

## BENAMI LAW – A FUNDAMENTAL ANALYSIS

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### Case No 2 – points that can be argued/ discussed before higher fora

- Issue of retrospectivity
  - Transaction pertains to 2011, is it legal to apply the *benami* law as amended in 2016 – issue discussed in PPT
  
- Reasons to believe
  - The IO has only relied on the findings of Income-tax Department – no enquiry conducted by him, though vast powers have been given to him under sections 19 to 23 of the PBPT Act – this amounts to borrowed satisfaction - IO ought to have made proper enquiries before recording the reasons to believe
  
  - Argument of IO is that the addition has been made under section 68 – IO failed to appreciate the difference between the income-tax law and *benami* law; more particularly, difference between section 68 of the IT Act and section 2(9) of the PBPT Act – section 68 is a deeming fiction (onus is on the assessee to prove the identity, creditworthiness and genuineness of the transaction) whereas section 2(9) requires a material positive evidence to prove the transaction to be *benami* (onus is on the person who asserts it (the IO, in this case)) – refer Supreme Court in the case of Mangathai Ammal vs Rajeswari [2019] 111 taxmann.com 275 and Fair Communication & Consultants vs Surendra Kardile [2020] 113 taxmann.com 377
  
- Holding immovable property as *benami* property
  - Since the proceeds from issue of equity shares were utilised for the purpose of acquiring immovable properties, IO held that the said immovable properties are properties in ‘converted form’ – **inherently flawed observation**: shares issued by J Ltd still exist with the shareholders and hence, it cannot be said that shares are converted into immovable properties  
(example of conversion: when debentures are converted into shares, debentures cease to exist)
  
  - Further, for a property to be a *benami* property, the legal owner and beneficial owner should be different – in this case, the Company is both, the legal owner and the beneficial owner; there is no *benamidar* – this fact is not in dispute – so how the IO could have held the immovable properties to be *benami*
  
  - At best, only the equity shares could have been held as *benami* property (Not that we should concede on this)

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  - The IO has borrowed the findings of the Anti-Corruption Bureau
- Approval under section 23
  - Though the IO made enquiries under section 23 after taking necessary approval, the approval was given by the Approving Authority in a mechanical manner, without any application of mind – the Approving Authority is required to apply his/ her own mind and record the same in writing before giving such approval – various Courts and Tribunals have dealt with the issue of approval under section 151 of the IT Act (which is required before issue of notice under section 148 – reopening of assessment)