Indian Income Tax Appellate Tribunal holds for "beneficial ownership" under Black Money Act; mere signature on foreign bank's account opening form is inadequate

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Indian Income Tax Appellate Tribunal holds for "beneficial ownership" under Black Money Act; mere signature on foreign bank's account opening form is inadequate

The Indian State Income Tax Appellate Tribunal (ITAT) rejected Revenue's appeal and deleted the addition made under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (BMA), holding that the mere mention of name in the account opening form of an overseas bank account does not establish beneficial ownership. The assessee individual had put his signature on the account opening form of an overseas bank account belonging to a foreign company Watergate Advisors Ltd – in which the assessee's son was the sole shareholder and Director. The assessee had settled a revocable trust where his sons and grandson were beneficiaries, and on revocation of the trust in November 2011, the USD equivalent of INR 5.66 Crores of funds were transferred to the overseas account belonging to the foreign company. The assessing officer (AO) made additions under the BMA contending an undisclosed foreign asset and held that, since the assessee signed as the beneficiary on the account opening form, he was the beneficial owner of the account. The assessee denied the beneficial ownership, stating that he had never contributed any funds either to the trust or his son's company. The ITAT examined the term "beneficial ownership" using a touchstone of various statues, including the Income Tax Act, the Prevention of Money Laundering Act, the Benami Property (Prohibition) Act and Black's Law and Webster's dictionaries to conclude that, in this case, the assessee fails the test of beneficial ownership. They observed, "the mere account opening form where the assessee is mentioned as the beneficial owner of the account mentioning the details of his passport as an identification document, does not necessarily, in absence of any other corroborative evidence of the beneficial ownership of the assessee over that for an asset cannot lead to taxability in the hands of the assessee under the Black Money Act". The decision relied on the Mumbai bench ruling in *Kamal Galani*, wherein under similar facts, the addition of money in a foreign bank account was deleted under the Income Tax Act, 1961.

Decision Summary:

Background

The assessee, Jatinder Mehra, an individual, was in receipt of salary income. Pursuant to a search operation conducted in the case of a "Rakesh Agarwal Group" at Baroda, and after inquiries and information obtained from foreign tax authorities under the India-Singapore DTAA, it was found that one trust, "Rajvin Ltd" was among the six trusts found involved. Rajvin Ltd was settled by the assessee as a revocable trust in April 2005 with Merrill Lynch Bank and Trust Company (Cayman) Ltd as settlor/trustee, and his sons (Rajneesh and Vineet) and grandson were the ultimate beneficiaries under the trust. The trust deed was revoked on 16 November 2011, and the funds were transferred to the bank account with Clariden Leu Ltd, Singapore (now Credit Suisse), i.e. the overseas bank account held by Watergate Advisors Ltd., a company incorporated in the British Virgin Islands (BVI). For AY 2016-17 (equivalent to Financial Year 2015-16), the assessee returned an income of INR 6.57 Crores. On receipt of the above information, an interim report was submitted to the AO for action under the BMA, and accordingly a notice under section 10(1) of the BMA was issued on 21 November 2016. The AO found, based on information received under the Exchange of Information article of the India-Singapore DTAA, that the INR assessee was the beneficial owner of the overseas bank account, showing a credit of USD 834,025.32, equivalent to INR 5.66 Crores. The AO issued a show cause notice, treating it as undisclosed foreign income and assets under the BMA and, disregarding the assessee's various contentions, passed an order under section 10(3) of the BMA determining his total income at INR 122.37 Crores. The assessee preferred an appeal with the First Appellate Authority, Commissioner of Income Tax (Appeals) [CIT(A)], challenging

the AO's order on jurisdictional grounds as well as merits. The CIT(A) dismissed grounds related to the applicability of the BMA but deleted the additions made therein and held that the overseas bank account did not belong to the assessee.

Revenue preferred an appeal before ITAT wherein ITAT decided in favour of the assessee.

Revenue's contentions

1. Revenue supported the AO's order and stated that the assessee's name was reflected as beneficial owner in the account opening form of the overseas bank account. Further, it was submitted that details of his passport were mentioned in the identification document for the account and stated that the assessee's contention that he had not signed any document could not be accepted.

2. Revenue further contended that if the Assessee was merely a nominal settler of the trust, then his name would not have been shown as the beneficial owner of the overseas bank account.

3. Revenue did not deny that the assessee's son, Mr Rajneesh, had been carrying out business activities in Rajvin Ltd. for the last 20 years but contended that it did not prove that the overseas bank account was not maintained by the assessee.

4. Further, Revenue referred to the meaning of undisclosed asset under the BMA and stated that in this case, since the assessee did not disclose the overseas bank account in his return of income, the amounts were rightly brought to tax.

The assessee's contentions

The assessee challenged the order on its validity, jurisdiction and also on merits, in the cross objections filed.

A. Contentions challenging the validity of the order

1. The assessee contended that the order was erroneous, as in computation of total undisclosed foreign income and assets under the BMA, his returned income was also included. Further, the demand raised also included cess, surcharge and interest under section 234B, all of which are not applicable to charge tax under the BMA. Thus, the assessee challenged that the order as well as demand are both invalid and beyond the scope of the BMA.

2. The assessee further stated that the AO had filed an invalid appeal under section 18(1) of the BMA, as the same was required to be filed in Form 3, in contrast with Form 36 filed by the AO.

B. Contentions challenging the order on merits

1. The assessee submitted that the overseas bank account is in the name of Watergate Advisors Ltd, where his son, Mr Rajneesh Mehra, is the sole shareholder and director, and the assessee has neither contributed nor invested or contributed any amount to the account.

2. The assessee referred to the certificate of incumbency to substantiate that Mr Rajneesh Mehra was the sole shareholder and director of the company and also shows that only the shareholder could be the contributor or beneficiary of the account.

3. The assessee further submits that his name was mentioned as beneficial owner out of gratitude and respect shown by his son. He further submitted that the source of funds in the overseas bank account has not been disputed upon by the AO, and it is not emanating from the assessee. The source of credit in the overseas account is on account of business transactions of Rajvin Ltd., and the source is thus fully explained.

4. The assessee referred to the memorandum of family arrangement substantiating that Rajvin Ltd. was created by his son, and the assessee has not provided any funds in the trust.

5. The assessee relied on the Mumbai bench ruling in Kamal Galani wherein the issue is regarding similar facts and decided in favour of the assessee.

6. Relying on the SC ruling in *Estate of HMM Vikramsinhji of Gondal* [TS-258-SC-2014], the assessee submitted that it is a settled legal principle that taxation would arise either on account of the contribution of assets or funds or on receipt of any distribution or benefit from such trusts/structures/entities.

7. Lastly, the assessee contended that the BMA is effective from 1 July 2015, and therefore money deposited in the overseas bank account in FY 2011-12/2012-13 could not be brought to tax, when there was no act. He further stated that the issue of retroactive application of the BMA was pending before the SC, and hence the same cannot be taxed.

Key observations

A. <u>On the validity of the order as challenged by the assessee</u>

1. The ITAT observed that section 3 of the BMA provides that, irrespective of the year of investment, the undisclosed asset located outside India shall be charged to tax on its value in the previous year in which such asset comes to the AO's notice. It further notes that under section 10(1) of the BMA, AO can issue a notice in the year in which he discovers an undisclosed foreign asset or receives information about foreign asset / income.

2. ITAT noted that under section 81 of the BMA, no notice, assessment, summons or other proceedings will be invalidated merely by reason of mistake, defect or omission in such assessment, notice, summons or proceedings if it is in substance and effect in conformity with or according to the intent and purposes of the BMA.

B. <u>On beneficial ownership</u>

3. The ITAT referred to the provisions relating to the taxability of undisclosed assets located outside India under the BMA and notes the following conditions to be fulfilled: (i) there has to be an asset located outside India; (ii) the asset must be in the name of the assessee which can also be held by the assessee as beneficial owner; and (iii) no explanation is offered by the assessee about the source of such investment, or in the opinion of the AO, the information offered is not satisfactory. The ITAT remarked that the condition for beneficial ownership is required to be tested.

4. The ITAT observed that "beneficial ownership" has not been defined under the BMA and examined the term as defined under Explanation 4 to section 139(1) of the Income Tax Act, remarking that "to identify a beneficial owner of an asset, the said person should have nexus, direct or indirect to the source of the asset and he must have provided funds for the said asset". They further noted that in the present case, based on facts, it was demonstrated that the assessee was not involved either in Rajvin Limited or in Watergate Advisor Private Limited in providing any fund directly or indirectly in any of the above entities.

5. The ITAT, however, remarked that according to the provisions of section 84 of the BMA, only certain provisions of the Income Tax Act are made applicable and it does not include the provisions of section 139(1). Therefore, the beneficial ownership is required to be understood with respect to its dictionary definition as well as other provisions of other statutes, also keeping in mind the nature of the object of the BMA.

6. The ITAT referred to Black's Law Dictionary, in which beneficial ownership is defined as "one recognized in equity as the owner of something because use and title belonged to that person, even though legal title may belong to someone else, esp one for whom property is held in trust". They also referred to Webster's Dictionary, according to which beneficial owner is the "one who is entitled to receive the income of an estate without its title, custody or control".

7. The ITAT tested this case within the parameters of company law in the context of "beneficial interest" and noted that it is not also demonstrated that assessee exercises any control to appoint directors or control the management or policy decision of that company, thus assessee does not satisfy the criteria of beneficial ownership.

8. The ITAT further examined the term "beneficial owner" in the context of the Benami Property (Prohibition) Act 1988 and remarked that in this case "there is no evidence that the consideration has been provided by the assessee of the sum

deposited in the bank account of Watergate advisors Limited. Contrary to that, that assessee has shown that the above funds have been transferred from Rajvin Limited, which is owned and controlled by the son of the assessee".

9. On the test of beneficial ownership in the context of the Prevention of Money Laundering Act, the ITAT noted that "it is apparent that the assessee does not own any share capital in the case of Watergate Advisors Limited as well as it also does not control the above company as he does not have any shareholding or management rights in that company".

10. The ITAT further relied on the Mumbai bench ruling in *Kamal Galani* [TS-498-ITAT-2020(Mum)], wherein it was held that merely on the basis of the name of the assessee mentioned in the account opening form, which is rebutted by the assessee in an affidavit, the assessee cannot be held to be the beneficial owner of such sum. The ITAT held that such a solitary fact cannot lead to an addition, where there is no other evidence available with respect to ownership/beneficial ownership of such overseas bank account.