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THE NEWSLETTER

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ITC Allowed when Debt Settled by Adjustment in Books

The Authority for Advance Ruling ("AAR"), West Bengal in the case of ***Re: Senco Gold Ltd.*** *[Order No. 024/WBAAR/2019-20] vide* Order dated 08.05.2019 has held that input tax credit ("ITC") will be eligible even in cases where a payment, including taxes payable, is discharged through adjustments in the books of the taxpayers. The Applicant in this case relied upon the proviso to Section 16(2) of the Central Goods and Service Tax Act, 2017 ("CGST Act"), which provides that no ITC shall be available unless the recipient pays the supplier the consideration for the supply received. It was contended that this section did not place any restrictions on the method of payment. Moreover, the practice of settling of debts through adjustments in books is an acceptable accounting practice as per para 42 of Indian Accounting Standard 32. Previously under the VAT Regime, Rule 19(8) of the WB VAT Rules, 2005 restricted the claim of ITC to cases where transactions were made by account payee cheque or electronic banking in cases where the amount exceeded Rs. 20,000 in a day, but there is no such stipulation in GST. The Revenue raised an objection to the Applicant's contention on the basis of Section 49(1) of the CGST Act, which required transactions to be carried out through the prescribed online banking methods. The AAR accepted the contentions of the Appellant, and relied upon the wide scope of the term 'consideration' as defined in Section 2(31) of the CGST Act. It was held that the definition was wide enough to cover reduction in debt liability in the books of accounts as a valid mode of payment. The AAR further held that Section 49 of the CGST Act only dealt with the payment of tax to the government and was not applicable to the transactions between a supplier and the recipient.

No Service Tax on Transfer of Development Rights

A question regarding the taxability of development rights ('DRs') under service tax was raised before the Customs, Excise and Service Tax Tribunal, Chandigarh ('CESTAT') in the case of ***DLF Commercial Projects Corporations v/s CST, Gurugram*** *[Appeal No. ST/60476/2018]*. Here, DLF Ltd. was engaged in the business of real estate development. As per the business model of DLF Ltd., they appointed DLF Commercial Projects Corporations ('Appellant') to purchase land on their behalf. Accordingly, the Appellant approached the Land Owning Companies ('LOCs') who entered into and executed a Land Development Agreement or Memorandum of Understanding or both with Appellant for the transfer of DRs. These DRs were then trans-

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ferred to DLF Ltd. Subsequently, when DLF Ltd. would transfer the constructed property to its prospective buyers, tripartite agreements would be executed between the LOCs, DLF Ltd. and the prospective buyers. On this transfer of DRs, the revenue department demanded service tax from the Appellant. The CESTAT vide an Order dated 22.05.2019 noted that in the entire transaction, the LOCs remained the owner of the land and did not transfer the land in the name of the Appellant. As the Appellant does not acquire ownership of the land, thus the question of transfer of DRs does not arise. Therefore, the transaction was held to be purchasing of land by the Appellant for DLF Ltd. The CESTAT further observed that when land owners transfers DRs to the developers, the developers get the right to not only to develop projects on such land but also the right to sell such developed property along with undivided interest in the land underneath, and the right to receive payments for such transfers from the buyers. Once a landowner transfers DRs to a developer for a consideration, the landowner is obligated to transfer undivided interest in the land to the developer's buyers for which no separate consideration is paid. In other words, such transfer of undivided interest in the land by the landowner is in return of the initial consideration paid by the developer to it for transfer of DRs only. Thus, it is the ownership of the land which effectively stands transferred in return of consideration payable by the developers. The moment it is either land or 'benefits arising out of land', it goes outside the purview of 'Service' as defined in section 65B(44) of Finance Act, 1994. Therefore, the transfer of DRs was held to be transfer of immovable property in terms of Section 3 (26) of General Clauses Act, 1897 and no service tax was held to be payable as per the exclusion in terms of section 65B(44) of the Finance Act, 1994. Hence, it was held that the activity in question is only acquisition of land and no service tax is payable by the Appellant .

Proceedings without mandatory Pre-Notice Consultation quashed

The Hon'ble Delhi High Court in the matter of ***Amadeus India P. Ltd.*** *[W.P. (C) 914/2019 & CM APPL. 4125/2019]* ("Petitioner") has annulled the Service Tax proceedings on the ground that even if the impugned demand was above Rs. 50 lakhs, no pre-notice consultation was issued by the department. The Petitioner provides computer data processing software, which is used by travel agents and ticket booking entities in the Airline industry. In consequent to a search conducted by the Anti-evasion Unit of the Service Tax Commissionerate at the premises of the Petitioner, the department found that the services provided by it are liable to service tax. In this regard a show cause notice was issued by the department alleging that the tax was not paid on taxable services rendered by the Petitioner. In reply to the said notice, the petitioner contended that as per Master Circular dated 10.03.2017 r/w instructions dated 21.12.2015 ("Master Circular") issued by CBEC a pre show cause notice consultation is mandatory in cases involving demand of more than Rs.50 lakhs. However, when no response was received, the Petitioner approached the High Court for relief wherein it was observed that department has completely ignored the Master Circular. The court on perusing the Master Circular found that it was necessary in terms of para 5.0 of the Master Circular for the Respondent to have engaged with the Petitioner in a pre SCN consultation, particularly, since in the considered view of the Court neither of the exceptions specified in para 5.0 were attracted. The court stated that the department officials are bound by the circulars issued by CBEC. Consequently, without expressing any view on the merits of the case, the Court sets aside the impugned show cause notice and relegates the

parties to the stage prior to issuance of impugned notice. The department has been ordered to fix a date on which the authorised representative of the Petitioner would be heard in relation to the issue under consideration.

Omission to Mention Nature of Debt or Liability in Notice does not Render it Invalid

In the matter of ***B. Surendra Das vs. State of Kerala*** *[Crl.MC. No. 3289 of 2015, decided on 05.05.2019]*, the Hon'ble Kerala High Court ("**Court**") was considering a petition filed under under Section 142 of the Negotiable Instruments Act, 1881 ("**Act**") pertaining to an offence punishable under Section 138 of the Act. The Petition seeked to quash the criminal proceedings on the ground that no demand for payment of the amount of the cheque was made by the complainant as per the notice sent by him and therefore, the notice is defective and the proceedings initiated against the accused under Section 142 of the Act pursuant to such notice cannot be sustained. Perusing the contents of the notice, the Hon'ble Court observed that the notice stated that the complainant is legally entitled to realize the amount of the cheque from the petitioner and that the petitioner is legally bound to pay the amount of Rs.35,00,000 to the complainant within 15 days from the date of the notice. Thus, the Hon'ble Court rejected the contention that the nature of the debt or liability of the accused is not mentioned in the notice and for that reason, the notice is defective. The Hon'ble Court held that there is no statutory mandate that the notice shall narrate the nature of the debt or liability. Therefore, the omission or error in the notice to mention the nature of the debt or liability, does not render it invalid.

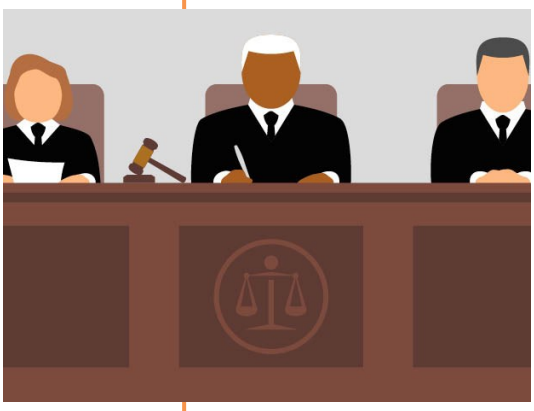
Retrospectivity of Section 148 of the Negotiable Instrument Act, 1881

The Division Bench of Supreme Court in ***Surinder Singh Deswal vs. Virender Gandhi,*** *[Criminal Appeal Nos. 917-944 of 2019, decided on 29.05.2019]* has put an end to the long-drawn controversy that whether the Negotiable Instrument Act ("**NI Act**") as amended shall be applicable in respect of the appeals against the order of conviction and sentence for the offence under Section 138 of the NI Act, even to the cases where the criminal complaint for the offence were filed prior to the date of the amendment i.e. 01.09.2018. The amended Section 148 of the NI Act confers power upon the Appellate Court to pass an order pending appeal to direct the Appellant-Accused to deposit a sum of minimum 20% of the fine or compensation, either on an application filed by the original complainant, or on the application filed by the Appellant-Accused under Section 389 of the Code of Criminal Procedure to suspend the sentence. The Court while exploring the intent of the legislature in bringing into force the amendment observed that is because delay tactics were being employed by unscrupulous drawers of dishonored cheques since filing of appeals and obtaining a stay on the suit against them was easy. The Court further observed that, if such a purposive interpretation is not adopted, the object and purpose of the amendment in section 148 of the NI Act would be frustrated. The Hon'ble Bench further observed that while considering the amended Section 148 of the NI Act, the same should be read as a whole with the Statement of Objects and Reasons of the amending Section 148 of the NI Act. Further, the Hon'ble Court observed that though it is true that the amended Section 148 of the NI Act, uses word 'may', it is generally to be construed as a 'rule'

or 'shall' and not to direct to deposit by the appellate court is an exception for which special reasons are to be assigned.

Abatement of Appeal on Death of Co-Appellant

In the case ***Hemareddi (died through LRs) vs. Ramachandra Yallappa Hosmari and others [Civil Appeal No. 4103 of 2008, decided on 07.05.2019]***, the question dealt by Supreme Court was that whether the death of one of the appellants in the suit can lead to abatement of the appeal as a whole. In this case, the appeal arose out of a suit which was jointly instituted by two brothers for a declaration that the adoption of the first defendant was invalid and therefore, he had no right in the joint properties of the plaintiffs. The trial court dismissed the suit and upheld the adoption. The matter was taken in appeal to the High Court of Karnataka ("**High Court**"). During the pendency of the appeal, one of the brothers died. No steps were taken to bring on record the legal representatives of the deceased brother. The appeal was continued by the surviving brother. The High Court dismissed the appeal holding that entire appeal stood abated as a whole, as the abatement in respect of the deceased brother was not set aside and his legal representatives were not brought on record. The said order of the High Court was challenged and an appeal lied before the Supreme Court. The Supreme Court while discussing the issue in hand, relied upon ***State of Punjab vs. Nathu Ram [AIR 1962 SC 89]*** wherein it was observed that the Courts will not proceed with an appeal: (a) when the decree is such that it would be contradictory to the decree which had become final between the appellant and the deceased respondent, the appeal will abate as a whole; (b) when the appellant could not have brought the action for the necessary relief against only the remaining respondents, in the absence of the deceased respondent; and (c) when the decree against the surviving respondents, if the appeal succeeds, could not be successfully executed. Thus, on the basis of the said observations, the Supreme Court held that if the decree is joint and indivisible and the situation is such that it would lead to irreconcilable decrees between the parties, the appeal will abate as a whole and therefore, dismissed the appeal without merits.



Reconciliation of Share Capital Audit Report

The Ministry of Corporate Affairs by Notification No. G.S.R. 376(E) dated 22.05.2019 has brought in the Companies (Prospectus and Allotment of Securities) Third Amendment Rules, 2019 ("**Amendment Rules**") with effect from 30.09.2019. The Amendment Rules provide that every unlisted public company which is required to get its securities dematerialized as per Rule 9A of the Companies (Prospectus and Allotment of Securities) Rules, 2014, is required to file a half-yearly return in form PAS-6 within 60 days from the end of each half year duly certified by a company secretary in practice or chartered accountant in practice. As per the Amendment Rules the unlisted public companies are required to report following information in form PAS-6:

1. The basic details of company
2. Period for which the form is filed by a company
3. Following details pertaining to the share capital of company: (a) Issued Capital (b) Number of shares held in dematerialized form in Central Depository Services Limited (c) Number of shares held in dematerialized form in National Security Depository Limited (d) Number of shares held in physical form.

4. Reasons, if there is any difference in the issued capital and total share capital.
5. Details of change, if any, occur in the half year under consideration.
6. Details of shares held by promoters, directors and Key Managerial Personnel.
7. Status as to whether the register of members is updated or not.
8. Whether the dematerialized shares were exceeding the total number of shares in the previous half year and whether the company has resolved the issue in the current quarter, if not, reasons for the same.
9. Total number of dematerialization request confirmed after 21 days and pending for more than 21 days.
10. Details regarding company secretary of the company.
11. Details regarding company secretary in practice certifying this E-Form.

Further, the form PAS-6 must be accompanied by a certificate of practicing professional certifying that the information provided by company in form PAS-6 true, correct and complete. Furthermore, through the Amendment Rules, a sub-rule 8A has been inserted after sub-rule 8 of Rule 9 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 which states that a company shall immediately bring into the notice of its depositories in case if there is any difference in issued capital and the capital by the members in dematerialized form .

Mandatory to Frame Substantial Question of Law Before Hearing of an Appeal

In the case of ***Ryatar Sahakari Sakkarre Karkhane Niyamit vs. ACIT,*** *[[2019] 105 taxmann.com 3 (SC) decided on 01.05.2019]***,** it was held by the Supreme Court ("**SC**") that High Courts ("**HC**") have to mandatorily follow the procedure laid down in Section 260A(3) of Income Tax Act, 1961 ("**Act**"), which requires to the HCs to frame substantial question of law. The case was brought before the SC as the Appeal filed by the Assessee was dismissed by the Karnataka HC on 26.02.2016. The SC observed that while both Assessee and the department had raised the questions of law in their respective appeals, no substantial question of law was formulated by the HC. The SC placed reliance on the judgment of ***PR. Commissioner of Income Tax Central-2 vs. M/s A.A. Estate Pvt. Ltd,*** *[Civil Appeal No.3968 of 2019]* pronounced by the SC itself, which had the same facts as the previous case, wherein it was held that: (a) There lies a difference between the questions framed by the parties and the questions framed by the court. (b) The questions, which are proposed by the appellant, fall under Section 260A(2)(c) of the Act whereas the questions framed by the High Court fall under Section 260A(3) of the Act. (c) The appeal is heard on merits only on the questions framed by the High Court u/s 260A(3) of the Act as provided u/s 260A(4) of the Act. (d) The Court was of the view that High Court did not decide the appeal in conformity with the mandatory procedure prescribed in Section 260-A of the Act which deals with the provision for appeals to the High Court and therefore remanded the appeals. Based on such discussion, the matter was remanded to the HC for a *de novo* hearing on merits.

KEY TAKE AWAYS

- CBDT via **F.No.275/38/2017-IT(S)** dated 24.05.19 passed an order under Section 119 of the Income Tax Act, 1961, extended due date for depositing TDS to 20.05.19, due date of filing of Quarterly Statement of TDS to 30.06.19 and the due date for issue of TDS certificates to 15.07.19 in Orissa on the account of Cyclone Fani.
- As per **Notification No. 23/2019 & 24/2019** dated 11.05.2019, issued by Government of India, Ministry of Finance, due date for furnishing FORM GSTR-1 and GSTR-3B, for the month of April 2019, for registered persons in specified districts of Odisha, has been extended to 10.06.19 and 20.06.19 respectively.
- CBDT via **F No 370149/230/2017- Part (3)** dated 27.05.19 extended the deadline by two months for task force comprising tax officials and outside experts to come up with a new draft direct tax code.
- CBDT via **Notification No. 09/2019** dated 06.05 2019, specified the procedure, formats and standards for the generation and downloading of certificate of tax withheld (Form 16). This is applicable from financial year (FY) 2018-19, and all employers need to download Part B of Form 16 from the TRACES Portal. In addition, they need to authenticate the correctness of the contents mentioned therein before issuing it to its employees, and verify the same using either a manual or digital signature.
- Government of Kerala via **G.O. (P) No. 79/2019/TAXES** dated 25.05.2019 notified that 1st June, 2019 will be considered as the date from which the levy of Kerala Flood Cess will come into effect .
- CBDT via **Notification G.S.R. 375(E)** dated 22.05.19 amended the Income Tax Rules, 1962 in Appendix II, in Form No. 15H in Part II, in note 10, a proviso is inserted which states, "Provided that such person shall accept the declaration in a case where income of the assessee, who is eligible for rebate of income-tax under section 87A, is higher than the income for which declaration can be accepted as per this note, but his tax liability shall be nil after taking into account the rebate available to him under the said section 87A".
- .The Ministry of Labour and Employment *vide* **notification no. [F. No. S-38012/01/2016-SS-I]** dated June 13, 2019 amended the Employee's State Insurance (Central) Rules, 1950. The said amendment has reduced the rates for employer and employee contribution under the Employee's state insurance Act, 1948 i.e. employers contribution from 6.5% to 4% and employee contribution from 4.75% to 3.25%. The said reduced rates will be in effect from July 01, 2019.
- The Government of Uttar Pradesh vide **notification no. 1058 (2)/LXXIX-V-1-19-1(KA)-20-2018** dated June 06, 2019 has brought in amendment in the Code of Criminal Procedure, 1973 as applicable to Uttar Pradesh. The said amendment has reintroduced Section 438 and the concept of anticipatory bail in the state of Uttar Pradesh.
- The Hon'ble Orissa High Court in the case of **Safari Retreats (P.) Ltd. v. Chief Commissioner of Central Goods and Services Tax [2019 105 taxmann.com 324 (Orrisa)]** allowed sett off of ITC on goods/services used in construction of mall against GST payable on rental income recieved.
- Central Board of Indirect Taxes and Customs vide **Notification F. No. 354/32/2019** issued Part II of FAQ's answering queries relating to the real estate sector under GST.

KNOWLEDGE CENTRE

FAQ on GST rate structure for real estate sector

1. What are the applicable rates of GST on construction of residential apartments with effect from April 01, 2019?

Description	Effective rate of GST (after deduction of value of land)
Construction of affordable residential apartments	1% without ITC on total consideration.
Construction of residential apartments other than affordable residential apartments	5% without ITC on total consideration.

2. What is an affordable residential apartment?

A residential apartment in a project which commences on or after April 01, 2019, or in an ongoing project in respect of which the promoter has opted for new rate of 1% having carpet area upto 60 square meter in metropolitan cities and 90 square meter in cities or towns other than metropolitan cities and the gross amount charged for which, by the builder is not more than Rs. 45 lakhs.

3. What is an on-going project?

(a) Commencement certificate for the project, where required, has been issued by the competent authority on or before March 31, 2019, and it is certified by a registered architect, chartered engineer or a licensed surveyor that construction of the project has started on or before March 31, 2019.

(b) Where commencement certificate in respect of the project, is not required to be issued by the competent authority, it is to be certified by any of the authorities specified in (a) above that construction of the project has started on or before the March 31, 2019.

(c) Completion certificate has not been issued or first occupation of the project has not taken place on or before the March 31, 2019.

(d) Apartments of the project have been, partly or wholly, booked on or before March 31, 2019.

4. Does a promoter or a builder has option to pay tax at old rates of 8% & 12% with ITC?

Yes, but such an option is available in the case of an ongoing project. In case of such a project, the promoter or builder has option to pay GST at old effective rate of 8% and 12% with ITC. To continue with the old rates, the promoter/ builder has to exercise one time option in the prescribed form and submit the same manually to the jurisdictional Commissioner by the May 10, 2019.

5. What are the criteria to be used by an architect, a chartered engineer or a licensed surveyor for certifying that construction of the project has started by March 31, 2019?

Construction of a project shall be considered to have been started on or before March 31, 2019, if the earthwork for site preparation for the project has been completed, and excavation for foundation has started on or before the March 31, 2019.

6. Whether a Promoter can opt for old rates or new rates, as the case may be, for different projects being undertaken by him under the same entity?

Yes, the option to pay tax on construction of apartments in the ongoing projects at the effective old rates of 8% and 12% with ITC can be exercised for each ongoing project separately.

7. Whether the old rate of 8% and 12% with ITC is available for construction of apartments in a project that commences on or after April 01, 2019?

No, the said option is only available for ongoing projects.

8. Does a promoter/ builder have to purchase all goods and services from registered suppliers only?

A promoter shall purchase at least 80% of the value of input and input services, from registered suppliers. For calculating this threshold, the value of services by way of grant of development rights, long term lease of land, floor space index, or the value of electricity, high speed diesel, motor spirit and natural gas used in construction of residential apartments in a project shall be excluded.

EDITORIAL

PAYMENT OF PART SALE CONSIDERATION OR STAMP DUTY CANNOT BE SOLE CRITERIA TO HOLD TRANSACTION AS BENAMI

-By Prapti Mishra, Advocate

Benami transactions have been prevalent in India since many years. It was gradually realised that such transactions were being employed for dishonest intentions like money laundering and evasion of taxes, by diverting one's assets in another's name and thereby defeating the lawful claims of creditors. To prevent benami transactions to continue unabated, the Benami Transactions (Prohibition) Act 1988 was brought into force prohibiting such transactions.

The Benami Act was overhauled by the Benami Transaction (Prohibition) Amendment Act, 2016, renaming it, the Prohibition of Benami Property Transactions Act, 1988, ("***Benami Act***") giving the authorities the power to curb such transactions and confiscate benami properties.
The Benami Act defines a benami transaction, under Section 2(9)(A), as a transaction or an arrangement where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person and where the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

This article endeavours to discuss the criteria to ascertain whether a transaction is benami or not. The issue has been contended before the Indian courts even prior to the advent of the Benami Act. It was most recently presented before the Supreme Court in the case of ***Mangathai Ammal & Ors. Vs. Rajeswari & Ors***. *[Civil Appeal No. 4805 of 2019]*. The Apex Court took the view that the payment of part sale consideration or stamp duty by another person cannot be the sole criteria to hold a sale/transaction as benami.

The bench, comprising of Justice L. Nageswara Rao and Justice M.R. Shah, was considering an appeal against the Trial Court and High Court orders which held that the suit properties were benami transactions as the property was purchased in the wife's name although the part of the sale consideration was paid by another person, her husband. It was also found that the stamp duty at the time of the execution of the sale deed was purchased by the husband. The Apex Court noted that being the husband, he might have contributed towards the sale consideration, and that mere financial contribution could not be the sole criteria for holding it as benmai, as reproduced herein below:

> *"While considering a particular transaction as benami, the intention of the person who contributed the purchase money is determinative of the nature of transaction. The intention of the person, who contributed the purchase money, has to be decided on the basis of the surrounding circumstances; the relationship of the parties; the motives governing their action in bringing about the transaction and their subsequent conduct etc."*

The Court also relied upon its recent decision in the case of ***P. Leelavathi vs. V. Shankarnarayana Rao***,*[(2019) 6 SCALE 112]* wherein it was held that mere financial assistance to buy a property cannot be the sole basis for ascertaining whether a transaction qualifies as benami.In

the said decision, the Apex Court reiterated the view taken in the case of ***Bipani Paul vs. Pratima Ghosh*** *[(2007) 6 SCC 100]* and several others, holding that the source of money was merely one of the relevant considerations, not a determinative basis.

The Apex Court, in the present case, reiterating the view taken in catena of its decisions, noted that while considering a particular transaction as benami, the paramount considerationis the intention of the person who contributed the purchase money. The intention of such a person can be ascertained by taking cognizance of the circumstances surrounding the financial assistance. Placing reliance upon the view taken by the Apex Court in ***Valliammal vs. Subramaniam*** *[(2004) 7 SCC 233]* it was hence noted, that to hold a particular transaction as benami transaction, the following six circumstances could be taken as a guide:

1. Source from which the purchase money came
2. Nature and possession of the property, after the purchase
3. Motive, if any, for giving the transaction a benami colour
4. Position of the parties and the relationship, if any, between the claimant and the alleged benamidar
5. Custody of the title deeds after the sale
6. Conduct of the parties concerned in dealing with the property after the sale

The Apex Court noted that the Trial Court and the High Court gravely erred in holding that the purchase of the suit properties qualified as a benami transaction, as the transaction in question did not meet the aforementioned criteria delineated by the Apex Court.

The Apex Court also dealt with the question of onus of proving that a particular transaction is benami. It was noted that it was well-established that the burden to prove whether a particular sale was benami and that the apparent purchaser was not the real owner, always rested on the person asserting it to be so, as was held by the Apex Court in the case of ***Jaydayal Poddar vs. Bibi Hazra*** *[(1974) 1 SCC 3]*. It was further held that the burden was to be strictly discharged by adducing definitive legal evidence which would either prove the fact of a benami transaction or establish circumstances that unerringly and reasonably infer the same conclusion.

The Apex Court, thus, disagreed with the reasoning given by the Trial Court and confirmed by the High Court, stating that they had erred in shifting the burden on the defendants to prove that the sale transaction were not benami transactions, and that the mere contribution to part sale consideration could not be the definitive basis of holding any transaction as a benami transaction

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