

**Petitioner has no right to take his counsel along with him at time when his statement is recorded by Enforcement Directorate pursuant to summons issued u/s 37 of FEMA, 1999**

The relief sought for by the petitioner seeking permission to be accompanied by an advocate of his choice when he appears before the Enforcement Directorate in pursuance of the summons issued under section 37 of the Foreign Exchange Management Act, 1999 and recording of statement in the presence of an advocate who will be present beyond the hearing distance does not require any consideration.

**RELEVANT EXTRACTS:**

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1. These writ petitions have been filed for mandamus directing the respondent to permit the petitioner to be accompanied by an advocate of his choice when he appears before the respondent in pursuant of the summons issued to them under Section 37 of The Foreign Exchange Management Act, 1999 (FEMA) and recording of statement, though the advocate will be present beyond the hearing distance, if need be.

7.6. The question that arises for consideration is whether at the stage of preliminary investigation, can the petitioners seek the assistance of a lawyer.

7.7. When collecting materials to take further action, the officers of FEMA does not act as a Court. Whether, the petitioners will be treated as accused of contravention of the provisions of FEMA or whether they would be treated as witness would be decided after preliminary enquiry or investigation by the authorities concerned. Even at the initial stage itself, before the adjudicating authorities comes to a conclusion to proceed further or not, there need be no assistance to the petitioners either by an Advocate or by a Chartered Accountant. The said view was taken by the Division Bench of this Court which is reported in (1984) 149 ITR 341 (MAD) V.Dakshinamurthy v. Assistant Director of Inspection, Income Tax. The observations made by the Division Bench is usefully extracted here under:

The question thus to be considered is whether the scope of the enquiry under the I.T.Act is the same as it was before the civil court in passing the

decree. The civil court adjudicated, though in a summary way, on the claim of the depositors in the present case, based on the promissory notes executed in their favour. The ITO in making investigation in the case of the Federation was seeking to find out the person to whom the money belongs. In other words, he wanted to find out whether there was any income earned by the Federation, which took its shape as deposits in the names of these persons, who had obtained decrees. As the scope of the enquiry under the I.T. Act is wholly different from that before a civil court, it is not possible to accept the submission that the ITO in making the enquiries was acting in any manner contrary to the findings of the civil court. Any action taken by the ITO is not likely to set at naught these decrees if they otherwise remained unchallenged in accordance with the provisions of the Code of Civil Procedure in the appropriate forum. As the scope of the enquiries by the civil court and by the ITO are different, the principle of this decision cannot be applied to the facts herein.

We agree with this statement of principle by the learned judge. We hold that a witness has no right to take his counsel along at the time when his statement is recorded.

It is thus manifest that there is great latitude allowed to the ITO in the collection of materials and he does not act as a court at that stage. There are no two parties before him, and the procedure in the adversary system of proceedings cannot be applied to him. However, the ITO, before he uses the materials so collected, is bound to give the necessary opportunity to the assessee to test the evidence, to adduce any evidence in rebuttal and to explain the facts that appear against him. Thus, it is clear that the ITO cannot be asked to put on, or be thrust with, the garb of a court, even at the stage of collection of evidence.

The ITO is a tribunal of a kind. He is duly appointed under the I.T. Act to discharge the powers and functions which are well-defined by the statute. His principle job is to make an assessment of the income and levy income-tax on the basis of his determination. For the purpose of discharging these functions, he is invested with the power to gather information, material evidence, and the like. A specific power is conferred on him to summon witnesses, enforce their attendance, issue commissions and the like. In this respect, his powers are co-equal with those of courts of law under the Civil Procedure Code. He is held to be a tribunal within the meaning of section 135(2) of the Code of Civil Procedure, and witnesses who have to appear before him are protected from arrest. He is also a court for purposes of the Criminal Procedure Code. In these circumstances, the ITO, in his own sphere, is a tribunal of plenary jurisdiction subject to no other control and limitations save those which are enacted in the income-tax code. It stands to reason, therefore, that the investigations and inquiries launched by him are not subject to the jurisdiction of ordinary courts.

Indeed, there is a specific provision in the I.T. Act which forbids courts of law from interfering with the ITO's jurisdiction to assess:vide section 293.

7.8. Thus, considering the overall aspects of the judgement cited above, I am of the considered view that the petitioners have no right to take their counsels along with them at the time when their statement is recorded by the respondent or his officials.

12. Yet another decision relied on by the learned Special Counsel appearing for the respondent is reported in 2000 (117) E.L.T. 4 (Mad.), Kishore J.Chawla v. Union of India. This Court in the said judgement has held that person examined under Section 108 of Customs Act, 1962 is not having a right to have his lawyer at the time of interrogation or near to him in the premises.

13. Yet another judgement relied on by the learned Special Counsel appearing for the Enforcement Directorate, is an unreported judgement made in W.P.No.2429 of 2009 dated 24.11.2009. The question that came for consideration before this Court was whether the summons issued by the respondent therein under Section 37 of the FEMA should be interdicted by this Court on the ground that there was no application of mind and the documents sought for would amount to a roving enquiry by the Directorate. Para 10 of the said judgement is usefully extracted here under:

10. The Act has deliberately chosen not to apply the concept of summons used either under the Code of Civil Procedure or under the Code of Criminal Procedure, but has chosen to apply analogous provisions found in the Income Tax Act. Therefore, while interpreting the scope and width of Section 37 of FEMA, one cannot apply the concept of summons as available to a Civil Court under the Code of civil Procudure, only because the power of a Civil Court was conferred on the authorities.

14. Yet another judgement relied on by the learned Special Counsel appearing for the Enforcement Directorate, is the judgement made in Crl. O.P.(MD)No.7646 of 2007 dated 11.01.2008. Para 11 of the said judgement is usefully extracted here under:

11. The perusal of the eleven conditions would clearly demonstrate that all those eleven conditions are relating to arrestees / detenues. At this juncture, the learned counsel for the respondent would convincingly put forth his arguments that under pretext of examining / interrogating the respondent R.Sundar Raj, he cannot be kept even during night time or for days together, simply labelling him as a mere witness.

15. Thus the decisions relied on by the learned Special Counsel appearing for the respondent will amply prove that the request made by the petitioners to

have an assistance of an Advocate at the stage of initial and preliminary investigation by the officials of the respondent does not sound well.

16. Thus, summing up the entire discussions made above, I am of the considered opinion that the relief sought for by the petitioners seeking permission to be accompanied by an advocate of his choice when he appears before the respondent in pursuant of the summons issued under Section 37 of The Foreign Exchange Management Act, 1999 (FEMA) and recording of statement in the presence of an advocate who will be present beyond the hearing distance does not require any consideration.