S.148A: Reopening old wounds?

(*Ashish Agarwal* decision, Instruction 1/2022 and Current Issues…)

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Background

Step 1. Due to covid, CG passed **Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (38 of 2020) on 29.9.2020** which provided for various time limits for completion or compliance of actions under Specified Acts. Income Tax Act, 1961 being one of them. **Relevant portion is S.3(1) of TOLA 2020:**

3. (1) Where, any time-limit has been specified in, or prescribed or notified under, the specified Act which falls during the period from the 20th day of March, 2020 to the 31st day of December, 2020, or such other date after the 31st day of December, 2020, as the Central Government may, by notification, specify in this behalf, for the completion or compliance of such action as—

(a) completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval, or such other action, by whatever name called, by any authority, commission or tribunal, by whatever name called, under the provisions of the specified Act; or

(b) ……..filing of any appeal, reply or application or furnishing of any report, document, return or statement or such other record, by whatever name called, under the provisions of the specified Act; or

(c) in case where the specified Act is the Income-tax Act, 1961 (43 of 1961),—

(i) making of investment, deposit, ….. for the purposes of claiming any deduction, exemption….. (I) sections 54 to 54GB, or under any provisions of Chapter VI-A …..

(II) such other provisions of that Act, …. as the Central Government may, by notification, specify; or

(ii) beginning of manufacture or production …….. referred to in section 10AA of that Act, ……

Provided that the Central Government may specify different dates for completion or compliance of different actions:

Provided further that such action shall not include payment of any amount as is referred to in sub-section (2):

Provided also that where the specified Act is the Income-tax Act, 1961 (43 of 1961) and the compliance relates to---- ".

Background

Step 2. Under power conferred by S.3(1) of the TOLA, 2020 the CBDT issued various notifications extending time limits for completion of action under IT Act, 1961 including time limits for issuance of notice under Section 148 of the Act.

Step 3. Parliament enacted Finance Act, 2021 on 28.3.2021. Erstwhile proceedings for S.148 to 153 as it existed were substituted and completely new scheme was introduced w.e.f 1.4.2021

Step 4. Among other notifications**, CBDT** Notification No.20/ 2021/ F.No.3701/ 42/ 35/2020-TPL dated 31.3.2021 vide power granted under S.3(1) TOLA 2020 clarifying that reassessment orders which were earlier to be passed on 31st March 2021 can now be passed to 30th April 2021.

148A: History of notifications

Date of Notification	Original limitation for issuance of notice under Section 148	Extended limitation
31.3.2020	20.3.2020 to 29.6.2020	30.6.2020
24.6.2020	20.3.2020 to 31.12.2020	31.3.2021
31.3.2021	31.3.2021	30.4.2021
27.4.2021	30.4.2021	30.6.2021

The Explanations to the Notifications dated 31 st March, 2021 and 27th April, 2021 issued under section 3 of the Relaxation Act, 2020 also stipulated that the provisions, as they existed prior to the amendment by the Finance Act, 2021, shall apply to the reassessment proceedings initiated thereunder.

S.148A: High Court Orders in favour of assessee

Taxpayers approached various High Courts challenging the validity of reassessment notices issued under old law after April 1, 2021. Most of the High Courts quashed the notices, holding that TOLA did not supersede the amendment made vide the Finance Act 2021, introducing an entirely new regime.

Name of case	Writ No.	Court
Ashok Kumar Agarwal Vs. UOI	Writ Tax No. 524/2021 dated 30.09.2021	Allahabad HC
Bpip Infra Pvt. Ltd. Vs. ITO & Others	SB Civil WP No.13297/2021 dated 25.11.2021	Rajasthan HC
Mon Mohan Kohli Vs. ACIT	W.P.(C) No. 6176/2021 dated 15.12.2021	Delhi HC
Bagaria Properties & Investment P. Ltd. Vs UOI	W.P.O No. 244/2021 dated 17.01.2022	Calcutta HC
Manoj Jain vs. UOI	W.P.A. No. 11950 of 2021 dated 17.01.2022	Calcutta HC
Sudesh Taneja Vs. ITO	D.B. Civil WP No. 969 of 2022 dated 27.01.2022	Rajasthan HC
Vellore Institute of Technology Vs. CBDT	W.P. No. 15019/2021 dated 04.02.2022	Madras HC
Tata Communications Transformation Services Vs. ACIT	WP No. 1334 of 2021 dated 29.03.2022	Bombay HC

"Approximately 90,000 reassessment notices under section 148 of the unamended Income Tax Act were issued by the Revenue after 01.04.2021, which were the subject matter of more than 9000 writ petitions before various High Courts across the country and by different judgments and orders, the particulars of which are as above, the High Courts have taken a similar view and have set aside the respective reassessment notices issued under section 148 on similar grounds"

UoI v. Ashish Agarwal on 4th of May, 2022 Findings – Part I

*7. Thus, the new provisions substituted by the Finance Act, 2021 being **remedial and benevolent** in nature and substituted with a specific aim and object to protect the rights and interest of the assessee as well as and the same being in public interest, the respective High Courts have rightly held that the benefit of new provisions shall be made available even in respect of the proceedings relating to past assessment years, provided section 148 notice has been issued on or after 1st April, 2021. We are in complete agreement with the view taken by the various High Courts in holding so.*

- How can 10 years case be considered remedial and benevolent? Merely encoding GKN Driveshaft does not make it *blanket* remedial and benevolent.
- What about expanded scope such as audit objections, 10 years limit etc. How is that remedial and benevolent?

Ashish Agarwal findings – Part 2

8. However, at the same time, the judgments of the several High Courts would result in no reassessment proceedings at all, even if the same are permissible under the Finance Act, 2021 and as per substituted sections 147 to 151 of the IT Act. ***The Revenue cannot be made remediless and the object and purpose of reassessment proceedings cannot be frustrated.*** ***It is true that due to a bonafide mistake*** *and in view of subsequent extension of time vide various notifications, the Revenue issued the impugned notices under section 148 after the amendment was enforced w.e.f. 01.04.2021, under the unamended section*

Ashish Agarwal observations - Part 3

8. …In our view the same ought not to have been issued under the unamended Act and ought to have been issued under the substituted provisions of sections 147 to 151 of the IT Act as per the Finance Act, 2021. There appears to be ***genuine nonapplication of the amendments as the officers of the Revenue may have been under a bonafide belief that the amendments may not yet have been enforced****. Therefore, we are of the opinion that* ***some leeway must be shown*** *in that regard which the High Courts could have done so.*

- Are the IT Act provisions interpreted in the lens of equitable justice ?
- Would assessee filing belated returns be given "leeway" to carry forward losses as he did not think those amendments aren't enforced?
- Hadn't SC recently said no leeway i.e., strict interpretation even for exemption provisions for assessee…..?

Ashish Agarwal findings – Part 4

*9. ……We have also proposed to **pass the aforesaid order in exercise of our powers under Article 142 of the Constitution of India** by holding that the present order shall govern, not only the impugned judgments and orders passed by the High Court of Judicature at Allahabad, but shall also be made applicable in respect of the similar judgments and orders passed by various High Courts across the country and therefore the present order shall be applicable to PAN INDIA.*

Ashish Agarwal Conclusion - Part 1

(i) The impugned section 148 notices issued to the respective assessees which were issued under unamended section 148 of the IT Act, which were the subject matter of writ petitions before the various respective High Courts **shall be deemed to have been issued under section 148A of the IT Act as substituted by the Finance Act, 2021 and construed or treated to be showcause notices in terms of section 148A(b).** The assessing officer shall, within thirty days from today provide to the respective assessees information and material relied upon by the Revenue, so that the assesees can reply to the showcause notices within two weeks thereafter;

Ashish Agarwal Conclusion – Part 2

(ii) The requirement of conducting any enquiry, if required, with the prior approval of specified authority under section 148A(a) is hereby dispensed with as a onetime measure visàvis those notices which have been issued under section 148 of the unamended Act from 01.04.2021 till date, including those which have been quashed by the High Courts. Even otherwise as observed hereinabove holding any enquiry with the prior approval of specified authority is not mandatory but it is for the concerned Assessing Officers to hold any enquiry, if required

Ashish Agarwal Conclusion – Part 3

(iii) The assessing officers shall thereafter pass orders in terms of section 148A(d) in respect of each of the concerned assessees; Thereafter after following the procedure as required under section 148A may issue notice under section 148 (as substituted);

(iv) ***All defences which may be available to the assesses including those available under section 149 of the IT Act*** *and all rights and contentions which may be available to the concerned assessees and Revenue under the Finance Act, 2021 and in law shall continue to be available.*

CBDT Instruction 1/2022: Let us interpret SC decision…in our own way!

6.1 …Hon'ble Supreme Court has upheld views of High Courts that benefit of new law shall be available even in respect of proceedings relating to past assessment years. Decision of Hon'ble Supreme Court read with the time extension provided by TOLA will allow extended reassessment notices to travel back in time to their original date when such notices were to be issued and then new section 149 of the Act is to be applied.

- The Instruction posts a peculiar interpretation to the decision of the Hon'ble Supreme Court?

CBDT Instruction 1/2022: Let us interpret SC decision…in our own way!

6.2 Based on above, the extended reassessment notices are to be dealt with as under:

(i) AY 2013-14, 2014-15 and 2015-16, fresh notices under Section 148 of the Act can be issued in these cases, with the approval of the specified authority, only if the case falls under clause (b) of sub section (1) of section 149 as amended by the Finance Act, 2021 and reproduced in paragraph 6.1 above. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (ii) of that section.

(ii) AY 16-17, AY 17-18: Fresh notice under section 148 can be issued in these cases, with the approval of the specified authority, under clause (a) of sub-section (1) of new section 149 of the Act, since they are within the period of three years from the end of the relevant assessment year. Specified authority under section 151 of the new law in this case shall be the authority prescribed under clause (i) of that section.

7.1 …However, it has also been noticed that notices cannot be issued in case of AY 2013-14, 2014-15 and AY 2015-16 if the income escaping assessment, in that case for that year, amounts to or is likely to amount to less than fifty lakh rupees.

- In short, only exclusion is para 7.1 above!

CBDT Instruction 1/2022 vs. S.149 (FA 2021)

149. (1) No notice under section 148 shall be issued for the relevant assessment year,—

(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);

(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of—

(i) an asset;

(ii) expenditure in respect of a transaction or in relation to an event or occasion; or

(iii) an entry or entries in the books of account,

which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more:]

Provided that ***no notice under section 148 shall be issued at any time*** *in a case for the relevant assessment year beginning on or before 1st day of April, 2021,* ***if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021:***

CBDT Instruction 1/2022 vs. S.149

Provided further that the provisions of this sub-section shall not apply in a case, where a notice under section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31st day of March, 2021:

Provided also that for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A or the period during which the proceeding under section 148A is stayed by an order or injunction of any court, shall be excluded:

Provided also that where immediately after the exclusion of the period referred to in the immediately preceding proviso, the period of limitation available to the Assessing Officer for passing an order under clause (d) of section 148A is less than seven days, such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.

Explanation.—For the purposes of clause (b) of this subsection, "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.

S.148A: What is the Correct interpretation?

- SC had categorically held that all the defences which may be available to the assessee under the substituted provisions of sections 147 to 151 and which may be available under the Finance Act, 2021 and in law can be taken by the assessee. Provision of S.149 is clear and cannot be done away by CBDT Instruction. Therefore, time limit as specified u/s.149 for issuance of notice u/s.148 must be seen on the date of issue of notice u/s.148?
- Therefore, in terms of proviso to new S.149, in an ideal world ☺
  - AY 2013-14, 2014-15 time-barred period of six years under erstwhile provisions would be 31.3.2020, 31.3.2021 and notices issued after these respective dates would not satisfy proviso to. S.149. [But TOLA extension will kick-in between 20-3-2020 till 30-6-2021?!]
- In terms of new S.149, for AY 2016-17, 2017-18 three year from end of AY is 31.3.2020, 31.3.2021 and notices issued after these respective dates would have to satisfy S.149(1)(b)

S.148A: Fallout of CBDT Instruction
6 year time-barring

- **Salil Gulati vs. ACIT (WP (C) 12541/2022 dated 31.8.2022 Del HC)**
  - Delhi HC dismisses Assessee's writ petition challenging reassessment proceedings under new regime for **AY 2013-14** wherein original notice issued under old regime on **June 23, 2021** and pursuant to SC ruling in Ashish Agarwal, notice under the new regime was issued on Jul 30, 2022.
  - Assessee challenged order passed on July 30, 2022 u/S. 148A and notice issued u/S. 148 for AY 2013-14 on ground that same is barred by limitation as Section 149(1)(a) & (b) (amended by FA 2021); Also that time limit for reassessment u/S.149(1)(b) under the old regime was six years and case for AY 2013-14 could not be opened u/S. Section 149(1)(b) under new regime as the said notices have already become time barred on March 31, 2020.
  - HC holds that subsequently, SC ruling in Ashish Agarwal considered notices issued between April 1, 2021 to June 30, 2021 as deemed to have been issued under Section 148A and accordingly, original reassessment notice issued on June 23, 2021 stood revived. With TOLA, 7years and 3 months for AY 13-14 u/s 148/148A!

"9. Consequently, since the time period for issuance of reassessment notice for assessment year 2013-14 stood extended until 30th June, 2021 and the income alleged to have escaped assessment is beyond Rs.50 lakhs, the first proviso of Section 149 (as amended by the Finance Act, 2021) is not attracted in the facts of this case and even without the benefit of Instruction No.01/2022 the impugned notice is within limitation."

S.148A: Fallout of CBDT Instruction

6 year time-barring

- **Touchstone Holdings vs. ITO (WPC 13102/2022 dated 9.10.22)**
  - AY 13-14, initial Notice 29th June 2021. WP of assessee dismissed.

"The contention of the petitioner that assessment for AY 2013-14 became time barred on 31st March, 2020 is incorrect. The time period for assessment stood extended till 30th June, 2021. The initial reassessment notice for AY 2013-14 has been issued to the petitioner within the said extended period of limitation. The Supreme Court has declared that the said reassessment notice be deemed as a notice issued under Section 148A of the Act and permitted Revenue to complete the said proceedings. In this case, the income alleged to have escaped assessment is more than 50 lakhs and therefore, the rigour of Section 149(1)(b) of the Act (as amended by the Finance Act, 2021) has been satisfied."

- **Vinayak Services Pvt. Ltd. vs ITO (WP (C) 12220/2022 dated 24.8.22)**
  - AY 14-15 Writ against 148A(d), notice dated 22nd July 2021 beyond 6 year period with extension being till 30th June 2021. AO can pass order but not give effect to it.

S.148A: Fallout of CBDT Instruction Beyond 3 years and < 50L

- **Geeta Agarwal Vs Income-tax Officer (Raj HC, 11.10.22)**

Sub-Notice u/s 148 issued on 26th July, 2022 for AY 2016-17 for income escaping Rs 8 lacs stayed in view of the same having been issued beyond three years from the end of the Assessment year for an amount of income escaping assessment below Rs 50 lacs.

- **Dinesh Kumar Goyal HUF vs ITO (WPA 20669 of 2022 Kol HC)**

AY 16-17 *"Considering the submission of the parties and admitted factual and legal position which appears on perusal of the impugned order dated 28th July, 2022, I am of the considered view that the aforesaid impugned order is bad and not sustainable in law and is liable to be quashed for the reason that the impugned notice under Section 148A(b) under the newly amended Act was issued after expiry of three years from the end of relevant assessment year and the alleged escapement of income is below Rs.50 lakh."*

- **Ajay Bhandari vs. UOI (WP 347/2022 dated 17.5.22)**
    - AY 14-15, Writ Petition quashed as income escaping < 50L.

S.148A cases: Current issues – "likely" Rs.50 lakhs
Abdul Majeed vs ITO (DB Civil WP 7853/2022 dated 29.6.2022)

On conjoint reading of the provisions contained in Section 148A of the Act and what has been provided under Section 149 of the Act, it is vividly clear that in order to initiate proceedings under Section 148A of the Act, it is not enough that in case where notice is proposed to be issued under Section 148 of the Act after three years have elapsed from the end of the relevant assessment year that ***there should exist material available on record to reach to conclusion that some income chargeable to tax has escaped assessment, but the amount should be more than Rs.50,00,000/-. Only on the basis that the cash deposits of Rs. 19,39,000/- chargeable to tax have escaped assessment, without anything more, the authority was not justified in jumping to the conclusion that the assessee may have more bank accounts.*** *If such an interpretation is placed on the provision of Section 148A (d) of the Act with reference to expression 'material available on record', then in that case,* ***it will open flood gate and even without availability of any material, the authority would be initiating proceedings under Section 148 of the Act, which will completely frustrate the object of incorporation of Section 148A in the Act.*** *It is well settled principle of interpretation that the taxing statute is required to be construed strictly. The interpretation as has been suggested by the learned counsel for the revenue cannot be placed upon the expression 'material available on record' to include possibility of collection of any relevant or tangible material for opening of proceedings under Section 148A of the Act.*

S.148A cases: Current issues – 148A(d) tangible material for S.143(1) assessment

(C) No.17235/2022 dated 14.10.2022

- SC dismisses SLP preferred by E&Y US LLP against Delhi HC judgment upholding reassessment proceedings for AY 18-19 under new regime
- Delhi HC followed SC ruling in *Rajesh Jhaveri* to uphold 148A(d) order and reiterated that it was not necessary for the Revenue to have some fresh tangible material to form a belief that income had escaped assessment where the Assessee's return was only processed under Section 143(1)
- HC also held that the Assessee could not demonstrate that the services of Rs.1.92Cr. rendered to Batliboi & Associates LLP during the relevant AY i.e., AY 2018-19 were similar/identical to the services rendered in the AY 2019-20, thus, denied the benefit of Article 15 of the India-US DTAA which was granted for AY 2019-20

S.148A cases: Current issues – old reassessment not completed, S.148A(b) issued
Nagesh Trading vs ITO (WPC 13781/2022 dated 12.10.2022 Delhi HC)

- For AY 17-18, notice issued under old regime on 31.3.2021 and assessee participated. 147 Order not passed within time being 31.3.2022. But new notice issued u/S 148A(b) on June 30 2022. Quashed by Delhi HC wherein it observed:

"5. Having heard learned counsel for the parties, this Court is of the view that the Respondent having issued and served the impugned notice on 31st March, 2021 under Section 148 of the unamended Act, could not have issued another notice under Section 148A(b) of the Act dated 2nd June, 2022 to the Petitioner.

6. Further the directions given by the Supreme Court in Ashish Agarwal (supra) were applicable to cases, where notices under Section 148 of the Act had been issued during the period 01st April, 2021 to 30th June, 2021 – which is not the case in the present matter"

S.148A cases: Current issues – 148A(b) vs 148A(d)

Excel Commodity and Derivative vs. UOI (APOT/132/2022 IA No GA/1/2022 dated 29.8.22 Kol HC)

- WP was disposed of by setting aside u/S. 148A(d) saying it is devoid of reasons and without any discussion on the contentions raised by the petitioner in their objections to the notice issued by AO u/S 148A(b)
- After having held so Single Bench remanded the matter back to the assessing officer to pass a fresh speaking order.
- Assessee went on Writ Appeal, HC held AO has *"given up the said allegation which formed the basis of the notice and proceeded on a fresh ground for alleging that the transaction with some other company was an accommodation entry."* WP allowed, direction issued by Single Bench remanding the matter is also set aside. Consequently, no further action can be taken by the department against the appellant/assessee on the subject issue.

S.148A cases: Current issues – "information" requirement Dr.Mathew Cherian & Others vs. ACIT(WP 12692….of 2022)

- Consultant Doctors were held to be salaried employees. S.148A proceedings initiated.
- **In a very detailed Order, the Madras HC quashed the proceedings.** Key & interesting point was the word "information" in S.148:

"S.148….Provided that no notice under this section shall be issued unless there is ***information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment*** *in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice:*

….Explanation 1.—For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,—

(i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;….."

S.148A cases: Current issues – "information" requirement Dr.Mathew Cherian & Others vs. ACIT(WP 12692….of 2022)

24. ….It is true that the proceedings for reassessment are only at the threshold. However, what is impugned before me is the ***assumption of jurisdiction for re-assessment under Section 148A****. The provision stands triggered only if the Income Tax Department is in possession of 'information', which suggests that income chargeable to tax has escaped assessment.*

28. No doubt, the definition of 'information' is wide and could include just about any material in the possession of the officer. However, the caveat/precondition is that ***such information must enable the suggestion of escapement of tax****. Then again, the mandate cast upon the officer under Section 148A(d) is that he is to decide whether it is a 'fit case' for issue of a notice for reassessment, upon a study of the material in his possession, including the response of the assessee.*

29. Thus, not all information in possession of the officer can be construed as 'information' that qualifies for initiation of proceedings for re-assessment, and it is only such 'information' that suggests escapement and which, based upon the material in his possession, that the officer decides as 'fit' to trigger reassessment, that would qualify.

30. The 'information' in possession of the Department must prima facie, satisfy the requirement of enabling a suggestion of escapement from tax. This is not to say that the sufficiency or adequacy of the 'information' just be tested, as such an analysis would be beyond the scope of jurisdiction of this Court in writ jurisdiction. However whether at all the 'information' gathered could lead to a suggestion of escapement from tax can certainly be ascertained.

S.148A cases: Current issues – “information” requirement
Dr.Mathew Cherian & Others vs. ACIT(WP 12692….of 2022)

31. For the purposes of such ascertainment and to determine 'fitness’ to re-assess, the materials gathered must be seen in the context of the allegation of tax evasion, taking assistance of decided cases to ascertain whether the allegation is sustainable or not. With the necessity for ‘belief’ effaced from the statutory provision, the dimension of subjectivity that existed pre 01.04.2021 stands substantially whittled

32. In the present regime of reassessments, an assessing officer must be able to establish proper nexus of information in his possession, with probable escapement from tax. No doubt the term used is ‘suggests’. That is not to say that any information, however tenuous, would suffice in this regard and it is necessary that the information has a live and robust link with the alleged escapement. This is where settled propositions assume relevance and importance.

…

84. The terms in the agreements before me compare very closely to those in the cases discussed in the preceding paragraphs and the conclusions of several Courts upon identical issues are equally applicable in these matters. ***In light of the discussion as above, I have no hesitation in holding that the ‘information’ in possession of the revenue does not, in light of the settled legal position discussed above, lead to the conclusion that there has been escapement of tax***

S.148A cases: Current issues – “information” under new regime
Divya Capital One vs ACIT (WP (c) 7406/2022 dated 12.5.2022 Delhi HC)

- Assessee challenges impugned order u/S 148A(d) as arbitrary, cryptic and without application of mind as a huge sum of Rs.10,07,05,88,04,543/- (!!!) is held to have escaped assessment without considering the return and business of the Petitioner. Assessee states there is no proper indication as to how income has escaped.

“8. This Court is further of the view that under the amended provisions, ***the term “information” in Explanation 1 to Section 148 cannot be lightly resorted to so as to re-open assessment. This information cannot be a ground to give unbridled powers to the Revenue.*** *Whether it is “information to suggest” under amended law or “reason to believe” under erstwhile law the benchmark of “escapement of income chargeable to tax” still remains the primary condition to be satisfied before invoking powers under Section 147 of the Act. Merely because the Revenue-respondent classifies a fact already on record as “information” may vest it with the power to issue a notice of re-assessment under Section 148A(b) but would certainly not vest it with the power to issue a re-assessment notice under Section 148 post an order under Section 148A(d). “*

S.148A cases: Current issues – “information” for initiating S.148
Divya Capital One vs ACIT (WP (c) 7406/2022 dated 12.5.2022 Delhi HC)

10. In fact, perusal of para 9 of the impugned notice dated 17th March, 2022 suggests that reassessment in the present case was sought to be initiated merely for verification. This Court is of the view that even if the re-assessment was being done for verification in accordance with Explanation 1 to Section 148, nothing prevented the Assessing Officer from conducting an enquiry with respect to the said information in accordance with Section 148A(a) of the Act. In any event, it was all the more necessary in the present case for the Assessing Officer to thoroughly scrutinise the contentions and submissions advanced by the petitionerassessee before passing an order under Section 148A(d) of the Act

15. In fact, this Court in ***Fena Pvt. Ltd. vs. ACIT Circle 7-1 & Anr. In W.P.(C) 6553/2022*** *had quashed the order passed under Section 148A(d) of the Act in similar circumstances i.e.* ***where Assessing Officer had not taken into consideration the replies along with the documents/evidences filed by the assessee before passing the order under Section 148A(d).***

S.148A cases: Current issues – “information” for initiating S.148
Divya Capital One vs ACIT (WP (c) 7406/2022 dated 12.5.2022 Delhi HC)

“SIGNIFICANCE OF ISSUANCE OF A SHOW CAUSE NOTICE AT A STAGE PRIOR TO ISSUANCE OF A REASSESSMENT NOTICE UNDER SECTION 148 OF THE ACT HAS BEEN LOST ON THE RESPONDENTS.

16. This Court is of the opinion that significance of issuance of a show cause notice at a stage prior to issuance of a reassessment notice under Section 148 of the Act has been lost on the Respondents. This Court takesjudicial notice that in a majority of reassessment cases post 1st April, 2021, the orders under Section 148A(d) of the Act use a template / general reason to reject the defence of the assessee on merits, namely, “found devoid of any merit because the assessee company has failed to produce the relevant documents in respect of transactions mentioned in show cause notice……..it is established that the assessee has no proper explanation……” Consequently, this Court is of the opinion that a progressive as well as futuristic scheme of re-assessment whose intent is laudatory has in its implementation not only been rendered nugatory but has also had an unintended opposite result.”

S.148A: Current issues…. surprising decisions on S.148A(d) writability

- ***Red Chilli International Sales vs. ITO (CWP No 10073 of 2022 dated 2.6.2022)***
- ***Midland Microfin Ltd vs UOI & Ors. (CWP No 10583 of 2022 dated 7.7.2022)***
- ***Gian Castings Pvt. Ltd vs CBDT & Ors. (CWP No 9142 of 2022 dated 2.6.2022)***
  - SLP dismissed 17.6.2022! Non-speaking
- In a parallel universe ☺, not even referring to GKN Driveshaft, P&H Writs have held that 148A(d) is premature for Writ (!!!)
  - GKN Driveshaft has been codified in 148A(b) – (d). 148A(d) serves as the speaking order disposing objections. Beyond that there is no requirement for an order to be passed till the final 147 Order; only information collected and enquiries made. If final 147 Order is passed then appellate remedy argument, thus 148A(d) with 148 notice is Writable
  - Thousands of Writ's have been adjudicated – allowed, dismissed, disposed off against 148A(d) already!

S.148A: Current issues
Gian Castings Pvt. Ltd vs CBDT & Ors. (CWP No 9142 of 2022 dated 2.6.2022)

- 148A(b) issued on 9.3.2022 for AY e. 2018-19 claiming that the information with the authorities suggests that the income chargeable to the tax for the assessment year escaped the The explanation offered by the petitioner was rejected vide order dated 31.3.2022 u/S 148A(d).
- *"The Petitioner has approached this Court seeking writ of certiorari against the proceedings initiated under Section 148A(b) for the assessment year 2018-19 finally culminating in the notice issued under Section 148 of the Act "*
  - *"Whether at this stage of notice under Section 148, writ Court should venture into the merits of the controversy when AO is yet to frame assessment/reassemment in discharge of statutory duty casted upon him under Section 147 of the Act ?"*

S.148A: Current issues
Gian Castings Pvt. Ltd vs CBDT & Ors. (CWP No 9142 of 2022 dated 2.6.2022)

"12. Thus, the consistent view is that where the proceedings have not even been concluded by the statutory authority, the writ Court should not interfere at such a pre-mature stage. Moreover it is not a case where from bare reading of notice it can be axiomatically held that the authority has clutched upon the jurisdiction not vested in it. By now it is well settled that there is vexed distinction between jurisdictional error and error of law/fact within jurisdiction. For rectification of errors statutory remedy has been provided.

13. In the light of aforesaid settled proposition of law, we find that there is no reason to warrant interference by this Court in exercise of the jurisdiction under Article 226/227 of the Constitution of India at this intermediate stage when the proceedings initiated are yet to be concluded by a statutory authority. Hence, the instant writ petition stands dismissed."

S.148A: Current issues
Anshul Jain vs PCIT (SLP (c) 14823/2022, 2.9.22)

"What is challenged before the High Court was the re-opening notice under Section 148A(d) of the Income Tax Act, 1961. The notices have been issued, after considering the objections raised by the petitioner. If the petitioner has any grievance on merits thereafter, the same has to be agitated before the Assessing Officer in the re-assessment proceedings. Under the circumstances, the High Court has rightly dismissed the writ petition. No interference of this Court is called for"

- HC noted that challenge to Section 148A(d) order was on a factual premise contending that jurisdiction though vested has been wrongly exercised and held that for rectification of errors statutory remedy exists in law [!!]

Point to ponder

- S.149(1)(b) w.e.f 1-4-22 reads

(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of—

(i) an asset;

(ii) expenditure in respect of a transaction or in relation to an event or occasion; or

(iii) an entry or entries in the books of account,

which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more:]

Explanation.—For the purposes of clause (b) of this subsection, "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.

- Definition changed in FA 2022 w.e.f 1-4-22 expanded. So if reassessment proceedings were initiated in fiscal 2021-2022 initial definition of asset holds?
- Asset definition says “shall include”, is it exhaustive ?

Analysis of SC's landmark judgment on Benami Transactions (Prohibition) Amendment Act, 2016

UOI vs. M/s. GANPATI DEALCOM PVT. LTD.

CIVIL APPEAL No. 5783 of 2022[@ SLP (C) NO. 2784/2020]

23.8.2022

Vikram Vijayaraghavan, Advocate

Subbaraya Aiyar, Padmanabhan & Ramamani Advocates

Crux of the issue

- The term ‘benami transaction’ generally implies that one purchases the property in the name of somebody else, i.e., a name lender, and the purchaser does not hold beneficial interest in the property.
- Literally, ‘benami’ means ‘without a name’.
  - The simplest example is if person ‘A’ (real owner) purchases a property from ‘B’ in the name of ‘C’ (benamidar/ostensible owner), wherein ‘A’ exercise rights/interest over the property.
- Benami Act 1988 was amended (extensively!) by Benami Transactions (Prohibition) Amendment Act, 2016.
  - **Is the 2016 Act prospective?**

Question of law involved?

The short legal question which arises for this Court's consideration is whether the Prohibition of Benami Property Transactions Act, 1988 [for short 'the 1988 Act'], as amended by the Benami Transactions (Prohibition) Amendment Act, 2016 [for short the '2016 Act'] has a prospective effect

- Is the 2016 Act prospective?
- Judgment went well beyond that in its search for the answer!

Landmark Judgment

- How do we know it's a landmark judgment? ☺

First rule is initial lines read like a classic opening to an English Novel!

"This case involves a tussle between the normative and positivist positions regarding the nature of a crime and punishment. Treating the Constitution as a flag post, a result of this tussle is sought in the following deliberation. "

Just kidding…!

Facts of the case - 1

- On 02.05.2011, the respondent co purchased property in for total consideration of Rs.9,44,00,000/.- paid from the capital of the company.
- On 31.03.2012, 99.9% of the respondent co were acquired by two other companies at a discounted price of Rs.5/ per share for a total amount of Rs.19,10,000/- !!
- Two directors of respondent Co (Goenka's) also held directorship in the subsequent purchaser company.
- On 29.08.2017, the DCIT issued notice to the respondent–co invoking Section 24(1) of the 2016 Benami Amendment Act to show cause as to why aforesaid property should not be considered as **Benami property** and the respondent co as **Benamidar** as per Section 2(8) of the 2016 Act.

Facts of the case - 2

- Respondent Co replied denying that the scheduled property is a Benami property.
- Adjudicating Authority, by order dated 24.11.2017, passed an order under Section 24(4)(b)(i) of the 2016 Act, provisionally attaching the property.
- Respondent Co filed a Writ (being W.P. No.687 of 2017) in Kol HC. The aforesaid WP was disposed of by Single Judge by an order dated 18.12.2018 with a direction to the Adjudicating Authority to conclude the proceedings within 12 weeks.
- Respondent Co filed a Writ Appeal being APO No. 8 of 2019. High Court, vide impugned order dated 12.12.2019, while quashing the showcause notice dated 29.08.2017, held that the 2016 Act does not have retrospective application.
- **Thus, Revenue was petitioner in SLP before SC in this case**

What did the HC hold? - Part 1

(i) The 2016 Amendment Act, which came into force on 01.11.2016, was a new and substantive legislation, inter alia, substituting and widening the definition of 'benami property and benami transaction', and in order to have retrospective operation for the period or transactions entered into prior to 01.11.2016, a provision to that effect should have been specifically providing under the said Act; in the absence of any express provision to that effect, simply by virtue of the provisions contained in subsection (3) of Section 1 of the 1988 Act [which remained unaltered by the 2016 Amendment Act, and have consequently been retained under the Benami Act], the provisions of the 2016 Amendment Act cannot be impliedly construed as retrospective;

What did the HC hold? – Part 2

(ii) HC made reliance on unreported ruling of the Single Judge of the Raj. HC dated 12.07.2019 in the case of ***Niharika Jain v. Union of India [S.B.C.W.P. No. 2915/2019],*** wherein, following the ruling of Single Judge of the Bombay HC in the case of ***Joseph Isharat v. Mrs. Rozy Nishikant Gaikwad [S.A. No. 749/2015; decided on 01.03.2017/30.03.2017],*** it was held that in terms of the protection enshrined under clause (1) of Article 20 of the Constitution of India, the 2016 Amendment Act, amending, inter alia, the definition of "benami transaction", could not be given retrospective effect

Reliance also placed on SC in the case of ***Rao Shiv Bahadur Singh vs. State of Vindhya Pradesh, AIR 1953 SC 394***

What did the HC hold? – Part 3

(iii) The 1988 Act, which came into force on 19.05.1988 [except Section 3, 5 and 8 thereof which came into force on 05.09.1988], provided for punishment for persons entering into a "benami transaction", **being noncognizable and bailable**, and also however, provided for acquisition of property held to be benami; provisions of the 1988 Act, were never operationalized since the rules and procedure required to be framed under Section 8 of the said Act bringing into existence the machinery for implementation of the 1988 Act, were never notified – therefore, although 1988 Act was part of statute book, the same was rendered "dead letter", and all txns and properties alleged 'benami', carried out / acquired between the period of 19.05.1988 and 01.11.2016, were deemed to have been accepted by the Government as valid 'vesting rights' in the parties to such alleged transactions; ergo, the CG having waived its right of implementation and operationalisation of 1988 Act cannot now do so indirectly by way of retrospective operation of the 2016 Amendment Act.

Some things we need to know first….
Article 20 of the Constitution

Article 20. Protection in respect of conviction for offences

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence

(2) No person shall be prosecuted and punished for the same offence more than once

(3) No person accused of any offence shall be compelled to be a witness against himself

Some things we need to know first….
What is a Benami Transaction

- This SC decision succinctly describes what is a Benami Transaction in terms of jurisprudence

"13.3 Eventually, there developed two loose categories of transactions that were colloquially termed as benami, which can be explained through the following examples:

(i) Tripartite: 'B' sells a property to 'A' (real owner), but the sale deed mentions 'C' as the owner/benamidar.

(ii) Bipartite: 'A' sells property to 'B' without intending to pass the title to 'B'.

The first instance was usually termed as a real benami transaction, and the second transaction was considered either as a sham transaction or "loosely" benami transaction."

Some things we need to know first....
What is a Benami Transaction

- In ***Sree Meenakshi Mills Ltd. v. Commissioner of Income Tax, Madras, AIR 1957 SC 49***, speaking for the Bench, Venkatarama Ayyar, J., stated that the first category of transactions is 'usually' termed as benami, while the second category is 'occasionally' considered a benami transaction. He added that it is "perhaps not accurately so used".
- In ***Thakur Bhim Singh v. Thakur Kan Singh, AIR 1980 SC 727***, Venkataramiah, J. straightway called the first category as benami but chose to describe the second category as "loosely" termed benami.

Some things we need to know first….
THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 [“1988 Act”]

2. Definitions- In this Act, unless the context otherwise requires,--

(a) benami transaction means any transaction in which property is transferred to one person for a consideration paid or provided by another person; [!!!!!]

(b) prescribed means prescribed by rules made under this Act;

(c) property means property of any kind, whether movable or immovable, tangible or intangible,

and includes any right or interest in such property.

3. Prohibition of benami transactions- (1) No person shall enter into any benami transaction.

(2) Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife of the unmarried daughter.

(3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this section shall be non-cognizable and bailable.

Some things we need to know first....
THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 ["1988 Act"]

7. Repeal of provisions of certain Acts- (1) Sections 81, 82 and 94 of the Indian Trusts Act, 1882 (2 of 1882.), section 66 of the Code of Civil Procedure, 1908 (5 of 1908.) and section 281A of the Income-tax Act, 1961 (43 of 1961.), are hereby repealed.

8. Power to make rules- (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) the authority competent to acquire properties under section 5;

(b) the manner in which, and the procedure to be followed for, the acquisition of properties under section 5;

(c) any other matter which is required to be, or may be, prescribed.

(3) Every rule made under this Act shall be laid, so soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Some things we need to know first….
THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 [“1988 Act”]

4. Prohibition of the right to recover property held benami- (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,--

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

5. Property of benami liable to acquisition- (1) All properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure as may be prescribed.

(2) For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1).

6. Act not to apply in certain cases- Nothing in this Act shall affect the provisions of section 53 of the Transfer of Property Act, 1882 (4 of 1882.), or any law relating to transfer for an illegal purpose.

Some things we need to know first….

THE BENAMI TRANSACTIONS (PROHIBITION) AMENDMENT ACT, 2016 [“2016 Act”]

Chapter	Sections	Highlight
Chapter I – Preliminary	S.1-2	**S.2(9) benami transaction hugely expanded S.2(9A) – S.2(9D)**
Chapter II – Prohibition of Benami Transactions	S.3-6	***“S.5. Any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government.”***
Chapter III - Authorities	S.7-23	Adjudicating Authority and its functioning laid out in detail
Chapter IV – Attachment, adjudication and confiscation	24-29	**S.27 is key section dealing with Confiscation and Vesting of nenami property**
Chapter V – Appellate Tribunal	30-49	
Chapter VI – Special Courts	50-52	
Chapter VII – Offences and Prosecution	53-55	*S.53. (1) Where any person enters into a benami transaction* ***in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors****, the beneficial owner, benamidar and any other person who abets or induces any person to enter into the benami transaction, shall be guilty of the offence of benami transaction.* *(2) Whoever is found guilty of the offence of benami transaction referred to in sub-section (1) shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to 25% of the fair market value of the property*
Chapter VIII – Miscellaneous	56-72	

SC : Benami Jurisprudence & Acts prior to 1988

- SC referred to ***Jaydayal Poddar v. Bibi Hazra, AIR 1974 SC 171***, which laid down a test to determine whether a transaction is benami or not.

(i) The source from which the purchase money came;

(ii) The nature and possession of property after purchase;

(iii) Motive, if any, for giving the transaction a benami colour;

(iv) The position of the parties and the relationship, if any, between the Claimant and the alleged Benamidar.

(v) The custody of the titledeeds after the sale, and

(vi) The conduct of the parties concerned in dealing with the property after the sale.

SC : Benami Jurisprudence & Acts prior to 1988

- **The judiciary came to establish the general principle that in law, the real owner is recognized over the ostensible owner**.
- This principle had certain statutory exceptions, albeit limited, such as
  - Section 66 of Civil Procedure Code, 1908 with respect to properties wherein sale certificates are issued by courts; and
  - Section 281A of the Income Tax Act, 1961, which allows filing of suit by the original owner to enforce his right over a benami property, only if the same is declared for taxing purpose, as provided thereunder. Such provision under the Income Tax Act did not bar such benami transactions completely, rather it only attempted to legitimize and bring them into the net of taxation.
  - Further, it is a matter of fact that the Indian Trusts Act has recognized and accepted the principle behind benami transactions.

SC's decision : Role of Law Commissions wrt Benami Transactions

- SC decision referenced and relied on Law Commission Reports on Benami Transactions heavily
- **57th Report of the Law Commission (1973) relied on by SC read as under:**

"5.2 Summary of present position in general

A few basic points concerning benami transactions may be stated, as follows:

(a)Benami transfer or transaction means the transfer by or to a person who acts only as the ostensible owner in place of real owner whose name is not disclosed;

(b)The question whether such transfer or transaction was real or benami depends upon the intention of the beneficiary;

(c) The real owner in such cases may be called the beneficiary, and the ostensible owner the benamidar.

5.3. Effect of benami transfer. *The effect of a benami transfer is as follows:*

(a)A person does not acquire any interest in property by merely leading his name;

(b)The benamidar has no beneficial interest though he may represent the legal owner as to third person.

(c)A benami transaction is legal, except in certain specified situations.

SC's Benami decision : Role of 57th Law Commission Report

- Law Commission, through its aforementioned 57th Report, did not find it suitable to accept the stringent provision of making benami transactions liable to criminal action. Rather, it recommended adoption of certain less stringent, civil alternatives
- In 1978, the Indian Parliament took a drastic measure and did away with this fundamental right to property and relegated the same to a constitutional right under Article 300A.
- Further, it was an era during which India pursued 'socialism', which was also included in the Preamble of the Constitution through the 42nd (Amendment) Act in 1976. Successive judicial opinions in ***Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225*** etc., viewed the right to property as a stumbling block in the path of achieving social goals that the government of the time aspired to.

SC's Benami decision : Role of 130th Law Commission Report

- In 1988, an Ordinance – The Benami Transactions (Prohibition of the Right of Recover Property) Ordinance, 1988 was promulgated. This statutory instrument being not satisfactory, it was referred to Law Commission again!
- In any case, the issue was reexamined by the Law Commission in the year 1988 through its 130th Report Although the Law Commission characterized the 130th Report as a continuation of its earlier recommendations, **it can be observed that some radical changes were suggested.**

SC's Benami decision : Role of 130th Law Commission Report

- Suggested extensive coverage of proposed legislation by encompassing property of every denomination (movable, immovable, tangible, intangible)
- Addressed lacuna in tax laws which recognized modus operandi such as irrevocable PoA with possession was used to violate rules such as Delhi Development Authority and other co-operative societies where transfer was prohibited.

"4.6 The Law Commission would like to make it very clear that some of provisions of the tax laws may become anachronistic because of the present approach of the law commission. This is inevitable. The tax laws were enacted at the time when benami was a part of Indian law. Such laws would have to conform to the changing legal order"

SC decision – 1988 Act Analysis

- Merely 9 Sections(!!) , Section 2(a) defines Benami Transaction simply
- Includes only tripartite transactions not bipartite/loosely defined benami were left out.
  - Further, SC said reading bipartite/sham transactions into 1988 definition would amount to *judicial overreach*
- SC disapproved of the 1988 Act definition saying it does not capture the essence of benami transactions as the broad formulation includes certain types of legitimate transactions as well!
- SC pointed out the transferee/property holder's lack of beneficial interest in the property was a vital ingredient, settled by years of judicial pronouncements and common parlance, found to be completely absent in definition given in the 1988 Act.

SC decision – Disapproval of 1988 Act
1. S 2(a) poorly worded

- SC says 1988 Act's S.2(a) will prohibit legitimate transactions like:

(a)'A' purchases property in name of his son's wife 'B', for the benefit of the son's family from person 'Y', treats the consideration as a gift to the son, and pays gift tax on it.

(b)'A' who is old and infirm, purchases a property in the name of 'B', intending that 'B' will hold the property in trust of the son of 'A', who is mentally retarded.

(c) A firm 'X' purchases property in the name of the working partner 'B' for the benefit of the firm 'X', making the payment out of the firm's funds.

- Section 3 puts forth a prohibitive provision. Further, it intended to criminalize an act of entering into a benami transaction. Section 5 was never utilized as it was felt that there was requirement of additional statutory backing to make the law effective.
- Section 6 provided that nothing in the 1988 Act will affect Section 53 of the Transfer of Property Act or any law relating to transfers for an illegal purpose. The object of Section 6 was to vest ownership rights in benamidars as opposed to the real owner. 1988 Act was not meant to protect such persons from creditors and so S.6 limited S.4.

SC decision: You said it.....

- The main thrust of Dept. argument was that the amended 2016 Act only clarified the 1988 Act.
- It was argued 1988 Act had already created substantial law for criminalizing the offence and the 2016 amendments were merely clarificatory and procedural, to give effect to the 1988 Act.
- SC uses this to drop an atom bomb☺ *"Such a submission mandates us to examine the law of the 1988 Act in detail and determine the scope of the earlier regime to understand as to whether the 2016 amendments were substantive or procedural."*

SC decision – Disapproval of 1988 Act
1988 Act S.3 lacks Mens Rea!

"Reading Section 2(a) along with Section 3 makes one thing clear – the criminal provision envisaged under the aforesaid provisions does not expressly contemplate mens rea"

- Mens rea may be excluded from a statute only where absolutely clear that implementation of object of statute would otherwise be defeated. *(Nathulal v. State of MP, AIR 1966 SC 43)*
- SC points out mens rea specifically considered by 57th Law Commission Report, mentioned in 130th LC Report. But seems to be not integrated into 1988 Act.
- SC says 1988 Act *"envisaged on* ***touchstone of strict liability****.... had left* ***loose ends*** *in the 1988 Act .... The* ***prosecution would only have to prove only that consideration was paid or consideration was provided by one person for another person and nothing more.*** *In all the judicial precedents, this Court has had the occasion to examine this legislation on the civil side and never on the criminal side, which would bear a higher standards. Conflation of the ingredients under Section 3(1) and (2) with those of Section 4, to forcefully implied mens rea, cannot be accepted."*

SC decision – Disapproval of 1988 Act
Are 1988 Act S.3 and 5 constitutional? - Part 1

"There is no doubt that the unamended 1988 Act tried to create a strict liability offence and allowed separate acquisition of benami property. This begs the question whether such a criminal provision, which the State now intends to make use of, in order to confiscate properties after 28 years of dormancy, could have existed in the books of law. Other than the abuse and unfairness such exercise intends to bring about, there is a larger constitutional question about existence of such strict provisions without adequate safeguards."

SC decision – Disapproval of 1988 Act
1988 Act S.3 & 5 constitutionality – Part 2

15.1 The simple question .... is whether the amended 2016 Act is retroactive or prospective. Answering the above question is inevitably tied to an intermediate question as to whether the 1988 Act was constitutional in the first place. The arguments addressed by the Union of India ***hinges on the fact that the 1988 Act was a valid substantive law****, which required only some gap filling through the 2016 Act, to ensure that sufficient procedural safeguards and mechanisms are present to enforce the law. According, to the UoI, the 2016 Act was a mere gap filling exercise*

15.2 However, upon studying the provisions of the 1988 Act, we find that ***there are questions of legality and constitutionality which arise with respect to Sections 3 and 5 of 1988 Act. <u>The answers to such questions cannot be assumed in favour of constitutionality, simply because the same was never questioned before the Court of law.</u>***

SC decision – Disapproval of 1988 Act
1988 Act S.3 & 5 constitutionality – Part 3

- **<u>Doctrine of Manifest Arbitrariness</u>** applied to S.3 & 5 of 1988 Act:
  - Lacks mens rea. (Which the SC points out 2016 Act brings back in S.53!)
  - Poor definition by ignoring beneficial ownership exercised by real owner
  - Accepted fact that criminal provision was never utilized as there was significant hiatus in enabling functioning of such a provision.
  - S.2(a) with S.3(1) *if accepted* would create overly broad laws susceptible to challenge on grounds of manifest arbitrariness, for example:
    - S.187C of Companies Act nominal and beneficial holding of shares are at risk
    - Benami cooking gas connections regularized from time to time at risk
    - Housing colones and benami allotments of DDA regularized from time to time at risk
  - Criminal provision under Section 3(1) of 1988 Act has serious lacunae. Could not been cured by judicial forums, even through harmonious interpretation. *"A conclusion contrary to the above would make the aforesaid law* ***suspect to being overly oppressive, fanciful and manifestly arbitrary, thereby violating the 'substantive due process' requirement of the Constitution."***

SC decision – Disapproval of 1988 Act
1988 Act S.3 & 5 constitutionality – Part 4

- Section 5 of the 1988 Act, was conceived as a **"halfbaked provision"**☺ which did not provide the following and rather left the same to be prescribed through a delegated legislation:

(i) Whether the proceedings under Section 5 were independent or dependant on successful prosecution?

(ii) The standard of proof required to establish benami transaction in terms of Section 5.

(iii) Mechanism for providing opportunity for a person to establish his defence.

(iv) No 'defence of innocent owner' was provided to save legitimate innocent buyers.

(v) No adjudicatory mechanism was provided for.

(vi) No provision was included to determine vesting of acquired property.

(vii) No provision to identify or trace benami properties.

(viii) Condemnation of property cannot include the power of tracing, which needs an express provision.

Such delegation of power to the Authority was squarely excessive and arbitrary as it stood. From the aforesaid, the Union's stand that the 2016 Act was merely procedural, cannot stand scrutiny.

SC decision – Disapproval of 1988 Act
1988 Act S.3 & 5 constitutionality – Part 5

The gaps left in the 1988 Act were not merely procedural, rather the same were essential and substantive. In the absence of such substantive provisions, the omissions create a law which is fanciful and oppressive at the same time. Such an overbroad provision was manifestly arbitrary as the open texture of the law did not have sufficient safeguards to be proportionate.

15.22 From the above, Section 3 (criminal provision) read with Section 2(a) and Section 5 (confiscation proceedings) of the 1988 Act are overly broad, disproportionately harsh, and operate without adequate safeguards in place. Such provisions were stillborn law and never utilized in the first place. In this light, this Court finds that Sections 3 and 5 of the 1988 Act were unconstitutional from their inception.

15.23 Having said so, we make it abundantly clear that the aforesaid discussion does not affect the civil consequences contemplated under Section 4 of the 1988 Act, or any other provisions.

SC decision: 2016 Act

- After having destroyed the 1988 Act's constitutionality viz a viz. S.3 and S.5, the SC turns its attention to S.2016 Act arguments!
- 2016 is a hugely expanded Act : 72 sections, 8 chapters! Very definition of Benami Transaction under S.2(9) underwent a huge metamorphis:
  - Expansion of the definition from arm's length transactions contemplated under the 1988 Act, to arrangements and schemes.
  - Additional ingredient of benefits flowing to the real owner under 1988 Act, is included in terms of Section 2(9)(A)(b).
  - Expansion of the ambit through Section 2(9)(C), to those properties where benamidar denies knowledge of such ownership.
  - Expansion of the ambit through Section 2(9)(D), wherein the person providing the consideration is not traceable or is fictitious.
  - Expansion to also include bipartite transactions ignored by 1988 Act.

SC: Can S.3(1) and Chapter IV r.w S.5 of 2016 Act have retrospective effect?

- **UoI argued the following:**
  1. That the 1988 Act was a valid enactment with procedural gaps that were filled retrospectively by the 2016 amendment.
  2. That the provision of confiscation (civil forfeiture) under the 1988 Act, being in the domain of civil law, is not punitive and therefore, the prohibition under Article 20(1) of the Constitution is not attracted in this case.
- **As we have seen, 1st argument above was thrown out by SC holding:**
  - Section 3(1) of 1988 Act is vague and arbitrary.
  - Section 3(1) created an unduly harsh law against settled principles and Law Commission recommendations.
  - Section 5 of 1988 Act, the provision relating to civil forfeiture, was manifestly arbitrary.
  - Both provisions were unworkable and as a matter of fact, were never implemented.

SC: Can Article 20(1) even be invoked?

- UoI argued that **civil forfeiture** being in the domain of civil law is **not punitive** in nature. It thus does not attract the prohibition under Article 20(1) of the Constitution. Meaning if SC holds that the civil forfeiture prescribed under the 2016 Act is punitive, only then will the prohibition under Article 20(1) apply.

"17.9 Although we have held that Section 5 of the 1988 Act was unconstitutional for being manifestly arbitrary, however such holding is of no consequence if this Court comes to the conclusion that confiscation under Section 5 of 2016 Act read with Chapter IV, was civil in nature and is not punitive."

SC: Can Article 20(1) even be invoked?

- Well settled that the legislature has power to enact retroactive/ retrospective civil legislations under the Constitution.
- However, Article 20(1) mandates that no law mandating a punitive provision can be enacted retrospectively.
  - A punitive provision cannot be couched as a civil provision to bypass Article 20(1) - *"what cannot be done directly, cannot be done indirectly"*.
- SC therefore considered whether the retroactive confiscation provided under S.5 r.w Chapter IV of 2016 Act is punitive or not?

SC: Are 2016 Act confiscation procedures punitive?

- Acquisition provided u/S.5 of 1988 is same as confiscation u/S.16 of 2016 - both concepts are related to civil law and not concerned with punitive punishments.
- Forfeiture in India:
  - Criminal: Punitive forfeitures *in personam;* typically at end of trial
  - Civil: *in rem* or *in personam*
- SC looked at 2016 Act and held S.27(3), S.5 and S.67 of the 2016 Act create a confiscation procedure which is distinct from CrPC or any other Act.
  - This separation of confiscation mechanism is not merely procedural.
  - Alters evidentiary rights from “beyond reasonable doubt” to “preponderance of probabilities”.

SC: Are 2016 Act confiscation procedures punitive?

- SC held there is an implicit recognition of the forfeiture being a punitive sanction, as the Officer is mandated to build a case against the accused for such confiscation, wherein the presumption of innocence is upheld structurally.
- SC further held 2016 Act now condemns not only those transactions which were traditionally denominated as benami, rather a new class of fictitious and sham transactions are also covered. It observed such proceedings cannot be equated as enforcing civil obligations as, for example, correcting deficiencies in the title. It goes further and the taint attaches to the proceeds as well.

SC: Are 2016 Act confiscation procedures punitive?

"17.37 In view of the fact that this Court has already held that the criminal provisions under the 1988 Act were arbitrary and incapable of application, the law through the 2016 amendment could not retroactively apply for confiscation of those transactions entered into between 05.09.1988 to 31.10.2016 as the same would tantamount to punitive punishment, in the absence of any other form of punishment. It is in this unique circumstance that confiscation contemplated under the period between 05.09.1988 and 31.10.2016 would characterise itself as punitive, if such confiscation is allowed retroactively."

- Brilliant point made that when confiscation is enforced retroactively, it would only for reason that continuation of such a property/instrument, would be dangerous for the community to be left free in circulation. But Benami transaction were accepted form of holding for so long!

SC held that without any effective enforcement proceedings for a long span of time, the rights that have crystallized since 1988, would be in jeopardy if 2016 Act were held to retrospective. *"Such implied intrusion into the right to property cannot be permitted to operate retroactively, as that would be unduly harsh and arbitrary."*

SC: Conclusion on Benami Act 2016 prospectivity!

a) S.3(2) of 1988 Act is declared as unconstitutional for being manifestly arbitrary. S.3(2) of 2016 Act is also unconstitutional as violative of Article 20(1) of the Constitution.

b) In rem forfeiture u/S.5 of 1988 prior to the 2016 Amendment Act, was unconstitutional for being manifestly arbitrary.

c) The 2016 Amendment Act was not merely procedural, rather, prescribed substantive provisions.

d) In rem forfeiture provision u/S.5 of 2016 Act, being punitive, is prospective.

e) No initiation or continue criminal prosecution or confiscation proceedings for transactions entered into prior to the coming into force of the 2016 Act (1.11.2016). All such prosecutions or confiscation proceedings shall stand quashed.

f) SC is not concerned with the constitutionality of such independent forfeiture proceedings contemplated under the 2016 Act on the other grounds, aforesaid questions are left open to be adjudicated in appropriate proceedings

Thanks!

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