APPELLATE TRIBUNAL UNDER SAFEMA AT NEW DELHI

MP-FE-88/DLI/2024 (Misc.)
MP-FE-384/DLI/2018 (Stay)
FPA-FE-112/DLI/2018

Shri Pradip Burman ... Appellant

Versus

The Special Director
Directorate of Enforcement, Delhi ... Respondent

Advocates/Authorized Representatives who appeared

For the appellant : Mr. Sudhir Makkar, Advocate
Mr. Ambar Bhushan, Advocate

For the respondent : Mr. Mahip Datta Parashar, Advocate
Mr. Rahul Mehta, Advocate

CORAM
SHRI V. ANANDARAJAN : MEMBER
SHRI RAJESH MALHOTRA : MEMBER

FINAL ORDER
18.07.2024

The present appeal is preferred by the Appellant against the impugned order dated 05.11.2018, passed by the Competent Authority confirming the provisional order dated 18.05.2018, seizing Government tax free bonds of the Appellant amounting to Rs. 20,93,96,000/- u/s 37A(1) vide the seizure order No. DLZO-II/S.0.1/37A/2018/DD (JPM)/558.

Facts in Brief:

2. The relevant facts of the case briefly are that secret information was received in the office of the Deputy Director, Directorate of Enforcement (FEMA,1999), that the Income Tax authorities have filed a criminal prosecution case against Sh. Pradip Burman S/o Late Sh. R.C. Burman, alleging that he had kept black money in foreign bank, i.e , HSBC Zurich, Switzerland. Acting on the same, the Directorate of Enforcement, Delhi Zonal Office, filed an application before Hon'ble Addl.

Chief Metropolitan Magistrate (Spl. Acts), Tis Hazari Courts, Delhi who, vide his order dated 11.09.2015 directed that a copy of prosecution complaint No. 70/4/2014, be given to the Directorate of Enforcement. After obtaining documents from the court, investigation was taken up by the Directorate of Enforcement.

3. Investigation carried out in this regard by the Directorate, revealed that the Sh. Pradip Burman had acquired USD 32,12,000/- outside India and had kept the said amount with Hong Kong and Shanghai Banking Corporation (HSBC), Zurich and had not repatriated the said amount to India till date. Inquiries were made with Sh. Pradip Burman by issuing summons for his appearance before the Dy. Director, Directorate of Enforcement. Sh. Pradip Burman, in his statement dated 13.07.2017 stated, inter-alia, that he was resident of Dubai from the period 1999 to Sep. 2001 and, thereafter, he has been permanent resident in India; that he had an account with HSBC, Zurich, Switzerland, but the said account stands closed; that he himself had declared this account and amount lying therein to the Income Tax Authorities vide letter dated 30.08.2011 and had paid applicable taxes on the balance lying in that account; that he had offered to pay Income Tax on this amount to buy peace and that source of his funds lying in the said HSBC account was that while he was in Dubai, he was involved in giving advice to a number of companies working therein.

4. Sh. Pradip Burman, vide letter dated 25.07.2017, also furnished certain explanation and submitted documents to the Directorate which included the following. It was submitted-

(i) That he had written to HSBC, Zurich on 20.12.2011 requesting for copy of his statement with them, but did not get the same;

(ii) That he has provided evidence of his NRI status during 1999-2000;

(iii) That he has provided the list of three foreign companies whom he was advising on investment issues as investment advisor; that he has further clarified that when account was closed the amount lying was approximately 3 million dollars;

(iv) That he has furnished copies of his Income Tax returns for the A.Y. 2000-2001 and 2001- 2002 in which his residential status was shown as non-resident Indian; that he also submitted resident permit in Dubai from 19.05.1999 from 18.05.2002.

(v) That he also submitted details of his movable properties, bank accounts, shares, debentures, vehicles and immovable properties as on 2017.

Vide his letter dated 09.05.2018, the appellant further submitted as under:

"*that he also possesses movable property in the form of Tax free Govt. bonds of Public Sector undertakings which I offer as security in the above ongoing ED matter with you. The said bonds are quoted marketable securities and are held by me in demat form with IL & FS Securities Services Ltd. and not in physical form. The original cost of the said Bonds is Approx. Rs. 20,93,96, 000/- and present market value as certified by the broker is Approx. Rs. 22.72 Crore."*

Based on the investigation, the Directorate concluded that –

(i) That the appellant, Sh. Pradip Burman was having USD 32,12,000 in his account with HSBC, Zurich, Switzerland and instead of repatriating the same to India he has retained the same outside India in contravention of provisions of the FEMA, 1999;

(ii) That though, Sh. Pradip Burman stated that this account stands closed, but no evidence was submitted by him during the

investigation under the FEMA disclosing the destination of this USD 32,12,000/-;

(iii) That the Sh. Pradip Burman was evasive about the repatriation of the said foreign exçhange to his account maintained in India;

(iv) That though the Sh. Pradip Burman claimed that he earned this amount by advising certain foreign companies in the capacity of investment advisor during the period 1999-2001, but he could not furnish evidence indicating that the entire amount of USD 32,12,000 was earned during this period.

5. The Directorate was of the view that the appellant, Sh. Pradip Burman acquired and deposited foreign exchange to the tune of USD 32,12,000/- with HSBC Bank, Zurich Switzerland and did not get that amount repatriated to India in contravention of provisions of Section 4 of the FEMA, 1999 and that a total amount of USD 32,12,000/- was still held outside India in contravention of Section 4 of the FEMA, 1999 and, therefore, the equivalent value of the property, i.e., USD 32,12,000/- with HSBC Bank, Zurich Switzerland was liable to be seized in terms of the provisions of Section 37A(1) and in terms of G.S.R. 702 (E) dated 16.09.2015 & G.S.R. 701(E) dated 16.09.2015 issued by the Ministry of Finance (Department of Revenue), Government of India, and therefore, a Seizing Order No. DLZO-I1/S.O. 1/37A/2018/DDUPM) dated 18.05.2018 was issued u/s 37A(1) of FEMA, 1999, whereby total 209396 tax free Govt. bonds of Public Sector undertaking valued at Rs. 22.72 crore held by the Sh. Pradip Burman were seized.

6. Consequent to the aforesaid seizing order, a petition was filed before the Ld. Competent Authority under Section 37A(2) for confirmation thereof. Vide the impugned order passed under Section

37A(2) of FEMA, 1999, the Ld. Adjudicating Authority confirmed the seizure Order dated 18.05.2018.

7. Aggrieved by the said order of the ld. Competent Authority, the appellant has filed this appeal before us.

Arguments on Behalf of the Appellant

8. Detailed submissions have been made before us on behalf of the appellants challenging the impugned order on both facts and law. It is contended that the actions of the Respondent Department pursuant thereto are arbitrary, unsustainable in law, and ought to be quashed/set aside.

9. In this regard, it is firstly contended that the basis of the proceedings under FEMA, 1999, as admitted by the Respondent, is the tax prosecution launched by the Income Tax authorities wherein they failed to make out even a prima facie case despite leading evidence, and the Appellant stands discharged. It is pointed out that in the said proceedings, over and above the said complaint, the prosecution was also permitted to lead evidence, and examined six witnesses. On 18.11.2020, having considered elaborate arguments from the side of both the prosecution and the appellant, and having considered the evidence of the witnesses examined by the prosecution, the Ld. ACMM (Central), Special Acts, Tis Hazari discharged the Appellant on the ground that the prosecution had failed to establish even a prima facie case. The I-T authorities failed to even identify a specific bank account, specific branch, or specific account number, let alone link such account to the Appellant.

10. It is also contended that the whole initiation of proceedings under the FEMA, 1999 is illegal because neither the Income Tax authorities nor the Ld. ACMM could have shared information received under the India-France Double Taxation Avoidance Agreement with any other authority or court, except for authorities dealing with income tax proceedings. Our attention in this regard is drawn to Article 28 of the India-France Double Taxation Avoidance Agreement, a copy of which has been filed by the appellant.

11. A copy of the discharge order in Prosecution Complaint No. 70/4/2014 has also been filed during the course of the proceedings before this Appellate Tribunal. The appellant submits as follows:

- The very existence of the alleged foreign bank account, at specific branch with specific account number is not established (paras 25, 32, 33, 34, 49, 53, and 59 of the Order of the Ld. ACMM are referred to)
- No occasion ever arose to conduct investigation and file the prosecution complaint (para 33)
- The Appellant's offer to pay tax to buy peace cannot be construed as an admission of existence of a bank account/bank branch, and in any event, these stood retracted (paras 41-45)
- The Prosecution has failed to establish even a prima facie case (para 53)
- The information allegedly obtained from the French Government are not trustworthy, authentic, and reliable (para 33)

12. It is submitted that the above findings of fact having been established in a judicial proceeding, the confirmation order dated 18.05.2018 has no legs to stand on, and ought to be quashed forthwith.

13. Secondly, it is contended that Section 37A of FEMA, 1999 was introduced by way of an amendment in the year 2015 (w.e.f. 9-9-2015).

The actions taken by the Respondent are purportedly in exercise of powers under S. 37-A FEMA. The said provision is ex-facie not in any manner clarificatory or retrospective in its application and grants entirely new powers to the Authorized Officer to effect seizure of assets outside India, or equivalent value in India. The amendment which granted entirely new powers to the Respondent, is prospective in nature. Such a prospective amendment cannot apply to alleged undisclosed foreign bank account/income relating to AY 2006-2007 and 2007-2008, which transactions, assuming the allegations of the Income Tax authorities to be correct, were concluded prior to the said amendment. Since the ITO's demands relate to specific financial years, there is also no basis to claim that this is a continuing infraction of FEMA, 1999 since no evidence has been led either in the Income Tax prosecution or in the FEMA, 1999 adjudication that the Appellant continues to hold any foreign exchange/bank accounts outside India after the introduction of Section 37A FEMA. This not being the case, it is contended that Section 37A of FEMA, 1999 cannot apply to the Appellant.

14. It is also contended that the alleged income-tax offence, in which the Appellant now stands discharged, relates to AY 2006-2007 and 2007-2008. The allegation of the Respondent, that the offence is a 'continuing offence' is inapplicable, since, (i) The Appellant has already been discharged, and as such there is no offence, let alone continuing offence, and (ii) there are clear findings by the Ld. ACMM Special Acts, Tis Hazari, that there is no bank account, specific branch, or account number identified, and there is no material to link the Appellant to any foreign bank account. Further, without prejudice to the above, it is contended on behalf of the appellant that no evidence has been led either in the Income Tax prosecution or in the FEMA adjudication that the Appellant

continues to hold any foreign exchange/bank accounts outside India after the introduction of Section 37A FEMA. In the absence of such evidence, there is no basis to claim that there is a continuing FEMA contravention and, consequently, no occasion for a seizure under Section 37A of FEMA.

15. The decision of the Hon'ble Supreme Court of India in *Union of India v Ganapati Dealcom 2022 SCC OnLine SC 1064 para 127* is relied upon for the proposition that *in rem* civil procedure for confiscation of property cannot be applied retroactively, and would be characterized as penal. It is contended that similarly, the provision of S. 37A of FEMA, 1999, which authorizes seizure of property which is penal in nature by way of amendment effective on 09.09.2015, cannot be applied retroactively to transactions between 29.12.1999 and 08.09.2015, including the transactions relating to AY 2006-2007 and AY 2007-2008.

16. Thus, according to the appellant, the purported seizure and actions taken pursuant thereto by retroactive application of S. 37A FEMA are illegal, arbitrary, and must be quashed.

17. Thirdly, without prejudice to the main argument that S. 37A of FEMA, 1999 is inapplicable, it is submitted by the appellant that even assuming S. 37A to be applicable, the section only authorizes seizure of assets, and not confiscation of the same. In the present case, the Government Bonds of the Appellant were seized on 08.05.2018. The said order of seizure was confirmed by the order of the Ld. Competent Authority on 05.11.2018, which has been challenged by the appellant way of the present appeal, i.e., FPA-FE-112/DL/2018 dated 28.12.2018. The Government Bonds meanwhile remained seized and in the custody of

the Respondents and there was no change in circumstances warranting any further action. However, on 21.01.2019, being conscious of the pendency of the present appeal, the Respondent wrote to IL&FS Securities Ltd., the issuer of the Tax Free Government Bonds, and directed them to transfer the said bonds from the name of the Appellant to the name of the Respondent. It is contended before us that this action of the respondents was not authorized by the order of the Ld. Competent Authority. There was no occasion, nor any change of circumstances warranting such a drastic step by the Respondent.

18. Further, the said confiscation is without the authority of law as S. 37A does not authorise such confiscation, nor did the order of the Ld. Competent Authority dated 05.11.2018 ever permit confiscation and confirmed the seizure only. Further, the taking of such a drastic step despite being aware of the present Appeal being sub-judice before this Hon'ble Appellate Tribunal appears to be little more than an attempt to render the present Appeal infructuous, and to avoid any judicial review of the Respondent's illegal actions.

19. It is pointed out that the Appellant has also filed an application on 25.02.2019 bearing No. MPFE-413/DLI/2019 in respect of this act of confiscation seeking restoration of the said Government bonds which is also pending.

20. In summary, the Appellant contends that the order of the Ld. Competent Authority dated 18.05.2018 ought to be set aside in view of, (i) the judicial finding of fact that there is no identified bank, bank branch, or account number which has ever been linked to the appellant, and hence there is no occasion to continue any seizure/confiscation, (ii)

discharge of the appellant in the Income Tax Prosecution Complaint No. 70/4/2014 which erodes the foundation of the FEMA proceedings, including the attachment/confiscation under challenge, (iii) inapplicability of S. 37A FEMA, which was introduced in the statute book with effect from 09.09.2015 to transactions alleged to have taken place in AY 2006-2007 and AY 2007 2008, (iv) gross abuse of power and illegal action of the Respondent in confiscating the Government Bonds in the name of the Appellant, without any authority of law and beyond the order of the Ld. Competent Authority.

21. The appellant is also aggrieved that the present appeal was filed on 28.12.2018, the appellant was discharged in the underlying Income Tax Prosecution Complaint on 18.11.2020, a certified copy of the discharge order has been placed on record on 17.12.2020. Even so, the matter has not moved forward due to the failure of the respondent Directorate to file any reply despite multiple requests sought and opportunities granted to do so, over a period of 28 months at the time of filing the present submissions. It is contended that the respondents have sought over 20 adjournments in the present matter, and grave prejudice is being caused to the appellant, who is a very senior citizen over 80 years of age and suffering from various ailments.

22. Based on these contentions, the counsel for the appellant submitted that the impugned order of the Ld. Competent Authority ought to be set aside, and the respondent should be directed to return the government bonds under their confiscation/seizure to the Appellant forthwith.

Arguments on Behalf of the Respondent

23. The counsel on behalf of the Respondent has strongly contested the contentions put forward by the Appellant.

24. In the written reply to the appeal filed by the respondents on 02.04.2024, the respondent has contended that the Appellant has not come before this Appellate Tribunal with clean hands as the present appeal has been filed on wrong and concocted facts.

25. Firstly, it is submitted that the appellant has challenged the order dated 05.11.2018 passed by the Ld. Competent Authority on the ground that the respondent Department could not have launched proceedings on the basis of evidence given in another proceeding brought by Income Tax Authorities before ACMM, Tis Hazari Court. In this regard it is submitted that the respondent Department launched proceedings on secret information from reliable sources that respondent had kept black money in Switzerland. Section 37A of the FEMA, 1999 provides, "*Upon receipt of any information or otherwise...*". It is not relevant as to where the Department gained knowledge of such contravention.

26. With regard to the contention that the Department has used stolen, unverified photocopies of papers handed over by Govt. of France to Govt. of India under Article 28 of India-France DTAA to base its investigation and that such information could only be used for tax purposes as stipulated by aforementioned Article, it is submitted that the evidence against the respondent was acquired from the Government of France who did their due diligence before handing over such documents to Govt. of India. It is further submitted that Article 28 of the India-France DTAA provides that "*...Any information received by a contracting*

State shall be treated as secret in the same manner as information obtained under the domestic laws of that contracting State...", and as per Article 28, the Income Tax authorities "*may disclose the information in public court proceedings or in judicial decisions."*

27. It is next contended that the appellant first submitted before the Income Tax authorities that he could not declare his foreign income to the tune of USD 32,12,000/- . Then the appellant changed his statement and declared this amount as his foreign earnings and offered to pay applicable Income Tax on the amount. Then before the respondent Department, the appellant again changed his statement and said that the account was closed long ago, and he cannot produce statement of the said accounts. Further, the appellant also admitted that he did not repatriate this amount to India. Now, the appellant has contended that the alleged bank account is not his individual bank account or from his individual funds.

28. Thirdly, it is contended that the respondent has successfully discharged its burden to prove that the amount was lying outside India in the account of the appellant and has not been repatriated back to India. Thereafter, the onus was upon the appellant to prove that it had in fact been repatriated by him but the appellant made no such averment which further proves his liability under Section 4 of FEMA, 1999.

29. Fourthly, with regard to the argument that Section 37A was enacted only on 09.09. 2015 and impugned foreign exchange has been held prior to 09.09.2015 therefore, the contravention is not made out since S.37A does not have a retrospective effect, it is submitted that Section 37A applies to the present case since the offence is continuing.

Had the amount been repatriated by the appellant, then the proceedings initiated by the respondent under Section 37A could have been held to be invalid. But since the impugned amount still lies outside India and has not been repatriated, it is a continuing offence and, therefore, Section 37A applies. Therefore, the question of retrospectivity does not arise. Moreover, in the case laws cited by the appellant, the amount was already repatriated back to India. Therefore, such case laws don't apply to the present case and are of no help in the disposal of the present case. It is also pointed out that the Hon'ble Karnataka High Court has upheld the validity of section 37A of FEMA in the case of *Xiaomi Technology India Pvt, Ltd. vs., Union of India.*

30. It is also contended that the respondent could not explain his foreign income to the tune of USD 32,12,000/- before the Income Tax Authorities. He did not produce any evidence of the alleged investment advisory services he extended to one Sheikh Abdul Rahim while residing in Dubai.

31. It is further submitted that the transfer of bonds to the demat account of the respondent is as per the applicable provisions of FEMA, 1999. It is submitted that even the interest earned by the appellant on the seized bonds before the bonds got credited to the demat account of Respondent ought to be returned to the Respondent department as the same legally belongs to it till the proceedings are concluded in the matter. It is also submitted that the Respondent department has only seized the bonds and the same have not been confiscated. The appellant is casting baseless aspersions on the Respondent without any evidence. That the confiscation will happen only after the adjudication proceedings are concluded. It is submitted that any earnings/interest earned on the

seized bonds rightfully lies with the Respondent as the appellant can't be allowed to enjoy the earnings from amount accrued by contravening the provision of FEMA.

32. It is submitted that there is no doubt that the impugned foreign income of USD 32,12,000/- has been held outside India. It is on record that it has not been repatriated back. Hence, the action u/s 37A of FEMA, 1999, has been initiated and pursuant to the impugned order, the amount has been seized by the respondent herein as per the provisions of FEMA, 1999. Hence the averments made by the appellant herein are wrong.

33. In light of the above facts and circumstances, it is prayed by the Respondent department that the appeal filed by the Appellant against confirmation order dated 05.11.2018 be dismissed *in limine*.

34. During oral argument of the case on 07.05.2024, the learned counsel for the respondent raised a fundamental legal issue which goes to the root of the matter. He drew our attention to the language of Section 37A which reads as below:

> *"37A. Special provisions relating to assets held outside India in contravention of section 4.—(1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property: Provided that no such seizure shall*

be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

(2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.

(3) The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person. Explanation.—While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.

(4) ***The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure made under sub-section (1)****:*

Provided that if, at any stage of the proceedings under this Act, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, as the case may be, on receipt of an application in this regard from the aggrieved person, and after affording an opportunity of being heard

to the aggrieved person and representatives of the Directorate of Enforcement, shall pass an appropriate order as it deems fit, including setting aside of the seizure made under sub-section (1).

(5) .....

(6) .....”

[Emphasis supplied]

35. In view of the categorical language of Sub-section 4 of the above Section, he argued that the order of the Authorised Officer acting under 37A(1) which is confirmed by the Competent Authority under Sub-section (3), *shall continue till the disposal of adjudication proceedings.* He pointed out that in the instant case, the Adjudicating Authority is yet to pass its order in adjudication proceedings, and therefore, the order of the Competent Authority cannot be interfered with at this stage of the proceedings by this Appellate Tribunal taking into account the developments subsequent to the passing of the impugned order, including the order of the Ld. ACMM in the prosecution case filed by the Income Tax Department, and the decision of Hon’ble ITAT. The order appealed against is an order passed under section 37A(3). When the said the order was passed by the Ld. Competent Authority, the aforementioned developments had not taken place. Section 37A, is a self-contained provision. From the heading of the section, it is also evident that it is a “special provision” which must be given full effect. Under the said provision, the next step is adjudication by the Adjudicating Authority under Section 37A(4). It is submitted before us that adjudication proceedings under Section 16 are still pending in this case. During the adjudication proceedings, the appellant will have an opportunity to bring on record subsequent developments, including the order of the Hon’ble ITAT and the Ld. ACMM. But until the adjudication

proceedings are contemplated under Section 37A(4) are complete, the impugned order passed by the Competent Authority shall continue in accordance with the clear and unambiguous language of the statute. During the pendency of the adjudication proceedings, this Appellate Tribunal cannot pass an order based on the aforesaid developments. The only thing that can happen during this period is what has been provided under the Proviso to Section 37A(4), i.e., that if the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, upon receipt of an application in this regard from the aggrieved person, and giving both sides an opportunity of being heard, can set aside the seizure made under Section 37A(1) or pass other appropriate order as it deems fit. The jurisdiction of the Appellate Tribunal is only restricted to the order passed by the Competent Authority, taking into consideration the facts which were before it the said Authority.

36. In support of the above contentions, he relied upon the judgments of this Appellate Tribunal in *Nirayu Private Ltd. v. The Competent Authority, Mumbai, FPA-FE-44/MUM/2018 (order dated 11.09.2018)* and *Sintex Industries Ltd. v. The Special Director, Directorate of Enforcement, Ahmedabad, FPA-FE-47/AHD/2018 (order dated 11.12.2015).* We shall revert to these two judgments of Appellate Tribunal later.

37. The learned counsel for the respondent also took us briefly through the relevant provisions of the Act, including Section 4 to which Section 37A relates, Section 13 which provides for imposition of penalty for contravention of the provisions of the Act (including Section 4), Section 16 which relates to the establishment, role and function of the

adjudicating authority, as also Section 2(a) which defines 'adjudicating authority' to mean an officer authorised under Section 16(1).

Rejoinder on Behalf of the Appellant

38. The learned counsel for the appellant, in his concluding argument, submitted that it is a fundamental rule of jurisprudence that appeal is a continuation of the original proceedings. He strongly contended that though the learned counsel for the respondent Directorate refers to the adjudication proceedings, there is no sign of such 'imaginary' adjudication proceedings. No such proceedings have even commenced though six long years are already over. He further emphasized that in the instant case, the bonds were offered by the appellant as security, but Department has transferred the bonds to a demat account in its own name and has thus confiscated the same. Disputing the respondent's submission that this Appellate Tribunal cannot take into account subsequent developments, he contended that the Appellate Tribunal alone has the jurisdiction to do so as the order of the lower authority is to be tested before the Appellate Tribunal to see whether or not the same in accordance with the law. He further submitted that the essence of section 37A is that till the time the person concerned repatriates the amount held abroad, he is offering an alternate security to the Directorate. He also contended that the orders of the Appellate Tribunal have no application to the present case. There is a categorical judicial order passed by the Ld. ACMM recording a finding that there is not even enough material to proceed with the framing of charges. He emphasized that it is case of discharge at the stage of framing of charges and not an acquittal. Therefore, he contends, the very genesis or the basis of the order does not survive. He reiterated that the adjudication proceedings are yet to even begin though six years are over.

Analysis and Findings

39. We have given our thoughtful consideration to the material on record and the rival contentions of the parties. Since a legal issue going to the root of the matter has been raised, we propose to deal with the same first before going into the arguments on the merits.

40. We find that the scheme of the Act insofar as the issue at hand is concerned, is as follows:

- Under Section 4, there is a bar on acquiring, holding, owning, possessing or transferring any foreign exchange, foreign security or any immovable property situated outside India otherwise than as provided by the Act, the rules or regulations framed under the Act, or with the permission of the RBI

- Under Section 37A(1), which was inserted w.e.f. 09.09.2015, an **Authorised Officer** as prescribed by the Central Government can seize (subject to the conditions prescribed therein), *equivalent property* situated in India where (s)he has reason to believe that any foreign exchange, foreign security or immovable property situated outside India is held in contravention of the aforesaid Section 4

- Under Section 37A(2), the said order of seizure shall be placed before the **Competent Authority** within 30 days of the seizure. Further, under Section 37A(3), the Competent Authority shall dispose of the said petition within 180 days from the date of seizure whereby, it will either confirm or set aside the order of seizure passed u/s 37A(1)

- Section 37A(4) provides that in cases where the order of seizure is confirmed by the Competent Authority, the seizure of equivalent assets u/s 37A(1) **shall continue till the disposal of the adjudication**

proceedings, unless the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India and makes an application to the Competent Authority or the Adjudicating Authority and the Authority concerned passes an appropriate order thereon, including setting aside the said seizure order

- Under Section 37A(5), an appeal lies to the **Appellate Tribunal** against the order of the Competent Authority.

41. From the above, it can be seen that after the disposal by the **Competent Authority** of the petition filed before it, the Act contemplates, *firstly,* adjudication by the **Adjudicating Authority** under Section 37A(4) and, *secondly*, an appeal to this **Appellate Tribunal** from the said order of the Competent Authority under Section 37A(5) in case any person is aggrieved by the order of the Competent Authority. It is notable that once the Adjudicating Authority passes its order in the matter, the same would also be appealable to this Appellate Tribunal under Section 19(1) as the same would constitute "an order made by an Adjudicating Authority" within the meaning of the said Section 19(1). A question, therefore, arises what is the scope of the appeal to the Appellate Tribunal under Section 37A(5) when adjudication by the Adjudicating Authority is yet to take place.

A single-member bench of this Appellate Tribunal, in its judgement in the case of *Nirayu Private Ltd. FPA-FE-44/MUM/2018* (order dated 11.09.2018) has held as below:

"3. In response, the learned counsel for the respondent stated that the Tribunal has no jurisdiction to get into new issues which the impugned order had not dealt with. He also drew attention to the Seizure Order No. 01/2017 dated 08.12.2017 wherein the seizure

was done on the basis of an investigation. He further stated that Section 37(A)(4) clearly mentions that the seizure order passed by the Competent Authority will continue till the disposal of adjudication proceedings and hence the appellants will have a chance to represent their case with regard to the subsequent developments, subsequent to the passing of the order dated 18.05.2018 by the Competent Authority before the Adjudicating Authority. Moreover, Section 37(A)(4) proviso gives the power only to the Competent Authority or the Adjudicating Authority and the Appellate Tribunal has not been given that power. With regard to the powers of review, the Appellate Tribunal has the power to review its own orders only, as per Section 28(2)(f) of FEMA. His further submission was that FEMA being a special law, the judgment quoted by the appellants which were in the context of different facts and law will not be applicable.

4. I have examined the case records, the documents placed on record, and also heard both the parties. The limited point to be decided is whether as per Section 37(A)(4) proviso, the seizure can be set aside which was confirmed by the impugned order dated 18.05.2018. It is an accepted fact that no show cause notice has yet been issued nor any adjudication proceedings been initiated. That of course will be a separate proceeding under the Act. With regard to Section 37(A), the title of the Section makes it clear that this is a special provision relating to assets held outside India in contravention of Section 4. Section 37(A)(4) provides that the order confirming seizure of the Competent Authority will continue till the disposal of the adjudication proceedings and thereafter the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to the action as regards the seizure.

There is of course one exception made in the proviso to Section 37(A)(4) which gives the power to the Competent Authority or the Adjudicating Authority as the case may be, where an application has been made by the aggrieved person disclosing the fact of bringing back the foreign exchange, foreign security etc. into India to pass an appropriate order as it deems fit including setting aside of the seizure made under Sub-Section 1 of Section 37(A). The sub-Section 1 authorizes the authorized officer to seize value equivalent situated within India. In the present case, the provisions of sub-Section 1 of Section 37(A) has led to the issue of seizure order 01/2017 dated 08.12.2017, which was confirmed by the impugned order dated 18.05.2018.

A reading of the proviso would therefore make it clear that the CA or Adjudicating Authority has the power to deal with this seizure order only, and not review its own order once passed under Section 37(A)(3). Hence, the contention of the appellant that it has the powers to review, is not borne out by this legal provision. ***Coming to the Appellate Tribunal's power, Section 37(A)(5) clearly mentions that any person aggrieved by any order passed by the Competent Authority under Section 37(A)(3) may prefer an appeal to the Appellate Tribunal. Hence, the Appellate Tribunal jurisdiction is limited only to the orders passed by the Competent Authority under Section 37(A)(3). He does not have any original jurisdiction to get into any issues which have not been dealt by the original authority or are subsequent developments to the passing of the order by the Competent Authority.*** *The judgments referred to by the appellants as at para 2 (iv) supra, pertain to different facts and different law. Even there the Hon'ble Supreme Court has held as at para 11 of the*

judgment in the case Om Prakash Gupta vs. Ranbir B. Goyal that "the doctrine itself is of an exceptional character only to be used in very special circumstances". Moreover, the courts have extraordinary powers which this Appellate Tribunal, which is a creature of the statute, does not have. Hence, I do not find them to be covering the present issue at hand.

5. The law is very clear in as much as the Competent Authority has the power only to confirm or otherwise, the seizure done under Section 37(A)(1). The Appellate Tribunal's powers are only limited to hearing of appeals against these orders. In any case, the adjudication proceedings will have to be gone through as Section 37(A)(4) clearly lays down that the seizure will continue till the disposal of adjudication proceedings.

Hence, I do not find any merits in the application asking for setting aside the seizure on the above grounds. It is therefore disallowed. *Reply be filed in the main appeal within four weeks' time and rejoinder within four weeks thereafter."* [Emphasis added]

42. Further, in the case of *Sintex Industries Ltd., FPA-FE-47/AHD/2018 (judgment dated 11.12.2018),* once again the single-member bench of this Appellate Tribunal reiterated the same position:

"Section 37-A (4) reads as under:

"The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure (emphasis added) made under sub-Section 1……."

6. ***From the above, what is clear from a simple reading which is plain and unambiguous is that the order of the Competent Authority confirming seizure attains finality only when the adjudicating authority disposes of the adjudication proceedings and passes appropriate directions with regard to the seizure.*** *In case, the seized goods are not available or the seizure is quashed, as submitted by the appellant, the provision of Section 37-A (4) will become redundant. The Supreme Court in the case of Union of India & Ors. Vs. Filip Tiago De Gama of Vedem, Vasco De Gama (AIR 1990 SC 981) has laid down the principle that the court cannot read anything into the statutory provision which is plain and unambiguous. The court has to find out legislative intent only from the language employed in the statutes. Surmises and conjectures cannot be for interpretation of the statutes.* ***There is a provision in Section 37-A (5) which states "any person aggrieved by any order passed by the Competent Authority may prefer an appeal to the Appellate Tribunal." The powers of the Appellate Tribunal are stipulated in Section 19(3) of FEMA, 1999 which states ".....the Appellate Tribunal may after giving the parties to the appeal an opportunity of being heard pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against."***

7. The powers of the Appellate Tribunal are general in nature and does not have any specific powers. Whereas Section 37-A(4) is a specific provision. In a clash between a general provision and a specific provision, the specific provision would prevail. *The decision of the Supreme Court of India in the case of Suresh Nanda vs. CBI dated 24.01.2008 dealt*

with the issue of a special Act with the specific subject and a general Act. It laid down "where there is a special Act dealing with specific subject, resort should be had to that Act instead of general Act providing for the matter connected with the specific Act." The golden rule of interpretation of statues stipulates that no law or any part thereof can be so interpreted to make the other part redundant. The appellant's plea of setting aside the seizure would tantamount to that." [Emphasis added]

43. In the present case the undisputed facts are that action against the appellant under Section 37A was initiated on the basis if the prosecution case filed by the Income Tax Department as already referred to in para- 2 above. During the course of the proceedings, an application MP-FE-870/DLI/2020 (M.A.) was moved by the appellant in February, 2020, for urgent hearing attaching therewith a copy of the order of the Ld. ACMM (Spl. Acts), Central District dated 18.11.2020 whereby the appellant was discharged in the aforesaid prosecution case filed by the Income Tax Department, finding no evidence of the requisite standard to proceed with the framing of charges. A notice thereon was issued in the virtual hearing held on 08.01.2021. The said application is yet to be disposed of.

44. The Ld. Counsel for the respondent Directorate has relied upon the judgments of this Appellate Tribunal referred to in paragraphs 41 & 42 above to contend that in disposing of an appeal under Section 37A(5) of the Act, the Appellate Tribunal has to confine itself strictly to the issues that have been dealt with by the Competent Authority and cannot get into issues which have not been dealt with by that Authority, or the developments subsequent to the passing of the order by the said

Authority, including the orders of the Ld. ACMM and the Hon'ble ITAT in the present case.

45. On the other hand, the submission from the appellant's side in this regard, as already noted, is that it is a fundamental rule of jurisprudence that appeal is a continuation of the original proceedings and the order of the lower authority is to be tested before the Appellate Tribunal; that this Appellate Tribunal alone has the jurisdiction to take into account the subsequent developments and pass appropriate orders; and also, that so-called adjudication proceedings in the matter are merely 'imaginary' at this stage as there is no sign of them even after six years. The same have not even been initiated.

46. We have given careful consideration to the submissions made before us from either side. We note that the most fundamental rule of interpretation of a statute is that where the language of the statute is clear and unambiguous, full effect must be given to it. There cannot be any room for doubt that Section 37A(5) provides for an appeal to this Appellate Tribunal from the order of the Competent Authority. An appeal having been filed before us under the aforesaid Section 37A(5), we propose to dispose of the same on the basis of the material before us. Furthermore, we do not find anything in the language of the statute which states categorically that the Appellate Tribunal must necessarily pass its order on the basis of outdated facts, which would remain frozen in time as they were at the time when the Ld. Competent Authority passed its order. Being the order of a judicial authority, in the appellant's own case, and underlying facts in that case being substantially the same as in the present case, we deem it appropriate in the interest of justice to take the discharge order passed by the Ld.

ACMM in the prosecution case filed by the Income Tax Department on record.

47. Coming now to the merits of the case, the first issue raised before us on behalf of the appellant is that the entire proceedings under FEMA, 1999 were initiated on the basis of the prosecution case launched by the I-T Department and the appellant stands discharged in the aforesaid case. It is also emphasized that the Ld. ACMM (Central), Special Acts, Tis Hazari while discharging the appellant observed that the prosecution had failed even to establish a prima facie case. The Department failed to identify a specific bank account, branch or account number, let alone link the account to the accused (appellant before us). It was also observed that there is nothing to show that the bank account in question belongs to the accused or that it was operated at any time by the appellant during the relevant assessment years, namely, 2006-07 and 2007-08. It was also noted that the NRI status of Shri Pradip Burman during the period 1998-2001 was found to be correct; that in the statement made before the Income Tax Authorities there was no admission of guilt on the part of the appellant; and that the Complainant Department failed to bring on record any material/ document/ circumstance suggesting that the accused had a bank account at a particular branch or carried out any transaction with the foreign bank account during the relevant period or availed the service of the said bank for any purpose.

48. In this regard, we firstly note that upon a perusal of the copy of the order of the Ld. ACMM, we find that the entire prosecution case of the I-Tax Department in that case related to Assessment Years 2006-07 and 2007-08 (financial years 2005-06 and 2006-07). Accordingly, the Ld.

Court has made several references to the absence of any evidence in respect of the aforesaid two years. The present case does not specifically pertain to the two financial years in question and, therefore, the findings of the Ld. ACMM in respect of the said two years have little relevance for the present case.

49. More importantly, as regards the prerequisite condition for framing of charges against the accused, the Ld. Court categorically observed in its order that mere suspicion, even grave suspicion, could not lead to framing of charges in the case before him and the evidence must be such that at least without considering the evidence/defence of the accused, it establishes the guilt of the accused "just below reasonable doubt". He found that sufficient evidence of requisite standard did not exist. As against this, we note that the language of 37A only requires the Authority acting under sub-section (1) of the said provision to have *"**reason to believe** that any foreign exchange, foreign security, or any immovable property, situated outside India, **is suspected to have been held** in contravention of section 4"* (emphasis added). To invoke the provisions of Section 37A, therefore, there is no requirement of proof "just below reasonable doubt". In fact, there is no requirement even to have the reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is held in contravention of section 4 but merely the reason to believe that it is *suspected* to have been so held. From the above, it is evident that a very low threshold has been set by the legislature under Section 37A. It appears that the threshold for initiating action under section 37A has been kept low deliberately since the section provides for multiple avenues of redress to the affected person, including adjudication, appeal to the Appellate Tribunal, and also an opening to have the seizure set aside at any stage

of the proceedings by disclosing the fact of such foreign exchange or foreign security or immovable property, bringing it back into in India and, thereafter, making an application to the Competent Authority or the Adjudicating Authority.

50. In light of the above discussion, we do not agree with the appellant that the action taken under section 37A in the present case no longer has any legs to stand because the appellant stands discharged in the prosecution case filed by the I-T Department.

51. The next contention put forward on behalf of the appellant is that the information shared under the India-France Double Taxation Avoidance Agreement (DTAA) could not have been shared with any other authority or court other than authorities dealing with Income Tax proceedings. In this regard we firstly note that the said argument, though referred to briefly, was not seriously pressed by the Ld. Counsel for the appellant at argument stage. In any case, we find merit in the contention put forward by the respondent that as per the plain language of Section 37A, the Respondent Directorate could invoke the said provision *"upon receipt of any information or otherwise"* and it is not relevant as to where the department gained knowledge of such contravention. He further pointed out that Article 28 of the said DTAA provides that any information received by any contracting state shall be treated as secret in the same manner as information obtained under the domestic laws of the contracting state and further provides that the information may be disclosed in public court proceedings or in judicial decisions. In any case, this Appellate Tribunal is not the appropriate forum to look into issue of violation of DTAA, if any. In view of the facts

stated above, we do not find any merit in the aforesaid contention of the appellant.

52. As an alternate contention, it is also argued that even assuming that the provisions of Section 37A are applicable, the said section only authorises seizure of the assets but not confiscation of the same. However, in the present case the government bonds which were already under seizure and custody of the respondents and there was no change in circumstances warranting any further action, the Respondent Directorate, on 21.01.2019, being fully aware of the present Appellate proceedings, directed IL&FS Securities Ltd. (the issuer of the tax-free government bonds), to transfer the bonds to the Respondent Directorate. It is contended that the said action was not authorised by the Ld. Competent Authority. An application (numbered as MP-FE-415/DLI/2019) was also filed on behalf of the appellants on 27.02.2019 for restoration of the govt. tax free bond which also remains pending. We have considered this submission. We find that under section 37A the Authorized Officer has been empowered to 'seize' value equivalent in India to the foreign exchange/foreign security/immovable property outside India. The word "seize" is not defined under the Act, being a commonly used of word of general parlance. However, the common meaning of the word is to take possession of something, especially property. Needless to say, possession of financial instruments which are held in a dematerialized form can only be taken by transfer of the same to the demat account of the Respondent Directorate. The learned counsel for the respondent has pointed out that this is all that has been done in the present case. The Directorate has merely seized the bonds and the same have not been confiscated. Confiscation will happen only after the adjudication proceedings are concluded. Having considered the facts

before us and the clarification provided on behalf of the respondents, we find no merit in the argument of the appellant regarding confiscation of the property.

53. It is next contended that Section 37A of FEMA, 1999 was introduced by way of an amendment in the year 2015, it came into effect from 09.09.2015. It is not a clarificatory amendment and grants entirely new powers to the Authorised Officer to effect seizure of assets outside India, or equivalent value in India. Hence, it is prospective in nature. Such a prospective amendment could not have been applied to undisclosed foreign bank account/income which existed much before the amendment came into effect. It cannot be held to be a continuing offence either because no evidence has been brought on record to that effect. Hence, it is argued, Section 37A of FEMA, 1999 could not have been invoked in the present case. The decision of the Hon'ble Supreme Court of India in *Union of India v Ganapati Dealcom 2022 SCC OnLine SC 1064 (para 127)* is also relied upon for the proposition that in rem civil procedure for confiscation of property cannot be applied retroactively, and would be characterized as penal. It is contended that similarly, the provision of S. 37A of FEMA, 1999, which authorizes seizure of property which is penal in nature by way of amendment effective on 09.09.2015, cannot be applied retroactively to transactions between 29.12.1999 and 08.09.2015, including the transactions relating to AY 2006-2007 and AY 2007-2008 to which the Income-tax prosecution case pertained. Thus, according to the appellant, the purported seizure and actions taken pursuant thereto by retroactive application of S. 37A FEMA are illegal, arbitrary, and must be quashed.

54. The Respondent Directorate, on the other hand, contends that Section 37A applies squarely to the present case since the contravention is continuing. The amount in question has not been repatriated by the appellant even now and still lies outside India. Being a continuing contravention, the question of retrospectivity does not arise.

55. We have considered the arguments from both sides. On the issue of 'continuing offence', the contention of the appellant essentially is that in the first instance there is no offence/contravention whatsoever in this case. At no stage of the proceedings did the appellant make any admission of continuing to hold any account abroad and the Directorate also does not have any evidence to support that conclusion. The Directorate had relied solely on the Income Tax prosecution case in which the appellant now stands discharged based on the categorical finding that there was no evidence even to charge him. In support of his contention, the learned counsel for the appellant relied heavily upon the language of the letter dated 30.08.2011 addressed to the Director General of Investigation of the Income Tax Department written on behalf of the appellant and the other members of his family by their Authorised Representative, Shri Abhay K. Aggarwal. The relevant part of the said letter reads as below:

> *"Dear Sir,*
>
> *We have been informed by Dr. Anand Burman r/o 2 Rajesh Pilot Marg, New Delhi, Chairman of Dabur India Limited, New Delhi that certain stolen data relating to his account at HSBC Private Bank (Suisse) SA, Paradeplatz 5, PO Box, CH-8027, Zurich will be shared with the Indian Authorities by French Government as per*

information available with him vide letter of 25 August 2011 of HSBC Bank, Zurich (letter enclosed as Annexure 1).

We would like to inform you that Dr. Anand Burman ……..

Further, we have been informed that Mr. Siddharth Burman ……

Further, Mr. Pradip Burman (brother of Mr. Siddarth Burman) r/o A 5/3 Vasant Vihar, New Delhi, Whole-time Director, Dabur India Limited, has also been informed through Banking Channels that in the stolen data his also name appears. Mr. Pradip Burman was a non-resident for the AY 2000-01 and 2001-02 under Indian income-tax Act and has earned foreign income during the aforesaid two years. He has been all along filing his income tax returns in India vide his PAN reference No AAAPB7429C. Mr. Pradip Burman opened a Bank account while his stay abroad and continued to operate the same after becoming tax resident in India as per FEMA regulations. However, Mr. Pradip Burman has informed us that he has closed the account long time back. Mr. Pradip Burman has informed that his brother Mr. Siddarth Burman also supported him for his foreign exchange needs from time to time.

Sir, I am appearing for Dr. Anand Burman, Mr. Siddarth Burman and Mr. Pradip Burman in the income-tax matters for more than last 10 years. The aforesaid persons have requested me to appear in connection with the above matter and this letter to your good office. As regards, POA in the matter, I will submit within a fortnight as they are presently not in India.

In the above matter, if your goodself requires any further information, I shall be glad to furnish the same.

Thanking You

Yours Faithfully

Abhay K. Aggarwal

(Authorised Representative)"

56. Further, while offering additional income for taxation during the income-tax assessment proceedings as well as in response to the notice of penalty notice issued by the I-T Department, he had made it very clear that he was offering the same because of his age, his "fading memories", in order to "buy peace" and avoid unnecessary litigation in a situation where neither the Department nor he has authentic evidence. As regards the documentary evidence shown to him, he stated that the same were "typed statement of balances of various investments lying in these accounts on a particular date in a particular month and a year" and that from the figures, it was not clear when and in what year the amount alleged was deposited.

57. We have considered carefully the above contentions of the appellant. We note, firstly, that the letter written by the Authorised Representative of the appellant to the DG of Investigations, Income Tax Department on 30.08.2011 was in no way voluntary. It was prompted by the clear knowledge that data relating to the account in HSBC, Zurich will be shared with the Indian authorities by the French Government. The said letter was preceded by a letter from Mr. Subir Mitra and Mr.

Adolf Meier, Directors of HSBC Private Bank, Zurich, dated 25.08.2011. The contents of the said letter are as follows:

"HSBC Private Bank

Anand Burman

11 Gloucester Gate

Regents Park

London NW1 4HG

25 August 2011

Theft of Client Data

Dear Anand

We refer to the Bank's letter which was sent on the 11th March 2010. At the end of June 2011 we were informed by the Swiss authorities that France will share the stolen data with the Indian authorities. They have explained that this decision has been taken following the signing of the new tax treaties with India that allows the exchange of information under strict conditions.

Please accept our unreserved apologies for this situation.

Yours sincerely,

HSBC Private Bank (Suisse) SA

Sd/-	*Sd/-*
Subir Mittra,	*Adolf Meier,*
Director	*Director*

58. Upon perusal of the letter it is also seen that the same clearly reflects the close relationship the Bank enjoyed with the Burman family even in 2011, pointing towards the strong likelihood that the account in question among others, was still being maintained and had not been closed.

59. Furthermore, in the letter dated 30.08.2011 addressed to the DG of Income Tax, the Authorised Representative of the appellant while admitting that the appellant continued to operate the said account even after he became a tax resident in India, stated that appellant had informed him that he had closed the account "long time back". However, he did not provide any specific date as to when the account in question was closed, nor provided any evidence of such closure of account. It is highly unlikely that a person maintaining an account with a foreign bank with substantial balances would have no documentary evidence or details whatsoever of the date of its closure. Moreover, the balance standing in the account as on the date of closure would surely have been transferred to another bank account. No details of such account on which the balance was transferred have been provided either. It is also worthy of note that in case the account was closed and the amount had been brought back to India, it was always open and even now remains open for the appellant to make an application to the Competent Authority/ Adjudicating Authority to have the order set aside under the Proviso to Section 37A (4).

60. It is also undisputable that the appellant offered amounts equivalent to US $ 40,000 and US $ 32,12,000 for tax for Assessment Years 2006-07 and 2007-08, although qualifying the offer by stating that it was being offered not because there was any concrete evidence with

the I-T Department but on account of his age, fading memory and to buy peace and avoid litigation. No doubt, the Income Tax Appellate Tribunal has allowed his appeal against the penalty. However, perusal of the order reveals that the Hon'ble ITAT relied entirely on the order of the Ld. ACMM discharging the appellant. We have already held that the said order of the Ld. ACMM does not take away the basis of initiation of action under Section 37A of FEMA, 1999.

61. In the absence of any evidence having been adduced by the appellant, or even a definite date when the account was closed, in view of the fact that the appellant himself offered income for taxation when confronted with information relating to the said account as late as in Assessment Years 2006-07 and 2007-08 (financial years 2005-06 and 2006-07) although admittedly he was an NRI only upto 2001; as the correct and full facts with regard to the account are within the specific knowledge of the appellants and the persons looking after his financial affairs which they have not divulged till now, keeping in view the scope and ambit of Section 37 A which we have already discussed at length in para 39 above; and also considering the interim nature of the proceedings under Section 37A at this stage wherein adjudication is yet to take place, we are of the view that action under Section 37A was justified in the facts and circumstances of the case. We also note that even the source of funds in the account have not been substantiated by the appellant as no proof has been adduced regarding the 'investment advisory services' claimed to have been provided by him while in Dubai. Since the date of closure of the account and even the factum of closure is not proved, the question of retrospective application of law would not arise. Thus, the appellant's reliance upon the decision of the Hon'ble Supreme Court in *Ganpati Dealcom Pvt. Ltd.* (supra) would not assist

him. It may also be pointed out that this Appellate Tribunal, vide its order dated 15.12.2023 in the case of *Prism Scan Express Pvt. Ltd.(FPA-PBPT-1079/MUM/2020)* had held that a property which was 'transferred' prior to 2016, could still constitute benami property if it continued to be 'held' after the Amendment Act of 2016 came into force, since definition of 'benami transaction' under Section 2 (9) (A) of the amended Act covers not only property "transferred to" but also property "held by" a person the consideration for which has been provided by another person. In such cases, the question of retrospectivity would not arise as action was initiated on the ground that the property was 'held' in contravention of the amended Act after it came into force. Similar is the situation with respect to application of S. 37A in the present case. Accordingly, we do not find any grounds to interfere with the impugned order at this stage of the proceedings under Section 37A.

62. In light of the above discussions, we do not find merit in the appeal or the application for restitution of the seized property and accordingly, dismiss the appeal with all pending applications.

63. Appeal dismissed.

64. No order as to costs.

(Rajesh Malhotra)
Member

(V. Anandarajan)
Member

New Delhi
18th July, 2024
'ST'