

Test 1 – FEMA   GCA   IOS   Marks: 40 (4 Marks Each Question)   Time: 80 Minutes
<p><b>Q.1</b> Mr. Ram, an advocate has fraudulently deceived his client Mr. Shyam, who was taking his expert advice on taxation matters. Now, Mr. Ram is liable to a fine for acting fraudulently both under the Advocates Act, 1961 as well as the Income Tax Act, 1961. State the provision as to whether his offence is punishable under both the Acts, as per the General Clauses Act, 1897.</p>
<p><b>Ans.</b> As per <b>Sec 26 of General Clause Act</b>, where an act or omission constitutes an offence under two or more enactments, then the <b>offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be punished twice for the same offence.</b></p> <p>Thus, Mr. Ram shall be liable to be punished under the Advocates Act, 1961 or the Income Tax Act, 1961, but shall not be punished twice for the same offence.</p>
<p><b>Q.2</b> Mr. Mike has lent his house property to Mr. Wise at a monthly rent of Rs. 15,000 per month. The yearly rent agreement was due to expire in near future. However, Mr. Mike does not intend to continue this agreement and he has sent a notice to Mr. Wise for the termination of the agreement. Mr. Wise on the other hand does not want to vacate the property and hence has returned the notice with an endorsement of refusal. Now, Mr. Wise has contended that the notice was not served to him and hence there is no need for him to vacate the property. As per the provisions of the General Clauses Act, 1897, discuss whether a notice was served to Mr. Wise.</p>
<p><b>Ans.</b> As per <b>section 27 of the General Clause Act, 1897</b>, where any legislation or regulation requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by:</p> <ul style="list-style-type: none"><li>(i) properly addressing</li><li>(ii) pre-paying, and</li><li>(iii) posting by registered post.</li></ul> <p>A letter containing the document to have been effected at the time at which the letter would be delivered in the ordinary course of post.</p> <p><b>Thus, where a notice is sent by the landlord by registered post and the same is returned by the tenant with an endorsement of refusal, it will be presumed that the notice has been served.</b></p> <p>Hence, in the given situation, a notice was <b>rightfully served to Mr. Wise.</b></p>
<p><b>Q.3</b> PK and VK had a long dispute regarding the ownership of a land for which a legal suit was pending in the court. The court fixed the date of hearing on 29.04.2018, which was announced to be a holiday subsequently by the Government. What will be the computation of time of the hearing in this case under the General Clauses Act, 1897?</p>

**Ans.**

According to **Section 10 of the General Clauses Act, 1897**, where by any legislation or regulation, **any act or proceeding is directed or allowed to be done or taken in any court or office on a certain day** or within a prescribed period then, if the Court or office is closed on that day or last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open.

In the given question, the court fixed the date of hearing of dispute between PK and VK, on 29.04.2018, which was subsequently announced to be a holiday.

Applying the above provisions we can conclude that the hearing date of 29.04.2018, shall be extended to **the next working day**.

**Q4.**

**(i)** Mrs. K went to a Jewelry shop to purchase diamond ornaments. The owners of Jewelry shop are notorious and indulging in smuggling activities. Mrs. K purchased diamond ornaments honestly without making proper enquiries. Was the purchase made in Good faith as per the provisions of the General Clauses Act, 1897 so as to convey good title?

**(ii)** There are two ways to reach city A from city B. The distance between the two cities by roadways is 100 kms and by water ways 80 kms. How is the distance measured for the purpose of any Central Act under the provisions of the General Clauses Act, 1897?

**Ans.(i)**

In the instant case, the purchase of diamond ornaments by Mrs. K from a Jewelry Shop, the owners of which are notorious and indulged in smuggling activities, made in good faith, **will not convey good title**.

As per **section 3 (22)** of the General Clauses Act, 1897, **a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not.**

The **definition of good faith as is generally understood** in the civil law and which may be taken as a practical guide in understanding the expression in the Indian Contract Act, 1872 is that **nothing is said to be done in good faith which is done without due care and attention** as is expected with a man of ordinary prudence (**Reasonable Examination**). **An honest purchase made carelessly without making proper enquiries cannot be said to have been made in good faith so as to convey good title.**

**(ii) "Measurement of Distances"** [Section 11 of the General Clauses Act, 1897]: In the measurement of any distance, for the purposes of any Central Act or Regulation made after the commencement of this Act, that distance shall, unless a different intention appears, be measured in a straight line **on a horizontal plane**.

**Q.5** Explain whether Foreign Decisions be used for construing Indian Acts.

**Ans.**

The normal function of a proviso is to **except something out of the enactment or to qualify something stated in the enactment** which would be within its purview if the proviso were not there. The effect of the proviso is to qualify the preceding enactment which is expressed in terms which are too general.

As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment ordinarily a proviso is not interpreted as it stating a general rule.

It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. **It carves out an exception to the provision to which it has been enacted as a proviso and not to the other.** (Ram Narain Sons Ltd. Vs. Assistant Commissioner of Sales Tax. A.I.R,1995 SC 765)

**Q.6** Explain 'Mischieve Rule' for interpretation of statute. Also, give four matters it considers in construing an Act.

**Ans.**

**Mischieve Rule:** Where the language used in a statute is capable of more than one interpretation, principle laid down in the Heydon's case is followed. This is known as 'purposive construction' or 'mischieve rule'. The rule then directs that the courts must adopt that construction which 'shall suppress the mischief and advance the remedy'.

It has been emphasized by the Supreme Court that the rule in Heydon's case is applicable only when the words used are ambiguous and are reasonably capable of more than one meaning.

It enables consideration of four matters in construing an Act:

- (1) what was the law before the making of the Act;
- (2) what was the mischief or defect for which the law did not provide;
- (3) what is the remedy that the Act has provided; and
- (4) what is the reason for the remedy.

**Q.7** When can the Preamble be used as an aid to interpretation of a statute?

**Ans.**

While the Preamble can be used to know the aims and objects of the legislation it cannot be used to control or qualify the precise and unambiguous language of an enactment. The preamble is the key to the mind of the maker of the law, but it cannot override in order to enlarge or restrict the enacting provision of the Act. A provision contained in the Act cannot be considered as invalid because they do not accord with the preamble, which is only a brief summary of legislative objectives behind the Act, and if there is any conflict between the preamble and any provision of an Act, the provision prevails.

The preamble merely affords help in the matter of construction if there is any ambiguity. Where the language of the Act is clear, the court is bound to give it effect. When will courts refer to the preamble as an aid to construction? Situation 1: Where there is any ambiguity in the words of an enactment the assistance of the preamble may be taken to resolve the conflict.

Situation 2: Where the words of an enactment appear to be too general in scope or application then courts may resort to the preamble to determine the scope or limited application for which the words are meant.

**Q.8** ABC Limited hired the services of Mr. Taylor, a technician from Germany for the installation of a machinery. The company paid USD 40,000 for the services rendered by Mr. Taylor. Examine under the FEMA, 1999, whether payment of remuneration to foreign technician Mr. Taylor is a permissible transaction under the provisions of the said Act.

**Ans.**

**Section 5: Current Account Transaction**

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction.

Provided that the CG may, in public interest and in consultation with the RBI, impose reasonable restrictions for current account transactions as prescribed under the FEM (Current Account Transactions) Rules, 2000.

**If the transaction is not listed in any of the above 3 schedules, it can be undertaken without any approval.**

**Hiring of foreign national as technicians is permissible without restriction.** There is no ceiling on salary which can be paid as per contract. Their salary can be remitted abroad after-tax deductions, contribution to provident fund and other deductions at source.

**Q.9** Under the auspices of the Foreign Exchange Management Act, 1999, (the Act) examine whether the given situations fall under "Current Account Transactions" or not as defined in the Act?

- (i) Mr. S, a resident in India, imports machinery from a vendor in UK for installing in his factory.
- (ii) An Indian resident, imports machinery from a vendor in US for installing in his factory on a credit period of 3 months.
- (iii) An Indian resident, transfers US\$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian Bank account to the NRI brother's Bank account in New York.

**Ans.**

**Section 2(j): Current Account Transaction**

It means a transaction other than a capital account transaction and without prejudice to generality of the foregoing such transaction includes.

1. Payments due in connection with foreign trade (Import-Export), other current business, services, and short-term banking and credit facilities (Buyer's Credit) in the ordinary course of business,
2. Payments due as interest on loans and as net income from investments,
3. Remittances for living expenses of parents, spouse and children residing abroad, and
4. Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

**Answer (i)**

An Indian resident imports machinery from a vendor in UK for installing in his factory. As per FEMA, it does not alter (create) an asset in India for the UK vendor. It does not create any liability to a UK vendor for the Indian importer. Once the payment is made, the Indian resident or the UK vendor neither owns nor owes anything in the other country.

Hence it is a **Current Account Transaction**.

**Answer (ii)**

An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months. Under FEMA, it is a liability outside India. However, under definition of Current Account Transaction (Section 2)," short-term banking and credit facilities in the ordinary course of business" are considered as a Current Account Transaction.

Hence import of machinery on credit terms is a **Current Account Transaction**.

**Answer (iii)**

An Indian resident transfer US\$ 1,000 to his NRI brother in New York as "gift". The funds are from resident's Indian bank account to the NRI brother's bank account in New York. As per FEMA once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or the transaction is over.

Hence it is a **Current Account Transaction**.

**Q.10**

Mr. Ram, citizen of India, left India for employment in U.S.A. on 1st June, 2020. Mr. Ram purchased a flat at New Delhi for 795 lakhs in September 2021. His brother, Mr. Gopal employed in New Delhi, also purchased a flat in the same building in September, 2021 for 795 lakhs. Mr. Gopal's flat was financed by a loan from a Housing Finance Company and the loan was guaranteed by Mr. Ram. Examine with reference to the provisions of the FEMA, 1999 whether purchase of flat and guarantee by Mr. Ram are Capital Account transactions and whether these transactions are permissible.

**Answer**

**Section 2(e): Capital Account Transaction**

It means a transaction which alters:

- a) The assets or liabilities, including contingent liabilities, outside India of Persons Resident in India [PRI]
- b) Assets or liabilities in India of Persons Resident Outside India [PROI].

Schedule II of FEM (Permissible Capital Account Transactions) Regulations 2015 permits the following Capital Account Transactions of a PROI "Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India."

**Section 6: Permissible Capital Account Transaction**

Subject to the provisions of Sec 6(2) & 6(2A), any person may sell or draw foreign exchange to or from an Authorized person for a capital account transaction.

In the given case, there are 2 Capital Account Transactions and both of them are Permissible.

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(A) Purchase of immovable property in India by Mr. Ram [PROI].

(B) Giving of Guarantee by Mr. Ram [PROI] on behalf of Mr. Gopal [PRI] to the Housing Finance Company.

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