

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF OCTOBER, 2022

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MRS. JUSTICE M.G. UMA

WRIT APPEAL No.844 OF 2022 (T-IT)

BETWEEN :

SRI. JITENDRA VIRWANI
S/O MOHANDAS VIRWANI
AGED ABOUT 56 YEARS
341, EMBASSY WOODS
6A, CUNNINGHAM ROAD
VASANTH NAGAR
BANGALORE-560 052

... APPELLANT

(BY SHRI. K. SHASHIKIRAN SHETTY, SENIOR ADVOCATE
FOR SHRI. A. MAHESH CHOWDHARY AND
MS. KRISHIKA VAISHNAV, ADVOCATES)

AND :

1. JOINT COMMISSIONER
OF INCOME TAX
CENTRAL CIRCLE, CENTRAL RANGE-1
CENTRAL REVENUE BUILDING
QUEENS ROAD
BANGALORE-560 001

2. PRINCIPAL COMMISSIONER
OF INCOME TAX-I
CENTRAL REVENUE BUILDING
QUEENS ROAD
BANGALORE-560 001

... RESPONDENTS

(BY SHRI. K.V. ARAVIND AND
SHRI. M. DILIP, ADVOCATES)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO ALLOW THE APPEAL BY SETTING ASIDE THE JUDGMENT DATED 22.07.2022 IN WP NO.17813/2021 PASSED BY THE HON'BLE SINGLE JUDGE AND ALLOW THE WRIT PETITION NO.17813/2021 AS PRAYED.

THIS WRIT APPEAL, HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 09.09.2022. COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **P.S.DINESh KUMAR J**, PRONOUNCED THE FOLLOWING:-

JUDGMENT

This intra-Court appeal is directed against order dated July 22, 2022 in W.P. No.17813/2021.

2. For the sake of convenience, parties shall be referred as per their status in the writ petition.

3. In the writ petition, petitioner has challenged the proceedings initiated under Section 10 of The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015¹ on the ground that the same are opposed to the

¹ 'BM' Act for short

provisions of the Act and without jurisdiction. He has sought for quashing the notice dated August 11, 2021 (Annexure-E) issued by the JCIT², Bengaluru. By the impugned order, the writ petition has been dismissed reserving liberty to take appropriate defence before the Assessing Officer.

4. Briefly stated the facts pleaded in the writ petition are, pursuant to a search conducted on January 07, 2015, under Section 132 of the Income Tax Act, 1961³, the Assessing Officer passed Assessment orders under Section 153-A of the IT Act for the A.Ys⁴. 2009-10 to 2015-16 making certain additions by treating the petitioner as a beneficial owner of 'Romulus Assets Ltd., ('RAL' for short). Petitioner's appeals before CIT(A) stood dismissed. Petitioner challenged CIT(A)'s orders

² Joint Commissioner of Income Tax

³ 'IT Act' for short

⁴ Assessment Years

before ITAT⁵ and the ITAT has set-aside the additions vide order dated July 30, 2021, holding *inter alia* that the Assessing Officer has not discharged the burden cast on him to prove that the petitioner is a beneficial owner of RAL.

5. The JCIT, Central Circle, Central Range - I Bengaluru issued the impugned notice dated August 11, 2021 (Annexure-E) under Section 10 of the BM Act for the A.Y. 2022-23 and the same has been challenged in the instant writ petition. The Hon'ble Single Judge has dismissed the writ petition with liberty to the petitioner to take appropriate defence before the Assessing Officer. Hence, this appeal.

6. Shri. Shashikiran Shetty, learned Senior Advocate for the appellant/writ petitioner contended *inter alia* that:

⁵ Income Tax Appellate Tribunal

- the notice issued by the JCIT under the BM Act, is without jurisdiction because the proceedings have been initiated without any information required under Section 10 of the BM Act;
- that ITAT is the ultimate fact finding authority even under the BM Act. The ITAT, Bengaluru in ITA Nos.1211-1217/Bang/2019⁶ has held that the Assessing Officer had not discharged the burden cast on him to prove that the appellant is the share holder /beneficial owner of RAL; Assessing Officer had merely acted on suspicion and not brought on record any legal evidence to prove that appellant is a beneficial owner or share holder of RAL;
- No income chargeable to tax has escaped the assessment. Notices have been issued under

⁶ decided on 30.07.2021

Section 148 of the IT Act invoking the extended period of limitation of 16 years to tax an income in relation to any asset outside India clearly shows that the income is chargeable under the IT Act and therefore, BM Act cannot be invoked;

- Revenue's stand that information was received from JCIT (OSD) Central Circle, vide letter dated 06.08.2021, is factually incorrect because, the very same Officer had issued notices under Section 148 of the IT Act for A.Y. 2003-04 to A.Y. 2017-18 on 30.03.2021;
- Section 2(11) of the IT Act defines 'Undisclosed Asset located outside India'. Unless the explanation given by the assessee is not satisfactory in the opinion of the Assessing Officer, an asset cannot be declared as 'Undisclosed asset outside India'.

Therefore, the Assessing Officer has to first determine whether assessee is the beneficial owner of the alleged assets before issuing the notice under challenge;

- the Hon'ble Single Judge has held at para 13 of the impugned order that jurisdictional fact is a condition precedent for assumption of jurisdiction. Having recorded the said finding, the Hon'ble Single Judge has erred in dismissing the writ petition even though the Revenue has not determined the jurisdictional facts and placed before the Court.

7. With these main submissions, Shri. Shashikiran Shetty prayed for allowing this writ appeal.

8. Shri. K.V. Aravind, learned Senior Standing Advocate for the Revenue opposing the appeal, argued in support of the impugned order.

He submitted that the procedure for assessment under the BM Act is provided under Section 10 of the said Act. The impugned notice has been issued after receiving information from the JCIT (OSD), Central Circle 1(3). Though the designation of the Officer who has issued the notice under challenge and notices under Section 148 of the IT Act are the same, the Officers are different. He contended that the notice has been issued under Section 10(1) of the BM Act and the assessee has liberty to produce the accounts, documents or evidence and make out a case that the assets in question are not undisclosed assets located outside India. The notice under challenge is an exhaustive notice and contains *prima facie* material/ information based on the search conducted under Section 132 of the IT Act. He relied upon *Commissioner of Central*

*Excise, Haldia Vs. Krishna Wax (P) Ltd*⁷ in support of his case.

9. We have carefully considered rival contentions and perused the records.

10. The sum and substance of Shri. Shashikiran Shetty's argument is, before issuing notice under Section 10(1) of the BM Act, the Revenue has to determine that assessee is the beneficial owner of undisclosed assets located outside India. To buttress this argument, Shri. Shetty sought to rely upon para 15 of the impugned order passed in the writ petition and urged that existence of 'jurisdictional facts' is a condition precedent. According to him, before issuing the notice, Revenue ought to have determined that assessee is the beneficial owner of undisclosed asset located outside India.

⁷ (2020)113 taxmann.com 70 (SC) [paras 6 to 12]

11. The preamble of BM Act (Act 22 of 2015) reads as follows:

"An Act to make provisions to deal with the problem of the Black money that is undisclosed foreign income and assets, the procedure for dealing with such income and assets and to provide for imposition of tax on any undisclosed foreign income and asset held outside India and for matters connected therewith or incidental thereto."

(Emphasis supplied)

12. A plain reading of the preamble shows that the purpose and intent of the Act is to deal with the problem of Black money and the procedure for dealing with such income and assets.

13. Shri. Shetty's contention is that 'Undisclosed Asset located outside India' having been defined in Section 2(11) of the BM Act, the Revenue has to first determine such assets. This argument is untenable because, Section 2(11) of

the BM Act merely defines what is 'Undisclosed Asset located outside India'.

14. The procedure to be followed under the Act is provided in Section 10 of the BM Act. Section 10(1) authorizes the Assessing Officer to issue notice upon receipt of information from an Income Tax Authority. It was urged by Shri. Shetty that the Officer issuing the notice and the Officer, who has issued notices under Section 148 of the IT Act are one and the same. The assessments have been completed and the ITAT has recorded that the Assessing Officer had not discharged the burden cast on him to prove that the appellant is shareholder/beneficial of the owner of RAL. He placed reliance on para 125 of ITAT's order in ITA No.1211-1217/Bang/2019 and it reads as follows:

"125. In our opinion, the additions made by the AO on the basis of Board resolutions of RAL is not justified for the following reasons:-

(a) The assessing officer has not discharged the burden cast on him to prove that the appellant is the shareholder/beneficial owner of RAL.

(b) The assessing office has merely acted on a suspicion and has not brought on record any legal evidence to prove that the appellant is the beneficial owner/shareholder of RAL.

(c) RAL is duly incorporated in respective legal jurisdiction and assessee has discharged his burden by furnishing proper explanation with documents.

(d) The assessing officer has failed to carry out the necessary enquiries and investigation to prove the allegation made by him in the assessment order.

(e) The quantification of the addition based solely on the amounts mentioned in the Board resolution defies logic and is totally perverse. It is also not known whether the amount mentioned in the Board Resolution has been spent for the purpose mentioned therein.

(f) S.28(iv) of the Act is not applicable as the appellant is not carrying on any independent business.

(g) S.69C of the Act is not applicable for the very simple reason that the appellant has not incurred the expenditure and the source for various payments is the funds of RAL.

(h) No seized material to sustain the addition."

(Emphasis Supplied)

15. Shri. Aravind is right in his submission that both Officers are of the same designation but, operate under different jurisdictions. The Officer who has issued the notices under Section 148 of the IT Act for A.Y. 2003-04 to A.Y. 2017-18 is one Shri. Sunil Goutam Tadimalli. His designation is, JCIT (OSD)-Central Circle 1(3), Bengaluru. The Officer who has issued the notice under Section 10(1) of the BM Act is one Shri. Nallusamy Balakrishnan, Central Circle, Central Range-1, Bangalore. Thus, the Officers are different and it is specifically mentioned in para 2 of the notice that a reference regarding Black Money Transactions was received from JCIT (OSD), Central Circle 1(3).

16. In *Krishna Wax Pvt. Ltd.*, relied upon by Shri. Aravind, it is held that Excise law is a complete code. On the facts of that case, where

ever a show cause notice was not issued, the Apex Court had allowed the appeal.

17. It is mentioned in para 2 of the notice that the relevant facts were verified from the reference and the material available on record. By the impugned notice, the assessee has been called upon to produce the accounts or documents or evidence specified in Annexure-1 to the notice.

18. Section 10(2) of BM Act authorizes the Assessing Officer to make such enquiry for the purpose of obtaining full information in respect of undisclosed Foreign income and asset of any person. After considering the documents or evidence and taking into account any relevant material gathered by him, the Assessing Officer shall pass an order assessing the 'Undisclosed foreign income and assets' and determine the sum payable by the assessee.

19. The Hon'ble Single Judge has framed following three questions for consideration:

"[a]. Should the first respondent have held an enquiry and decided whether the petitioner is a beneficial owner of the 'Undisclosed Assets' mentioned in the impugned Show Cause Notice before issuing the same.

[b]. Whether the Impugned Notice is issued beyond thirty days from the date of receipt of information of the alleged Undisclosed Foreign Assets held by the petitioner. If the Impugned Notice is issued beyond the said thirty days, should it be quashed because the first respondent has not obtained necessary permission from the Principal Commissioner of Income Tax/Chief Commissioner of Income Tax?

[c]. Whether the Impugned Notice dated 11.08.2021 is impermissible in law because it has not considered the decision by the Income Tax Appellate Tribunal [ITAT] on 30.07.2021 in ITA Nos.1211-1217/BANG/2019."

20. It is recorded in para 3 of the impugned order that the petitioner's statement under Section

132(4) of the IT Act was recorded with regard to transactions amongst different entities namely:

- " 1. *M/s Karadt Trust*
2. *M/s Lubimaya Holding Limited [LHL.]*
3. *M/s Romulus Assets Limited [RAL]*
4. *M/s Fragrant Harbour Limited [FHL]*
5. *M/s Aceworth Finance Limited [AFL]*
6. *M/s Insight Capital Limited [ICL]*
7. *M/s Kaileigh Limited*
8. *M/s Weisser Limited "*

21. It is recorded in para 4 of the impugned order that the Assessing Officer had concluded that petitioner is a beneficial owner and that RAL's income and expenditures must be treated as petitioner's business income. It is further noticed that the ITAT has allowed the appeals.

22. In the backdrop of the above undisputed facts, the question that arises for consideration is *whether the petitioner is entitled for relief sought in prayer clause (ii) in the writ petition namely, to*

quash the impugned notice under the BM Act dated August 11, 2021?

23. As recorded hereinabove, BM Act has been enacted to deal with the problem of black money i.e., undisclosed Foreign income and assets. Penalties defined in Chapter IV and the punishments described in Chapter V, entail serious consequences. It is settled that when a citizen is called upon to answer a statutory notice, such notice must be clear and unambiguous; describe the violation committed by the noticee, the material relied upon by the statutory authority, to enable the noticee to submit his defence.

24. It is not in dispute that a search under Section 132 of the IT Act, 1961 was conducted on January 7, 2015 in the farm house belonging to the assessee. The assessments under Section 153A read with Section 143(3) of the IT Act for the

A.Ys. 2009-10 to 2012-13 were completed by the Assessing Officer in December 2016. Appeals filed before the CIT(A) have been dismissed on March 25, 2019. On further appeal, the ITAT vide order dated July 30, 2021 in ITA Nos. 1211-1217/Bang/2019 has set-aside the additions made by the Assessing Officer holding *inter alia* that the Assessing Officer had not discharged the burden cast on him to prove that assessee is a shareholder or beneficial owner of RAL. The impugned notice has been issued on August 11, 2021 based on the information said to have been received from the JCIT (OSD), Central Circle 13, Bangalore vide his letter dated August 6, 2021.

25. The basic premise on which the impugned notice has been issued is, assessee is the beneficial owner of RAL as per his statement recorded during the search. (See: para 4.4 of the notice). It is further stated thus in the notice:

" 5. Further investigation led to receipt of a large volume of documents namely, bank statements, portfolio statements, financial statements, trust deeds, company incorporation documents, board resolutions, and letter correspondences of the following entities connected to you and your family:

1. Karadt Trust
2. Docha Trust
3. Lubimaya Holding Limited (LHL)
4. Romulus Assets Limited (RAL)
5. Fragrant Harbour Limited (FHL)
6. Aceworth Finance Limited (AFL)
7. Insight Capital Limited (ICL)
8. Kaileigh Limited
9. Kalinka Limited
10. Weisser Limited

5.1 Upon scrutiny of incorporation documents, bank statements and board resolutions of the above entities and letter correspondences between you and the Credit Suisse, it is inferred that the transactions of these entities are carried out as per your instructions. Thus, it appears that you hold the control and management or place of effective management, as the case may be, of these entities and you are admittedly a tax resident of India. "

26. Thus, Revenue's specific case is, assessee is the beneficial owner of RAL and the

transactions in the ten Companies referred above are carried out as per assessee's instructions. To substantiate this stand, Revenue has referred to various scanned documents, which have been made part of notice. The documents also include the minutes of the Board Meeting of 'Romulus Assets Ltd. One such document of RAL is minutes of the Board Meeting dated 12.08.2008 (at page 6 of notice). This is in respect of payment of SGD 100,000 to DBS Bank. This precise transaction was subject matter of assessment under Section 143A read with Section 143(3) of the IT Act for A.Y. 2009-10. The said entry is recorded at serial No.18 in the Tabular Column in para 9.1 of the Assessment Order. Similarly, another minutes of the Board Meeting of RAL dated 23.08.2011 in respect of payment of USD100,000 (USD 50,000 to Lina Virwani and USD 50,000/- to Lina Shmalts). This document is extracted in page 8 of the

impugned notice. These payments were subject matter of the Assessment Order for A.Y. 2012-13. The relevant entries are at Sl. Nos. 19 & 20 in para 9.1 of the Assessment order. These very Assessment Orders were subject matter of appeal before CIT(A) and the ITAT. The ITAT, among other observations, has held that the Assessing Officer had not discharged his burden to prove that assessee was beneficial owner of RAL. After pronouncement of order by the ITAT on July 30, 2021, the JCIT (OSD), Central Circle 13, Bengaluru vide his letter dated August 6, 2021 has sent the information to the JCIT, Central Circle, Central Range-I, the Officer who has issued the impugned notice.

27. The Income Tax Authority is bound by these findings recorded by ITAT. It is stated in para 2 of the impugned notice that a reference regarding

Black money transactions involving undisclosed Foreign income and assets were received from the JCIT (OSD) and the relevant facts were verified from the reference. But the findings recorded by us hereinabove with regard to the resolution of RAL's Board meeting dated 12.08.2008 and 23.08.2008 show that the authority under the BM Act has placed reliance on at least two distinct transactions, which were subject matter of appeal before the ITAT. This leads to an inference that the Income Tax Authorities had sent information with regard to transactions in respect of which ITAT did not agree with Assessing Officer's stand. Though it is stated in para 2 of the impugned notice that the relevant facts have been verified, we have noticed and recorded hereinabove that at least two transactions in respect of which assessee/petitioner has been called upon to show cause were subject matter of appeal before the ITAT. Unless the orders passed

by the ITAT are reversed or modified in the manner known to law, they cannot be held against the petitioner assessee.

28. It is settled that ordinarily, this Court shall not interfere with a show cause notice in writ proceedings under Article 226 of the Constitution of India except under rare circumstances where the notice is issued without jurisdiction or in such cases where, even if the facts stated in the notices are assumed to be correct, no case is made out against the noticee.

29. As recorded hereinabove, proceedings under BM Act entails serious civil and criminal consequences. The two transactions noted above, show that there is no proper application of mind both at the stage of sending the information by the Income Tax Department and by the Authorities under BM Act before issuing the notice under

challenge. It is stated in para 2 of the notice that information was received from the JCIT (OSD). In Para 4.4 of the notice it is stated thus:

" 4.4 It has become apparent from the documents and statements recorded during the search, that you are a beneficial owner of RAL. When this was pointed out to you and clarification was sought, you stated that you were not related to RAL in any way, under oath in 2015, you gave a contradictory reply that you discovered that you were a beneficiary of RAL only during the statement recorded on 31.10.2016."

(Emphasis supplied)

30. A careful perusal of para 4.4 of the notice clearly indicates that Authority under the BM Act has prejudged and formed an opinion that the petitioner is the beneficial owner of RAL. This contention of the Revenue has not been accepted by the ITAT by holding that the Assessing Officer had not discharged the burden to prove that petitioner is the beneficial owner of RAL.

31. We may profitably note that the Hon'ble Supreme Court of India in *Hindustan Poles*

*Corporation Vs. Commissioner of Central Excise, Calcutta*⁸ has held that Revenue must refrain from sending show cause notices without proper application of mind and such exercise is absolutely imperative to curb unnecessary and avoidable litigation in the Courts leading to unnecessary harassment and waste of time of all concerned, including the Tribunals and the Courts.

32. In *Jayantilal Thakkar & Co. Vs. Union of India*⁹, a division bench of Bombay High Court while quashing a show cause notice issued by the Collector of Central Excise has held thus:

"17.This settled principle of law is applicable with little greater force to the show cause notice because each allegation made in the show cause notice is required to be replied specifically by the noticee and entire matter is required to be investigated on the basis of the show cause notice and reply thereto. Issuance of show cause notice with material facts and particulars is a basic requirement of principles of natural justice. Underlying the rules of natural

⁸ (2006)4 SCC 85 (para 42)

⁹ 2005 (3) Mh.L.J

justice is to prevent miscarriage of justice and secure fair play in action. Thus, the show cause notice must contain all necessary allegations with material particulars forming cause of action for the action initiated....."

33. The Hon'ble Single Judge has held in para 19 of the impugned order that a definition clause in an Act cannot be construed as a positive enactment by placing reliance on the authorities mentioned therein. It is further recorded in para 25 that strict rules of interpretation will have to be followed while dealing with fiscal statutes and we respectfully agree with the same.

34. It was argued by the petitioner in this appeal that the authority under BM Act has to first decide the 'jurisdictional facts' before issuing notice under Section 10(1) of the BM Act. On principle of law, we agree with the view taken by the Hon'ble Single Judge that such an exercise is not contemplated in the Act. However, the aspect which

requires consideration in this appeal is, issuance of notice on the premise that petitioner is the beneficial owner of RAL which contention has been negated by the ITAT. The two transactions which we have noted above were subject matter of appeals before ITAT and the ITAT has returned a finding that the Assessing Officer had not discharged his burden and proved that petitioner is the beneficial owner of RAL. It is **trite** that a charge/imputation set aside by a judicial forum, cannot be reopened in parallel proceedings. The authority under the BM Act has alleged several transactions listed therein as illegal transactions. This court cannot examine all allegations/transactions in this proceeding. But the two transactions examined by us clearly show that Income-Tax Department has sent information without proper verification and the Authorities

under the BM Act have acted mechanically and sent the impugned notice without application of mind.

35. It is also relevant to note that the search was conducted in 2015. ITAT has decided the appeal on July 30, 2021 and the IT department has sent the information on August 06, 2021 and the impugned notice has been issued on August 11, 2021. These dates lead to an inference that Income-Tax Department sent the information hurriedly, immediately after disposal of appeal by the ITAT and the authority under BM Act has also acted hurriedly.

36. In view of the above discussion, in our considered view that atleast a portion of the notice is based on the allegations set aside by the ITAT. Therefore, the impugned notice requires re-examination in the hands of authorities under the BM Act. Hence, the following:

ORDER

(a) Writ appeal is **allowed**.

(b) Order dated July 22, 2022 in W.P. No.17813/2021 is modified;

(c) Notice dated August 11, 2021 issued by the first respondent is quashed reserving liberty to the respondents to issue fresh notice, if so advised, in accordance with law after reconsideration with reference to the order dated July 30, 2021 passed by the ITAT in ITA No.1211-1217/Bang/2019.

No costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

SPS