Benami Law- Jurisdictional issues

1. The Benami Transactions (Prohibition) Act, 1988 was enacted in 1988 and per its preamble, was enacted to prohibit benami transactions and to recover property held benami and for matters connected therewith. Section 3 of the Act prohibits benami transactions and makes the same punishable with imprisonment for a term extending to three years or with fine or with both. Section 4 of the Act prohibits enforcement of rights in any property held benami against the person in whose name the property is held. Section 5(1) makes all properties held benami subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribed. Section 5 (2) of the Act provides that no amount shall be payable for such acquisition. Section 8 authorised Govt. to make and notify rules and procedures for the purposes of the Act. However , Act was allowed to remain toothless and even the Central Government admitted its difficulties in this regard vide the counter affidavit filed before Delhi High Court in Shanmuga Patro vs Ministry of Finance on 20 April, 2012-W.P.(C) No. 5174/2011 admitting lacunae in the Provisions and that the power vested in the Central Government under Section 8 of the Act to make Rules for carrying out the purposes of the Act was not found to be sufficient for constituting the Authority and for prescribing the manner and procedure for acquisition of the property held benami.

2. The Benami Transactions (Prohibition) Amendment Act 2016 amended the old Act and was renamed as Prohibition of Benami Property Transactions Act, 1988 (PBPT) . The Scheme of the amended PBPT-1988 Act provides for 72 Sections covered under Eight Chapters and the Prohibition of Benami Property Transactions Rules, 2016 were also notified by the Government for the purposes of implementing the provisions of the Act. The present write up is an attempt to address only the jurisdictional issues .

3. S. 18 (1) provides for Authorities which are Initiating Officer; Approving Authority; Administrator; and Adjudicating Authority. Section 18(2), akin to s. 120(1) of Income Tax Act , provides that "The authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, as the case may be, to it under this Act or in accordance with such rules as may be prescribed." Quite curiously , no notification u/s 18(2) has been issued and this may have serious implications.

4. The IO and Approving Authority are claiming jurisdiction on the strength of the notifications NO. SO 3290(E0 Dated 25/10/2016 and 40/2017, dated: May 18, 2017 S.O. 1621(E). Both these notifications are issued ' In exercise of the powers conferred under sub-section (2) of section 28 read with section 59..'. Heading of S. 28 is 'Management of properties confiscated '. Sub-Section 28 (1) provides for powers to Administrator to receive and manage confiscated properties , while Section 28(2) envisages appointment of Administrators by Central Government. The plain reading of section 28 shows that section 28 has no bearing upon jurisdiction/ powers / functions of IO and Approving Authority.

5. On the other hand , section 59 confers powers upon Central Government to issue such orders, instructions or directions to the authorities or require any person to furnish

information as it may deem fit for the proper administration of this Act and such authorities and all other persons employed in execution of this Act shall observe and follow the orders, instructions and directions of the Central Government. Quite obviously, Section 59 is on the lines of Section 119 of Income Tax Act.

6. Important question for consideration is whether notifications issued under S. 28 can be construed to have conferred jurisdiction upon IO and Approving Authorities, which otherwise could have been conferred under section 18 . Answer to this question is most likely to be negative , in accordance with well settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it is to be done in that manner and in no other manner. It is settled Law that when two separate Provisions are enacted covering distinctly different purposes , one Provision cannot be taken as substitute for other. Contrary stand that the basic jurisdiction can be allotted u/s 28 , then the section 18(2) becomes completely redundant which is against all the known rules of interpretation. It was held by Supreme Court in Chief Information Commissioner v. State of Manipur [2011] 16 taxmann.com 189 (SC) that Sections 18 and 19 of the Right to Information Act, 2005 serve two different purposes and lay down two different purposes and procedures and they provide two different remedies, that One cannot be a substitute for the other and that any other construction would render the provision of section 19(8) totally redundant against well known canons of interpretation that no statute should be interpreted in such a manner as to render a part of it redundant or surplusage. It was held by the supreme court in Nathi Devi vs Radha Devi Gupta on 17 December, 2004 CASE NO.: Appeal (civil) 5027 of 1999 "*It is equally well settled that in interpreting a statute, effort should be made to give effect to each and every word used by the Legislature. The Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors. (See State of U.P. and others vs. Vijay Anand Maharaj: AIR 1963 SC 946; Rananjaya Singh vs. Baijnath Singh and others: AIR 1954 SC 749; Kanai Lal Sur vs. Paramnidhi Sadhukhan: AIR 1957 SC 907; Nyadar Singh vs. Union of India and others: AIR 1988 SC 1979; J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. State of U.P.: AIR 1961 S.C. 1170 and Ghanshyam Das vs. Regional Assistant Commissioner, Sales Tax: AIR 1964 S.C. 766).*" Madras High Court in Srinidhi Karti Chidambaram [2019] 411 ITR 1 (Madras) has considered catena of cases on the principle that no redundancy or surplusage to be attributed to Legislature.

7 . By the very nature of the matter , allocation of jurisdiction in a case under PBPT has to specify the basis for classification i.e. location of the benamidar or location of the real owner or location of the benami property under consideration, otherwise it would be free for all in chaotic manner. The Finance Ministry has been issuing jurisdiction orders under Income-tax Act, Excise, Service Tax etc. for decades and it is unconceivable that the Ministry would issue a bland order as is in of Notification NO. 40/2017, dated: May 18, 2017 S.O. 1621(E) and by Notification S.O. 2320 (E)-dated 25th July, 2017 , baldly mentioning only specified geographical territory . Obviously this Notification is in respect of the confiscated properties since in such matter, only criterion is location of property. Reference to section 2(18) of the PBPT Act 1988 (post amendment) is warranted whereby the jurisdictional High Court has

been defined on the basis of "the aggrieved party ordinarily resides or carries on business or personally works for gain;'.

8 . Reference is invited to CCE Vs SAYED ALI & ANR 2011-TIOL-20-SC-CUS. In this case, issue was whether Commissioner of Customs (Preventive), Mumbai, could be treated as a "proper officer" as defined in Section 2(34) of the Customs Act, when only such officers of customs who have been assigned specific functions would be "proper officers". Supreme Court held that *´From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions. Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officers". In our view therefore, it is only the officers of customs, who are assigned the functions of assessment, which of course, would include re-assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act……. We are convinced that Notifications No. 250-Cus and 251-Cus., both dated 27th August, 1983, issued by the Central Government in exercise of the powers conferred by subsection (1) of the Section 4 of the Act, appointing Collector of Customs (Preventive) etc. to be the Collector of Customs for Bombay, Thane and Kolaba Districts in the State of Maharashtra did not ipso facto confer jurisdiction on him to exercise power entrusted to the "proper officers" for the purpose of Section 28 of the Act. In that view of the matter, we do not find any substance in the contention of Mr. V. Shekhar, learned Senior Counsel, appearing for the revenue in the second set of appeals, that the source of power to act as a "proper officer" is Sections 4 and 5 of the Act and not sub-section 34 of Section 2 of the Act. The said sections merely authorize the Board to appoint officers of Customs and confer on them the powers and duties to be exercised /discharged by them, but for the purpose of Section 28 of the Act, an officer of customs has to be designated as "proper officer" by assigning the function of levy and collection of duty, by the Board or the Commissioner of Customs.*"

9 . It appears that authorities themselves were aware of the factum of issuing Notification under wrong provision and that this has created chaotic situation. To salvage, Standard Operating Procedure (SOP) was issued by the Investigation Division of the CBDT in F. No.414/63/2016-IT (Inv. I) dated 10.08.2017 as reproduced by ATS in Ace Infracity Developers Pvt. Ltd. Date of decision: 11.09.2019 - FPA-PBPT-464/MUM/2019 and reproduced below which unfortunately created more chaos :

"***4. Jurisdiction of the IO, Approving Authority and Administrator: Section 3(1) of Prohibition of Benami Property Transactions Act, 1988 states that no person shall enter into any benami transaction. The scheme of the Act revolves around consequences of violation of this section. It***

***is, therefore, appropriate that the jurisdiction is assumed by a BPU when any of the 3 limbs viz. benami transaction / property, benamidar or beneficial owner falls under its assigned territorial jurisdiction. In cases where the benami property/transaction, beneficial owner and/or benamidar are located in territorial jurisdictions of different BPUs, the BPU from which the first show cause notice u/s 24 of Prohibition of Benami Property Transactions Act has been issued shall assume jurisdiction over the case and shall intimate the other BPUs concerned regarding assumption of jurisdiction in that particular case involving benami property/transaction, benamidar and beneficial owner. Each benami transaction/property may be considered as a separate case. The BPU assuming jurisdiction in such a case shall ensure that the fact of assuming jurisdiction by it is brought to the notice of other BPUs concerned with a view to avoid multiple show cause notices/actions by other BPUs concerned in such a case*.**" **Firstly , CBDT itself does not appears to be authorised by PBPT to decide jurisdiction as Act confers most of the powers / functions upon of the Central Government and the Board has been referred only in very few provisions, precisely two i.e S.26 regarding qualification for Authorised Representative and S. 55 regarding prior sanction for launching prosecution. Secondly , with due respect , there can never be more chaotic order allocating jurisdiction on first come first serve basis.**

In summation , the issue of jurisdiction under PBPT requires sincere attention of concerned authorities to thwart unintended consequences in respect of all the proceedings already commenced on the strength of Notifications issued under section 28(2). It is pertinent to note that in order to overcome the situation created by the judgment of Hon'ble Supreme Court in the case of Sayed Ali (supra), subsequently, sub-section 11 was inserted under section 28 of the Customs (Amendment and Validation) Act, 2011 dated 16.9.2011, assigning the functions of proper officers to various DRI officers with retrospective effect & even this did not solve the problem as Delhi High Court in the case of Mangali Impex vs. Union of India 2016-TIOL-877-HC-DEL-CUS held that even the new inserted section 28 (11) does not empower either the officers of DRI or the DGCEI to issue the SCN for the period prior to 8.4.11. It is better to avoid such unnecessary legal complications .