including with respect to interest rate and maturity are being used in in connection with the consummation of certain internal reorganization transactions.*
>
> *Borrowings under the Credit Agreement bore interest rate equal to 2.00% per annum.*

The Credit Agreement was guaranteed by Genpact and certain of its subsidiaries. The obligations under the Credit Agreement were secured by the proceeds of the loans held by Genpact and certain of its subsidiaries.

The foregoing description of the Credit Agreement is qualified in its entirety by the full text of the Credit Agreement, which is attached hereto as Exhibit 10.1 and is incorporated herein by reference.

The foregoing description includes forward-looking statements and information that involves risks, uncertainties and assumptions, including but not limited to those listed under "Risk Factors" in our Quarterly Report on Form 10-Q for the quarter ended September 30, 2014, and in our Annual Report on Form 10-K for the year ended December 31, 2013.

Item 2.03. Creation of a Direct Financial Obligation or Obligations under an Off Balance Sheet Arrangement of a Registrant.

The disclosure required by this item is included in Item 1.01 of this Current Report on Form 8-K and is incorporated herein by reference

8.114. He also submits that a similar disclosure was made by Genpact Ltd. regarding the second tranche on 23.03.2015 at Item No.1.01 and Item No.2.03 which are extracted hereunder for easy reference;

Item 1.01. Entry into a Material Definitive Agreement.

On March 23, 2015, Genpact Limited ("Genpact") and its indirect, wholly-owned subsidiary Genpact Global Holdings (Bermuda) Limited, an exempted limited liability company organized under the laws of

Bermuda ("Genpact Bermuda"), entered into a credit agreement (the "Credit Agreement") with Genpact Bermuda as borrower and Morgan Stanley Senior Funding, Inc., as lender, under which Genpact Bermuda borrowed $737.5 million, the full principal amount available under the new credit facility. The full amount of the borrowings under the new credit facility was repaid on March 26, 2015.

Borrowings under the Credit Agreement (together with borrowings made on substantially similar terms under a separate credit agreement with Morgan Stanley Senior Funding, Inc. dated as of January 27, 2015, which borrowings were repaid on January 30, 2015) were used in connection with the consummation of certain internal reorganization transactions.

Borrowings under the Credit Agreement bore interest at a rate equal to 2.00% per annum.

The Credit Agreement was guaranteed by Genpact and certain of its subsidiaries. The obligations under the Credit Agreement were secured by the proceeds of the loans held by Genpact and certain of its subsidiaries.

The foregoing description of the Credit Agreement is qualified in its entirety by the full text of the Credit Agreement, which is attached hereto as Exhibit 10.1 and is incorporated herein by reference.

The foregoing description includes forward-looking statements and information that involves risks, uncertainties and assumptions, including but not limited to those listed under "Risk Factors" in our Annual Report on Form 10-K for the year ended December 31, 2014.

Item 2.03. Creation of a Direct Financial Obligation or Obligations under an Off Balance Sheet Arrangement of a Registrant.

The disclosure required by this item is included in Item 1.01 of this Current Report on Form 8-K and is incorporated herein by reference.

8.115. By referring to the disclosures made by Genpact Ltd., in Form 8-K filed by Genpact Ltd. before the Securities and Exchange Commission, USA, on 27.01.2015, he submits that, under Item 1.01, Genpact Ltd. disclosed that Genpact Limited, Headstrong Singapore Pte. Ltd. (now Genpact Singapore) and Genpact Global Holdings (Bermuda) Limited (Genpact Bermuda) had entered into a Credit Agreement with Morgan Stanley Senior Funding Inc. The disclosure records that the Credit Agreement provided for credit facilities aggregating USD 672.5 million, comprising a USD 660 million term loan facility with Headstrong Singapore and a USD 12.5 million term loan facility with Genpact Bermuda, and that the facilities were repaid on 30.01.2015.

8.116. He submits that the same disclosure records that the borrowings were made in connection with the consummation of certain internal reorganisation transactions and that the borrowings carried interest at 2% per annum. The disclosure further records that the credit facilities were guaranteed by Genpact and certain of its subsidiaries and that the obligations were secured by the proceeds of the loans held by Genpact and certain of its subsidiaries.

8.117. He submits that Item 2.03 of the Form 8-K, dealing with creation of a direct financial obligation or obligations under an off-balance-sheet arrangement of the registrant, specifically incorporates the disclosure contained in Item 1.01. According to him, the filing therefore contemporaneously records both the borrowing and its stated purpose in connection with the internal reorganisation transactions.

8.118. He further refers to the Form 8-K filed by Genpact Ltd. on 23.03.2015 in relation to the second phase. He submits that, under Item 1.01, Genpact Ltd. disclosed that Genpact Bermuda had entered into a Credit Agreement with Morgan Stanley Senior Funding Inc. and had borrowed USD 737.5 million, being the full principal amount available under the facility.

The disclosure expressly records that the entire borrowing was repaid on 26.03.2015.

8.119. He submits that the second Form 8-K further records that the borrowing was made in connection with the consummation of certain internal reorganisation transactions and that it carried interest at 2% per annum. It also records that the Credit Agreement was guaranteed by Genpact and certain of its subsidiaries and that the obligations were secured by the proceeds of the loans held by Genpact and its subsidiaries.

8.120. He submits that Item 2.03 of the second Form 8-K likewise incorporates the disclosure made under Item 1.01. Thus, according to him, Genpact Ltd.'s own contemporaneous disclosures before the SEC establish the existence, quantum, interest rate, purpose and extremely short duration of the two borrowings.

8.121. By referring to these disclosures, he submits that Genpact Ltd. has itself disclosed that Headstrong Singapore (now Genpact Singapore) and Genpact Bermuda were its indirect, wholly-owned subsidiaries and that the borrowings were undertaken as part of internal reorganisation transactions. According to him, the disclosures are therefore relevant while examining the relationship between the entities and the manner in which the funds moved through the group.

8.122. He submits that the first borrowing was entered into on 27.01.2015 and was repaid on 30.01.2015, while the second borrowing was entered into on 23.03.2015 and the entire amount was repaid on 26.03.2015. According to him, the contemporaneous disclosures thus demonstrate that both borrowings were of exceptionally short duration and were specifically undertaken in connection with the internal reorganisation.

8.123. He submits that these disclosures are significant when considered alongside the actual movement of funds in the two phases. According to him, the first borrowing was followed by the movement of funds through the Genpact entities and the acquisition of 49% shareholding in Genpact India, while the second borrowing was followed by the NCD subscription by Genpact Luxembourg, the transfer of the NCD proceeds by Empower India towards acquisition of the remaining 51% shareholding and the subsequent repayment of the Morgan Stanley borrowing.

8.124. He submits that the disclosures before the SEC therefore provide contemporaneous documentary evidence of the borrowing arrangements and their connection with the internal reorganisation. According to him, they are not subsequent explanations developed during the FEMA proceedings, but disclosures made by Genpact Ltd. itself at the relevant point of time.

8.125. He submits that the first Form 8-K records the USD 660 million and USD 12.5 million facilities and their repayment on 30.01.2015, while the second Form 8-K records the USD 737.5 million facility and its repayment on 26.03.2015. Both disclosures state that the borrowings were used in connection with internal reorganisation transactions and carried interest at 2% per annum.

8.126. According to him, these disclosures assume importance when the ED's case regarding the circular movement of funds is considered. The very short duration of the borrowings, their stated connection with internal reorganisation and their repayment immediately after the funds had passed through the various group entities, according to him, support the ED's contention that the borrowings and the subsequent transactions were successive steps in an integrated arrangement.

8.127. He submits that the disclosures must therefore be read together with the banking records, the NCD documents, the share acquisition documents and the subsequent remittances. According to him, when the contemporaneous SEC disclosures are considered with the actual fund trail, they provide further material for examining whether the transactions were independent commercial transactions or successive steps forming part of a common arrangement.

8.128. He therefore submits that the Form 8-K disclosures constitute relevant contemporaneous material which was available for consideration while examining the transactions. According to him, they corroborate the existence and timing of the Morgan Stanley borrowings and their stated connection with the internal reorganisation, and when read with the subsequent movement of funds, support the need for investigation into the substance and effect of the entire arrangement.

8.129. His submission is that the loan availed from Morgan Stanley by Headstrong Singapore(Genpact Singapore) on 27.01.2015 was repaid on 30.01.2015 which is the very amount which in the meantime was routed by Headstrong Singapore(now, Genpact Singapore) to Empower India as alleged FDI and which was immediately paid back to Headstrong Singapore (now, Genpact Singapore) on the same day for procuring 49% of the shares of Genpact India and thereafter Headstrong Singapore (now, Genpact Singapore) repaid the loan to Morgan Stanley.

8.130. He submits that the loan availed from Morgan Stanley by Genpact Bermuda on 25.03.2015 was repaid by Genpact Bermuda on the very next day, i.e., 26.03.2015 and that, in the intervening period of one day, the very same amount was routed through Genpact Luxembourg to Empower India as a Rupee loan, against which Empower India issued NCDs of approximately INR 4,600 crore to Genpact Luxembourg carrying interest at 11% per annum, subsequently reduced to 9.5%. He submits that the amount so lent to Empower India was immediately paid to Headstrong Singapore (now Genpact Singapore) towards acquisition of the remaining 51% shares in Genpact India, whereafter Headstrong Singapore routed the very same funds back to Genpact Bermuda, which in turn repaid the Morgan Stanley loan. According to him, the entire movement of funds demonstrates that the amount borrowed from Morgan Stanley was not brought into India as an independent investment, but was routed through the Indian entity only as an intermediate step in an internal reorganisation. He further submits that the disclosures made by Genpact Ltd. before the Securities and Exchange Commission, USA, contemporaneously described these borrowings as being utilised in connection with "internal reorganisation transactions" and disclosed them as "off-balance sheet arrangements". According to him, these disclosures are inconsistent with the characterisation of the transaction as a genuine Foreign Direct Investment intended to bring capital into India for use in the business of the Indian entity.

8.131. He submits that the manner in which the transactions were structured and implemented also indicates that they proceeded pursuant to a predetermined plan. He refers to the communication dated 05.12.2014 addressed by the advisors of Empower India to the officials of the RBI, without disclosing that the query was being raised on behalf of Empower India. According to him, the query was framed generally as to the circumstances in which an Indian company could issue NCDs to a qualified foreign investor. The RBI, by its communication dated 07.01.2015, clarified that an Indian company could issue Rupee denominated bonds/NCDs to an FPI/FII/QFI, within the prescribed limit of INR 51 billion, for any general legitimate corporate purpose. He submits that this clarification has to be understood in the context in which it was sought, namely, an issuance of NCDs for a legitimate corporate purpose, and cannot be treated as an unconditional approval for routing foreign funds through an Indian entity for an internal acquisition arrangement.

8.132. His submission is that the expression "general legitimate corporate purpose" necessarily requires that the proceeds of the NCDs be utilised for a lawful corporate purpose of the Indian company and cannot extend to an arrangement whose real object was merely to facilitate the acquisition of the remaining 51% shares in Genpact India through a circular movement of funds. According to him, Empower India had no independent financial capacity to fund such acquisition and the funds received from Genpact Luxembourg were not deployed in India for carrying on or expanding the business of Empower India. Instead, the very same funds were immediately transferred to Headstrong Singapore towards acquisition of the shares, and were thereafter routed back to Genpact Bermuda for repayment of the Morgan Stanley borrowing. He submits that the NCD therefore served only as the mechanism through which the short-term Morgan Stanley borrowing was passed through the Indian entity and converted into a long-term liability of Empower India, while simultaneously enabling the acquisition of the remaining shares in Genpact India.

8.133. He submits that, consequently, the description of the NCD as a Rupee loan cannot be examined in isolation from the purpose for which the funds were raised and the manner in which they were immediately deployed. According to him, the substance of the arrangement was not an independent lending transaction between Genpact Luxembourg and Empower India, but a pre-arranged funding structure forming part of the larger internal reorganisation. He submits that the subsequent creation of a long-term NCD liability in India, carrying substantial interest, was the consequence of this arrangement, while the funds themselves passed through India and ultimately returned to the foreign group entities. It is therefore his contention that the transaction cannot be brought within the RBI clarification merely by relying upon the formal issuance of NCDs to a registered FPI, since the actual deployment of the proceeds was, according to him, outside the legitimate corporate purpose for which such issuance was contemplated.

8.134. After Empower India issued the NCDs and after disclosures were made to the Security and Exchange Commission, USA, Empower India addressed one more communication to the General Manager of RBI on 12.12.2015 seeking for a clarification at 1.3 of the said letter as under;

> ***1.3*** *The Debentures carry a fixed coupon rate and have tenure of 8 years from the date of allotment (i.e. from March 25, 2015). The issue proceeds were intended to meet the funding requirements for the operations of the Company, making further downstream investment and for general corporate purposes.*

8.135. By referring to the aforesaid representation, he submits that the basis on which clarification was sought from and furnished by the RBI was that the proceeds of the NCDs were intended to meet the operational funding requirements of Empower India, to make further downstream investments and for general corporate purposes. He submits that the actual deployment of the funds does not correspond with any of these stated purposes. According to him, the proceeds were not utilised for meeting the operational requirements of Empower India, nor were they utilised for making any downstream investment. Instead, the entire amount was immediately transferred to Headstrong Singapore (now Genpact Singapore) towards acquisition of the remaining 51% shares in Genpact India. He submits that acquisition of shares in one group company from another group company cannot, in the circumstances be characterised as a downstream investment by Empower India or as a general legitimate corporate purpose for which the NCD proceeds were represented to the RBI as having been raised.

8.136. He submits that the sequence of events assumes significance when the representation made by Empower India to the RBI is juxtaposed with the contemporaneous disclosure made by Genpact Ltd. before the Securities and Exchange Commission, USA. According to the SEC disclosure, the USD 737.5 million borrowing by Genpact Bermuda from Morgan Stanley on 25.03.2015 was repaid in full on 26.03.2015. Thus, according to him, while the transaction was represented to the RBI as an eight-year NCD issuance intended to fund the operations of Empower India, make downstream investments and meet general corporate purposes, the underlying foreign borrowing was itself only of one day's duration and the corresponding funds, after being routed through Genpact Luxembourg and Empower India, were transferred out of India towards the acquisition of shares in Genpact India and ultimately returned to Genpact Bermuda for repayment of the Morgan Stanley borrowing.

8.137. He submits that the immediate movement of the entire amount out of India is inconsistent with the stated purpose of providing funds for the operations of Empower India. According to him, if the NCD proceeds had genuinely been raised for the operational requirements of Empower India or for making downstream investments, the funds would ordinarily have remained available for deployment for those purposes. Instead, the entire amount was transferred immediately to Headstrong Singapore towards acquisition of shares within the same group. He submits that this circumstance, when considered together with the one-day Morgan Stanley borrowing and its immediate repayment, demonstrates that the NCD transaction cannot be viewed as an isolated lending transaction but forms part of a pre-arranged sequence of transactions.

8.138. His submission, therefore, is that the NCD transaction was structured as the mechanism through which the short-term foreign borrowing was routed through Empower India and converted into a long-term liability of the Indian entity. According to him, the transaction enabled the acquisition of the remaining 51% shares in Genpact India without Empower India having independent financial resources for such acquisition, while the funds ultimately returned to the foreign group entities and the Morgan

Stanley borrowing was discharged. He submits that the subsequent liability of Empower India to Genpact Luxembourg, carrying interest for a period of eight years, provided the means for the amounts to be repatriated from India over time under the guise of repayment of principal and interest.

8.139. He further submits that the different descriptions given by the Genpact entities to the SEC in the USA and to the RBI in India assume significance in determining the true nature and purpose of the arrangement. According to him, before the SEC, the borrowing was disclosed as part of an internal reorganisation transaction and the foreign borrowing was shown to have been repaid within one day. Before the RBI, however, the NCD proceeds were represented as being required for the operations of Empower India, further downstream investment and general corporate purposes. He submits that these descriptions cannot be reconciled with the actual movement and deployment of the funds and, according to him, demonstrate that the NCD issuance was used as a pre-arranged mechanism for round-tripping the funds and for creating the long-term liability through which the free reserves of Genpact India could ultimately be moved outside India.

8.140. He accordingly submits that the relevant question is not merely whether Empower India formally issued NCDs to a registered FPI, but whether the transaction, viewed in its entirety and having regard to the actual use of the proceeds, satisfied the purpose for which such issuance was represented to the RBI. According to him, the formal compliance with the mode of investment cannot, by itself, legitimise a transaction which, in substance, was designed and implemented for a different purpose.

8.141. His submission is that similar correspondence had been exchanged with the SEBI, Empower India had addressed a communication to the Executive Director, Department of Debt and Hybrid Securities, SEBI on 12.10.2018, wherein at paragraph 1.5, is stated as under;

> ***1.5*** *It is submitted that the NCD's so issued by Applicant to FPI have maturity period (including residual maturity) of more than three years and were utilized for meeting the funding*

> *requirements for day-to-day operations, downstream investment and for general corporate purposes. Further, in terms of repayment schedule, the first tranche of principal repayment amounting to INR 6,000,000,000/- has been effected on April 26, 2018.*

8.142. By relying upon the aforesaid representation, he submits that Empower India represented to SEBI that the NCDs issued to the FPI, namely Genpact Luxembourg, had a maturity period of more than three years and that the proceeds thereof had been utilised for meeting the funding requirements of its day-to-day operations, making downstream investments and for general corporate purposes. It was further represented that, in accordance with the repayment schedule, the principal amounting to INR 600 crore had been repaid on 26.04.2018. His submission is that, while the maturity and repayment particulars may be borne out by the documents, the representation regarding the utilisation of the NCD proceeds is contrary to the actual movement of funds.

8.143. He submits that none of the amounts received by Empower India from Genpact Luxembourg were utilised for meeting its day-to-day operational requirements, for making any downstream investment or for any other general corporate purpose. According to him, the entire amount of approximately INR 4,600 crore received against the NCD issuance was exhausted on the very same day by Empower India by transferring the funds to Headstrong Singapore (now Genpact Singapore), an entity situated outside India, towards acquisition of the remaining 51% shares in Genpact India.

8.144. He submits that the expression "downstream investment" cannot be applied to the transaction merely because the ultimate acquisition resulted in Empower India acquiring the remaining shares of Genpact India. According to him, the relevant consideration is the actual deployment of the NCD proceeds by Empower India. The funds were not retained by Empower India for investment in its business or deployed as capital into another entity in the manner contemplated by the representation made to SEBI; rather, they were immediately transferred to an overseas group entity as consideration for acquisition of shares from that entity. He therefore submits that the representation that the NCD proceeds were utilised for day-to-day operations, downstream investment and general corporate purposes does not correspond with the actual utilisation of the funds.

8.145. He submits that the representation made to SEBI assumes significance when considered along with the earlier representation made to the RBI and the contemporaneous disclosures made by Genpact Ltd. before the SEC, USA. According to him, the RBI was informed that the NCD proceeds were intended for the operations of Empower India, downstream investment and general corporate purposes; SEBI was subsequently informed that the proceeds had in fact been utilised for those purposes; whereas the SEC disclosures recorded that the underlying Morgan Stanley borrowing formed part of an internal reorganisation and was repaid within one day. He submits that the contemporaneous banking trail, when considered alongside these representations, shows that the funds were routed through Empower India and immediately transferred outside India for acquisition of shares within the Genpact group.

8.146. His submission, therefore, is that the issue cannot be examined merely on the basis of the form of the transaction, namely, the issuance of NCDs to an FPI having a maturity exceeding three years. According to him, the actual purpose for which the proceeds were raised and their immediate deployment are material to determine whether the transaction was genuinely undertaken for the legitimate corporate purposes represented to the regulatory authorities. He submits that the fact that the entire proceeds were transferred out of India on the very day on which they were received, towards acquisition of the remaining 51% shares in Genpact India, is a material circumstance which, according to him, supports the allegation that the NCD arrangement was part of a predetermined structure for routing funds through India and subsequently creating a long-term liability in India.

8.147. His submission is that the amount received from the FPI served no other purpose other than such purchase it only created a fictitious loan with interest liability and a repayment schedule so as to migrate the free reserves of Genpact India outside the country. His submission is that the purchase of shares of Genpact India by Empower India will not amount to a downstream investment, since the purchase is from an entity located outside India. He submits that there are discrepancies in the various disclosures made inasmuch as Genpact Ltd., has informed the SEC, USA that they have borrowed funds from Morgan Stanley for purpose of interim reorganization. The Indian Regulators RBI and SEBI were informed that the very same funds were required for operation of the Indian company for downstream investment and for general corporate purposes and on the basis of the manner in which the money has been used, his submission is that the disclosure made for the Indian Regulators is contrary to what actually happened.

8.148. His submission is that these facts constitute reasons to believe that there is a violation of the FEMA which has been recorded in the seizure order. The seizure order being interim order, the culpability is not being decided. What is required to be shown is only the reason to believe which according to him has been adequately denoted in the seizure order.

8.149. He refers to the decision of the Hon'ble Supreme Court in ***Vodafone International Holdings BV vs. Union of India & Anr***.[23], more particularly paragraphs 79, 80, 81 and 249 thereof, which are reproduced hereunder for easy reference;

> ***79.*** *When it comes to taxation of a holding structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant. To give an example, if a structure is used for circular trading or round tripping or to pay bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a holding structure an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such interpositioning of that entity. However, this has to be done at the threshold.*

[23] (2012) 6 SCC 613

80. *In this connection, we may reiterate the "look at" principle enunciated in Ramsay [1982 AC 300 : (1981) 2 WLR 449 : (1981) 1 All ER 865 (HL)] in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature [see Craven v. White (Stephen) [1989 AC 398 : (1988) 3 WLR 423 : (1988) 3 All ER 495 (HL)] which further observed that genuine strategic tax planning has not been abandoned by any decision of the English Courts till date].*

81. *Applying the above tests, we are of the view that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/courts should keep in mind the following factors: the concept of participation in investment, the duration of time during which the holding structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit.*

249. *Moving offshore or using an OFC does not necessarily lead to the conclusion that they involve in the activities of tax evasion or other criminal activities. Multinational companies are attracted to offshore financial centres mainly due to the reason of providing attractive facilities for investment. Many corporate conglomerates employ a large number of holding companies and often high-risk assets are parked in separate companies so as to avoid legal and technical risks to the main group. Instances are also there when individuals form offshore vehicles to engage in risky investments, through the use of derivatives trading, etc. Many of such companies do, of course, involve in manipulation of the market, money laundering and also* *indulge in corrupt activities like round tripping, parking black money or offering, accepting, etc., directly or indirectly bribe or any other undue advantage or prospect thereof.*

8.150. By relying on ***vodafone***, his submission is that the Hon'ble Supreme Court has recognised that where a transaction, though clothed in a legally permissible form, is in substance a sham or is undertaken for circular trading or round-tripping, the legal form of the transaction cannot, by itself, be determinative of its true character. He submits that the Hon'ble Supreme Court has specifically held that the "substance over form" principle or the test of piercing the corporate veil may be invoked where the Revenue is able to establish, from the facts and circumstances surrounding the transaction, that the structure is sham or tax avoidant, and has expressly referred to circular trading and round-tripping as instances where the legal form may have to be discarded by applying the test of fiscal nullity.

8.151. He submits that ***Vodafone*** also requires the transaction to be examined as a whole and not by dissecting its individual components. According to him, the fact that the individual steps comprising the present transaction may, when viewed separately, bear the form of a Morgan Stanley loan, an investment by Genpact Luxembourg in NCDs issued by Empower India, a payment towards acquisition of shares and repayment of the Morgan Stanley borrowing, cannot conclude the matter. This Court is required to "look at" the entire transaction in its proper context and ascertain its true legal and commercial character. He submits that, when the present transaction is examined in that manner, the temporal proximity, identical quantum of funds, movement of the funds through the different Genpact entities and their ultimate return to Genpact Bermuda for repayment of the Morgan Stanley borrowing disclose, according to him, a single integrated arrangement rather than a series of independent commercial transactions.

8.152. He further submits that paragraph 81 of ***Vodafone*** identifies, inter alia, the duration of the holding structure, the period of business operations in India, the generation of taxable revenues in India, the timing of exit and the continuity of business on exit as relevant factors while examining the substance of a strategic foreign direct investment. According to him, these factors are particularly significant in the present case. The funds were introduced into India and transferred out on the same day; Empower India did not utilise the funds for its own business operations; no corresponding productive capital remained deployed in India; and the immediate deployment was towards acquisition of shares of Genpact India from another group entity. He submits that the transaction must therefore be assessed having regard to its entire structure, its purpose and the actual movement of funds, rather than merely by reference to the formal status of Genpact Luxembourg as an FPI or the formal issuance of NCDs by Empower India.

8.153. He submits that paragraph 249 of ***Vodafone*** also recognises that the use of offshore financial centres or offshore corporate vehicles does not, by itself, establish illegality, but that such structures can also be used for activities including round-tripping and other impermissible purposes. According to him, therefore, the mere fact that Genpact

Luxembourg was incorporated outside India or was a registered FPI cannot by itself validate the transaction. What is material is the manner in which the offshore entity was used in the overall arrangement and the movement of funds between the foreign and Indian entities.

8.154. Applying the aforesaid principles, he submits that the transaction in the present case cannot be considered merely by asking whether Genpact Luxembourg was legally capable of subscribing to NCDs issued by Empower India. The question, according to him, is whether the NCD issuance, viewed together with the Morgan Stanley borrowing, the transfer of funds to Empower India, the immediate payment to Headstrong Singapore for acquisition of the remaining 51% shares in Genpact India and the subsequent repayment of the Morgan Stanley borrowing, constituted a genuine investment transaction or was merely a component of a pre-arranged round-tripping structure. He submits that the sequence of transactions, their timing, the substantially identical quantum of funds and the absence of any meaningful deployment of the funds in India constitute circumstances which, according to him, require the transaction to be viewed as one integrated arrangement.

8.155. He reiterates that the funds passed through India within a very short period and were not retained or deployed for the operations of Empower India or for productive investment in India. According to him, the consequence of the arrangement was that India was left with a substantial and continuing NCD liability, while the funds themselves ultimately returned to the foreign group entities. He submits that what was described in form as Foreign Direct Investment and a Rupee-denominated NCD transaction therefore did not result in corresponding capital being brought into India for business deployment, but facilitated the acquisition of the Indian operating company and thereafter created the liability through which substantial amounts could subsequently be remitted outside India. He submits that, on a holistic examination of the transaction in accordance with the principles in Vodafone, these circumstances support the allegation of round-tripping and demonstrate why the formal legal character of the individual steps cannot, by itself, constitute an answer to the alleged FEMA contravention.

8.156. Insofar as the decision of the Hon'ble Delhi High Court in ITA No.103 of 2023 is concerned, he submits that, though the decision was rendered in favour of Genpact Singapore (earlier, Headstrong Singapore), the Income Tax Department has carried the matter in appeal before the Hon'ble Supreme Court in SLP (C) No.025934 of 2026, wherein notice has been issued in relation to the delay in filing the Special Leave Petition. He submits that, although no stay of the judgment of the Hon'ble Delhi High Court has been granted, the pendency of the Special Leave Petition and issuance of notice demonstrate that the matter remains pending consideration before the Hon'ble Supreme Court. He therefore submits that the decision of the Hon'ble Delhi High Court cannot, at this stage, be treated as having finally concluded the controversy between the parties.

8.157. He submits that the proceedings before the Income Tax authorities arose in a distinct statutory context and concerned the exercise of revisionary jurisdiction under Section 263 of the Income Tax Act. For Assessment Year 2016-17, Genpact Consulting Singapore transferred 14,86,025 shares held by it in Genpact India to Empower India. Though the transfer constituted a transfer of a capital asset, exemption from capital gains was claimed under Section 47(o) of the Income Tax Act and was accepted by the Assessing Officer. The Commissioner, exercising powers under Section 263, by order dated 31.03.2021 held that the Assessing Officer had failed to conduct basic enquiries and that there was a lack of enquiry. The Commissioner further concluded that the overall scheme had been designed in a manner which resulted in avoidance of Dividend Distribution Tax under Section 115-O of the Income Tax Act.

8.158. He submits that the aforesaid order of the Commissioner was challenged before the ITAT and that the ITAT, by its order dated 13.06.2022, did not adjudicate upon the substantive legality or commercial purpose of the entire transaction. According to him, the ITAT proceeded on the jurisdictional requirements of Section 263 and held that the twin conditions, namely, that the order of the Assessing Officer must be erroneous and that it must also be prejudicial to the interests of the Revenue, were not satisfied in the circumstances of that case. The Income Tax Department thereafter carried the matter to the Hon'ble Delhi High Court in ITA No.103 of 2023, which upheld the decision of the ITAT.

8.159. His submission is that the issue before the ITAT and the Hon'ble Delhi High Court was therefore whether the statutory conditions for exercise of revisionary jurisdiction under Section 263 were satisfied and not whether the entire Genpact group structure, the Morgan Stanley borrowings, the NCD issuance, the movement of funds, the subsequent repayment of the NCD liability or the alleged round-tripping constituted a contravention of FEMA. He submits that the Income Tax proceedings were thus confined to the statutory question arising under Section 263 and cannot be treated as an adjudication upon the FEMA issues now being examined by the Enforcement Directorate. According to him, the ED is not seeking to rely upon the findings in those proceedings as concluding the FEMA controversy, and the fact that the Income Tax authorities did not ultimately sustain the revisionary proceedings does not prevent the ED from independently examining the same underlying transactions under FEMA.

8.160. He submits that FEMA is an independent statutory enactment containing a distinct regulatory scheme and conferring independent powers upon the Enforcement Directorate to examine transactions from the perspective of foreign exchange regulation. According to him, the fact that a transaction may have been accepted for the purposes of the Income Tax Act does not immunise it from scrutiny under FEMA. He submits that the nature and purpose of a transaction, its movement of funds and its effect upon foreign exchange are matters which fall for consideration under FEMA independently of the questions which arose before the Income Tax authorities.

8.161. He submits that the contention of the petitioner that the ED is precluded from examining the transaction merely because the foundational events occurred in January and March 2015, prior to the coming into force of Section 37A on 09.09.2015, proceeds on an incorrect understanding of the transaction under investigation. According to him, the events of January and March 2015 were not the end of the transaction but constituted the initial steps in a larger arrangement, the consequences of which continued and were implemented after Section 37A came into force.

8.162. He submits that the transactions undertaken in January and March 2015 were only the foundation stones of the larger arrangement. According to him, the first phase involving the Morgan Stanley borrowing and the acquisition of 49% shares and the second phase involving the USD 737.5 million borrowing, the NCD issuance by Empower India and the acquisition of the remaining 51% shares were structured to ultimately create a substantial liability in the Indian entity. It was this liability which, according to him, was subsequently discharged from the funds of the resultant Genpact India after the amalgamation. The repayment of the NCD principal and interest commenced in 2018 and continued until 2023, resulting, according to the ED, in remittances aggregating to approximately INR 7,800 crore to Genpact Luxembourg, which amounts were thereafter repatriated outside India.

8.163. His submission is that, consequently, the relevant post-09.09.2015 conduct cannot be regarded as merely the continuing consequence of a transaction completed in 2015. According to him, the alleged contravention manifested itself through subsequent acts of payment and transfer which occurred after Section 37A had come into force. He submits that the foreign exchange was, according to the ED's case, ultimately moved outside India during the period from 2018 to 2023 and that these subsequent transfers constitute independent acts attracting the provisions of FEMA as they stood at the relevant time.

8.164. He submits that Section 4 of FEMA prohibits a person resident in India from, inter alia, acquiring, holding, owning, possessing or transferring any foreign exchange, foreign security or immovable property situated outside India, save as otherwise provided under the Act. According to him, the expressions “hold”, “own” and “possess” are significant because the alleged FEMA contravention is not confined to the original act by which the arrangement was created. His submission is that where the consequence of the arrangement is that foreign exchange or foreign assets are subsequently held, possessed or transferred outside India in circumstances contrary to Section 4, the subsequent acts fall for examination under FEMA notwithstanding that the original arrangement may have been entered into before 09.09.2015.

8.165. He submits that Section 37A does not itself create the substantive prohibition contained in Section 4. According to him, Section 4 was already part of FEMA and Section 37A, introduced with effect from 09.09.2015, provides an additional statutory mechanism for dealing with the value equivalent in India of foreign exchange, foreign security or immovable property situated outside India which is suspected to have been held in contravention of Section 4. Therefore, according to him, the introduction of Section 37A does not alter the substantive prohibition contained in Section 4; it provides an additional enforcement mechanism which became available from 09.09.2015.

8.166. He submits that the decision in ***Deokaran Nenshi*** does not assist the petitioner because the ED's case is not that a completed act of January or March 2015 became retrospectively punishable merely because Section 37A was subsequently enacted. His submission is that the January and March 2015 transactions and the subsequent payments from 2018 to 2023 form part of one integrated arrangement and that the alleged FEMA contravention continued to be effectuated through subsequent acts after 09.09.2015. According to him, the investigation commenced in 2021, at a time when the alleged remittances and discharge of the NCD liability were still continuing. He therefore submits that the principle relating to a completed offence and a continuing offence laid down in ***Deokaran Nenshi*** has no application to the facts as alleged by the ED.

8.167. He further distinguishes ***Canara Bank***. He submits that in that case the relevant mortgage and the corresponding security interest had been created before the introduction of Section 37A and that the act which was sought to be subjected to Section 37A had itself been completed before the provision came into force. According to him, there was no subsequent act after 09.09.2015 which independently attracted the statutory mechanism. The present case, according to him, stands on a different footing because the alleged arrangement resulted in actual payments and transfers commencing from 2018 and continuing until 2023. He therefore submits that the ratio of ***Canara Bank***, which concerned the retrospective application of Section 37A to a pre-existing completed transaction, cannot be mechanically extended to subsequent acts alleged to have occurred after Section 37A came into force.

8.168. He submits that the investigation commenced in 2021, during the period in which the alleged repayment of the NCD liability was still being made. According to him, the investigation was therefore not directed merely at a transaction which had become complete in March 2015, but at the continuing implementation and consequences of the alleged arrangement, including the subsequent transfer of substantial amounts outside India. He submits that, on this basis, the contention that the ED has acted after an inordinate delay or has sought to apply Section 37A retrospectively is misconceived.

8.169. He submits that the two streams of funding, namely, the alleged FDI infusion in the first phase and the NCD-based funding in the second phase, have to be considered together. According to him, neither stream resulted in any corresponding infusion of capital into the Indian operating business. No part of the amounts, according to him, was utilised to augment the capital, assets or operations of Genpact India or Empower India. Instead, the first phase enabled Empower India to acquire 49% of Genpact India, while the second phase enabled it to acquire the remaining 51% from Headstrong Singapore. Thus, according to him, the ultimate consequence of the two arrangements was only that Empower India became the owner of Genpact India, without the alleged foreign funds being deployed as productive capital in any Indian entity.

8.170. He submits that this circumstance is material to the ED's case because the formal characterisation of the individual transactions as FDI, NCD subscription, intra-group share acquisition or repayment of borrowing does not explain the economic effect of the arrangement when the transactions are considered as a whole. According to him, the structure enabled the acquisition of the entire shareholding of Genpact India by Empower India without Empower India possessing independent financial resources to fund such acquisition, while simultaneously creating a substantial liability in the Indian entity. It was thereafter, according to him, the discharge of that liability from the Indian entity's resources which resulted in the movement of approximately INR 7,800 crore to Genpact Luxembourg during 2018–2023. He submits that these subsequent movements of funds, and not merely the original acts of January and March 2015, form a material part of the FEMA contravention alleged by the ED.

8.171. He submits that the NCDs were issued by Empower India to Genpact Luxembourg in March 2015 and that the RBI circular relied upon by the petitioner, dated 30.03.2016, is subsequent to the issuance of the NCDs and therefore cannot govern the legality of the transaction as on the date of its issuance. He submits that the applicable policy at the relevant time was the FDI Policy issued by the Department of Industrial Policy and Promotion with effect from 17.04.2014. Paragraph 3.3.2 thereof provided that non-convertible, optionally convertible or partially convertible preference shares/debentures, for which funds had been received on or after 01.05.2007, would be treated as debt and that the norms applicable to External Commercial Borrowings (ECB), including those relating to eligible borrowers, recognised lenders, amount and maturity, end-use stipulations and other applicable conditions, would apply. The relevant portion reads as under:

> ***3.3.2*** *Other types of Preference shares/Debentures i.e. non-convertible, optionally convertible or partially convertible for issue of which funds have been received on or after May 1, 2007 are considered as debt. Accordingly all norms applicable for ECBs relating to eligible borrowers, recognized lenders, amount and maturity, end-use stipulations, etc. shall apply. Since these instruments would be denominated in rupees, the rupee interest rate will be based on the swap equivalent of London Interbank Offered Rate (LIBOR) plus the spread as permissible for ECBs of corresponding maturity.*

8.172. By relying upon the aforesaid FDI Policy, he submits that the NCDs were required to be denominated in Indian Rupees and that the Rupee interest was required to be based on the swap equivalent of LIBOR, together with the spread permissible for ECBs of the corresponding maturity. He therefore submits that, at the time when the NCDs were issued, the ECB framework was applicable to the transaction and that the petitioner was required to comply with the norms applicable to ECBs, including the requirements relating to end-use and other conditions. According to him, the alleged manner in which the NCD proceeds were deployed demonstrates non-compliance with the applicable ECB framework.

8.173. He submits that there are no reasons relied upon by the Enforcement Directorate in the present proceedings which were not already contained in the order passed under Section 37A of FEMA. According to him, the sum and substance of the allegations and the prima facie conclusions recorded in the impugned order disclose the very features which constitute round-tripping, even if the expression "round-tripping" has not been used at every place in the order.

8.174. He refers to page 101 of the impugned order, where respondent No.1 has recorded that the funds were routed in a circular manner and thereafter paid back to Morgan Stanley within three days, without any commercial substance. According to him, this is the factual description of a round-tripping arrangement. He further refers to page 151, where the order records that the inflow and outflow of funds clearly demonstrated that the alleged FDI was merely a routing mechanism and did not constitute genuine capital infusion into India. He submits that page 112 records that the structure involving the infusion of money in the guise of

FDI, NCD borrowings and downstream investment operated as a closed-loop arrangement which ultimately cycled back to the original source through intra-group routing, resulting, according to the order, in there being no genuine foreign exchange inflow into India. He also refers to the diagram at page 120, which, according to him, depicts a coordinated, multi-jurisdictional and closed-loop movement of funds within the Genpact group.

8.175. He submits that the allegation of round-tripping was therefore not introduced for the first time during the hearing of the writ petition. According to him, the factual basis for that allegation is expressly contained in the Section 37A order itself. He submits that there is no requirement that the particular expression "round-tripping" must be used as a matter of form, so long as the reasons recorded describe the essential features of such an arrangement, namely, the circular movement of funds, the absence of genuine capital infusion, the closed-loop nature of the transactions and the return of the funds to the original source. He therefore submits that the contention that the ED is attempting to supplement the reasons in the impugned order is unfounded.

8.176. On that basis, he submits that W.P. No.7283 of 2026 ought to be dismissed and the Section 37A order permitted to proceed before the Competent Authority. He submits that the statutory scheme itself requires the seizure order and the material relied upon to be placed before the Competent Authority, which is required to consider the matter after affording an opportunity of hearing to the Enforcement Directorate as well as the aggrieved person. If the Competent Authority confirms the seizure, the petitioner has a statutory appellate remedy under Section 37A(5) of FEMA. According to him, the petitioner cannot short-circuit this statutory mechanism by invoking the extraordinary jurisdiction of the High Court under Articles 226 and 227, particularly when the statutory adjudicatory process has not yet been completed.

Arguments on Behalf of Respondent – Enforcement Directorate in WP 16763 of 2026

8.177. Insofar as W.P. No.16763 of 2026 is concerned, he submits that it is admitted that the petitioner is under investigation by the Enforcement Directorate and is therefore required to obtain a "No Objection Certificate" under Rule 10 of the Overseas Investment Rules before making the proposed financial commitment or undertaking the proposed investment. He submits that the requirement of an NOC is a statutory safeguard intended to ensure that a person under investigation does not, during the pendency of such investigation, undertake a financial commitment which may have consequences for recovery, enforcement or foreign exchange regulation.

8.178. He submits that the Gift City Entity is a wholly owned subsidiary of Genpact India established within the GIFT Special Economic Zone and that it has been established for obtaining a finance company/global or regional treasury centre licence under the applicable IFSCA regulatory framework. According to him, the entity is proposed to operate as a global treasury centre for the Genpact group and would provide cash-pooling and lending facilities to Genpact group entities situated outside India.

8.179. He submits that, as admitted by the petitioner, the Gift City Entity is not intended to service Indian entities. Instead, the funds invested by Genpact India in the Gift City Entity would be utilised by it for providing loans and other financial facilities to Genpact group entities located outside India. According to him, the proposed structure would therefore provide another channel through which funds of Genpact India could be moved outside India. He submits that, particularly in the background of the FEMA investigation and the allegations regarding the earlier movement of funds, the proposed investment cannot be treated as an ordinary intra-group investment without examining the ultimate destination and utilisation of the funds.

8.180. He submits that the provisional registration of the Gift City Entity was granted on 15.09.2025, whereas the application under Rule 10 of the

Overseas Investment Rules was filed only on 26.11.2025, approximately two months thereafter. According to him, the petitioner was aware of the requirement of obtaining regulatory approval before making the proposed financial commitment and ought to have initiated the Rule 10 process at the appropriate stage. He submits that the subsequent filing of the application cannot create an entitlement to make the financial commitment without the statutory NOC.

8.181. He submits that the decision in ***Assistance Commissioner, Comercial Tax Department, Works Contract and Leasing, Kota v. Shukla and Brothers***[24] case would not apply to the facts of the present case. According to him, the relevant distinction is that the funds proposed to be lent by the Gift City Entity would themselves originate from Genpact India and there is no independent source of funds flowing into the Gift City Entity which would thereafter be deployed abroad. He submits that, for the purposes of the Overseas Investment Rules, the Gift City Entity is treated

[24] (2010) 4 SCC 785

as a foreign entity and, consequently, the immediate regulatory concern is the proposed financial commitment by Genpact India in that entity. According to him, the fact that the Gift City Entity would subsequently deploy those funds in lending to foreign group entities does not take the initial financial commitment outside the scope of Rule 10 or the regulatory scrutiny contemplated thereunder.

8.182. Insofar as the urgency pleaded on account of 15.09.2026 is concerned, he submits that there is no compulsion upon Genpact India to be the entity which provides the proposed funding to the Gift City Entity. According to him, the petitioner has not established that the Gift City Entity cannot be funded by another Genpact group entity situated outside India. He submits that the petitioner is therefore attempting to create an artificial urgency by contending that 15.09.2026 is the last date by which the funds must necessarily be deposited by Genpact India. He submits that, if the Gift City Entity requires capital, the Genpact group can explore funding it through its other overseas entities, subject of course to the applicable regulatory framework.

8.183. He submits that the petitioner has also not established that the provisional registration necessarily requires Genpact India to transfer the entire proposed USD 100 million. According to him, the petitioner could have demonstrated either that an extension of the period had been sought and refused or that no other entity of the Genpact group could provide the requisite funding. In the absence of such material, he submits that the insistence upon funding by Genpact India is significant, particularly when the proposed Gift City Entity is intended to deploy its funds in providing loans and financial facilities to foreign group entities. According to him, the proposed transaction must therefore be examined in the context of the ongoing FEMA investigation and the previous allegations concerning movement of funds outside India.

8.184. He submits that, having regard to the fact that the matter remains under investigation, the petitioner ought not to be permitted to mobilise its funds in a manner which may result in substantial reserves of Genpact India being placed outside India. He submits that the proposed commitment was initially stated to be USD 100 million and that, if an interim order were granted permitting the investment, it may not remain confined to the immediate amount of USD 0.2 million and the registration-related payment of USD 12,500, but could ultimately facilitate the proposed USD 100 million investment. According to him, this Court ought therefore not to grant an interim arrangement which would have the effect of permitting the very transaction which is required to be subjected to scrutiny under Rule 10.

8.185. Lastly, he submits that the entire transaction has to be examined holistically and not by viewing the individual steps in isolation. According to him, the arrangement was a make-believe transaction which did not create corresponding productive value in India but created an obligation upon an Indian entity to make payments to entities outside India. He submits that, although the classical conception of round-tripping ordinarily involves money moving from India to a foreign jurisdiction and thereafter returning to India, the same principle, according to him, must be applied to a structure where funds are brought into India and thereafter returned outside India through an arrangement which creates a substantial liability in India and enables further funds to be remitted abroad. He submits that the substance of the transaction, rather than the direction of each individual movement of funds, is therefore material.

8.186. He submits that the transactions undertaken in 2015 and the proposed transaction in 2026 form part of the same broad objective, namely, according to him, to facilitate the transfer of the free reserves of Genpact India outside India without complying with the statutory requirements applicable to such movement of funds. He submits that the earlier transactions resulted in the creation of the NCD liability, which was thereafter discharged through payments made from the Indian entity to Genpact Luxembourg, while the proposed GIFT City structure would provide a further mechanism for deploying funds of Genpact India through an entity whose proposed activities are directed towards lending to overseas group entities. On this basis, he submits that both writ petitions ought to be dismissed.

Submissions in Rejoinder of Shri Arvind Datar WP No. 7283/2026

9. Shri Arvind Datar Learned Senior Counsel in rejoinder would submit as follows

9.1. As regards the allegation of round-tripping, he submits that the petitioner and its group companies have not engaged in any round-tripping. Without prejudice to the aforesaid submission, he submits that the allegation of round-tripping, as now sought to be projected by the Enforcement Directorate, was not the basis upon which the seizure under Section 37A of FEMA was founded. According to him, the ED cannot improve upon the reasons recorded in the seizure order by introducing, during the course of the writ proceedings, a new or enlarged theory as to why the statutory jurisdiction under Section 37A was attracted. He submits that the question is not whether the expression "round-tripping" was expressly used in the order, but whether the material facts and the jurisdictional basis necessary to sustain such an allegation were actually recorded and relied upon by the Authorised Officer at the time of passing the seizure order.

9.2. He relies on the decision of the Hon'ble Supreme Court in ***Celir LLP v. Sumati Prasad Bafna***[25], more particularly paragraphs 135 to 147, which are reproduced hereunder for easy reference:

> ***135.*** *The 'Henderson Principle' is a foundational doctrine in common law that addresses the issue of multiplicity in litigation. It embodies the broader concept of procedural fairness, abuse of process and judicial efficiency by mandating that all claims and issues that could and ought to have been raised in a previous litigation should not be relitigated in subsequent proceedings. The extended form of res-judicata more popularly known as 'Constructive Res Judicata' contained in Section 11, Explanation VII of the CPC originates from this principle.*
>
> ***136.*** *In Henderson v. Henderson, [1843] 3 Hare 999, the English Court of Chancery speaking through Sir James Wigram, V.C. held that where a given matter becomes the subject of litigation and the adjudication of a court of competent jurisdiction, the parties so litigating are required to bring forward their whole case. Once the litigation has been adjudicated by a court of competent jurisdiction, the same parties will not be permitted to reopen the lis in respect of issues which might have been brought forward as part of the subject in contest but were not, irrespective of whether the same was due to any form*

[25] 2024 SCC OnLine SC 3727

of negligence, inadvertence, accident or omission. It was further held, that principle of res judicata applies not only to points upon which the Court was called upon by the parties to adjudicate and pronounce a judgment but to every possible or probable point or issue that properly belonged to the subject of litigation and the parties ought to have brought forward at the time. The relevant observations read as under:—

"In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. […]"

(Emphasis supplied)

137. *The above proposition of law came to be known as the 'Henderson Principle' and underwent significant evolution, adapting to changing judicial landscapes and procedural requirements. The House of Lords in Johnson v. Gore Wood & Co, [2002] 2 A.C. 1, upon examining the 'Henderson Principle' authoritatively approved it with the following observations:—*

(i) *Lord Bingham of Cornhill integrated the principle with the broader doctrine of abuse of process and held that the bringing of a claim or the raising of a defence in later proceedings which ought to have been raised earlier will not always be hit by this principle, but rather will apply* *where such point is sought to be raised as an additional or collateral attack on a previous decision and the bringing forth of such ground amounts to misusing or abusing the process of the court or as a means for unjust harassment of a party. The relevant observations read as under:—*

"Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same : that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not […]"

(Emphasis supplied)

(ii) *Lord Millett construing the Principle held that it does not belong to the doctrine of res-judicata in the strict sense but rather was analogous to the doctrine, as it goes a step further to encompass even those proceedings that either culminated into a settlement or issues which had never been adjudicated previously in order to protect the process of the court from abuse and the defendant from oppression. The relevant observations read as under:—*

"As the passages which I have emphasised indicate, Sir James Wigram V-C did not consider that he was laying down a new principle, but rather that he was explaining the true extent of the existing plea of res judicata. Thus he was careful to limit what he was saying to cases which had proceeded to judgment, and not, as in the present case, to an out of court settlement. Later decisions have doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it … But these various defences [res judicata, issue or cause of action estoppel] are all designed to serve the same purpose : to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. <u>While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.</u>

<u>In one respect, however, the principle goes further than the strict doctrine of res judicata or the formulation adopted by Sir James Wigram V-C, for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.</u>

However this may be, the difference to which I have drawn attention is of critical importance. It is one thing to refuse *to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 … <u>While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression</u> […]"*

(Emphasis supplied)

138. *In Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd., [2014] A.C. 160 Lord Sumption JSC further expounded the 'Henderson Principle' as although separate and distinct from cause of action estoppel or res judicata yet having the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The relevant observations read as under:—*

"The principle in Henderson v. Henderson has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in the Yat Tung case [1975] A.C. 581. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, Johnson v. Gore-Wood & Co [2002] 2 A.C. 1, in which the House of Lords considered their effect. This appeal arose out of an application to strike out proceedings on the ground that the plaintiffs claim should have been made in an earlier action on the same subject matter brought by a company under his control. Lord Bingham of Cornhill took up the earlier suggestion of Lord Hailsham of St Marylebone LC in Vervaeke (formerly Messina) v. Smith

[1983] 1 A.C. 145, 157 that the principle in Henderson v. Henderson <u>was "both a rule of public policy and an application of the law of res judicata". He expressed his own view of the relationship between the two at p. 31 as follows:</u> "Henderson v. Henderson <u>abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same : that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole"."</u>

(Emphasis supplied)

139. *Even in a common law action it was said by Blackburn, J.:"I incline to think that the doctrine of res judicata applies to all matters which existed at the time of giving of the judgment, and which the party had an opportunity of bringing before the Court." [See : Newington v. Levy, [L.R.] 6 C.P. 180 (J)].*

140. *The fundamental policy of the law is that there must be finality to litigation. Multiplicity of litigation benefits not the litigants whose rights have been determined, but those who seek to delay the enforcement of those rights and prevent them from reaching the rightful beneficiaries of the adjudication. The Henderson Principle, in the same manner as the principles underlying res judicata, is intended to ensure that grounds of attack or defence in litigation must be taken in one of the same proceeding. A party which avoids doing so does it at its own peril. In deciding as to whether a matter might have been urged in the earlier proceedings, the court must ask itself as to whether it could have been urged. In deciding whether the matter ought to have been urged in the earlier proceedings, the court will have due regard to the ambit of the earlier proceedings and the nexus which the matter bears to the nature of the controversy. In holding that a matter ought to have been taken as a ground of attack or defence in the earlier proceedings, the court is indicating that the matter is of such a nature and character and* *bears such a connection with the controversy in the earlier case that the failure to raise it in that proceeding would debar the party from agitating it in the future. The doctrine itself is based on public policy flowing from the age-old legal maxim interest reipublicae ut sit finis litium which means that in the interest of the State there should be an end to litigation and no party ought to be vexed twice in a litigation for one and the same cause.*

***141.** The Henderson Principle was approvingly referred to and applied by this Court in State of U.P. v. Nawab Hussain, (1977) 2 SCC 806 as the underlying principle for res-judicata and constructive res-judicata for assuring finality to litigation. The relevant observations read as under:—*

"3. The principle of estoppel per rem judicatam is a rule of evidence. As has been stated in Marginson v. Blackburn Borough Council [[1939] 2 K.B. 426 at p. 437], it may be said to be "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories : (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of res judicata.

4. But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and Somervell, L.J., has answered it as follows in Greenhalgh v. Mallard [[1947] All ER 255 at p. 257]:"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has some times been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle."

(Emphasis supplied)

142. *This Court in Devilal Modi v. Sales Tax Officer, Ratlam, AIR 1965 SC 1150, held that if the underlying rule of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time, and would be inconsistent with considerations of public policy. The relevant observations read as under:—*

"8. […] the rule of constructive res judicata which is pleaded against him in the present appeal is in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that

plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy […]"

(Emphasis supplied)

143. *In Shankara Coop. Housing Society Ltd. v. M. Prabhakar, (2011) 5 SCC 607, this Court held that the ground of non-compliance of statutory provision which was very much available to the parties to raise but did not raise it as one of the grounds, cannot be raised later on and would be hit by the principles analogous to constructive res judicata. The relevant observations read as under:—*

"89. In the present case, it is admitted fact that when the contesting respondents filed WP No. 1051 of 1966, the ground of non-compliance with statutory provision was very much available to them, but for the reasons best known to them, they did not raise it as one of the grounds while challenging the Notification dated 11-12-1952 issued under the Evacuee Property Act. In the subsequent writ petition filed in the year 1990, initially, they had not questioned the legality of the notification, but raised it by filing an application, which is no doubt true, allowed by the High Court. In our view, the High Court was not justified in permitting the petitioners therein to raise that ground and answer the same since the same is hit by the principles analogous to constructive res judicata."

(Emphasis supplied)

144. *From the above exposition of law, it is clear that the 'Henderson Principle' is a core component of the broader doctrine of abuse of process, aimed at enthusing in the parties a sense of sanctity towards judicial adjudications and determinations. It ensures that litigants are not subjected to repetitive and vexatious legal challenges. At its core, the principle stipulates that all claims and issues* *that could and should have been raised in an earlier proceeding are barred from being raised in subsequent litigation, except in exceptional circumstances. This rule not only supports the finality of judgments but also underscores the ideals of judicial propriety and fairness.*

145. *There are, four situations where in second proceedings between the same parties doctrine res judicata as a corollary of the principle of abuse of process may be invoked : (i) cause of action estoppel, where the entirety of a decided cause of action is sought to be relitigated; (ii) issue estoppel or, "decided issue estoppel," where an issue is sought to be relitigated which has been raised and decided as a fundamental step in arriving at the earlier judicial decision; (iii) extended or constructive res judicata i.e., "unraised issue estoppel," where an issue is sought to be litigated which could, and should, have been raised in a previous action but was not raised; (iv) a further extension of the aforesaid to points not raised in relation to an issue in the earlier decision, as opposed to issues not raised in relation to the decision itself.*

146. *As part of the broader rule against abuse of process, the Henderson principle is rooted in the idea of preventing the judicial process from being exploited in any manner that tends to undermine its integrity. This idea of preventing abuse of judicial process is not confined to specific procedure rules, but rather aligned to a broader purport of giving quietus to litigation and finality to judicial decisions. The essence of this rule is that litigation must be conducted in good faith, and parties should not engage in procedural tactics that fragment disputes, prolong litigation, or undermine the outcomes of such litigation. It is not a rigid rule but rather a flexible principle to prevent oppressive, unfair, or detrimental litigation.*

147. *We are conscious of the fact, that ordinarily this principle has been applied to instances where a particular plea or ground was not raised at any stage of the proceedings, but were later sought to be raised. However, it must be borne in mind that construing this rule in a hyper-technical manner or through any strait-jacket* *formula will amount to taking a reductive view of this broad and comprehensive principle.*

9.3. By relying on ***Celir***, he submits that the Hon'ble Supreme Court has applied the Henderson principle as an aspect of the broader doctrine against abuse of process. He submits that the principle requires parties to bring forward, in the appropriate proceeding, the grounds which properly belong to the controversy and prevents successive proceedings or successive attempts to advance grounds which ought to have been raised earlier. The principle is founded upon finality, procedural fairness and protection against fragmented litigation.

9.4. He submits that Celir makes it clear that the Henderson principle is not confined to the strict doctrine of res judicata, but is concerned more broadly with preventing abuse of the judicial process and successive attempts to advance matters which ought to have been raised at the appropriate stage. He submits that, in the present case, the ED cannot, having passed a seizure order on stated reasons, subsequently reconstruct the foundation of that order during the writ proceedings by presenting a more elaborate theory of round-tripping than what was actually recorded by the Authorised Officer. He submits that this is particularly important in proceedings under Section 37A, where the existence of the statutory "reason to believe" is a condition precedent to the exercise of the seizure power.

9.5. He submits that the ED's present contention that the word "round-tripping" need not have been used in the seizure order does not answer the petitioner's objection. According to him, the issue is not one of terminology. If the ED seeks to sustain the seizure on the basis that the entire transaction constituted round-tripping, the order must disclose the factual foundation upon which such conclusion was reached. The Authorised Officer was required, at the time of exercising the power under Section 37A, to record the reasons which led him to believe that the statutory conditions were satisfied. The subsequent identification of additional circumstances, re-characterisation of transactions or elaboration of the alleged circular flow during arguments cannot retrospectively supply the reasons which were absent when the power was exercised.

9.6. He submits that the references made by the ED to various pages of the seizure order do not establish otherwise. According to him, merely describing the movement of funds as “circular”, “closed-loop” or as a “routing mechanism” does not amount to recording a reasoned finding that the transactions constituted round-tripping in the legal sense asserted by the ED. The distinction is material because the petitioner's challenge is that the impugned order did not proceed upon the presently advanced theory and that the reasons now urged in Court are being relied upon to supplement the original reasons to believe.

9.7. He submits that the ED cannot simultaneously contend that the sufficiency or validity of the reasons recorded in the seizure order is a matter for the Competent Authority and, in the same proceedings, seek to supplement those reasons by placing before the Writ Court material or explanations which did not form part of the decision-making process of the Authorised Officer. According to him, if the impugned order is required to be tested on the basis of the reasons recorded therein, the ED must stand or fall on those reasons and cannot improve the order by means of subsequent pleadings or oral submissions.

9.8. He submits that the petitioner's case is not that the ED is barred by res judicata from examining a FEMA violation; rather, the submission is that the ED cannot retrospectively alter or enlarge the reasons upon which the Section 37A power was exercised.

9.9. He therefore submits that the principal issue in the present proceedings remains whether the Authorised Officer had, on the material available to him and on the reasons actually recorded, a lawful basis to form the “reason to believe” required under Section 37A of FEMA. According to him, that statutory question cannot be answered by introducing, for the first time in the writ proceedings, a broader theory of round-tripping or by supplementing the reasons contained in the seizure order with subsequent explanations.

9.10. He submits that the ED's reliance upon the expression "round-tripping" also cannot overcome the substantive objection arising from the decision in ***Canara Bank's*** case. His submission is that the original transactions relied upon by the ED were undertaken in January and March 2015, whereas Section 37A came into force only on 09.09.2015. If the ED's case is that those transactions themselves constituted the contravention which attracted Section 37A, the provision cannot be retrospectively applied to them. The attempt to describe the subsequent repayment of a contractual NCD liability as a continuation of the original transaction, according to him, does not alter the date on which the underlying transaction was completed.

9.11. He reiterates that the mere fact that payments under the NCDs continued after 09.09.2015 does not convert the March 2015 issuance of the NCDs into a transaction entered into after Section 37A came into force. According to him, the subsequent discharge of a liability created under a transaction completed in March 2015 cannot, without identifying a separate post-09.09.2015 contravention satisfying the statutory requirements, retrospectively bring the original transaction within Section 37A.

9.12. He therefore submits that the ED's attempt to sustain the seizure by characterising the entire arrangement as a continuing round-tripping transaction cannot substitute for establishing the statutory jurisdictional facts under Section 37A. According to him, unless the reasons recorded contemporaneously establish the necessary nexus between the foreign exchange or foreign asset alleged to have been held in contravention of Section 4 and the exercise of the seizure power, the subsequent description of the transaction as a “closed loop” or “round-tripping” cannot cure the defect in the original exercise of jurisdiction.

9.13. His submission, therefore, is that the allegation of round-tripping, insofar as it is sought to be relied upon as an independent or enlarged basis for the seizure, cannot be introduced or developed for the first time in the writ proceedings. This Court is required to examine the legality of the seizure on the reasons which existed when the order was made and not on reasons subsequently formulated to defend it. He accordingly submits that the Section 37A seizure order cannot be sustained by supplementation of its reasons through the present proceedings.

9.14. The submission of learned ASGI, insofar as it seeks to rely upon the loan and credit arrangements between non-resident entities, proceeds on transactions which are themselves outside the regulatory field of FEMA insofar as the present petitioner is concerned. He submits that the borrowing in January 2015 by Headstrong Singapore (now Genpact Singapore) of USD 660 million from Morgan Stanley, together with USD 77.5 million borrowed from a group company, for the purpose of acquiring shares worth approximately INR 4,050 crore in Genpact India, and the subsequent borrowing in March 2015 by Genpact Bermuda of USD 737.5 million from Morgan Stanley, followed by its lending of the said amount to Genpact Luxembourg, were transactions between non-resident entities. Genpact Luxembourg, which was a registered FPI, thereafter subscribed to the Rupee-denominated NCDs issued by Empower India for approximately INR 4,600 crore.

9.15. He submits that none of the aforesaid foreign borrowings involved the petitioner or any resident Indian entity as a borrower or lender. The borrowing by Headstrong Singapore from Morgan Stanley, the borrowing by Genpact Bermuda from Morgan Stanley, and the subsequent lending between Genpact Bermuda and Genpact Luxembourg were transactions between non-resident entities and were undertaken outside India. According to him, those transactions cannot, merely because they subsequently formed part of the factual background to a transaction in India, be brought within the scope of Section 37A of FEMA. He submits that the jurisdiction under Section 37A has to be founded upon the statutory conditions contained therein and cannot arise merely because funds originating from a transaction between non-residents were subsequently utilised in connection with an Indian transaction.

9.16. He submits that the petitioner, being a resident Indian entity, was not a party to the Morgan Stanley loan arrangements and did not borrow any foreign exchange from Morgan Stanley. The petitioner neither received USD 737.5 million from Morgan Stanley nor entered into any foreign currency borrowing with Morgan Stanley. According to him, the fact that Genpact Bermuda subsequently transferred the borrowed amount to Genpact Luxembourg cannot, by itself, create a FEMA contravention on the part of the petitioner. He therefore submits that the foreign borrowing transactions cannot be treated as the jurisdictional foundation for exercising the drastic power under Section 37A against the petitioner.

9.17. He submits that the allegation regarding the difference between the interest rate of 2% payable by Genpact Bermuda to Morgan Stanley and the 11% interest payable by Empower India on the NCDs is equally incapable of constituting a ground for invoking

Section 37A. According to him, the two transactions were entered into between different commercial entities, in different capacities and at different stages of the overall arrangement. The mere fact that one borrowing carried interest at 2% while the NCDs carried interest at 11%, subsequently reduced to 9.5%, does not establish that either transaction was fictitious or that there was a FEMA contravention. He submits that commercial terms, including the rate of interest, cannot be treated as inherently suspicious merely because they differ from one another.

9.18. He further submits that the fact that the January 2015 and March 2015 transactions were completed within a short period cannot, by itself, constitute a circumstance giving rise to a "reason to believe" under Section 37A. According to him, commercial transactions are frequently structured and completed with speed where the parties have already negotiated the relevant documentation and obtained the necessary approvals. The January transaction being completed within approximately three days and the March transaction being completed within a similarly short period therefore does not, without more, establish that the transactions lacked commercial substance.

9.19. He submits that the transactions were undertaken in the ordinary course pursuant to the corporate reorganisation of the Genpact group and were accompanied by contemporaneous documentation and disclosures. He submits that the relevant regulatory authorities in the respective jurisdictions had the opportunity to examine the transactions and that the transactions were not clandestine arrangements concealed from the regulatory authorities. According to him, the ED cannot convert the speed with which the transactions were implemented into a circumstance of suspicion merely by looking at the transactions retrospectively and without identifying any specific violation of FEMA.

9.20. As regards the contention that Empower India, being a comparatively smaller company, became the holding company of the substantially larger Genpact India, he submits that the relative size or turnover of the two companies has no bearing upon the legality of the acquisition. The fact that Empower India had a smaller turnover or asset base than Genpact India does not prevent it from acquiring the shares of Genpact India if it is able to lawfully raise the necessary funds. He submits that Empower India raised the requisite resources, the shareholders of Genpact India received the agreed consideration and the shares were thereafter transferred to Empower India. According to him, the relative size of the acquiring company and the company whose shares were acquired cannot, by itself, establish a FEMA violation or demonstrate that the transaction was fictitious.

9.21. He submits that the commercial rationale of an acquisition also cannot be tested merely by comparing the turnover or reserves of the acquiring and acquired entities. Corporate groups may reorganise their shareholding structures for a variety of legitimate commercial, legal and organisational reasons. According to him, unless the ED establishes that the acquisition was prohibited by law or that the consideration was not genuinely paid, the fact that a smaller entity acquired a larger operating company cannot constitute a jurisdictional fact for exercise of power under Section 37A.

9.22. As regards the submission that the transaction did not generate any economic benefit either for Genpact India or for India, he submits that economic benefit is not the statutory test under FEMA for determining whether a transaction is permissible. He submits that the fact that funds were utilised for acquisition of shares rather than for expansion of the existing business does not render the transaction unlawful. Acquisition of shares pursuant to a corporate reorganisation is itself a commercial transaction and the absence of an immediate increase in the assets or operations of the Indian company cannot, without more, establish a FEMA contravention.

9.23. He submits that the same principle applies to the Morgan Stanley borrowing. The question whether a corporate group derived an economic advantage from borrowing at a particular rate or whether the funds were deployed in a manner which, in hindsight, appears commercially unnecessary is not a substitute for establishing a contravention of FEMA. According to him, corporate entities are entitled to structure their affairs, including their financing and holding structures, in the manner they consider commercially appropriate, provided the structure complies with the governing law and regulatory framework.

9.24. He submits that the ED's case effectively seeks to treat the commercial structure and movement of funds as sufficient to establish illegality, without first identifying the specific statutory prohibition which was violated by the petitioner. According to him, Section 37A cannot be invoked merely because the ED considers the transaction commercially unusual, because the funds moved quickly, because the interest rates differed, or because a smaller entity acquired a larger entity. The statutory requirement is that the conditions prescribed under Section 37A must first be satisfied, including the existence of the requisite reason to believe in relation to foreign exchange, foreign security or immovable property situated outside India being held in contravention of Section 4.

9.25. His submission therefore is that the foreign borrowings between Morgan Stanley and the non-resident Genpact entities, the subsequent inter se lending between such non-resident entities, and the commercial terms governing those transactions cannot, without establishing the necessary statutory nexus, furnish the jurisdictional basis for seizure under Section 37A against the petitioner. According to him, the ED is required to establish a specific FEMA contravention attributable to the petitioner and cannot substitute an assessment of the commercial desirability or economic substance of the overall corporate restructuring for the jurisdictional requirements imposed by Section 37A.

9.26. As regards avoidance of Dividend Distribution Tax, firstly, his submission is that the same has been upheld by the Hon'ble Delhi High Court in ***Genpact Luxembourg SARL v. Assistant Commissioner of Income Tax*** [WP(C). 7784 of 2022] and the same cannot be reopened. He again reiterates that at best the allegations if true would attract Section 6 of the FEMA, which has to be proceeded under Section 37 and not under Section 37A by contending that Section 4 is attracted. He relies on the decision of the Hon'ble Supreme Court in ***Vodafone International Holdings BV v. Union of India***[26], more particularly paragraphs 79, 81, 320, 321 and 423 which are reproduced hereunder for easy reference:

> ***79.*** *When it comes to taxation of a holding structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant. To give an example, if a structure is used for circular trading or round tripping or to pay bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a holding structure an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such interpositioning of that entity. However, this has to be done at the threshold.*
>
> ***81.*** *Applying the above tests, we are of the view that every strategic foreign direct investment coming to India,*

[26] (2012) 6 SCC 613

as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/courts should keep in mind the following factors: the concept of participation in investment, the duration of time during which the holding structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit.

320. *India is considered to be the most attractive investment destinations and, it is known, has received $37.763 billion in FDI and $29.048 billion in FII investment in the year to 31-3-2010. FDI inflows it is reported were of $22.958 billion between April 2010 and January 2011 and FII investment were $31.031 billion. Reports are afloat that million of rupees go out of the country only to be returned as FDI or FII.*

321*. Round-tripping can take many formats like under-invoicing and over-invoicing of exports and imports. Round-tripping involves getting the money out of India, say to Mauritius, and then come to India like FDI or FII. Article 4 of the Indo-Mauritius DTAA defines a "resident" to mean any person, who under the laws of the contracting State is liable to taxation therein by reason of his domicile, residence, place of business or any other similar criteria. An Indian company, with the idea of tax evasion can also incorporate a company offshore, say in a tax haven, and then create a WOS in Mauritius and after obtaining a TRC may invest in India. Large amounts, therefore, can be routed back to India using TRC as a defence, but once it is established that such an investment is black money or capital that is hidden, it is nothing but circular movement of capital known as round-tripping; then TRC can be ignored, since the transaction is fraudulent and against national interest.*

423. *I, therefore, find it difficult to agree with the conclusions arrived at by the High Court that the sale of the CGP share by HTIL to Vodafone would amount to transfer of a capital asset within the meaning of Section 2(14) of the Income Tax Act and the rights and entitlements that flow from FWAs, SHAs, term sheet,*

> *loan assignments, brand licence, etc. form an integral part of the CGP share attracting capital gains tax. Consequently, the demand of nearly Rs 12,000 crores by way of capital gains tax, in my view, would amount to imposing capital punishment for capital investment since it lacks authority of law and, therefore, stands quashed and I also concur with all the other directions given in the judgment delivered by the Lord Chief Justice.*

9.27. By relying on ***Vodafone,*** he submits that round tripping would arise only where funds first went out of India as overseas investment and then were routed back into a resident Indian entity. In the present case, there is no allegation of any funds having gone out of India and being brought back into India. Even as per the allegations made by the ED, the funds were sourced from Morgan Stanley by Genpact Luxembourg, who invested that money by subscribing to NCDs issued by Empower India and that money was repaid back.

9.28. There is no money from India which went out and came back to India and as such, he submits that round tripping would not apply. He reiterates that the flow of funds, both in equity and debt were from non-residents, who borrowed the funds from another non-resident namely Morgan Stanley, which is contrary to the allegations made. He submits that the merger of Genpact India, the largest Genpact entity in India into Empower India, a relatively smaller company was because Genpact India was an unlimited liability company and Empower India was a limited liability company. Empower India was the second largest Genpact entity in India and had commercial substance and existence.

9.29. The NCD borrowing from Genpact Luxembourg helped consolidate share holdings and finances to regulate management in order to effectively compete in the market and enhance the net worth by reducing the overall cost, which is a business call by the Genpact group of which Empower India and Genpact India are constituents. His submission is that when Genpact India and/or its shareholders had no objection to a smaller company like Empower India becoming the holding company and, subsequently, the merger of Genpact India into

Empower India, the question of ED having any objection thereto would not arise.

9.30. His submission is that post the Purchase of the shares of Genpact India by Empower India and the merger of Genpact India into Empower India, the name of Empower India was also changed to Genpact India, with all entities of Genpact India being merged into Empower India and thereafter the business of Genpact India has grown by metes and bounds.

9.31. He contends that the total empolyess grew from 42,000 in FY 2014-25 to 1,01,000 in FY 2025-26, total revenue grew from 4,814 crores in FY 2014-15 to 15,484 crores in FY 2025-26, total taxes which have been paid grew from 543 crores in FY 2014-2015 to 1,443 crores in FY 2025-2026 and Foreign Direct Investment (‘FDI’) contributed by petitioner grew from USD 797 million in FY 2014-15 to USD 1583 million. Thus, he submits that the present day financial position of the petitioner and its contribution to the tax exchequer, foreign exchange reserves and employment in India is substantial.

9.32. His submission is that the credit was raised from Morgan Stanley for a short duration to enable the buying of 100% share in Genpact India through a mix of debt and equity and the same was done within a short period of time so as to ensure proper running of the companies. His submission is that though Morgan Stanley had lent the funds, ultimately the shareholders were Genpact entities, who received the shareholding in the various entities by purchase from and out of the said funds advanced by Morgan Stanley. The shareholding of all foreign entities of Genpact group in Genpact India was purchased by Empower India, which has been subsequently merged with other entities which has no adverse impact on the country. It is a manner of foreign direct investment by foreign companies which the country is endeavouring to secure and no fault can be found therewith. His submission is that if closed transactions are reopened by entities like ED, there is a possibility of foreign direct investment not coming into India.

9.33. He submits that the first Morgan Stanley loan was taken by Headstrong Singapore (now

Genpact Singapore) to infuse funds into Empower India, Empower India thereafter used the said funds to purchase 49% shares of Genpact India, this loan and the share purchase were subject to detailed scrutiny by the AO and the TPO, both of whom approved it. The CIT having invoked Section 263 of the IT Act, treated the loan as a sham transaction contending that there is a violation of the capital gains provisions.

9.34. During those proceedings there was no allegation made of round tripping, it is for the first time now that allegation of round tripping has been made which is also not found in the reasons to believe in the order issued under Section 37A of FEMA.

9.35. The Hon'ble Delhi High Court has said that there is no violation, ED cannot raise the issue now is his submission. Insofar as the loan raised by Headstrong Singapore (now Genpact Singapore), relating to equity investment, has no connection or relevance to the NCDs, which are subject matter of seizure order. He, however, submits that any borrowing and repayment within 3 days were also approved by TPO, AO, ITAT and the Hon'ble Delhi High Court. Thus, even in regard thereto allegation of round tripping is baseless.

9.36. As regard the NCD borrowing, he submits that the same was required as Empower India had to acquire 100% shareholding of Genpact India. However, the equity infusion from Headstrong Singapore(now Genpact Singapore) was not sufficient and as such, Empower India had to issue the NCDs to Genpact Luxembourg to raise capital for the purpose of purchasing the rest of 51% of Genpact India, since even according to the ED, Genpact India was a bigger entity.

9.37. The borrowing and repayment were completed in 3 days, as these funds were necessary and critical to complete the internal reorganisation; no fault can be found with the speed of the transaction. Mere speed cannot be a ground for initiation of action by the ED and for the attachment sought to be done. His submission is that the entire action taken for borrowing, as also for investment in equity, is genuine, *bona fide* corporate transactions, as part of corporate restructuring of the Genpact group. There is no *mala fide* intent in any of the transactions that would warrant penal action against any member of *the Genpact group,* including the petitioner.

9.38. His submission is that the reliance placed by the ED on the framework applicable to External Commercial Borrowing is also misplaced. He submits that this has been clarified by the RBI in APDIR Circular No. 56 dated 3.03.2016 that the ECB framework will not be applicable to denominated NCDs. The NCD borrowing was undertaken as per APDIR, Circular No. 89 dated 1.03.2012 and Circular No. 7 dated 16.07.2012 and not in terms of the ECB framework.

9.39. On all the above basis, he submits that the writ petition in W.P. No. 7283/2026 and WP No. 16763 of 2026 are required to be allowed and the reliefs sought for granted.

10. Heard Shri Arvind Datar, Learned Senior Counsel for the Petitioner in WP No. 7283 of 2026; Shri Udaya Holla, Learned Senior Counsel for the Petitioner in WP No. 16763 of 2026; Shri N Venkataraman,

Learned ASGI for the Respondents in both matters. Perused papers.

11. The Points that would arise for determination are:

(i) Whether the present writ petitions are maintainable under Articles 226 and 227 of the Constitution of India, notwithstanding the alternate statutory remedy available under FEMA?

(ii) If the writ petition challenging the seizure is maintainable, whether Section 37A of FEMA could be invoked in respect of the transactions undertaken in January and March 2015, having regard to the fact that Section 37A came into force only on 09.09.2015; and, in particular, whether the subsequent subsistence of the NCD liability and payments made thereunder between 2018 and 2023 constitute a continuing or independent contravention so as to attract Section 37A?

(iii) Whether the transactions relied upon by the Enforcement Directorate, including the borrowings by the non-resident entities, the transfer of funds to Empower India, acquisition of the shares of Genpact India, issuance of the NCDs to Genpact Luxembourg and the subsequent repayment thereof, disclose a contravention of Section 4 of FEMA so as to constitute the jurisdictional facts necessary for exercise of power under Section 37A?

(iv) Whether, on the material available to the Authorised Officer at the time of passing the seizure order, there existed the requisite "reason to believe" under Section 37A(1) that the property in question was held in contravention of Section 4 of FEMA; and whether the validity of the seizure order can be supported by reasons or material subsequently relied upon by the Enforcement Directorate before this Court?

(v) What is the effect, if any, of the regulatory treatment of the transactions by the Reserve Bank of India, SEBI and the Income Tax authorities, including the clarifications, permissions, assessments or orders relied upon by the parties, on the legality of the action taken under Section 37A?

(vi) In W.P. No.16763/2026, whether the rejection dated 13.01.2026 of the petitioner's application for No-Objection Certificate under Rule 10 of the Foreign Exchange Management (Overseas Investment) Rules, 2022 is sustainable in the absence of reasons disclosing the basis for such rejection and the nexus between the pending investigation and the proposed overseas investment?

(vii) Whether the mere pendency of an investigation by the Enforcement Directorate is sufficient to refuse an NOC under Rule 10, or whether such refusal must be founded upon relevant, rational and disclosed reasons having a demonstrable nexus with the proposed

investment; and whether the subsequent seizure order dated 03.02.2026 can be relied upon to sustain the earlier rejection dated 13.01.2026?

(viii) What Order?

12. This Court answers the above points as follows:

13. **<u>Answer to Point No. (i):</u> Whether the present writ petitions are maintainable under Articles 226 and 227 of the Constitution of India, notwithstanding the alternate statutory remedy available under FEMA?**

13.1. Sri Arvind Datar, learned Senior Counsel for the petitioner in W.P. No.7283/2026, submits that the existence of an alternate remedy does not, by itself, bar the jurisdiction of this Court under Article 226 of the Constitution. He submits that the challenge in the petition is not based on disputed questions of fact. The principal questions are whether the Authorised Officer had the power to invoke Section 37A in respect of the transactions undertaken in January and March 2015, when Section 37A was not in force, and whether the seizure order records the material necessary to satisfy the requirement of "reason to believe" under

Section 37A(1). According to him, these are questions of law and jurisdiction which can be examined by this Court in exercise of its writ jurisdiction.

13.2. He further submits that where the very exercise of statutory power is questioned, the existence of an alternate remedy cannot compel a person to first undergo the statutory process. According to him, the petitioner is entitled to seek examination of the jurisdictional objection directly by this Court.

13.3. Shri Udaya Holla, learned Senior Counsel for the petitioner in W.P. No.16763/2026, submits that the rejection of the application for No-Objection Certificate under Rule 10 of the Foreign Exchange Management (Overseas Investment) Rules, 2022 contains no reasons. He submits that the absence of reasons, coupled with the absence of an appellate remedy against such rejection, attracts the exception to the rule of alternate remedy. The petitioner, therefore, cannot be required to pursue a remedy which is not available under the Rules.

13.4. Shri N. Venkataraman, Learned ASGI, relies upon ***Radha Krishan Industries v. State of Himachal Pradesh*** [2021 SCC Online SC 334], particularly paragraphs 27 and 28, and submits that where a statute provides a complete and efficacious remedy, the aggrieved party should ordinarily pursue that remedy before approaching this Court under Article 226.

13.5. He submits that Section 37A provides a complete mechanism. The seizure order is required to be placed before the Competent Authority within thirty days. The Competent Authority is then required to hear the concerned parties and pass an order under Section 37A(3), against which an appeal is provided under Section 37A(5). According to him, the petitioner has not exhausted this statutory remedy.

13.6. Shri N. Venkataraman, Learned ASGI, also relies upon ***Titaghur Paper Mills Co. Ltd. v. State of Orissa*** [(1983) 2 SCC 433] (paragraph 6), for the proposition that where a statute provides a complete machinery for examining the validity of an action, the party should ordinarily pursue that remedy instead of approaching the High Court directly. He submits that the issues raised in W.P. No.7283/2026 require examination of the cross-border loans, share acquisitions, NCD transactions and movement of funds between several entities. These matters involve appreciation of facts and material and should first be considered by the Competent Authority under Section 37A(3). The writ petition is, therefore, premature.

13.7. The rule that a writ petition should ordinarily not be entertained where an effective alternate remedy is available is a rule of judicial discretion. It is not an absolute bar on the exercise of jurisdiction under Article 226.

13.8. In ***Radha Krishan Industries***, the Hon'ble Supreme Court has considered the scope of this rule in paragraphs 27 and 28. In paragraph 27.3, the Hon'ble Supreme Court has recognised, among other circumstances, cases involving breach of natural justice and cases where the proceedings are wholly without jurisdiction as exceptions to the rule of alternate remedy.

13.9. Thus, the existence of an alternate remedy is only the starting point of the enquiry. This Court must also consider the nature of the challenge and the relief sought. If the challenge falls within a recognised exception, this Court may exercise its writ jurisdiction notwithstanding the existence of a statutory remedy.

13.10. In W.P. No.7283/2026, the nature of the challenge is important. The petition does not merely ask this Court to re-appreciate the evidence or to substitute its view for that of the Competent Authority. The petitioner raises a threshold objection to the exercise of power under Section 37A.

13.11. The first objection is based on time. The transactions relied upon by the Enforcement Directorate were undertaken in January and March 2015, whereas Section 37A came into force only on 09.09.2015. The question, therefore, is whether Section 37A could legally be invoked in respect of the transactions in question.

13.12. The second objection concerns the seizure order itself. The petitioner contends that the reasons now relied upon by the Enforcement Directorate were not the reasons recorded by the Authorised Officer when the seizure order was passed. This question concerns the legality of the decision-making process and the record on which the statutory power was exercised.

13.13. These questions are different from the question whether the underlying transactions were, in fact, in contravention of Section 4 of FEMA.

13.14. The distinction between jurisdiction and merits is also important. In ***Arun Kumar v. Union of India*** [(2007) 1 SCC 732], (paragraphs 73 to 76 and 84 to 85), the Hon'ble Supreme Court explained the concept of a jurisdictional fact. A jurisdictional fact is a fact upon the existence of which the authority's power to act depends. If such a foundational requirement is absent, the authority cannot acquire jurisdiction merely by assuming that it exists.

13.15. In the present case, the question whether Section 37A could be invoked in respect of transactions undertaken before the provision came into force goes to the statutory power of the Authorised Officer. This Court can examine that question without deciding the entire dispute on merits.

13.16. The same approach must be adopted in relation to the requirement of "reason to believe" under Section 37A(1). There is a distinction between examining whether the Authorised Officer recorded reasons as required by law and examining whether those reasons are sufficient, on a detailed assessment of the material, to establish a contravention of Section 4.

13.17. The latter exercise may require examination of the underlying transactions, the movement of funds, the corporate relationships, the NCDs, the share acquisitions and the explanations offered by the parties. Such an exercise is not appropriate at this stage by this Court.

13.18. Shri N. Venkataraman, Learned ASGI, has relied upon the decision of a coordinate Bench of this Court in ***Xiaomi Technology India Private Limited v. Union of India***, [W.P.No.9182/2022 dated 05.07.2022], (paragraph 23). In that case, the coordinate

Bench held that whether the Authorised Officer had the requisite "reason to believe" and whether the reasons recorded were sufficient to sustain action under Section 37A were matters for consideration by the Competent Authority. The coordinate Bench observed that examining the sufficiency of the reasons under Article 226 at that stage could prejudice either party.

13.19. This Court respectfully follows the said principle. It would not be appropriate for this Court to examine, at this stage, whether the material relied upon by the Enforcement Directorate is sufficient to establish a contravention of Section 4. That question is left to the Competent Authority in accordance with Section 37A(3).

13.20. There is, however, a clear distinction between the sufficiency of the recorded reasons and the question whether the reasons now relied upon were recorded at all. If a particular ground did not form part of the reasons recorded by the Authorised Officer, the question whether that ground can subsequently be relied upon to sustain the seizure order is a question concerning the decision-making process. Examining that question does not require this Court to decide whether the material itself is sufficient.

13.21. The submission of Shri N. Venkataraman, Learned ASGI, that the entire challenge must first be taken before the Competent Authority cannot, therefore, be accepted in that broad form. The statutory mechanism under Section 37A is intended to enable the Competent Authority to examine the seizure, consider the material and decide whether the seizure should be confirmed or set aside. That statutory process must be respected. At the same time, the existence of that process does not prevent this Court from examining a challenge which goes to the very authority to invoke Section 37A or to the legality of the decision-making process.

13.22. This Court must, however, avoid converting the writ proceedings into a full adjudication of the FEMA dispute. Questions which require appreciation of evidence and determination of the substantive contravention should ordinarily be left to the authority entrusted with that function.

13.23. The decision in ***Titaghur Paper Mills Co. Ltd.***, (paragraph 6), relied upon by Shri N. Venkataraman, Learned ASGI, does not require a different conclusion. The principle that where a statute provides a complete machinery for redressal of a grievance, the statutory remedy should ordinarily be followed, is not in dispute. The question is whether the present challenge falls within the recognised exceptions to that rule.

13.24. For the reasons stated above, the challenge to the seizure order raises questions which cannot, merely because an alternate remedy exists, be excluded from consideration under Article 226.

13.25. Accordingly, W.P. No.7283/2026 is maintainable to the limited extent that it raises questions concerning the statutory power to invoke Section 37A and the legality of the decision-making process reflected in the seizure order.

13.26. In W.P. No.16763/2026, the position is different. The challenge is to the rejection dated 13.01.2026 of the petitioner's application for No-Objection Certificate under Rule 10 of the Overseas Investment Rules. The petitioner's specific grievance is that the application was rejected without reasons.

13.27. A statutory authority exercising administrative power is required to act fairly. Reasons are important because they show that the authority has applied its mind to the application and the material placed before it. Reasons also enable the affected party to understand why the application has been rejected and enable the Court to examine whether the decision is lawful.

13.28. The absence of an appellate remedy is also relevant. If the Rules do not provide an appeal against rejection of a Rule 10 application, the petitioner cannot be directed to pursue a statutory remedy which does not exist. More importantly, the challenge is based on the alleged failure to follow a basic requirement of fair administrative decision-making.

13.29. The case therefore falls within the recognised exception relating to natural justice referred to by the Hon'ble Supreme Court in ***Radha Krishan Industries****,* (paragraph 27.3).

13.30. This Court is, therefore, satisfied that W.P. No.16763/2026 is maintainable under Article 226. The question whether the rejection dated 13.01.2026 is otherwise lawful, including whether the decision contains proper reasons and whether there is a rational nexus between the pending investigation and the proposed investment, will be considered separately.

13.31. For the above reasons, this Court answers Point No. (i) by holding that both the present writ petitions are maintainable under Articles 226 and 227 of the Constitution of India, notwithstanding the alternate statutory remedy available under FEMA in so far as WP No. 7283 of 2026 is concerned and in so far as WP 16763 of 2026, admittedly, there is no alternate remedy available.

14. **Answer to Point No. (ii): If the writ petition challenging the seizure is maintainable, whether Section 37A of FEMA could be invoked in respect of the transactions undertaken in**

January and March 2015, having regard to the fact that Section 37A came into force only on 09.09.2015; and, in particular, whether the subsequent subsistence of the NCD liability and payments made thereunder between 2018 and 2023 constitute a continuing or independent contravention so as to attract Section 37A?

14.1. Sri Arvind Datar, learned Senior Counsel, submits that the seizure order under Section 37A concerns the NCD transaction of March 2015 and not the equity transaction of January 2015. Sri Arvind Datar, learned Senior Counsel, submits that the two transactions are separate and that the January 2015 transaction had already been examined by the Assessing Officer and the Transfer Pricing Officer.

14.2. Sri Arvind Datar, learned Senior Counsel, submits that the borrowing by Headstrong Singapore in January 2015, the subsequent repayment, the borrowing by Genpact Bermuda in March 2015 and the issue of NCDs by Empower India to Genpact Luxembourg on 25.03.2015 were all completed before Section 37A came into force on 09.09.2015.

14.3. Relying upon ***State of Bihar v. Deokaran Nenshi***, [(1972) 2 SCC 890], (paragraphs 8 to

10), Sri Arvind Datar, learned Senior Counsel, submits that a completed act does not become a continuing wrong merely because its consequences continue. The NCDs were issued on 25.03.2015. The fact that the NCD liability remained outstanding and was later discharged cannot, according to Sri Arvind Datar, learned Senior Counsel, give retrospective operation to Section 37A.

14.4. The petitioner also rely upon ***Canara Bank v. Commissioner of Customs,*** [WP No.10895/2023] dt. 10.06.2024 particularly paragraphs 2, 3, 6, 15 and 20. In that case, the property had been mortgaged before Section 37A came into force and was subsequently sought to be seized under Section 37A. At paragraph 15, the coordinate Bench held that Section 37A, being substantive in character, could not be construed or treated as retrospective or retroactive in operation. Sri Arvind Datar, learned Senior Counsel, submits that the decision has not been challenged by the Enforcement Directorate and has attained finality.

14.5. Reliance is also placed upon ***Berger Paints India Ltd. v. CIT***, [(2004) 12 SCC 42] (paragraph 14), in support of the principle that a settled position should not be departed from without a proper reason.

14.6. Sri Arvind Datar, learned Senior Counsel, further relies upon ***Arun Kumar***, (paragraphs 73 to 76 and 84 to 85). The submission is that the existence of the conditions necessary for exercise of statutory power goes to jurisdiction. Since the transactions were completed before 09.09.2015, Section 37A could not, according to Sri Arvind Datar, learned Senior Counsel, be invoked in respect of those transactions.

14.7. Shri N. Venkataraman, Learned ASGI, submits that the Enforcement Directorate is not seeking to apply Section 37A retrospectively to a completed transaction of 2015. The case is that the transactions of January and March 2015 formed part of a larger arrangement which continued to be implemented after Section 37A came into force.

14.8. Shri N. Venkataraman, Learned ASGI, submits that the NCD liability was subsequently discharged through payments made between 2018 and 2023, involving approximately INR 7,800 crore paid to Genpact Luxembourg. The subsequent payments are not merely the continued existence of a liability. They are actual transactions which took place after 09.09.2015 and are relied upon by the Enforcement Directorate as part of the arrangement under investigation.

14.9. Sri N. Venkataraman, Learned ASGI, submits that Section 4 of FEMA was already in force and that Section 37A merely provides the machinery for taking action where the conditions prescribed by Section 37A are satisfied.

14.10. As regards ***Canara Bank***, Shri N. Venkataraman, Learned ASGI, submits that the facts are materially different. The case concerned a mortgage created before Section 37A came into force and a subsequent seizure affecting a third-party bank. There was no allegation of a later act or acts forming part of the contravention.

14.11. The present case, according to Shri N. Venkataraman, Learned ASGI, involves actual payments and transfers between 2018 and 2023. Those acts occurred after Section 37A came into force and form part of the case of the Enforcement Directorate.

14.12. There is no dispute that Section 37A came into force on 09.09.2015. The provision cannot be applied retrospectively to a transaction which was completely concluded before that date. This is the principle laid down by the coordinate Bench in ***Canara Bank***, particularly paragraphs 2, 3, 6, 15 and 20. At paragraph 15, the coordinate Bench held that Section 37A, being substantive in character, cannot be construed or treated as retrospective or retroactive in operation. This Court follows the said principle.

14.13. The question, however, is whether the present case is confined to transactions which were completed before 09.09.2015. Ex facie it is not.

14.14. The Enforcement Directorate does not rely only upon the creation of the NCD liability on 25.03.2015. Reliance is also placed upon payments made between 2018 and 2023 towards discharge of that liability. These payments took place several years after Section 37A came into force.

14.15. The question, therefore, is not whether Section 37A could have been invoked in March 2015. It plainly could not. The question is whether subsequent acts, occurring after 09.09.2015 and alleged to form part of the same arrangement, can be taken into account while exercising the power under Section 37A. The answer is yes.

14.16. The principle in ***State of Bihar v. Deokaran Nenshi***, (paragraphs 8 to 10), does not require a different conclusion. The Hon'ble Supreme Court held that a completed act does not become a continuing wrong merely because the consequences of that act continue. Thus, the mere fact that the NCD liability remained outstanding after 09.09.2015 would not, by itself, make the issue of the NCDs a continuing contravention. That, however, is not the case relied upon by the Enforcement Directorate.

14.17. The Enforcement Directorate relies upon actual payments made between 2018 and 2023. A payment made years after the original transaction is a subsequent act. It is different from the mere continuation of an existing liability.

14.18. Whether those payments ultimately amount to a contravention of Section 4 is a matter to be considered under Point No. (iii). For the purpose of the present point, the material fact is that the payments took place after Section 37A came into force. This distinction also answers the reliance placed upon ***Canara Bank***.

14.19. The coordinate Bench in ***Canara Bank*** was concerned with a pre-existing security interest created before Section 37A came into force. The subsequent seizure sought to operate against that pre-existing interest. There was no allegation of any later act which itself formed part of the alleged FEMA contravention.

14.20. The present case stands on a different footing. The Enforcement Directorate relies upon actual subsequent payments made between 2018 and 2023 and alleges that those payments were part of the same arrangement.

14.21. The ratio of ***Canara Bank***, therefore, continues to apply. Section 37A cannot be given retrospective operation to the completed transaction of 2015. But ***Canara Bank*** does not prevent the Enforcement Directorate from examining subsequent acts which occurred after Section 37A came into force.

14.22. The principle in ***Berger Paints***, (paragraph 14), does not alter this position. Consistency in the application of law is important. At the same time, this Court has to examine whether the facts of the two cases are the same. There is no departure from ***Canara Bank*** in the present case. The principle laid down in paragraph 15 is accepted and applied. The distinction is factual: in ***Canara Bank***, there was no subsequent act of the nature relied upon in the present case.

14.23. The principle stated in ***Arun Kumar v. Union of India***, (paragraphs 73 to 76 and 84 to 85), also requires the statutory conditions for exercise of power to be satisfied. Those conditions, however, cannot be examined only by looking at the date on which the NCDs were issued. The Enforcement Directorate relies upon subsequent acts which occurred after 09.09.2015. Such acts are part of the factual basis for the action under Section 37A. The fact that those acts arose out of an arrangement which began in 2015 does not make the later acts pre-09.09.2015 transactions.

14.24. The petitioner have also contended that the NCD transaction, at the highest, concerns a capital account transaction and would have to be dealt with under the provisions governing such transactions and the ordinary adjudicatory machinery under Section 37. That issue concerns the nature of the alleged FEMA contravention and is more appropriately considered under Point No. (iii). It does not answer the present question.

14.25. For the present purpose, it is sufficient to hold that the Enforcement Directorate was entitled to take into account conduct which occurred after Section 37A came into force while examining whether the conditions of Section 37A were satisfied. The January 2015 transaction also cannot be said to become irrelevant merely because Section 37A was not then in force. The January transaction cannot itself be subjected to Section 37A retrospectively. It may, however, be considered as part of the factual background while examining the March 2015 transaction and the subsequent conduct. The relevance of the January transaction is therefore to the factual history of the arrangement and not to the retrospective application of Section 37A.

14.26. This Court accordingly finds that the present case is not one where Section 37A is sought to be applied only to a transaction completed before 09.09.2015. The original NCD transaction took place in March 2015. The liability arising from that transaction continued thereafter. More importantly, actual payments were made between 2018 and 2023. The Enforcement Directorate relies upon those payments as acts forming part of the arrangement under investigation. Those subsequent acts took place when Section 37A was already in force. They can therefore be taken into account while considering the exercise of power under Section 37A.

14.27. For the reasons stated above, this Court answers Point No. (ii) in favour of the Enforcement Directorate. Section 37A cannot be applied retrospectively to the completed transactions of January and March 2015 merely because the consequences of those transactions continued after 09.09.2015. The principle stated in ***Canara Bank***, particularly paragraphs 2, 3, 6, 15 and 20, applies to that extent. However, the action in the present case is not based only upon the completion of the transactions in 2015 or the mere subsistence of the NCD liability. The Enforcement Directorate relies upon actual payments made between 2018 and 2023, which occurred after Section 37A came into force and which are alleged to form part of the arrangement under investigation.

14.28. The fact that the arrangement originated in 2015 does not prevent subsequent acts forming part of that arrangement from being examined under the law in force when those acts occurred. Accordingly, the invocation of Section 37A cannot be held invalid on the ground that the underlying arrangement commenced before 09.09.2015.

15. **<u>Answer to Point No. (iii):</u> Whether the transactions relied upon by the Enforcement Directorate, including the borrowings by the non-resident entities, the transfer of funds to Empower India, acquisition of the shares of Genpact India, issuance of the NCDs to Genpact Luxembourg and the subsequent repayment thereof, disclose a contravention of Section 4 of FEMA so as to constitute the jurisdictional facts necessary for exercise of power under Section 37A?**

15.1. Sri Arvind Datar, learned Senior Counsel, submits that the basic requirement for invoking Section 37A is not satisfied. Section 37A can be invoked only where the authorised officer has reason to believe that foreign exchange, security or immovable property situated outside India is suspected to have been acquired or held in contravention of Section 4 of FEMA. According to Sri Arvind Datar, learned Senior Counsel, the material relied upon by the Enforcement Directorate does not disclose such a contravention.

15.2. Sri Arvind Datar, learned Senior Counsel, submits that the borrowings from Morgan Stanley were undertaken by non-resident entities. The petitioner was not the borrower under those facilities. The subsequent movement of funds between non-resident entities, according to Sri Arvind Datar, learned Senior Counsel, cannot by itself amount to a contravention of Section 4 by a person resident in India.

15.3. Sri Arvind Datar, learned Senior Counsel, submits that the NCD transaction was a separate and regulated transaction. The NCDs were denominated in Indian Rupees and were subscribed to in India by Genpact Luxembourg, a SEBI-registered Foreign Portfolio Investor. The NCDs were listed within the prescribed period, had a maturity exceeding three years, and the subscription as well as subsequent redemption and payment of interest were made in Indian Rupees.

15.4. Sri Arvind Datar, learned Senior Counsel, further submits that Empower India and the resultant new Genpact India did not transfer any foreign exchange outside India in connection with the subscription to or repayment of the NCDs. The subsequent repatriation by Genpact Luxembourg was undertaken by a non-resident FPI under the applicable regulatory framework. According to Sri Arvind Datar, learned Senior Counsel, such repatriation cannot retrospectively convert a rupee transaction in India into a contravention of Section 4.

15.5. Sri Arvind Datar, learned Senior Counsel, also relies upon Section 6(3)(e) of FEMA, as it stood at the relevant time. The submission is that the provision specifically dealt with borrowing or lending in Indian Rupees between a person resident in India and a person resident outside India. Therefore, if the allegation concerns the NCD borrowing, the transaction has to be examined under the specific statutory provision governing such borrowing and cannot be brought within Section 4 merely by describing the transaction as part of a larger arrangement.

15.6. Reliance is placed upon APDIR Circular No.89 dated 1 March 2012, particularly paragraph 2, which permitted SEBI-registered FIIs and sub-accounts to invest in primary issues of NCDs and bonds subject to the prescribed conditions. Sri Arvind Datar, learned Senior Counsel, submits that the NCDs in question satisfied the applicable listing requirement.

15.7. Reliance is also placed upon APDIR Circular No.7 dated 16 July 2022, which expressly recognises and regulates FPI investment in Government securities and corporate bonds.

15.8. Sri Arvind Datar, learned Senior Counsel, submits that the Reserve Bank of India was approached regarding the transaction. Reliance is placed upon the correspondence exchanged with the Reserve Bank of India, including the communication dated 15 February 2016, to contend that the transaction, as disclosed to the Reserve Bank of India, was accepted subject to the applicable requirements.

15.9. Reliance is placed upon ***LIC v. Escorts Ltd*.,** [(1986) 1 SCC 264], particularly paragraphs 63, 64 and 84, in support of the submission that the Reserve Bank of India is the authority entrusted with determining compliance with the foreign exchange regulatory framework and that the Enforcement Directorate cannot disregard such regulatory treatment in the absence of legally recognised grounds.

15.10. Sri Arvind Datar, learned Senior Counsel, also submits that the allegation of round-tripping is misconceived. Reliance is placed upon ***Vodafone International Holdings BV v. Union of India*** [(2012) 6 SCC 613], particularly paragraph 321. It is submitted that round-tripping ordinarily involves money first leaving India and thereafter returning to India as foreign investment. In the present case, according to Sri Arvind Datar, learned Senior Counsel, the funds originated from Morgan Stanley, an independent third-party lender. The funds were thereafter brought into India and subsequently moved out in the course of the transactions relied upon by the Enforcement Directorate. The funds had not first left India.

15.11. On this basis, Sri Arvind Datar, learned Senior Counsel, submits that even if the transactions are considered together, the material does not disclose that the Indian resident acquired or held foreign exchange, foreign securities or immovable property outside India in contravention of Section 4.

15.12. Shri N. Venkataraman, Learned ASGI, submits that the petitioner's case proceeds by separating transactions which, when viewed in their proper sequence, formed part of a single financial arrangement. He also places reliance upon ***Vodafone International Holdings BV v. Union of India,*** particularly paragraphs 79, 80, 81 and 249, to submit that the substance of the arrangement and its commercial effect may be examined rather than each formal step being considered in isolation.

15.13. Shri N. Venkataraman, Learned ASGI, submits that the material discloses two phases.

15.14. In the first phase, on 27 January 2015, Morgan Stanley lent USD 660 million to Headstrong Singapore and USD 12.5 million to Genpact Global Holdings Bermuda. On 28 January 2015, the funds were transferred to Empower India. Empower India thereafter acquired 49% of the shares in Old Genpact India, with Headstrong

Singapore divesting 44% and Genpact Mauritius divesting 5%.

15.15. On 30 January 2015, Headstrong Singapore repaid the USD 660 million borrowed from Morgan Stanley from the monies received from Empower India as consideration for the sale of shares.

15.16. Shri N. Venkataraman, Learned ASGI, submits that the sequence of events is material. The non-resident entity which sold the shares had, according to the Enforcement Directorate, provided the funds which enabled Empower India to acquire those shares. The consideration received by the seller was then used to repay the very borrowing which had financed the acquisition. The Enforcement Directorate therefore contends that the transaction was not an independent acquisition funded by the purchaser, but part of a pre-arranged circular movement of funds.

15.17. Shri N. Venkataraman, Learned ASGI, submits that the second phase followed a similar pattern. On 25 March 2015, Morgan Stanley extended a USD 737.5 million loan to Genpact

Global Holdings Bermuda. The amount was transferred to Genpact Luxembourg. Genpact Luxembourg subscribed to 4,600 NCDs issued by Empower India, each having a face value of INR 1 crore, aggregating to approximately INR 4,600 crore. Empower India thereafter transferred the entire amount to Headstrong Singapore towards acquisition of the remaining 51% of the shares in Old Genpact India. On 26 March 2015, Headstrong Singapore transferred the amount to Genpact Global Holdings Bermuda, which used the amount to repay the Morgan Stanley borrowing.

15.18. The movement in the second phase may therefore be summarised as:

Morgan Stanley to Genpact Bermuda to Genpact Luxembourg to Empower India to Headstrong Singapore to Genpact Bermuda to Morgan Stanley.

15.19. Shri N. Venkataraman, Learned ASGI, submits that the second phase cannot therefore be treated merely as an isolated investment by Genpact Luxembourg. The funds came into India and were immediately transferred out.

What remained in India was a substantial and long-term NCD liability of Empower India. According to the Enforcement Directorate, the funds were not retained by Empower India for its business operations. The economic burden of the NCD liability remained with the Indian business and was subsequently discharged from Indian resources.

15.20. Shri N. Venkataraman, Learned ASGI, further submits that the financial position of Empower India is also relevant. Empower India had a book value of approximately INR 40 crore and did not possess substantial business operations or meaningful assets capable of independently funding the acquisition of Old Genpact India. Old Genpact India, on the other hand, had turnover exceeding INR 4,724 crore and free reserves of approximately INR 8,000 crore.

15.21. According to the Enforcement Directorate, following the amalgamation, the free reserves of Old Genpact India became available to the resultant New Genpact India, while the resultant entity also assumed the NCD liability. That liability was thereafter discharged between

2018 and 2023, involving payments of approximately INR 7,800 crore towards principal and interest to Genpact Luxembourg.

15.22. Shri N. Venkataraman, Learned ASGI, submits that the substance of the arrangement cannot therefore be determined merely by looking at the NCD documentation. The relevant question is whether the NCD was an independent investment or whether it formed one step in a pre-arranged structure by which funds originating from foreign borrowings were routed through the Indian entity and thereafter returned to the foreign group entities using the free reserves of Old Genpact India, thus amounting to a methodology of taking out the profits and free reserves of Old Genpact India.

15.23. Reliance is also placed upon ***Xiaomi Technology India Private Limited v. Union of India***, [W.P.No.9182/2022 dated 05.07.2022], particularly paragraph 23, to submit that the Court should not undertake a final examination of the sufficiency of the material at this stage. The statutory scheme contemplates examination by the Competent Authority under Section 37A(3).

15.24. The rival submissions have to be considered by looking at the transactions in their proper sequence. At the same time, Section 37A does not permit seizure merely because a transaction appears unusual or commercially inconvenient. There must be material which provides the statutory foundation for examining whether foreign exchange, security or immovable property situated outside India was acquired or held in suspected contravention of Section 4.

15.25. The question at this stage is therefore not whether the Enforcement Directorate has finally established the alleged FEMA contravention. The question is whether the material relied upon provides the jurisdictional foundation for invoking Section 37A and examining the transaction under Section 4.

15.26. In determining that question, the Court cannot examine every movement of money as though it had occurred independently of the other transactions. Where a series of transactions takes place within a short period, involves the same or connected entities and is alleged to have been undertaken pursuant to a common arrangement, the transactions can be considered together.

15.27. The principle relied upon from ***Vodafone International Holdings BV v. Union of India***, particularly paragraphs 79, 80, 81 and 249, is relevant in this regard. The Court can examine the substance and commercial effect of an arrangement where the formal structure is alleged to conceal the real nature of the transaction. At the same time, paragraph 321 relied upon by the petitioner also has to be kept in view. The issue is therefore not to apply a label such as "round-tripping", but to examine the actual movement of funds and the purpose and effect of the connected transactions. In the present case, the material discloses a close sequence of events in both phases.

15.28. In the first phase, the foreign borrowing was raised by non-resident entities, the proceeds were made available to Empower India, Empower India acquired shares in the Indian company, and the consideration received by the non-resident seller was thereafter used to repay the foreign borrowing.

15.29. In the second phase, Morgan Stanley advanced USD 737.5 million to Genpact Bermuda. The amount moved to Genpact Luxembourg and was thereafter invested in approximately INR 4,600 crore of NCDs issued by Empower India. Empower India immediately transferred the entire amount to Headstrong Singapore for acquisition of the remaining shares in Old Genpact India. Headstrong Singapore thereafter transferred the amount to Genpact Bermuda, which repaid the Morgan Stanley borrowing.

15.30. This Court is conscious that each step was supported by formal documentation. That, however, does not prevent the Enforcement Directorate from examining the transactions together. The short interval between the successive transfers, the identity and relationship of the entities involved, the financial position of Empower India, the immediate onward transfer of the NCD proceeds, the purpose for which the NCD structure was used, the subsequent amalgamation and the later discharge of the NCD liability are all relevant circumstances.

15.31. These circumstances, taken together, provide a factual basis for the Enforcement Directorate to examine whether the NCD investment was an independent financial transaction or one component of a larger arrangement.

15.32. The fact that the NCDs were denominated in Indian Rupees does not, by itself, conclude the issue under Section 4 or Section 37A. This Court has to look at the transaction as a whole and not only at the currency in which one component of the arrangement was denominated. Similarly, the fact that Genpact Luxembourg was a SEBI-registered FPI and was permitted to invest in NCDs does not make every transaction undertaken by the FPI immune from examination under FEMA. The relevant question is whether the particular transaction, viewed in its surrounding circumstances, formed part of an arrangement giving rise to the statutory consequences contemplated by FEMA. The submission that Empower India or the resultant new Genpact India did not itself transfer foreign exchange outside India is a relevant consideration, but it is not conclusive at this stage. The case of the Enforcement Directorate is based on the entire sequence of transactions, including the foreign borrowings, the movement of the funds into India, the NCD investment, the immediate transfer of the NCD proceeds out of India and the subsequent repayment of the foreign borrowing.

15.33. The fact that the funds came into India and thereafter left India does not, by itself, answer the question. What is material is the manner in which the entire arrangement operated and the rights and liabilities created as a result.

15.34. This Court also finds significance in the fact that, in the second phase, the funds introduced into India were not retained by Empower India for carrying on its business. The entire NCD proceeds were transferred out towards acquisition of the shares. The arrangement therefore left behind in India a substantial NCD liability.

15.35. The liability was subsequently assumed by the resultant Genpact India and was discharged from the resources of the Indian business. The payments made between 2018 and 2023, aggregating approximately INR 7,800 crore towards principal and interest, are therefore relevant circumstances while examining the manner in which the original arrangement operated.

15.36. The financial capacity of Empower India is also relevant. An entity with a book value of approximately INR 40 crore acquiring an Indian business having turnover exceeding INR 4,724 crore and free reserves of approximately INR 8,000 crore is a circumstance which the Enforcement Directorate was entitled to examine. The disparity does not, by itself, establish a contravention. It does, however, provide relevant material for considering whether Empower India was the real economic purchaser or was being used as an intermediary in the arrangement.

15.37. The subsequent discharge of the NCD liability also cannot be completely separated from the earlier transactions merely because the NCDs were issued in 2015. The payments between 2018 and 2023 are actual subsequent acts. They may ultimately be found either to constitute part of the alleged contravention or to provide evidence of the manner in which the original arrangement operated. At the present stage, they are relevant material which the Enforcement Directorate was entitled to consider.

15.38. **Round Tripping:** The submission that there can be no round-tripping merely because the funds originated with Morgan Stanley and did not first leave India before being brought into India cannot be accepted at this stage. Round-tripping cannot be understood only in the narrow sense of funds first leaving India and thereafter returning to India as foreign investment. What is required to be examined is the movement of the funds as a whole, including whether the funds travelled through a circuitous route and ultimately returned to, or came back under the control of, the entity from which the funds had originated, and whether, during that movement, the funds were used in a manner contrary to the applicable law.

15.39. In the present case, the fact that the initial funds were advanced by Morgan Stanley, an independent third-party lender, is certainly a relevant circumstance. However, that fact by itself does not conclude the question. The material relied upon by the Enforcement Directorate indicates that the funds advanced by Morgan Stanley were routed through various Genpact entities, brought into India, deployed in the transactions involving Empower India and the NCDs, and thereafter moved back through the Genpact entities to Morgan Stanley towards repayment of the very borrowings from which the funds had originated.

15.40. Thus, even though the funds did not initially leave India and thereafter return to India, the relevant question is whether the funds, after passing through the various entities and transactions, ultimately travelled back to the original source. If the answer to that question is in the affirmative, the transaction cannot, at this stage, be taken outside the scope of an allegation of "round-tripping" merely on the ground that the initial source of the funds was a foreign lender.

15.41. The expression "round-tripping" is, therefore, required to be understood by reference to the substance and movement of the funds rather than by applying a fixed requirement that the funds must necessarily have first originated in India, left India and thereafter returned to India. What is relevant is the circuit in which the funds travelled, the entities through which the funds moved, the purpose for which the funds were deployed during that journey, and whether the funds ultimately returned to the source from which they had originated.

15.42. This is particularly relevant in the present case because the Enforcement Directorate's allegation is not merely that foreign funds were brought into India. The allegation is that the funds moved through a connected series of transactions involving Morgan Stanley, the Genpact entities, Empower India and the NCDs and ultimately returned to Morgan Stanley through the Genpact entities. The fact that the funds originated with Morgan Stanley, therefore, does not by itself establish that the transactions were genuine, nor does it, at this stage, rule out the possibility of a circular or round-tripping arrangement.

15.43. Whether the entire movement of funds constituted a legitimate financing arrangement or was structured in a manner resulting in a contravention of FEMA or any other applicable law is a matter which requires examination on the basis of the complete transaction. At the stage of examining the jurisdictional foundation for action under Section 37A, this Court cannot accept the narrower proposition that there can be no round-tripping unless the funds first leave India and subsequently return to India.

15.44. Accordingly, the fact that the funds originated from Morgan Stanley and were thereafter routed through foreign Genpact entities into India does not, by itself, take the transaction outside the scope of the Enforcement Directorate's allegation. Since the material indicates that the funds ultimately moved back to Morgan Stanley through the Genpact entities, it cannot, at this stage, be held that there was no "round-tripping" merely because the initial funds were not Indian funds which had first travelled outside India.

15.45. **Section 6(3)(e):** The reliance placed by Sri Arvind Datar, learned Senior Counsel, upon Section 6(3)(e), as it stood during the relevant period, also requires consideration. That provision specifically dealt with borrowing or lending in Indian Rupees between a person resident in India and a person resident outside India. The provision is relevant because the NCD transaction was denominated in Indian Rupees. However, the existence of a specific provision regulating rupee borrowing does not, at this stage, conclude the inquiry under Section 4 where the allegation of the Enforcement Directorate extends beyond the mere creation of a rupee liability.

15.46. The Enforcement Directorate does not rest the entire case on the proposition that the NCD borrowing, viewed in isolation, was prohibited. The case is that the NCD formed one step in a larger arrangement involving foreign borrowings, acquisition of the Indian company, movement of funds through connected non-resident entities and the eventual return of the funds for discharge of the foreign borrowing.

15.47. Section 6(3)(e), therefore, cannot be treated as excluding examination of the connected transactions under Section 4 merely because one component of the arrangement was a rupee-denominated NCD.

15.48. Whether a particular act ultimately attracts Section 4, Section 6 or any other provision of FEMA is a matter for determination in the statutory proceedings. For present purposes, the existence of a regulated rupee transaction does not prevent the Enforcement Directorate from examining the connected transactions and the substance of the arrangement.

15.49. **Effect of RBI and SEBI Regulatory Treatment:** The regulatory history relied upon by the petitioner is undoubtedly relevant. The NCDs were listed securities, Genpact Luxembourg was a SEBI-registered FPI, and APDIR Circular No.89 dated 1 March 2012, particularly paragraph 2, recognised investment by SEBI-registered FIIs and sub-accounts in primary issues of NCDs and bonds subject to the prescribed conditions. The NCDs were listed within the stipulated period and had a maturity exceeding three years. The Reserve Bank of India was also approached regarding the transaction. The correspondence relied upon by the petitioner, including the communication dated 15 February 2016, has to be taken into account. These circumstances, however, do not conclude the present issue. Compliance with the formal requirements governing an FPI's investment in NCDs does not necessarily determine whether the transaction, when viewed together with the surrounding transactions, was undertaken for a purpose or in a manner prohibited by FEMA.

15.50. The principle stated in ***LIC v. Escorts Ltd.***, particularly paragraphs 63, 64 and 84, is relevant to the role of the Reserve Bank of India in the foreign exchange regulatory framework. That principle does not, however, prevent the Enforcement Directorate from examining material showing that a formally permissible transaction was used as one component of a larger arrangement which is alleged to have a different substantive character.

15.51. The regulatory correspondence with the Reserve Bank of India and the SEBI status of Genpact Luxembourg are therefore relevant circumstances, but they do not, at the threshold, extinguish the jurisdiction of the Enforcement Directorate to examine the connected transactions.

15.52. This Court also does not accept the submission that the FPI status of Genpact Luxembourg, by itself, places the NCD transaction beyond examination under FEMA. The regulatory permission to undertake a particular category of investment cannot be treated as an immunity from examination of the manner in which a particular transaction was structured and implemented.

15.53. **Income-Tax Proceedings:** The decisions of the Hon'ble Delhi High Court relied upon by the petitioner also require consideration. Reliance is placed upon Commissioner of ***Income Tax***

(International Taxation) v. Genpact Consulting Singapore Pte Ltd., [ITA No.103/2023], decided on 11 December 2024, particularly paragraphs 9 to 12, and ***Genpact Luxembourg S.A.R.L. v. Assistant Commissioner of Income Tax,*** [W.P.(C) No.7784/2022], decided on 8 August 2024, particularly paragraphs 2, 12, 13, 14, 15 and 16.

15.54. The fact that certain tax proceedings or tax characterisations did not survive judicial scrutiny cannot be ignored. At the same time, those proceedings arose under the Income Tax Act and involved questions which are distinct from the issues arising under FEMA.

15.55. The proceedings before the Hon'ble Delhi High Court concerned the liability of foreign companies. The question was whether a liability which, according to the tax authorities, arose in relation to the Indian company could be fastened upon the foreign companies. The Hon'ble Delhi High Court held, in substance, that such liability could not, on the facts and under the statutory scheme applicable to those proceedings, be imposed upon the foreign companies, and the proceedings were accordingly quashed.

15.56. The present proceedings stand on a different footing. The transactions under consideration involve an Indian company. The question before this Court is not whether a liability of an Indian company can be imposed upon a foreign company. The question is whether the transactions involving the Indian company, when considered along with the connected transactions involving the non-resident entities, disclose the jurisdictional facts necessary for action under Section 37A read with Section 4 of FEMA.

15.57. The distinction is material. The decisions of the Hon'ble Delhi High Court cannot be treated as determining the FEMA issue in the present case. At the same time, the findings recorded by the Hon'ble Delhi High Court, including the findings which resulted in the tax proceedings being set aside, cannot be disregarded. Those findings form part of the material which the

Competent Authority would have to consider while examining the case under FEMA.

15.58. The Petitioner would be entitled to place before the Competent Authority the response of the petitioner to the allegations of the Enforcement Directorate, the explanation regarding the transactions and the effect which, according to Sri Arvind Datar, learned Senior Counsel, the decisions of the Hon'ble Delhi High Court have on the allegations made in the present proceedings. These matters require consideration by the Competent Authority in accordance with the statutory scheme.

15.59. The statutory process, therefore, cannot be short-circuited merely on the basis of the decisions of the Hon'ble Delhi High Court in a different but related proceedings. Equally, those decisions cannot be treated as establishing the FEMA position in favour of the petitioner. The effect of the decisions, the explanation of the petitioner and the material relied upon by the Enforcement Directorate have to be considered together by the Competent Authority.

15.60. This Court accordingly holds that the decisions of the Hon'ble Delhi High Court do not, by themselves, either invalidate the proceedings under FEMA or establish the alleged FEMA contravention. The FEMA issue has to be independently examined under the applicable statutory framework, after considering the material relied upon by the Enforcement Directorate and the response of the petitioner.

15.61. On a cumulative consideration of the material, this Court is satisfied that the Enforcement Directorate had material which disclosed the requisite jurisdictional foundation for examining the transactions under Section 4 read with Section 37A.

15.62. The conclusion rests not upon any single transaction or circumstance, but upon the combined effect of the two phases, the connected movement of funds, the immediate onward transfer of the amounts introduced into India, the financial position of Empower India, the NCD structure, the subsequent amalgamation and the eventual discharge of the substantial NCD liability.

15.63. The two phases and/or their individual components cannot, at this stage, be artificially separated into unrelated transactions. The fund movements ex-facie disclose a closely connected structure involving the same group of entities and successive steps undertaken within a short period.

15.64. In particular, the second phase shows that the USD 737.5 million borrowed from Morgan Stanley moved to Genpact Luxembourg, was deployed through the NCD investment in Empower India, was immediately transferred by Empower India towards acquisition of the Indian company and thereafter moved through the non-resident entities for repayment of the Morgan Stanley borrowing. The NCD structure also resulted in a substantial liability being left in India. The funds were not retained by Empower India for its business. They came into India and were transferred out, while the Indian entity was left with the NCD liability. That liability was subsequently discharged from the resources of the Indian business. Ex facie, it appears that the fund movement was to create a liability with the Indian Company, without the Indian Company receiving any benefits. The later payments between 2018 and 2023 are therefore relevant to the examination of the arrangement and cannot be excluded merely because the NCDs were originally issued in 2015.

15.65. This Court also takes into account the substantial disparity between the financial position of Empower India and the value of the Indian business acquired. This was a circumstance which the Enforcement Directorate was entitled to consider in examining whether Empower India was acting as the real purchaser or as an intermediary within the larger arrangement.

15.66. The formal regulatory features of the NCD transaction do not lead to a different conclusion. The listing of the NCDs, the FPI status of Genpact Luxembourg, the applicable APDIR Circulars and the correspondence with the Reserve Bank of India are all relevant. They may bear upon the ultimate determination of the legality of particular steps. They do not, however, prevent examination of the larger arrangement when the Enforcement Directorate relies upon material beyond the mere fact of an NCD investment.

15.67. The reliance upon Section 6(3)(e) also does not defeat the jurisdictional foundation at this stage. The Enforcement Directorate's case is not confined to the proposition that a rupee-denominated NCD was, by itself, prohibited. The allegation concerns the manner in which the NCD was used in conjunction with the foreign borrowings, the acquisition of the Indian company and the subsequent movement and repayment of the funds.

15.68. The distinction between jurisdictional facts and proof of the substantive contravention is important. This Court is not, at this stage, recording a final finding that every allegation made by the Enforcement Directorate has been established, in fact it does not. The question is whether there was sufficient material to invoke the statutory process under Section 37A, which is answered in the affirmative.

15.69. As observed in ***Xiaomi Technology India Private Limited v. Union of India,*** [W.P.No.9182/2022], (paragraph 23), the statutory scheme contemplates examination by the Competent Authority under Section 37A(3). This Court, while exercising judicial review at this stage, is not required to finally determine the sufficiency of the material for confirmation of the seizure as though it were conducting the statutory adjudication itself.

15.70. The contention that Section 37A is without jurisdiction merely because the NCDs were denominated in Indian Rupees, because Genpact Luxembourg was an FPI, or because individual steps were supported by the regulatory framework, therefore cannot be accepted.

15.71. The Enforcement Directorate was entitled to examine whether the NCD transaction, together with the surrounding transactions, formed part of an arrangement resulting in a contravention of Section 4. The material relating to the two phases and their individual components, the connected fund flows, the financial position of Empower India, the immediate onward transfer of the funds, the subsequent amalgamation and the eventual discharge of the NCD liability provides a sufficient factual foundation for such examination.

15.72. This Court answers Point No. (iii) in favour of the Enforcement Directorate by holding that the material relied upon by the Enforcement Directorate discloses the jurisdictional facts necessary to invoke Section 37A and to examine the transactions under Section 4 of FEMA.

15.73. The transactions cannot, at this stage, be viewed only as isolated borrowings, share acquisitions or an independent NCD investment. The connected sequence of transactions, the movement of funds, the immediate onward transfer of the NCD proceeds, the financial position of Empower India and the subsequent discharge of the NCD liability provide sufficient material for the exercise of jurisdiction under Section 37A.

15.74. This finding does not amount to a final determination that the alleged contravention of FEMA has been proved. The ultimate question as to the precise nature of the contravention, the provision attracted and the consequences flowing from it remain subject to the statutory process contemplated under Section 37A, including consideration by the Competent Authority under Section 37A(3).

15.75. The challenge to the jurisdiction of the Enforcement Directorate on the ground that the NCD transaction was rupee-denominated, formally regulated or undertaken by a SEBI-registered FPI is, therefore, rejected at this stage directing the Competent Authority to examine all aspects in detail.

16. **Answer to Point No. (iv): Whether, on the material available to the Authorised Officer at the time of passing the seizure order, there existed the requisite "reason to believe" under Section 37A(1) that the property in question was held in contravention of Section 4 of FEMA; and whether the validity of the seizure order can be supported by reasons or material subsequently relied upon by the Enforcement Directorate before this Court?**

16.1. Sri Arvind Datar, learned Senior Counsel, submits that the belief formed by the Authorised Officer under Section 37A(1) is tentative and is required to be examined by the

Competent Authority under sub-sections (2) and (3). However, such belief must be based on the material available to the Authorised Officer at the time of seizure, and the reasons for forming such belief must find place in the seizure order.

16.2. Reliance is placed upon ***Sri Nisha v. Enforcement Directorate***, [2026 SCC OnLine SC 517] (paragraph 30), in support of the submission that the satisfaction of the Authorised Officer at the stage of seizure is preliminary and is subject to examination by the Competent Authority. Sri Arvind Datar, learned Senior Counsel, submits that the preliminary nature of the satisfaction does not permit the Enforcement Directorate to supply a new basis for the seizure at a later stage.

16.3. Reliance is also placed upon ***Ravinder Kumar v. State of Haryana***, [2024 SCC OnLine SC 2495] (paragraphs 12 to 14), to submit that "reason to believe" must have a rational and sufficient basis in the material available to the authority competent to take the decision. Sri Arvind Datar, learned Senior Counsel, submits that the expression "round-tripping" and the detailed theory of a circular movement of funds now advanced before this Court do not appear in the seizure order. According to Sri Arvind Datar, learned Senior Counsel, the Enforcement Directorate cannot improve the order by supplying reasons which were not recorded when the power was exercised.

16.4. Sri Arvind Datar, learned Senior Counsel, further submits that the seizure order substantially relies upon findings made in the Income Tax proceedings and the alleged loss of revenue on account of avoidance of Dividend Distribution Tax. It is submitted that those findings can no longer provide a valid foundation after the Hon'ble Delhi High Court upheld the order of the ITAT and restored the original order of the Assessing Officer.

16.5. Reliance is placed upon ***Mohinder Singh Gill v. Chief Election Commissioner***, [AIR 1978 SC 851] (paragraph 8), to submit that an administrative order has to stand on the reasons contained in the order itself and cannot subsequently be supported by a different basis.

Sri Arvind Datar, learned Senior Counsel, submits that the Enforcement Directorate cannot now replace the basis recorded in the seizure order with the round-tripping theory advanced before this Court.

16.6. Reliance is also placed upon ***Celir LLP v. Sumati Prasad Bafna***, [2024 SCC OnLine SC 3727] (paragraphs 135 to 147), particularly the discussion relating to the Henderson principle. Sri Arvind Datar, learned Senior Counsel, submits that a party is ordinarily expected to present the complete case at the appropriate stage and cannot substantially enlarge the case at a later stage.

16.7. Sri Arvind Datar, learned Senior Counsel, further relies upon ***Standard Chartered Bank v. Enforcement Officer, Ministry of Home Affairs,*** [2026 SCC OnLine SC 1368] (paragraphs 30 to 35), and ***Union of India v. Citi Bank***, [(2022) 19 SCC 188] (paragraphs 19 to 24), to submit that even where no specific limitation period is prescribed, statutory power must be exercised within a reasonable time.

16.8. It is submitted that the seizure was made in 2026 in respect of transactions which took place in 2015, while the investigation had been pending since 2021. No adjudication complaint had been filed during the intervening period. According to Sri Arvind Datar, learned Senior Counsel, the petitioner has cooperated throughout, and there is no material to suggest any attempt to place assets beyond the reach of the authorities.

16.9. Sri Arvind Datar, learned Senior Counsel, submits that the property seized is the petitioner's head office at Gurgaon and that seizure of the principal place of business of an established company is disproportionate, particularly when there is no demonstrated risk of dissipation or removal of assets. It is therefore submitted that a power intended to be pre-emptive and protective cannot, after such a long period, be permitted to operate in a punitive manner.

16.10. Shri N. Venkataraman, Learned ASGI, submits that the issue before the Income Tax Appellate Tribunal and the Hon'ble Delhi High Court was different from the question arising under FEMA. The tax proceedings concerned the exercise of revisionary jurisdiction under Section 263 of the Income Tax Act and the liability of the foreign companies under that statutory framework. Those proceedings did not determine whether the connected borrowings, NCD issuance, movement of funds and subsequent repayments constituted a contravention of FEMA.

16.11. Shri N. Venkataraman, Learned ASGI, submits that the Enforcement Directorate does not rely upon the Income Tax proceedings as establishing the FEMA contravention. The case under FEMA rests upon the fund movements and the connected transactions which were independently examined by the Enforcement Directorate.

16.12. Shri N. Venkataraman, Learned ASGI, submits that the allegation now described as "round-tripping" is not a new case. The underlying facts were already recorded in the seizure order. At page 101, the order records that funds were routed in a circular manner and returned to Morgan Stanley within three days without commercial substance. At page 151, the order records that the inflow and outflow of funds showed that the FDI was being used as a routing mechanism rather than as genuine capital infusion. At page 112, the order records that the FDI, NCD borrowing and downstream investment operated as a closed-loop arrangement returning to the original source. Further, Page 120 contains a diagram depicting the same movement of funds within the Genpact group.

16.13. Shri N. Venkataraman, Learned ASGI, submits that the expression "round-tripping" is only a description of the facts already recorded in the seizure order. The use of a different expression before this Court does not amount to introducing a new factual foundation.

16.14. As regards delay, Shri N. Venkataraman, Learned ASGI, submits that the investigation commenced in 2021 when the NCD liability was still being discharged. The investigation concerns multiple entities, jurisdictions and financial transactions extending over a considerable period. The time taken must therefore be considered in the context of the complexity of the investigation and cannot, by itself, be treated as evidence that the requisite belief was absent.

16.15. On the seizure of the head office, Shri N. Venkataraman, Learned ASGI, submits that Section 37A permits seizure of property representing the value involved in the alleged contravention. The choice of the property to be seized is within the assessment of the Authorised Officer and does not, by itself, affect jurisdiction. Shri N. Venkataraman, Learned ASGI, submits that the petitioner has not established that the value of the property seized is disproportionate to the value involved in the alleged contravention.

16.16. The objections raised under this point concern two separate matters. The first is whether the seizure order itself contained the material forming the basis for the "reason to believe" under Section 37A(1), or whether the Enforcement Directorate is attempting to introduce a new basis before this Court. The second concerns the delay between the transactions and the seizure. These questions have to be considered separately.

16.17. **Whether the seizure order contains the material relied upon by the Enforcement Directorate:** The law is clear that the validity of a statutory order has to be examined on the basis of the reasons disclosed in the order. The authority cannot ordinarily supplement an order by introducing an entirely new reason after the decision has been made. This principle assumes particular importance where the power exercised is the power of seizure under Section 37A.

16.18. The question, therefore, is whether the Enforcement Directorate is now relying upon a new factual foundation or is merely explaining the facts already recorded in the seizure order.

16.19. Having examined the portions of the seizure order referred to by Shri N. Venkataraman, Learned ASGI, this Court finds that the essential facts relating to the alleged circular movement of funds were already recorded in the order. The seizure order records the movement of funds to and from the entities concerned, the return of funds to Morgan Stanley within a short period, the absence of what the Enforcement Directorate considered to be genuine capital infusion, and the closed-loop nature of the transactions. The order also contains a diagram depicting the movement of funds.

16.20. The fact that the expression "round-tripping" may not have been used in the same form at every place does not alter the position. A statutory order is required to disclose the material facts and the basis of the satisfaction. It is not necessary for the order to use a particular expression or legal label to describe those facts.

16.21. The charts and diagrams relied upon before this Court stand on the same footing. The charts and diagrams are only a depiction of the transactions and fund movements already recorded in the seizure order. They do not contain any new transaction, new fact or new allegation. They have only been used as a tool to present the sequence of transactions in a simple and easily understandable manner to this Court, considering that this Court would have to understand the complex nature of transactions forming part of these proceedings. A complicated movement of funds through several entities can be difficult to understand when the transactions are spread across different paragraphs and documents. A chart merely brings the same transactions together and presents them in a connected form. The use of such a chart does not amount to supplementing the reasons in the seizure order.

16.22. This Court has therefore examined the underlying transactions and fund movements as recorded in the seizure order. The charts are only a convenient mode of explaining that material and do not constitute an independent basis for sustaining the seizure order.

16.23. This conclusion is consistent with ***Mohinder Singh Gill v. Chief Election Commissioner***, (paragraph 8). The principle in that decision prevents an authority from supplying an entirely new reason for an order after the event. It does not prevent the authority from explaining or presenting more clearly the facts which were already considered and recorded when the order was passed.

16.24. The same distinction answers the reliance placed upon ***Celir LLP v. Sumati Prasad Bafna***, (paragraphs 135 to 147). The Enforcement Directorate cannot be permitted to substitute an entirely different foundation for the seizure order. However, that is not what has occurred in the present case. The underlying facts relied upon before this Court are already reflected in the seizure order, and the subsequent submissions merely explain the manner in which those facts are connected.

16.25. **Whether the delay invalidates the seizure:** The next question is whether the lapse of time between the transactions and the seizure is, by itself, sufficient to invalidate the seizure order.

16.26. Reliance has been placed upon ***Standard Chartered Bank v. Enforcement Officer, Ministry of Home Affairs***, (paragraphs 30 to 35), and ***Union of India v. Citi Bank,*** (paragraphs 19 to 24), is relevant. Those decisions recognise that even where the statute does not prescribe a limitation period, statutory power must be exercised within a reasonable time having regard to the circumstances of the case.

16.27. The delay in the present case is undoubtedly substantial. The principal transactions took place in 2015 and the seizure was made in 2026. The investigation commenced in 2021. These circumstances require consideration.

16.28. However, the delay cannot be considered in isolation. The case of the Enforcement Directorate is that the investigation concerns a complex series of transactions involving several entities, more than one jurisdiction and financial records extending over a considerable period. The investigation also continued while the NCD liability was being discharged between 2018 and 2023.

16.29. This distinguishes the present case, at least at the threshold, from a case of unexplained inaction where nothing occurred during the entire intervening period. A long investigation into a complicated cross-border financial arrangement cannot, without more, be equated with a complete failure to act. This Court therefore does not consider the delay, by itself, sufficient to invalidate the seizure order.

16.30. At the same time, the age of the transactions, the period for which the investigation has remained pending, the cooperation extended by the petitioner and the absence of any material suggesting that the petitioner has attempted to place assets beyond the reach of the authorities are relevant circumstances. These matters will have to be considered by the Competent Authority while deciding whether continuation of the seizure remains justified under Section 37A(2) and (3). The fact that delay does not destroy jurisdiction at the threshold does not mean that delay is irrelevant to the continuation of the seizure.

16.31. **Seizure of the Head Office:** The petitioner has also objected to the seizure of the head office at Gurgaon.

16.32. Section 37A permits seizure of property representing the value involved in the alleged contravention. The provision does not, at the threshold, confine the power of seizure to property which has no operational use. The choice of the property to be seized is ordinarily a matter for the Authorised Officer, having regard to the material available and the statutory purpose of securing the property.

16.33. No material has been placed before this Court at this stage to establish that the value of the property seized is so disproportionate to the value alleged to have been involved as to render the seizure arbitrary.

16.34. This Court is nevertheless conscious that the property seized is the principal place of business of an established company. The practical effect of such seizure, particularly where the company has continued its business and there is no material suggesting an attempt to dissipate or remove assets, is a relevant consideration.

16.35. That consideration, however, goes primarily to whether the seizure should continue and on what terms. Section 37A(2) and (3) provide the statutory mechanism through which the Competent Authority can consider these matters.

16.36. This Court therefore does not find the seizure of the head office, by itself, sufficient to invalidate the seizure order at the threshold. However, the fact that the property has been seized cannot be understood as preventing the petitioner from continuing to carry on its business activities from the said premises. The purpose of seizure under Section 37A is to secure the property and to prevent the person concerned from dealing with, transferring, alienating or otherwise disposing of the property contrary to the order of seizure. The seizure is not, by itself, intended to bring the business operations of the petitioner to a standstill or to prevent the petitioner from using the premises for carrying on its ordinary business activities.

16.37. The petitioner would therefore be entitled to continue its lawful business operations from the said premises, subject of course to the seizure and without creating any third-party rights in, transferring, alienating, encumbering or otherwise dealing with the property in a manner inconsistent with the seizure. The protection afforded by the seizure is against dealing with the property; it does not, by itself, extend to restricting the petitioner's lawful use of the premises for carrying on its business.

16.38. This distinction is important, particularly because the property seized is the head office from which the petitioner carries on its business. Any interpretation of the seizure which prevents the petitioner from using the premises for its ordinary business operations would travel beyond the immediate purpose of securing the property and would have consequences which are distinct from the seizure itself. Such consequences would require separate justification in law.

16.39. **Finding on "Reason to Believe":** The question ultimately is whether, on the material available to the Authorised Officer when the seizure order was passed, there existed a basis for the requisite "reason to believe" under Section 37A(1).

16.40. Section 37A requires the existence of such belief before the power of seizure can be exercised. ***Sri Nisha v. Enforcement Directorate****,* (paragraph 30), makes it clear that the satisfaction at this stage is preliminary and is subject to consideration by the Competent Authority under Section 37A(2) and (3). The fact that the satisfaction is preliminary does not mean that this Court can disregard the material which was actually before the Authorised Officer.

16.41. In the present case, the seizure order, when read as a whole, records the material relating to the movement of funds, the circular flow alleged by the Enforcement Directorate, the return of funds to Morgan Stanley, the absence of genuine capital infusion as alleged, the relationship between the entities, the NCD transaction and the connected movement of funds.

16.42. This Court is also unable, at this stage, to hold that the subsequent Income Tax decisions automatically nullify the independent FEMA inquiry. The tax proceedings and the FEMA proceedings operate under different statutory frameworks and concern different questions. The effect of the tax decisions will have to be considered by the Competent Authority along with the petitioner's response and the other material.

16.43. This Court is not, while deciding this point, required to determine whether the material ultimately establishes the alleged FEMA contravention. That is the statutory function of the Competent Authority under Section 37A(3). The question before this Court is narrower: whether the seizure order had a sufficient factual basis for the Authorised Officer to form the requisite belief under Section 37A(1). On that question, this Court finds in favour of the Enforcement Directorate.

16.44. This Court answers Point No. (iv) by holding that the seizure order, read as a whole and with reference to the material recorded and relied upon in the order, contains the factual basis on which the Authorised Officer could form the requisite "reason to believe" under Section 37A(1). The Enforcement Directorate has not, in the present case, sought to sustain the seizure by introducing an entirely new factual foundation before this Court. The charts and diagrams relied upon by the Enforcement

Directorate are only a depiction of the transactions and fund movements already recorded in the seizure order. They contain no new transaction, fact or allegation. They have only been used as a tool for explaining the sequence of transactions in an easy and understandable manner. The use of such charts does not amount to supplementing the reasons in the seizure order.

16.45. The ultimate question of whether the material is sufficient to establish the alleged contravention of Section 4, whether the seizure should be confirmed and whether the seizure should continue is left to the Competent Authority in accordance with Section 37A(2) and (3), after considering the response of the petitioner and all relevant material.

17. <u>**Answer to Point No. (v):**</u> **What is the effect, if any, of the regulatory treatment of the transactions by the Reserve Bank of India, SEBI and the Income Tax authorities, including the clarifications, permissions, assessments or orders relied upon by the parties, on the legality of the action taken under Section 37A?**

17.1. It is submitted that the NCD transaction was placed before the Reserve Bank of India even before it was undertaken. Sri Arvind Datar, learned Senior Counsel, submits that the proposed transaction was discussed with the RBI on a no-name basis in late 2014 through the petitioner's consultants and that the RBI's response dated 07.01.2015 indicated that the proposed transaction was permissible.

17.2. It is further submitted that, after the transaction, Empower India sought a clarification from the RBI by letter dated 12.12.2015, disclosing the names of the entities involved. By letter dated 15.02.2016, the RBI considered the NCD borrowing and indicated that the transaction was acceptable subject to the NCDs having a minimum maturity of three years, which requirement was satisfied. SEBI is also stated to have provided guidance on 30.11.2018 regarding compliance with the applicable restrictions.

17.3. Relying upon ***LIC v. Escorts Ltd.*****,** (paragraphs 63, 64 and 84), Sri Arvind Datar, learned Senior Counsel, submits that the RBI is the statutory authority entrusted with determining compliance with foreign exchange law. Once the competent regulator has considered and accepted a transaction, another authority cannot subsequently take a contrary view on the same matter, except in circumstances such as mala fides, non-application of mind or action contrary to law. None of those circumstances, according to Sri Arvind Datar, learned Senior Counsel, exists in the present case.

17.4. Sri Arvind Datar, learned Senior Counsel, further submits that the transaction was examined in the Income Tax proceedings and that the petitioner succeeded in those proceedings. The ITAT, in ITA No.501/DEL/2021, by order dated 13.06.2022, set aside the reassessment proceedings against Genpact Singapore.

17.5. The Hon'ble Delhi High Court, ***Commissioner of Income Tax (International Taxation) v. Genpact Consulting Singapore Pte Ltd.,*** [ITA No.103/2023], decided on 11 December 2024.

17.6. It is also submitted that the Hon'ble Delhi High Court in ***Genpact Luxembourg S.A.R.L. v. Assistant Commissioner of Income Tax,*** [W.P.(C) No.7784/2022], decided on 8 August 2024, quashed the proceedings initiated against Genpact Luxembourg under Sections 148A and 148 of the Income Tax Act.

17.7. By placing reliance upon ***Commissioner of Income Tax (International Taxation) v. Genpact Consulting Singapore Pte Ltd.,*** particularly paragraphs 9 to 12. It is submitted that the Hon'ble Delhi High Court held that a DDT liability alleged to arise in the hands of Genpact India could not, on that basis, make the assessment of Genpact Singapore erroneous or prejudicial to the Revenue, since such liability, if attracted, would be that of Genpact India and not the foreign assessee.

17.8. According to Sri Arvind Datar, learned Senior Counsel, these decisions, together with the RBI and SEBI regulatory treatment, demonstrate that the transactions were repeatedly examined by competent authorities and were not found to be unlawful. Reliance is also placed upon the RBI's compounding order dated 22.11.2023.

17.9. Sri Arvind Datar, learned Senior Counsel, submits that the Enforcement Directorate cannot now take a contrary position in respect of the same transactions without identifying any changed circumstance or new legal basis. Reliance is placed upon ***Sivanandan C.T. v. High Court of Kerala***, [(2024) 3 SCC 799] (paragraph 44), for the principle that consistency and predictability in the actions of public authorities are important aspects of the rule of law and fairness under Article 14.

17.10. Sri Arvind Datar, learned Senior Counsel, further points out that the pending SLP in SLP(C) No.025934/2026 concerns ITA No.103/2023, relating to the equity/share transaction and Genpact Consulting Singapore. The decision in ***Genpact Luxembourg SARL v. Assistant Commissioner of Income Tax***, which concerns the NCD transaction, has not been challenged. Since the seizure order concerns the NCD transaction, Sri Arvind Datar, learned Senior Counsel, submits that the decision directly relevant to the seizure has attained finality.

17.11. Shri N. Venkataraman, Learned ASGI, submits that the RBI and SEBI correspondence does not amount to a statutory permission of the kind considered in ***LIC v. Escorts Ltd***. As regards the 2014 correspondence, Shri N. Venkataraman, Learned ASGI, points out that the transaction was discussed on a no-name basis. The RBI was not informed of the identity of the parties or the complete relationship between the entities involved. The subsequent correspondence was concerned with specific aspects of the NCD transaction, including the maturity requirement. Similarly, the SEBI guidance dealt with the applicable restrictions relating to NCDs.

17.12. It is submitted that neither the RBI nor SEBI was asked to consider whether the entire arrangement, including the movement of funds through the various Genpact entities, was structured in a manner which resulted in value being moved out of India. Compliance with the requirements applicable to an NCD, therefore, cannot be treated as an approval of the entire arrangement.

17.13. On the Income Tax proceedings, Shri N. Venkataraman, Learned ASGI, submits that those proceedings arose under a different statute and concerned different questions. The proceedings relating to Genpact Luxembourg concerned the proposed recharacterisation of interest income as dividend income for the purpose of reopening the assessment. The ITAT proceedings concerned the requirements for exercise of revisionary jurisdiction under Section 263.

17.14. According to Shri N. Venkataraman, Learned ASGI, though those proceedings are related and relevant neither proceeding examined whether the entire funding arrangement constituted round-tripping or contravened Section 4 of FEMA. A decision under the Income Tax Act therefore cannot prevent an independent examination under FEMA.

17.15. As regards ***Sivanandan C.T. v High Court of Kerala,*** (paragraph 44), Shri N. Venkataraman, Learned ASGI, submits that consistency can be required only where an earlier authority has actually decided the same issue. Since the RBI, SEBI and Income Tax authorities did not determine whether the arrangement as a whole contravened Section 4 of FEMA, there is no earlier determination from which the Enforcement Directorate has departed.

17.16. Shri N. Venkataraman, Learned ASGI, further submits that the RBI's compounding order dated 22.11.2023 concerned a specific delay in filing Form FC-GPR and did not amount to a finding that the entire transaction was compliant with FEMA.

17.17. The regulatory and tax history of the transactions is undoubtedly relevant. The fact that the petitioner approached the RBI, obtained correspondence concerning the NCDs, dealt with SEBI and succeeded in certain Income Tax proceedings cannot simply be ignored. The question, however, is what those proceedings actually decided.

17.18. The principle in ***LIC v. Escorts Ltd.,*** (paragraphs 63, 64 and 84), has to be applied having regard to the nature of the decision taken by the regulator. Where a statutory authority has considered the very question entrusted to it and granted the requisite permission, another authority cannot ordinarily reopen that decision merely because another view is possible. That is not the position here.

17.19. The 2014 correspondence was admittedly on a no-name basis. The RBI was therefore not considering the transaction with knowledge of the identity of the parties or the complete arrangement between them. Empower India subsequently sought a name-based clarification from the RBI regarding the NCD borrowing by letter dated 12.12.2015. The RBI, by letter dated 15.02.2016, considered the terms of the NCD borrowing and clarified, inter alia, that the

NCDs were required to have a minimum maturity period of three years.

17.20. The question placed before the RBI was therefore principally whether the NCD borrowing satisfied the applicable regulatory requirements, including the requirement relating to its maturity. The RBI was not called upon to examine the entire movement of funds forming part of the arrangement, namely, the flow from Morgan Stanley through the Genpact entities into India and the subsequent movement of the funds through the Genpact entities back to Morgan Stanley. The RBI's clarification regarding the NCD borrowing cannot, therefore, be treated as an examination or approval of the entire transaction from Morgan Stanley back to Morgan Stanley.

17.21. The same applies to the SEBI guidance relied upon by the petitioner. The material placed before this Court does not show that SEBI examined whether the entire sequence of transactions, viewed as one arrangement, was structured to move value out of India.

17.22. There is a distinction between examining whether an NCD satisfies the regulatory requirements applicable to that instrument and examining whether the NCD formed part of a larger arrangement which, in substance, may have resulted in a contravention of Section 4 of FEMA. The RBI and SEBI correspondence is therefore relevant, but it does not conclude the larger question now raised by the Enforcement Directorate.

17.23. The Income Tax proceedings stand on a similar footing. The decisions of the Hon'ble Delhi High Court in ***Genpact Luxembourg SARL v. Assistant Commissioner of Income Tax*** and ***Commissioner of Income Tax (International Taxation) v. Genpact Consulting Singapore Pte Ltd.,*** have to be understood in the context of the proceedings before that Court.

17.24. Those proceedings concerned the tax liability of the foreign Genpact entities under the Income Tax Act. In substance, the Hon'ble Delhi High Court was considering whether the statutory requirements for reopening or revising the assessments of those foreign entities had been satisfied. The Hon'ble Delhi High Court was not deciding whether the overall transaction contravened Section 4 of FEMA.

17.25. This distinction is important. The Hon'ble Delhi High Court was dealing with foreign companies, whereas the present proceedings concern the transactions involving the Indian company and the consequences alleged to arise under FEMA.

17.26. The finding that a tax liability of Genpact India could not be fastened upon Genpact Singapore does not determine whether the same underlying transactions can be examined under FEMA in proceedings concerning Genpact India. The two questions arise under different statutes and serve different purposes.

17.27. The fact that the decision in Genpact Luxembourg SARL concerning the NCD transaction has not been challenged does not alter this position. The decision is final as to the tax issue decided in that proceeding. It does not constitute a final determination of the FEMA question, which was not before the Hon'ble Delhi High Court.

17.28. The petitioner is, of course, entitled to rely upon the reasoning and findings in those decisions before the Competent Authority. The decisions cannot be ignored merely because they arose under the Income Tax Act. Equally, they cannot be treated as having decided a question which was never before the Hon’ble Delhi High Court.

17.29. The RBI's compounding order dated 22.11.2023 does not conclude the issue. The compounding was confined to the specific lapse concerning filing of Form FC-GPR and cannot be treated as approval of the entire arrangement under FEMA.

17.30. The NCD liability had already been discharged before the compounding order, through payments made between the financial years 2018 and 2023. The chronology of these payments may nevertheless be relevant while considering the subsequent conduct of Genpact India and the course of the Enforcement Directorate's investigation. These circumstances may be considered by the

Competent Authority while examining the matter under Section 37A.

17.31. The principle of consistency relied upon from ***Sivanandan C.T.*,** (paragraph 44), does not assist the petitioner to the extent contended. Consistency requires an earlier decision on the same question. There is no material to show that the RBI, SEBI or the Income Tax authorities examined and decided whether the entire funding arrangement, taken as a whole, contravened Section 4 of FEMA. This Court therefore does not find any inconsistency in the Enforcement Directorate examining a question which those authorities had not decided.

17.32. This does not mean that the earlier regulatory treatment has no relevance. On the contrary, it is an important circumstance which the Competent Authority must take into account. The fact that the petitioner sought clarification from the RBI before and after the transaction, the regulatory treatment of the NCDs, the SEBI correspondence, the Income Tax proceedings and the RBI compounding order are all matters which form part of the factual background.

17.33. This Court has already found that, at the threshold, the transactions cannot be considered only by looking at the individual instruments or individual steps in isolation. The question whether the arrangement, viewed as a whole, resulted in a contravention of Section 4 is a separate question.

17.34. This Court makes it clear that the earlier regulatory and judicial proceedings must be considered fairly and in their proper perspective. The Competent Authority shall consider the explanation of the petitioner, including the effect which the Hon'ble Delhi High Court decisions are said to have on the allegations made by the Enforcement Directorate, before taking a final decision under Section 37A.

17.35. The RBI and SEBI communications establish that particular aspects of the NCD transaction were placed before and considered by the respective authorities. They do not, however, establish that the entire arrangement, including the movement of funds through the various entities, was examined and approved from the standpoint of Section 4 of FEMA.

17.36. This Court answers Point No. (v) by holding that the earlier regulatory and tax proceedings do not invalidate the action taken under Section 37A. The RBI and SEBI communications establish that particular aspects of the NCD transaction were placed before and considered by the respective authorities. They do not, however, establish that the entire arrangement, including the movement of funds through the various entities, was examined and approved from the standpoint of Section 4 of FEMA. Likewise, the decisions of the Delhi High Court under the Income Tax Act concern the liability and assessment of the foreign Genpact entities and do not determine the separate question arising under FEMA in relation to the Indian company. The earlier proceedings are therefore relevant material, but they do not foreclose the Enforcement Directorate's examination of the transaction under Section 4.

18. **<u>Answer to Point No. (vi):</u> In W.P. No.16763/2026, whether the rejection dated 13.01.2026 of the petitioner's application for**

No-Objection Certificate under Rule 10 of the Foreign Exchange Management (Overseas Investment) Rules, 2022 is sustainable in the absence of reasons disclosing the basis for such rejection and the nexus between the pending investigation and the proposed overseas investment?

18.1. Shri Udaya Holla, Learned Senior Counsel for the petitioner, submits that the letter dated 13.01.2026 rejecting the petitioner's application for issuance of a No Objection Certificate under Rule 10 of the Foreign Exchange Management (Overseas Investment) Rules, 2022 is wholly unreasoned. The communication does not disclose the material considered by the Competent Authority, the basis for rejection or the manner in which the proposed investment in Genpact Global (IFSC) Private Limited is connected with the pending investigation.

18.2. Reliance is placed on ***Times Internet Ltd. v. Enforcement Directorate,*** [2024 SCC OnLine Del 8937] (paragraphs 15–17, 20, 22, 23 and 25–30), as also on ***A.K. Kraipak v. Union of India,*** [(1969) 2 SCC 262] (paragraph 17), ***Mohinder Singh Gill v. Chief Election***

Commissioner, [AIR 1978 SC 851] (paragraph 8), ***Siemens Ltd. v. State of Maharashtra,*** [(2006) 12 SCC 33] (paragraphs 9–11), and ***K.I. Shephard v. Union of India,*** [(1987) 4 SCC 431] (paragraph 16).

18.3. Shri Udaya Holla, Learned Senior Counsel, submits that the reasons now sought to be advanced on behalf of the Enforcement Directorate cannot cure the defect in the impugned communication. The decision must stand on the reasons recorded at the time when the decision was made.

18.4. Shri N. Venkataraman, Learned ASGI, submits that the proposed investment cannot be considered in isolation from the transactions which are the subject matter of the pending investigation. The proposed Gift City Entity is wholly owned by the petitioner and is intended to function as a global treasury centre for the Genpact group, including by providing financial facilities to entities situated outside India.

18.5. It is submitted that the proposed investment would therefore place funds of the petitioner with an entity whose activities are directed towards financing overseas entities. Having regard to the transactions already under investigation, the Enforcement Directorate was justified in examining whether the proposed investment has a nexus with the matters under investigation.

18.6. Shri N. Venkataraman, Learned ASGI, further submits that the investigation involves sensitive material and that the Enforcement Directorate could not be expected to disclose every aspect of the investigation while communicating the decision under Rule 10. It is also submitted that the petitioner is aware of the investigation and the circumstances which led to the refusal of the NOC. Shri N. Venkataraman, Learned ASGI, has further submitted that this Court could issue an appropriate direction enabling the time available for receiving the investment to be extended by the concerned authority.

18.7. The issue before this Court at this stage is not whether the petitioner has a substantive right to obtain the No Objection Certificate. The question is whether the rejection communicated on 13.01.2026 can be sustained when the communication itself discloses no reason for the decision.

18.8. The letter dated 13.01.2026 merely states that the request for issuance of the NOC has been rejected by the Competent Authority and that the same is being intimated for information and necessary action. The communication does not disclose the basis of the rejection.

18.9. This Court accepts that an investigating agency may, in an appropriate case, be required to protect sensitive information. Rule 10 cannot be understood as requiring disclosure of material which may prejudice an ongoing investigation. Confidentiality of investigation, however, does not dispense with the requirement of a reasoned decision. The authority may withhold sensitive particulars, but the substance of the ground for refusal must still be communicated.

18.10. The submission of Shri N. Venkataraman, Learned ASGI, regarding the proposed Gift City Entity cannot be said to be without substance. The proposed entity is intended to operate as a global treasury centre and to provide financial facilities to overseas Genpact entities. The proposed investment would therefore result in funds being placed with an entity whose activities are directed towards financing entities outside India. When this circumstance is considered together with the transactions which are the subject matter of the pending investigation, the Enforcement Directorate cannot be said to have been wholly without basis in examining the proposed investment.

18.11. This Court is therefore not holding that the Enforcement Directorate had no basis to examine or object to the proposed investment. Nor is this Court expressing any final opinion as to whether the proposed investment in the Gift City Entity in fact has a nexus with the transactions under investigation. That question must be considered by the Competent Authority in the first instance.

18.12. The difficulty, however, is that none of these matters finds place in the communication dated 13.01.2026. The reasons now advanced during the hearing may explain why the application was considered objectionable, but those reasons cannot convert an otherwise unreasoned decision into a reasoned one. The principle stated by the Hon'ble Supreme Court in ***Mohinder Singh Gill v. Chief Election Commissioner***, paragraph 8, therefore applies.

18.13. The decision in ***Times Internet Ltd. v. Enforcement Directorate,*** is also relevant. In paragraphs 22 and 23, the Hon'ble Delhi High Court considered a similarly bare rejection under Rule 10 and held that a decision of that nature could not be sustained when substantive reasons were not disclosed. Paragraphs 25 to 30 further emphasise the requirement that the decision must disclose a clear, cogent and rational basis and that the existence of an investigation cannot, by itself, result in an indefinite restraint upon legitimate business activity.

18.14. This Court is conscious that ***Times Internet Ltd.*** does not mean that the Enforcement Directorate is precluded from refusing an NOC merely because an investigation is pending. The facts and circumstances of each case have to be considered and an order of rejection if passed has to be accompanied by sufficient reasons for the purposes of effective Judicial review. This Court is also not holding that the petitioner is entitled to the NOC. The defect lies in the manner in which the decision has been made and communicated.

18.15. The petitioner must therefore be given an effective opportunity to place before the Competent Authority all relevant facts, documents and material, including the explanation regarding the transactions which are the subject matter of the investigation and the proposed investment in Genpact Global (IFSC) Private Limited. The Competent Authority must thereafter consider the material placed by the petitioner together with the material otherwise available on record and take a fresh decision in accordance with Rule 10 and the applicable law.

18.16. Accordingly, the communication dated 13.01.2026 is set aside and the matter is remitted to the Competent Authority for fresh consideration.

18.17. This Court answers Point No. (vi) by holding that in W.P. No.16763/2026, the rejection dated 13.01.2026 of the petitioner's application for No-Objection Certificate under Rule 10 of the Foreign Exchange Management (Overseas Investment) Rules, 2022 is not sustainable in the absence of reasons disclosing the basis for such rejection and the nexus between the pending investigation and the proposed overseas investment.

19. **Answer to Point No. (vii): Whether the mere pendency of an investigation by the Enforcement Directorate is sufficient to refuse an NOC under Rule 10, or whether such refusal must be founded upon relevant, rational and disclosed reasons having a demonstrable nexus with the proposed investment; and whether the subsequent seizure order dated 03.02.2026 can be relied upon to sustain the earlier rejection dated 13.01.2026?**

19.1. Shri Udaya Holla, Learned Senior Counsel for the petitioner, submits that the mere pendency of an investigation by the Enforcement Directorate cannot, by itself, be a ground to refuse a No Objection Certificate under Rule 10 of the Foreign Exchange Management (Overseas Investment) Rules, 2022. Rule 10 itself contemplates an application by a person who is under investigation. If the pendency of an investigation were sufficient by itself to justify refusal, there would be little purpose in having such a provision.

19.2. It is submitted that there must be a connection between the investigation and the particular investment for which the NOC is sought. The Gift City Entity is a separate entity incorporated for a specific purpose, namely, global treasury and cash-pooling activities. It had no role in the transactions of 2015 which are under investigation.

19.3. It is further submitted that the seizure order dated 03.02.2026 cannot be relied upon to justify the rejection dated 13.01.2026 since the seizure order came into existence subsequently. Reliance is placed on ***Mohinder Singh Gill v. Chief Election Commissioner***, particularly paragraph 8.

19.4. Shri Udaya Holla, Learned Senior Counsel, also submits that remitting the matter to the same authority would serve no useful purpose. Reliance is placed on ***Siemens Ltd. v. State of***

Maharashtra, [(2006) 12 SCC 33], paragraphs 9 to 11) and ***K.I. Shephard v. Union of India**,* [(1987) 4 SCC 431], paragraph 16. It is submitted that the Enforcement Directorate has already taken a clear position in these proceedings and has relied upon grounds which were not stated in the rejection letter.

19.5. It is therefore submitted that the rejection should be set aside without remanding the matter and that the petitioner should be permitted to make the limited investment necessary to preserve the registration of the Gift City Entity, namely USD 0.2 million towards capital and USD 12,500 towards the registration fee. The balance investment of USD 99.8 million, it is submitted, can await further orders.

19.6. Shri N. Venkataraman, Learned ASGI, submits that the Enforcement Directorate is not treating the pendency of the investigation as an automatic bar. The objection is to the particular investment proposed by the petitioner. It is submitted that the Gift City Entity is proposed to function as a global treasury centre and to provide treasury and lending facilities to Genpact group entities outside India. The proposed investment would therefore place funds of Genpact India with an entity whose activities are intended to facilitate financial transactions with overseas entities. According to the Enforcement Directorate, this has a direct connection with the subject matter of the investigation, which includes the alleged movement of value generated in India through overseas group entities.

19.7. Shri N. Venkataraman, Learned ASGI, submits that Genpact India is not required to provide the funds and that other Genpact entities could fund the Gift City Entity. It is therefore submitted that the approaching deadline for making the investment does not justify allowing the investment without a proper consideration under Rule 10.

19.8. As regards remand, Shri N. Venkataraman, Learned ASGI, submits that defending the rejection order before this Court does not mean that the matter has been finally decided or that the Competent Authority will not consider the matter afresh.

19.9. Shri N. Venkataraman, Learned ASGI, has also submitted that this Court may issue an appropriate direction enabling the concerned regulatory authority to extend the time available for making the investment and for the Gift City Entity to receive the investment.

19.10. The first question is whether the mere pendency of an investigation is sufficient to refuse an NOC under Rule 10. In the opinion of this Court, it is not. Rule 10 specifically provides a mechanism by which a person who is under investigation can seek an NOC for an overseas investment. The existence of an investigation, therefore, cannot by itself be treated as a ground for refusal. The authority must consider whether there is a reasonable connection between the investigation and the investment proposed. That, however, does not mean that the proposed investment in the present case is wholly unrelated to the investigation. The Gift City Entity is proposed to function as a global treasury centre and to provide financial facilities to overseas Genpact entities. The proposed investment would consequently involve funds of Genpact India being placed with an entity whose activities are directed towards financing entities outside India.

19.11. The investigation concerns, among other matters, the alleged movement of value from India through overseas entities. In that background, the proposed investment cannot be said to have no connection at all with the subject matter of the investigation. The Enforcement Directorate is entitled to examine whether the proposed investment has any bearing on the matters under investigation. The difficulty is that this connection does not appear from the rejection dated 13.01.2026. The communication simply states that the request for the NOC has been rejected. It does not explain why the proposed investment was considered objectionable or how it was connected with the investigation.

19.12. The subsequent seizure order dated 03.02.2026 cannot cure this defect. The seizure order was passed after the rejection of the NOC application. The validity of the decision dated 13.01.2026 has to be examined on the basis of the reasons and material which were available when that decision was made. A subsequent order cannot supply reasons which were absent from the earlier decision. The principle laid down in ***Mohinder Singh Gill v. Chief Election Commissioner***, paragraph 8, applies.

19.13. The position is different when the matter is considered afresh. The seizure order dated 03.02.2026 is now part of the record. The Competent Authority, while reconsidering the application, may take into account that order and any other material which is relevant and can lawfully be considered. The subsequent seizure order cannot, however, be used to retrospectively validate the rejection dated 13.01.2026.

19.14. The petitioner has also contended that the NOC should be deemed to have been granted because the period of sixty days under Rule 10 has expired. This submission cannot be accepted.

19.15. The application was made on 26.11.2025. The sixty-day period had not expired when the Enforcement Directorate communicated the rejection on 13.01.2026. Rule 10 provides for a presumption of no objection where the concerned agency fails to furnish the certificate within sixty days. In the present case, there was a response within that period. The fact that the response is found to be inadequate because it did not disclose reasons does not make it a failure to respond for the purpose of the deeming provision. The defect in the present case is the absence of adequate reasons and not the absence of a response within the prescribed period.

19.16. This Court has also considered the submission that a remand would be an empty formality in view of ***Siemens Ltd. v. State of Maharashtra***, [(2006) 12 SCC 33] (paragraphs 9 to 11) and ***K.I. Shephard v. Union of India,*** [(1987) 4 SCC 431], (paragraph 16).

19.17. Those decisions apply where the circumstances show that the authority has already made up its mind and that a further hearing would serve no real purpose. The material before this Court does not establish such a situation. The Enforcement Directorate has defended the rejection in these proceedings and has explained the connection which, according to the Enforcement Directorate, exists between the proposed investment and the investigation. That, by itself, does not establish that the Competent Authority will refuse to consider the matter afresh. There is no statement or material showing that the Competent Authority has closed its mind to the petitioner's explanation or documents.

19.18. There is another reason why the matter should be remitted. This Court has found that the connection relied upon by the Enforcement Directorate is not wholly without substance. The problem is that the connection was not stated in the rejection letter. It would therefore not be appropriate to direct the investment to proceed without first giving the Competent Authority an opportunity to consider the matter and pass a proper order.

19.19. A short, time-bound remand will serve both purposes. It will give the petitioner an opportunity to place the relevant material before the Competent Authority and will enable the Enforcement Directorate to take a fresh decision by applying its mind to that material.

19.20. This Court is also conscious of the time limit attached to the regulatory approval of the Gift City Entity. The existing extension is stated to be valid only up to 15.09.2026. If the matter is remitted without addressing this time limit, the petitioner may lose the benefit of the regulatory approval for no reason other than the time taken in reconsidering the NOC application.

19.21. Shri N. Venkataraman, Learned ASGI, has submitted that an appropriate direction may be issued to enable the concerned regulatory authority to extend the time for making and receiving the investment. In view of this submission, the concerned regulatory authority shall consider such request in accordance with the applicable regulatory framework.

19.22. This Court, however, is not inclined to permit the investment to be made before the Competent Authority takes a fresh decision under Rule 10. Whether the petitioner should be permitted to make the investment is a matter for the Competent Authority to consider in the first instance. Accordingly, the communication dated 13.01.2026 is set aside and the matter is remitted to the Competent Authority for fresh consideration.

19.23. The petitioner shall be at liberty to place before the Competent Authority all relevant facts, documents and material on which the petitioner seeks to rely in support of the application for issuance of the NOC, within ten days from the date of receipt of a certified copy of this order. The petitioner shall also be entitled to place the petitioner's explanation concerning the transactions under investigation and the proposed investment in the Gift City Entity.

19.24. The Competent Authority shall consider the material placed by the petitioner, together with the material otherwise available on record, and shall take a fresh decision within ten days from the date on which the petitioner places the complete material before the Competent Authority.

19.25. The Competent Authority shall communicate a reasoned decision to the petitioner. If any material or part of the reasons cannot lawfully be disclosed because disclosure would prejudice the ongoing investigation or compromise matters required to be kept confidential, the Competent Authority may withhold such sensitive particulars. This shall not prevent the Competent Authority from communicating the substance of the ground on which the application is accepted or rejected.

19.26. The remand is not a direction to issue the NOC. The Competent Authority shall independently consider whether the requirements of Rule 10 are satisfied and whether there is any lawful ground for withholding the NOC. All contentions of the parties regarding the merits of the proposed investment and its alleged nexus with the transactions under investigation are left open for consideration by the Competent Authority.

19.27. This Court has taken note of the submission of Shri N. Venkataraman, Learned ASGI, that an appropriate direction may be issued to enable the time available to the petitioner for making the investment and for Genpact Global (IFSC) Private Limited to receive the investment to be extended.

19.28. Since the present extension is stated to be valid only up to 15.09.2026, the concerned regulatory authority shall consider, in accordance with the applicable regulatory framework, the request for extension of the time available to the petitioner for making, and to Genpact Global (IFSC) Private Limited for receiving, the proposed investment. If, upon fresh consideration, the Competent Authority decides the application in favour of the petitioner and issues the requisite NOC, Genpact Global (IFSC) Private Limited shall be permitted to receive the proposed investment, subject to the applicable FEMA, RBI, IFSCA and other regulatory requirements and the terms and conditions of the NOC, within ten days from the date of such favourable decision.

19.29. The direction regarding extension of time shall not be construed as a direction to make or receive the proposed investment without the requisite statutory and regulatory approvals. The investment shall be made and received only after the requisite NOC and all other applicable permissions are in place.

19.30. This court answers Point No. (vii) by holding that the mere pendency of an investigation by the Enforcement Directorate is not sufficient to refuse an NOC under Rule 10, such refusal must be founded upon relevant, rational and disclosed reasons having a demonstrable nexus with the proposed investment, the subsequent seizure order dated 03.02.2026 cannot be relied upon to sustain the earlier rejection dated 13.01.2026 and sets aside the rejection order dated 13.01.2026 and remands the matter to the competent authority subject to the above directions.

20. **<u>Answer to Point No. (viii):</u> What Order?**

20.1. In view of the answers to Points No. (i) to (vii), this Court passes the following

ORDER

(i) W.P. No.7283/2026 is **dismissed.**

(ii) The interim order staying the operation of the seizure order dated 03.02.2026 is vacated. However, the seizure of the head-office premises shall not prevent the petitioner from continuing its lawful business operations from the said premises. The petitioner shall not create any third-party rights in the property or transfer, alienate, encumber or otherwise deal with the property in any manner inconsistent with the seizure order.

(iii) W.P. No.16763/2026 is **allowed in part**.

(iv) The communication dated 13.01.2026 rejecting the petitioner's application dated 26.11.2025 for issuance of NOC under Rule 10 of the Foreign Exchange Management (Overseas Investment) Rules, 2022, is set aside. The matter is remitted to the Competent Authority for fresh consideration.

(v) The petitioner shall be at liberty to place all relevant facts, documents and material before the Competent Authority within ten days from the date of receipt of a certified copy of this order. The Competent Authority shall consider the material placed by the petitioner and pass a fresh, reasoned and speaking order within ten days from the date of receipt of the complete submission.

(vi) If the application is rejected, the order shall disclose the basis for such rejection and, to the extent permissible in law, the nexus between the pending investigation and the proposed investment. Sensitive or confidential material need not be disclosed in full, but the substance of the grounds relied upon shall be communicated sufficiently to enable the petitioner to understand the basis of the decision.

(vii) The concerned regulatory authority shall consider, in accordance with the applicable regulatory framework, the extension of the time available to the petitioner to make, and to the Gift City Entity to receive, the proposed investment, particularly since the existing extension is stated to expire on 15.09.2026.

(viii) In the event a favourable NOC is issued, the Gift City Entity may receive the proposed investment within ten days from the date of such favourable decision, subject to compliance with FEMA, RBI, IFSCA and all other applicable statutory and regulatory requirements and the terms of the NOC.

(ix) The direction for consideration of extension of time shall not be construed as permission to make or receive the proposed investment in the absence of the NOC or any other approval, permission or compliance required under law.

(x) All contentions on the substantive merits of the pending investigation, the alleged transactions, the alleged contravention of FEMA and the nexus between the investigation and the proposed investment are left open for consideration by the appropriate authority in accordance with law.

(xi) Nothing stated in this order shall be construed as an expression of opinion on the ultimate merits of the pending proceedings or on the petitioner's entitlement to the proposed investment.

(xii) There shall be no order as to costs.

This Court has been assisted by Mr. Sourav, Law Clerk, in the formulation of this Judgement.

Digitally Signed By:
SURAJ GOVINDA RAJ
17/09/2026, 18:35, Bengaluru
Verified

(SURAJ GOVINDARAJ)
JUDGE

SR/LN/KTY
List No.: 3 Sl No.: 1