

Ritu Khaitan Vs Deputy Director, Directorate Of Enforcement

Court: Appellate Tribunal Under Prevention Of Money Laundering Act

Date of Decision: Aug. 23, 2023

Acts Referred: Prevention Of Money Laundering Act, 2002 " Section 8(2), 26
 Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 " Section 3, 50, 51
 Income Tax Act, 1961 " Section 6(6), 276C(1)

Hon'ble Judges: Munishwar Nath Bhandari, Chairman; V. Anandarajan, Member

Bench: Division Bench

Advocate: A.T. Patra, Aditya Ghadge, Kumud Lata Das, Pooja Rathore

Final Decision: Allowed

Judgement

FPA-PMLA-3409/DLI/2020

1. By this appeal under section 26 of the Prevention of Money Laundering Act, 2002, (in short the Act of 2002), a challenge is made to the order

dated 12.12.2019 passed by the Adjudicating Authority confirming the Provisional Attachment Order (PAO) dated 17.06.2019.

2. The learned counsel for the appellant has given brief facts of the case and submitted that without there being a scheduled offence, the bank account

of the appellant in ICICI Bank, New Delhi has been attached. The allegation against the appellant is for commission of offence under section 51 of

the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (hereinafter referred to the "Black Money Act").

The allegations of commission of offence is without evasion of tax by the appellant. The order of provisional attachment was passed without

foundation yet ignored by the Adjudicating Authority.

3. Elaborating the facts, it is submitted that the allegations against the appellant was for having few bank accounts in the foreign banks and even a

company outside India said to have not been disclosed in the Return submitted after 1st April, 2016. The allegations were made ignoring the facts that

all the bank accounts out of India were closed in the year 2013 itself and even the company outside India was closed in the year 2014. As per the Act

of 2015, one was required to charge tax on the Undisclosed Foreign Income and Assets of the previous year from the date of enactment of the Act of

2015. The Assessment Year for the aforesaid is on or after first day of April, 2016.

4. In the assessment year on or after 1st April, 2016, the appellant had no foreign asset or income so as to be disclosed for payment of tax at the rate

of 30%. Thereby, there was no question of evasion of tax.

5. The respondent, Enforcement Directorate ignored the aforesaid while issuing sanction for offence under section 51 of the Act, 2015 and passing the

Provisional Attachment Order.

6. The facts in regard to the bank accounts and the foreign company would be elaborately disclosed in the later part of the judgement to find out

whether a predicate offence under section 51 of the Act, 2015 is made out or not.

7. The learned counsel for the appellant further submitted that the Adjudicating Authority has failed to pass an order in accordance to section 8(2) of

the Act of 2002. The findings recorded by the Adjudicating Authority shows a prima facie case of money laundering. He has not recorded firm

opinion for an offence of money laundering though required under section 8(2) of the Act.

8. Therefore, on the aforesaid grounds also, the impugned Provisional Attachment Order so also the order passed by the Adjudicating Authority

deserves to be set aside.

9. The appeal is seriously contested by the counsel for the respondent. He has supported the order passed by the Adjudicating Authority.

10. The learned counsel for the respondent submitted that during the course of investigation, it was found that the appellant was having various bank

accounts out of India and shares in a company. Many credit and debit transactions in those bank accounts were made but were not disclosed in the

income tax returns and thereby a case for violation of section of 276C (1) of the Income-Tax Act was made out. The prosecution in pursuance to it

was lodged separately. The appellant was also having shares in M/s Ismax International Limited. All the bank transactions were not disclosed under

the Act of 2015 and thereby a case of evasion of tax was made out. It may be that the bank accounts were closed from time to time and it was lastly

in the year of 2013 but money lying in, therein was laundered by the appellant and has not been disclosed even during the course of investigation. The

further investigation may reveal where the money was diverted by the appellant though the earlier transaction shows, transfer of money to many

foreign entities though prior to year 2013.

11. In view of the above, a case for an offence under section 51 of the Act of 2015 is made out. The appellant had failed to even disclose her interest

in M/s Ismax international Limited which may have been closed in the year 2014 and therefore the respondent has rightly recorded ECIR and

conducted the investigation.

12. Finding a case against appellant and apprehension of transfer of money, the order of (PAO) provisional attachment of the bank account was

passed. It has been confirmed by the Adjudicating Authority by passing a speaking order and thereby the impugned order be sustained.

13. The learned counsel for the respondent further contested the allegations in reference to section 8 (2) of the Act of 2002. It is submitted that the

Adjudicating Authority has recorded its findings. The appellant was involved in the case of money laundering and therefore confirmed the order of

provisional attachment. A prima facie case was found in reference to the offence but mis-construed by the appellant.

14. The prayer is accordingly to dismiss the appeal.

15. We have considered the rival submissions of the parties and scanned the matter carefully.

16. The facts on the record shows attachment of the bank account of the appellant in ICICI bank having a sum of Rs.7,49,302/- . The allegations

against the appellant is for commission of offence under section 50 and 51 of the Act of 2015.

17. At this stage, we may clarify that offence u/s 50 is not a scheduled offence. It is only u/s 51 of the Act of 2015.

18. For ready reference, section 51 of the Act, is quoted here under:-

“Punishment for wilful attempt to evade tax.

51. (1) If a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act,

wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall be punishable with

rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and with fine.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without

prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term

which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

(3) For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment

thereof shall include a case where any person—

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding

under this Act) containing a false entry or statement; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or

imposable under this Act or the payment thereof.Ã¢â€â€

19. The offence under section 51 would be made out when a person, being resident other than not ordinarily resident in India within the meaning of

clause (6) of section 6 of Income Tax Act willfully attempts in any manner whatsoever to evade any tax, penalties or interest chargeable or imposable

under Act of 2015. The offence under section 51 of the Act 2015 was added in Ã¢â€â€Part CÃ¢â€â€ to the schedule in the year 2015.

20. At this stage, it would be relevant to refer section 3 of Act 2015 and is quoted as follows:-

Ã¢â€â€Charge of tax.

3. (1) There shall be charged on every assessee for every assessment year commencing on or after the 1st day of April, 2016, subject to the

provisions of this Act, a tax in respect of his total undisclosed foreign income and asset of the previous year at the rate of thirty per cent of such

undisclosed income and asset:

Provided that an undisclosed asset located outside India shall be charged to tax on its value in the previous year in which such asset comes to the

notice of the Assessing Officer.

(2) For the purposes of this section ""value of an undisclosed asset"" means the fair market value of an asset (including financial interest in any entity)

determined in such manner as may be prescribed.Ã¢â€â€

21. Section 3 makes it obligatory for every assessee to pay Tax on undisclosed foreign income and assets at the rate of 30% for the assessment year

commencing on or after 1st April, 2016. The undisclosed foreign income and asset is to be of previous year and thereby any assets or income in the

previous year relevant to the Assessment Year commencing on or after 1st April 2016 was required to be charged to tax. In case of default, it may

amount to evasion of tax to make out an offence under section 51 of the Act of 2015.

22. In the legal background given above, we need to analyze this case. The facts available on the record shows that the appellant was having joint

account with her husband Mr. Gautam Khaitan and interest in the M/s Ismax International Limited. She was having three bank accounts out of India.

23. The one bank account was in Barclays bank, Singapore in her name and in the name of M/s Ismax International Limited. M/s Pasawee Ltd had

acquired one share of M/s Ismax International Limited. The other bank account in the name of M/s Ismax International Limited was in the Bank of

Singapore Ltd. The third bank account was in the Bank of Singapore in the name of the appellant and her husband. The facts available on record

shows debit and credit transactions in those bank accounts. But, all the three bank accounts were closed on or before 22nd May 2013. In fact, one

bank account was closed in the year 2011 itself.

24. So far as M/s Ismax international Limited is concerned, the search report obtained from BVI Services Commission, Registrar of Corporate Affairs

shows it to have been "Struck off and Dissolved" on 24.9.2014.

25. In the light of the aforesaid, the appellant was not under obligation to disclose the bank accounts and share holding in the Ismax International

Limited pursuant to Section 3 of Act, 2015 as the assets and income was not existing in the previous year relevant to the Assessment Year starting

from 01.04.2016.

26. The respondents have failed to bring on record any other material or facts to show that the said assets or income were existing with the appellant

ever in the relevant year to charge tax at the rate of 30%. The statement of fact recorded even by the Adjudicating Authority shows that the income

and asset out of India on or after 1st April, 2016 may be revealed on further investigation.

27. Thus, till the time of passing of provisional attachment order, the respondent were not having material to show that the appellant has evaded the

tax by not following section 3 of Act of 2015 and thereby offence under section 51 of the Act.

28. This should not be taken as comment on the prosecution under section 276 C(1) of the Income Tax Act. If the appellant had failed to submit

Return after disclosing all the income and assets in the return for the year 2013 or prior to it, as per the Income Tax Act, it may have its consequence.

An offence under the Income Tax Act is not a scheduled offence under the PMLA, 2002.

29. Therefore, the case under Income Tax would have to be separately considered and decided by the Competent Authorities and for which this order

would not be having any bearing. A case for offence under section 51 of the Act of 2015 would be made out when foreign assets and income existed

in the previous year relevant to the assessment year on or after 1st April, 2016.

30. Under section 3, word used is "previous year" and not "previous years". The term "previous year" has been defined under section

2(9) of the Act. A perusal of the said provision reveals that a "previous year", in any event, cannot be longer than a period of 12 months prior to

the commencement of the relevant assessment year, though it can be shorter in some instances, such as when a new business comes into existence or

in case of a business discontinued during the year. There is nothing in the present case to show that the appellant had any undisclosed foreign income

or held any undisclosed foreign asset on or after 01.04.2015 so as to attract the charge of tax under section 3 of the Black Money Act, 2015 which

came into existence with effect from assessment year 2016-17. Therefore, we are of the opinion that in absence of a schedule offence/predicate

offence, the allegation of money laundering would not be made out. Therefore, we cannot confirm the order rather for that provisional attachment

order dated 17.06.2019 and the order passed by the Adjudicating Authority dated 12.12.2019 deserves to be set aside.

31. The appellant has raised an issue in reference to section 8 (2) of the Act of 2015 also. In our opinion, there is no merit in the said argument and

otherwise on facts, we have recorded our opinion in favour of the appellant. Thus, we are not required to go deep in other issues.

32. In the result, the appeal is allowed. The impugned order of Adjudicating Authority dated 12.12.2019 and Provisional Attachment Order (PAO)

dated 17.06.2019 are set aside. This order would not preclude the respondents to take up the matter afresh if an offence under section 51 of the Act

of 2015 is made out on further investigation.