

Cash Transactions Not Necessarily, Benami Transaction

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The recent judgment of the Honourable Appellate Tribunal¹ of New Delhi in the case of 28 appellants who are the professors of a college, who has received salary advances in cash and the initiating officer (IO) treating such salary advances in cash are benami transactions under the Prohibition of Benami Properties Transactions Act, 1988 (PBPT) and quashing such actions of IO by the Honourable Appellate Tribunal is welcome move as it clears certain vital aspects pertaining to the PBPT Act laying more clarity.

The judgment is taken up for consideration in this article to discuss about the key considerations laid down in the said judgment. The facts of the case are common in all 28 cases with minor changes. Hence, let us consider facts of single case to understand the issue involved.

- a) The Appellant is a professor in St Joseph's College of Engineering. The said college is run by St Joseph Institute of Science and Technology Trust (Trust).
- b) The appellant has received a salary advance of Rs 50,000/- on 17th November 2016 from the Trust. On the same day, a search was conducted on the Trust under Section 132 of Income Tax Act, 1961 (IT Act).
- c) On 23rd November 2016, the said amount which was received as salary advance was insisted by the IT authorities to be returned to the Trust and the same was returned as instructed by the Appellant.
- d) A sworn written statement was recorded from the appellant, wherein he stated that he has received an amount of Rs 50,000/- as salary advance. There was never a search conducted by IT authorities on the appellant.

A show cause notice was issued by the IO on 14th December 2016 wherein it was alleged that the appellant has held cash of Rs 50,000/- and also lent his name to be a benamidar. The appellant has made a reply to the notice stating that the notice is contrary to the factual position since the amount is received as salary advance and hence not a benami property.

The IO without considering the representations of the 28 appellants has passed a provisional attachment order under Section 24(3) of PBPT Act and thereby attaching the bank account of the appellants. The IO is of the belief that the Chairman of Trust is the beneficial owner and accordingly passed order attaching all the bank accounts of the employees.

The matter has travelled to the adjudicating authority and the same was confirmed by the adjudicating authority and the said authority under Section 26(3) of PBPT Act, upheld the order of IO. Such orders of adjudicating authority were challenged before the Honourable Appellate Tribunal.

¹ Tribunal for SAFEMA, FEMA, PMLA, NDPS, PBPT Acts

The Honourable Appellate Tribunal while dealing with the 28 appellants has made certain important observations which are discussed as under.

Attachment under PBPT can be only 'Benami Property' unlike 'Any Property' in PMLA:

- a) The Honourable Appellate Tribunal has stated that the actions of IO attaching the bank accounts of the appellants is without jurisdiction and without application of mind. The Tribunal has stated that what is allowed to attach under Section 24(3) of PBPT Act is only 'property held benami' and not 'any property'.
- b) The Appellate Tribunal has stated that the IO has ignored the fact that the salary advances which were received by the appellants were paid back to the Trust on the insistence of IT authorities as a result of search on Trust and there is nothing left with such appellants (even assuming such transaction is a benami transaction) which allowed the IO to attach the bank account of appellants.
- c) The Appellate Tribunal further held that vide Section 2(u) of Prevention of Money Laundering Act, 2002 (PMLA) which deals with the definition of phrase 'proceeds of crime', 'any property' is covered and accordingly the attachment under PMLA can be wide which legalises attachment of any property if it can be substantiated that such property has nexus with the proceeds of crime.
- d) However, in the PBPT Act, the attachment is confined only to the 'benami property' and nothing more or less. Hence, the action of IO and subsequent ratification by adjudicating authority attaching the bank account of the appellant which is not a 'benami property' is set aside.

Every Cash Transaction cannot be termed as 'Benami':

- e) The Appellate Tribunal after considering the definitions of 'attachment', 'benami transaction' and 'benamidar' as laid down in PBPT Act has in principle agreed with the contention of the appellant, that every cash transaction cannot be held as 'benami transaction'. To call a transaction as 'benami transaction', it has to satisfy twin conditions that (i) the property being held by a person who has not provided the consideration, (ii) the property is held by that person for the immediate or future benefit, direct or indirect of person who has provided the said consideration'.
- f) Thus, every transaction where cash is paid to person in lieu of a future promise cannot be a 'benami transaction' as there is no lending of name. There can be no 'benami transaction' if the future benefit is due from the person who is holder of the property.

Order of IO and Adjudicating Authority is Illegal:

- g) The Appellate Tribunal has held that order passed under Section 24(4) of PTBT Act is illegal as it relates to a property which does not exist at all. The order is unsustainable as it punishes the appellants for wanting to defeat the purposes of demonetization, which has no direct nexus with the PTBT Act and beyond the purview of the Act.

- h) The Appellate Tribunal further stated that the impugned order assumes that the object of disbursement was to bring undisclosed amount into circulation by depositing into 3rd party accounts, who did not own the money legitimately. This action of the IO is without any material on record and there is nothing on the record to show that the professors owned the money illegitimately.

Concluding Remarks:

- i) Appellate Tribunal has concluded stating that **'the benami act is a special act. All the provisions are stringent provisions. Once the appeals are dismissed by this Tribunal (and its order is become final in higher court), the criminal prosecutions have to be initiated against the parties. It is also settled law that once the provisions of Special Law are clearly worded, the question of importing any expression or omitting any part of the provision does not arise. The same have to be read as it is. The simple meaning is to be given. The question of any perception and personal notion does not arise. In the Benami Act, there is no specific provision which mandates that any movable or immovable property cannot be attached in value of such property unlike in Section 2(u) of PMLA, 2002, which is other special act. Any provisions of PMLA, 2002 cannot be invoked in the Benami Act. The members of the adjudicating authority have failed to appreciate the same law while passing the impugned order. In the present case, the amount was not held by the appellants, it was an advance salary received from the employers. It is not the case of the respondent, the appellants were involved in any link and nexus in the crime or they have hatched any conspiracy or arrangement between the employee and employer.**
- j) Further, in Para 44, **'The facts of the present case are clear that the property was never held by the appellants. The amount received by them are returned. Even the question of any arrangement in the present case does not arise as the appellants have received the advance salary from the employer under oral contract at the asking of respondent, the same was immediately returned. The said factual position has not been denied by the respondent. This is also not a case where the person providing the consideration was not traceable or fictitious. The admitted position is that the management/employer was very much traceable, his statement was recorded, the money returned by the appellants was dealt by the department'**.

The Appellate Tribunal has stated that existence of the 'benami' transaction has to be proved by the authorities i.e., the person who alleges the transaction by placing reliance on the judgment of Sitaram Agarwal vs Subrata Chandra 2008 7 SCC 716. Since the authorities have failed to discharge the burden of proof. The Tribunal has stated that the authority has purely gone on the premise that cash is transferred from one person to another, with an object to defeat demonization, which is insufficient to establish a benami transaction and has provided relief to all appellants and ordered to release the attachments.