Benami Transaction - A Continuing Offence?

Mar 19, 2024

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Recently, the Appellate Tribunal for SAFEMA (**Tribunal**) in the case of *Prism Scan Express Private Limited v Initiating Officer* [TS-805-PBPTAT-2023(DEL)] (**Prism Scan**) held that a 'benami transaction' under the Prohibition of Benami Property Transaction Act, 1988 (**Benami Act**) would include instances of property being acquired prior to 2016 but held post 2016 as well. Purportedly in line with the Supreme Court's diktat in the landmark case of Union of India v Ganpati Dealcom [TS-665-SC-2022] (**Ganpati Dealcom**) the Tribunal's ruling offers a convenient distinguishing factor for effectively giving a retrospective operation to the 2016 amendments by treating the offence of benami transaction as a continuing offence.

This article seeks to critically engage with the contours of what constitutes a benami transaction. Aside from exploring the provisions and legislative intent of the Benami Act, we also examine parallels with the Prevention of Money Laundering Act, 2002 (**PMLA**) and the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (**BMA**).

1. Background

1.1. Dictionary meaning

At its core, benami transactions require one person obtaining property with the intent to hold it for the benefit of someone else.

Blacks Law dictionary defines a 'Transaction' *as the act or instance of conducting business or other dealings*. Although quite wide in its amplitude, emphasis must be placed on the terms 'act' or 'instance'. From a grammatical perspective, an act or an instance is fixed in time, and not of a continuing nature.

Several judicial precedents have also provided the term 'transaction' a large import to include any 'act done'. The emphasis on an 'act done' demonstrates that a transaction is a specific event at a particular point in time and cannot be stretched to such an extent that a transaction includes a 'state of affairs'.

Our view is elaborated further below.

1.2. 'Holding property': Whether an independent benami transaction

Before elaborating further, it would be worthwhile to examine the definition of benami transaction under the Benami Act. The unamended Benami Act defined a benami transaction as under:

"(a) "Benami transaction" means any transaction in which the property is transferred to one person for a consideration paid or provided by another person."

Undoubtedly, mere holding of property would not constitute a benami transaction under the unamended Benami Act. Vide the amendment in 2016, the definition of benami transaction was expanded as follows:

"*(9) "Benami transaction" means:*

(A) A transaction or an arrangement-

a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

....."

It is only in 2016 that the holding of benami property constituted a benami transaction. Noting the language of the definition, the Tribunal in Prism Scan placed emphasis on the term 'held' as it appears in sub-clause (a) of the definition to hold that mere holding of benami property also constitutes a benami transaction. Therefore, the Tribunal held that mere holding of benami property post 2016 would constitute a fresh benami transaction under the Benami Act, despite such property having been acquired prior to 2016.

It is pertinent to note that the view taken in Prism Scan is already being invoked by the Government to invoke the Benami Act in instances where the transaction took place prior to 2016, but the property continues to be held post 2016. A similar factual scenario can be seen in a recent Madhya Pradesh High Court ruling in the case of Santosh Bhadoriya vs. Union of India [TS-187-HC-2024(MP)], where the petitioners filed a writ challenging a show cause notice which sought to invoke the Benami Act to transactions undertaken prior to 2016. While the petitioners argued that the same amounted to a direct contravention of the Supreme Court's ruling in Ganpati Dealcom, the High Court dismissed the writ petition on the grounds of alternative remedy being available. It is likely that we may see the Prism Scan ruling being invoked in similar cases in the near future.

With due respect to the Tribunal's view, we offer a differing interpretation of the term 'held' as it appears in the definition. As per our view, the wording of clause (a) should not be interpreted to include holding of property dehors any other identifiable transaction. This can be illustrated through an example as follows:

A and B are brothers. A possesses and owns certain property, which has been offered as collateral for a debt owed to C. However, A is unable to repay the debt. To ensure that the property is not taken over by C, B decides to repay the debt. However, the brothers reach a common understanding that henceforth, the property belongs to B, and that A continues to formally hold the property only on behalf of B. In this regard, A would be the benamidar, B would be the beneficial owner, and the benami transaction would be the act of B paying off A's debt coupled with the informal act of A agreeing to hold the property in the name of B.

The above illustration is to emphasize that the holding of the asset cannot be de-coupled with the manner in which the asset has been acquired, thereby creating two separate benami transactions. The significance of using the terms 'arrangement' and 'held' must be to target instances like the above illustration wherein, though no formal transfer/transaction has taken place, the property nevertheless begins to be held on another person's behalf. **Pertinently, the factual matrix before the Supreme Court in Ganpati Dealcom involved a situation wherein property was acquired prior to 2016 and was held post 2016 as well.**

It follows that once it is established that a benami transaction took place prior to 2016 in terms of

transfer of an asset, it cannot be said that such transfer continues even post 2016.

1.3. Parallels with PMLA and BMA

In understanding the scope of benami transactions under the Benami Act, parallels can be drawn to the PMLA, where there are several precedents that have held the offence of 'money laundering' under Section 3 of the PMLA to be a continuing offence. These precedents should not influence the interpretation of a Benami transaction under the Benami Act for the following reasons:

1.3.1 Laundering v/s transaction (grammatical interpretation)

From a grammatical perspective, the term 'laundering' in the context of money laundering can be considered in the 'present continuous' verb form. This implies that it is a phrase that envisions a process which need not be fixed at any point in time. Therefore, the process of money laundering (which includes placement, layering, and integration) continues as long as the proceeds of crime continue to be projected as 'untainted property'.

As stated earlier, the term 'transaction' is in the present perfect form and refers to an act/series of acts as opposed to a state of affairs. Therefore, the phrase cannot be understood in the same way as laundering.

1.3.2 Statutory provisions

A perusal of Section 3(ii) of the PMLA provides a clear legislative mandate to consider the offence of money laundering to be a continuous offence. The same is reproduced as below:

"(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever."

The definition of benami transaction under the Benami Act contains no such provision which unequivocally deems a benami transaction to be of a continuing nature. In the absence of such language, it would be a stretch to supply such language.

Parallels in this regard can be drawn to the BMA as well. Upon its introduction in 2015, the BMA sought to impose a tax of 30% and penalty of 90% of such tax on undisclosed foreign income and assets. Aside from such tax, the BMA also provided for prosecution if details regarding foreign income and assets were not disclosed in the tax filings for the concerned previous year. Section 72 of the BMA clarifies that the non-disclosure of foreign assets would be covered under the BMA despite such assets having been acquired prior to the commencement of the BMA.

The trigger event under the BMA is the non-disclosure of foreign income and assets. The trigger event for BMA continues each year that the disclosure has not been made. Therefore, the application of BMA to property acquired prior to 2016 cannot be invoked to support application of Benami Act to transactions prior to 2016, as the trigger events in both legislations are quite different.

1.4. Legislative intent and policy considerations

Proceeding under the assumption that mere holding of Benami property could constitute a benami transaction, it would be pertinent to note that applying the amended definition to attach and confiscate property acquired prior to 2016 is unfair and potentially unconstitutional.

While the Ganpati Dealcom ruling did not specifically discuss what constitutes a benami transaction, the spirit of the ruling can serve as a guiding factor for interpreting the definition of a benami transaction as well. At several instances, the Supreme Court in Ganpati dealcom noted that the unamended Benami Act lacked teeth. The substantive machinery to implement the unamended Benami Act was not introduced. Rather, several other legislative enactments gave Benami transactions a veneer of legitimacy.

It is a settled principle that citizens can structure their affairs as per the law of the land. Given the tacit approval of benami transactions (and coupled with the finding that the unamended Benami Act is unconstitutional), citizens could have entered into benami transactions as well. The IT Act specifically contained provisions wherein beneficial owners could, for the purpose of the IT Act, offer income from property to tax as their own income notwithstanding the fact that the registered owner was another individual. With the introduction of the amendments to the Benami Act, a state of affairs that was not a benami transaction earlier was suddenly termed a benami transaction.

Even the BMA provided a window of opportunity for taxpayers to disclose their foreign income and assets. In such a scenario, they would have to pay a flat tax of 30% on such foreign income/assets along with a penalty of equal amount (as opposed to three times under the ordinary provisions on detection by tax authorities). This concession was provided despite the fact that non-disclosure of foreign income and assets was impermissible prior to the introduction of the BMA as well.

It is important to note that no opportunity was provided to modify one's affairs so as to be in compliance with the amended provisions of the Benami Act. Section 6 of the Benami Act prohibits benamidars from retransferring benami property to the beneficial owner or any other person acting on his behalf. With immediate effect, a state of affairs that was implicitly blessed with legitimacy was overnight rendered as an offence without providing a window of opportunity to mend such state of affairs. Such an amendment is arbitrary in nature, and violative of an Individual's right to freedom (i.e., freedom to structure their affairs as per the law) and the constitutional right to property as well.

2. Conclusion

In this article, we have presented our views on why the Benami Act should not apply to arrangements wherein benami property was acquired prior to 2016 and continued to be held post 2016 as well. It remains to be seen whether the Supreme Court will provide clarity regarding what constitutes a benami transaction. Until clarity on the definition of a benami transaction is obtained, the law in this regard appears to be in limbo.