

**BEFORE THE INCOME TAX APPELLATE TRIBUNAL,  
'BMA' BENCH, MUMBAI**

was consistent with the case of the Revenue in WT Act proceedings, must follow that the jurisdictional objection of the Appellant to invocation of BMA is bound to be granted, and the order of the Commissioner (Appeals) is liable to be set aside, and it is respectfully prayed, accordingly.

132. A gist of Revenue Submissions, and Appellant's rebuttal, is set forth in tabular format below:

| No. | Revenue Submission  | Appellant's rebuttal  |
|-----|---|---|
| 1.  | Appellant unable to establish the existence of Trust and any connection of AT-351 Trust to Banyan Trust | <p>a) The Instrument of Trust dated 7 September 1989 was duly filed in the course of the IT proceedings, under certification dated 7 March 2016 from Mr. Michael Collins (Vol.1, pg. 54), director of Albany Trustee Company Limited, the original corporate trustee appointed by the Settlor, read along with certificates dated 15 March 2016 (Vol.1, pg. 55-59) and 24 March 2016 (Vol.1, pg. 72-74) of Confidence Ltd, trustees of Banyan Trust. The Instrument of Trust was duly executed in accordance with the governing laws of Guernsey <i>inter alia</i> by Mr. Michael Collins, whose association with the Trust dates back thirty plus years. Mr. Michael Collins participated in a June 2017 validation of the source of trust wealth reconfirming that in 1989 the shareholding interests of Kinetic Holdings Limited were settled upon trust <i>vide</i> Instrument of Trust dated 7 September 1989.</p> <p>b) The Revenue, in the course of IT Act proceedings, asserted that the right, power and authority vested upon the Appellant, under the Instrument of Trust, for the appointment and removal of trustees,</p> |

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|     |                    | <p>established that the Appellant was in control of the Trust, and further was the sole beneficiary and beneficially owned its assets/income, which was thus taxable in the hands of the Appellant. Revenue has, in particular, relied upon clause 8 of the Second Schedule to the Instrument of Trust, to assert that the power of appointment of new trustees and removal of trustees conferred ultimate control to the Appellant.</p> <p>c) Having relied upon the Instrument of Trust, and in particular upon the power for the appointment and removal of trustees contained therein, it is not available to the Revenue to now claim in BMA proceedings that the Instrument of Trust does not exist. The Revenue is blowing hot and cold at the same time, which is against the doctrine of fair play and inconsistent with settled principles of approbate and reprobate.</p> <p>d) Insofar as concerns the connection of <u>AT-351</u> (Guernsey trust, settled 1989) with <u>Banyan Trust</u> (Guernsey); the underlying assets are identical, i.e., the corporate structure of Kinetic Holdings Limited holds the shareholding of Avit Investments Limited, and through Kinetic Holdings Limited a series of wider corporate investment vehicles came to be established by the trustees from time to time, in order to invest the trust wealth, in accordance with the laws and regulations of Guernsey.</p> |

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|     |                    | <p>e) From a plain reading of (A) the Instrument of Trust in relation to the shareholding interests held in Kinetic Holdings Limited, of Jersey (incorporated 1985), recorded in the First Schedule Part I; (B) the Summary of Share Capital &amp; Shares of Kinetic Holdings Limited recording that the Settlor, resident of Singapore, held interests in Kinetic Holdings Limited; (C) the non-resident Indian status of the Settlor, at the material time, in relation to whom the Estate proceedings in relation to the Settlor and his late wife in Singapore were relied upon by the Revenue, at the ITSC, which thus re-validates the Settlor's status as non-resident Indian (ITSC order, PB Vol.1, Pg. 379); and, (D) the letter dated 28 August 2017, issued by the PCIT dated 28 August 2017 to the ITSC, conclusively establishing the position admitted by Revenue, i.e. that the equity interests in Kinetic Holdings Limited belonged to (Late) Pratap Malpani; it follows that the (Late) Pratap Malpani appointed Albany Trustee Company Limited as the trustee of the offshore 'corpus' settled upon trust by him. There has been no new finding by the Revenue since, and as such and otherwise, a materially inconsistent position cannot be adopted for purposes of BMA.</p> <p>f) Albany Trustee Company Ltd., acting under the powers available under clause 8(3) and 8(4) of the Instrument of Trust (at Vol.1, pg. 4 &amp; 5), were entitled to appoint new trustees and to migrate the</p> |

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|     |                    | <p>assets of the Trust over to the new trustees, i.e. to <u>Nebola Trust</u> (Liechtenstein) in 1998 with Credit Suisse Limited as trustee; in 2010, Nebola's trustees migrated the Trust assets to <u>Bird International Foundation</u> (Panama) with HSBC Guyerzeller Limited as trustee; and in 2011, the trust assets are migrated to The Banyan Trust, with Confiance Limited (Guernsey) as trustee. Migrations of trusts are, in fact, legally recognized as a matter of Indian law, specifically under section 75 of Indian Trusts Act, 1882.</p> <p>g) Confiance Limited issued a source of trust wealth certification in June 2017, in consultation and coordination with former trustees, lawyers of the trustees and lawyers of the non-resident beneficiaries of the Trust, which provides comprehensive details of creation and/or migration of trusts, and also the source of wealth and investments from time to time, which was taken into consideration by the PCIT, who in turn accepted in letter dated 28 August 2017 (Vol.1, @ pg. 311) that the assets of Kinetic Holdings Limited and Avit Investments Limited belonged to Late Mr. Pratap Malpani. Each of the trustees, some trusteeship arms of leading international banks, and also Confiance Limited, have at all material times lawfully carried on, at the material time, the business of trusteeship, with full accountability to the jurisdictional authorities in the country of incorporation. The Indian Revenue, through Tax</p> |

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|     |                    | <p>Information Exchange Agreements, is bound to have secured material information concerning the existence of the Trust. In the course of IT Act proceedings it transpired that various documents, including the trust instrument pertaining to Bird International Foundation), were available with Revenue, through FI&amp;TR.</p> <p>h) No material has been brought on record by the Revenue to discredit apostilled and/or notarized certifications issued by trustees from time to time. Revenue has had information concerning the assets of the Trust since 2014 and has thus had seven years to pursue all reasonable endeavours to obtain any information that would point to any contribution by the Appellant to the Trust, which is relevant for purposes of BMA.</p> <p>i) In the Wealth Tax Act proceedings the Revenue conceded that the Appellant has not made any contribution to the Trust, which in effect conceded the existence of the Trust.</p> <p>j) The contention of Revenue that no authenticated document to prove cessation of the Appellant as a beneficiary of the Trust is also inconsistent with the assertion that no valid trust is in existence.</p> <p>k) This Hon'ble Tribunal, in wealth tax proceedings of the Appellant, thus returned a final finding of</p> |

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|     |   | <p>fact <i>vide</i> order dated 24 December 2020, in relation to conclusive existence of AT 351.</p> <p>l) However, in the BMA proceedings Revenue has completely put forth a different case by challenging the very existence of the Instrument of Trust, overlooking inter alia that the order of this Hon'ble Tribunal, also constituted relevant evidence bound to be taken into consideration by the Commissioner (Appeals).</p> <p>m) Thus, the contention of the Revenue that the Appellant has failed to prove existence of the Trusts and / or its migration is untenable both factually and legally.</p>   |
| 2.  | No authenticated document to prove cessation as a beneficiary | <p>a) Independent of statutorily contemplated declarations made in Schedule FA by the Appellant, in returns of income filed under s.139(1) of the Income-tax Act, 1961, which carry an underlying statement of truth, the Appellant has also produced a 'source of wealth' certification issued in June 2017 (PB Vol.5, page 2303-2307), wherein the trustees record the cessation of the Appellant as beneficiary. The certification has been produced to the Revenue since the last four years and has not been contested by the Revenue in the IT proceedings. The position that the Appellant has ceased to be a beneficiary was also put forth in the WT Act proceedings before this Hon'ble Tribunal and was uncontroverted by the Revenue. The order dated 24 December 2020 records the submission of the</p> |

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|     |                    | <p>Appellant as to cessation of the Appellant's status as beneficiary of the Trust, at paragraph 18(3) at Page 1976-1977. As such the position that was not contested by Revenue in the IT and/or WT proceedings cannot now be contested in the BMA proceedings, on the principle of approbate and reprobate.</p> <p>b) The source of wealth statement dated 27 June 2017, duly issued by existing Trustees of the Banyan Trust i.e., Confiance Limited (now succeeded by Praxis Trustees Limited) has certified that the existing class of beneficiaries was wholly replaced on 14 July 2014 by a new class of beneficiaries, which does not include the Appellant or any other Indian residents.</p> <p>c) In order to counter the belated allegation of the Revenue that the Appellant has not produced authentic material in relation to cessation as beneficiary, a clarificatory validation of the June 2017 source of trust wealth certification has been obtained also from Praxis Trustees Limited on 4 August 2021, and duly filed under cover of application dated 5 August 2021 in order to establish the current position in the matter, i.e. that the Appellant is not a beneficiary of the Trust, having so ceased in July 2014.</p> <p>d) The Revenue's contention, therefore, that no document has been provided to prove cessation by</p> |

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|     |  | the Appellant, is fictitious, and overlooks positions hitherto adopted by the Revenue, and material on record in the BMA proceedings.   |
| 3.  | Appellant has withdrawn consent waiver | <p>a) The Appellant has signed a consent waiver letter dated 11 July 2013 but was alleged to have withdrawn the consent waiver based on a draft letter found in the computer of the Appellant during search proceedings.</p> <p>b) in the absence of a signed letter, the draft letter did not constitute valid or relevant evidence- the law accords it treatment as a 'dumb' document- judgment citations, in support, have been filed by the Appellant.</p> <p>c) In any event, the Swiss Federal Tax Administration in its letter dated 30 June 2015 certified that the Appellant had rendered full cooperation and authorized full cooperation, which is plainly inconsistent with any purported withdrawal of consent waiver.</p> <p>d) the Commissioner (Appeals) placed heavy reliance on the judgment of this Hon'ble Tribunal in the case of <b>Renu Tharani v. DCIT [2020] 117 taxmann.com 804 (Mumbai Trib.)</b> to allege that on similar facts, addition in respect of foreign bank account held in the name of Tharani Family Trust, of which Ms. Renu Tharani was a beneficiary, was upheld by this Hon'ble Tribunal. The case is distinguishable, since in that case, the assessee</p> |

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|     |  | <p>declined to sign the consent waiver letter to enable the Revenue to obtain all necessary details from the foreign bank; and accordingly, an adverse inference was drawn by this Hon'ble Tribunal, and consequently the additions were upheld. In the present case, not only has the Appellant duly co-operated with all relevant authorities, but rather this fact is also affirmed by the relevant competent authority, i.e., the Swiss Federal Tax Administration. Thus, the case of Renu Tharani (supra) is not applicable.</p>  |
| 4.  | Appellant enjoying assets of Trust           | <p>a) The Appellant reiterates the unsigned letter of Sorwood, which in any event has not been shown to have been acted upon, and in any event a letter that does not bear the signature of the Appellant, is both irrelevant, and in any event liable to treatment as 'dumb documents', with no sanctity in the eyes of law.</p>  |
| 5.  | Confiance letters dated 20 and 24 April 2012 | <p>a) During the IT Act proceedings, the Appellant relied upon the 'source of trust wealth' statement, issued in June 2017 by the trustees Confiance Limited (now succeeded by Praxis Trustees Limited), which had carried out a detailed analysis of the creation of the irrevocable offshore discretionary trust by the non-resident settlor / contributor of AT-351 Trust, migration of trusts and assets from time to time, and also certified that the existing class of beneficiaries was wholly replaced on 14 July 2014 by a new class of beneficiaries which did not include the Appellant or any other Indian residents. It is not open to</p> |

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|     |   | <p>Revenue to cherry pick documents issued by the trustees, disregarding that the assets of Kinetic Holdings Limited and Avit Investments Limited are admitted by the PCIT to have been held at the material time by Late Mr. Pratap Malpani.</p> <p>b) In any event, since the Revenue has unequivocally admitted, in the WT Act proceedings that the Appellant is not a contributor to the Trust, it is not available to the Revenue to adopt an inconsistent position for purposes of the BMA proceedings. There is an attempt by Revenue to distort facts, which is unjust and contrary to the doctrine of fair play in adjudication.</p>  |
| 6.  | <p>Confiance Limited is Appellant's service provider and thus letters issued by Confiance Limited cannot be relied upon as these are self-serving documents</p> | <p>a) Revenue seeks to contest the source of trust wealth certification issued by Confiance in June 2017 through purporting to rely upon the LinkedIn profile of Confiance Limited to allege that while the Appellant is the settlor / contributor since Confiance Limited is a private service provider of Appellant, it must only be issuing self-serving letters / certificates / documents, which are not contrary to the interests of this service recipient.</p> <p>b) Revenue overlooks that the source of trust wealth certification issued by Confiance in June 2017 was relied upon in the IT Act proceedings, and the Revenue had factored in its contents to concede in the PCIT letter dated 28 August 2017 that the shareholding interests of Kinetic Holdings Limited</p> |

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|     |                            | <p>and Avit Investments Limited belonged to Late Mr. Pratap Malpani.</p> <p>c) Revenue has had adequate opportunity of over four years to verify the validity and accuracy of the source of trust wealth certification issued by Confiance in June 2017, including through the Guernsey Tax Office, and where such enquiries for tax information have not yielded anything that can assist the inconsistent case advanced by the Revenue across IT Act, WT Act and BMA proceedings, the case of the Revenue must fail.</p> <p>d) Apostilled and notarized documents executed solemnly by trusteeship service providers who carry on lawful business, with full accountability to the relevant statutory authorities, cannot be lightly questioned through resort to frivolous surmise and conjecture.</p> |
| 7.  | Statements by Mr. G L Lath | <p>a) The reliance placed by the Revenue on statements made by Mr. G L Lath in the course of search proceedings is impermissible in circumstances where Mr. Lath after recording his statement on oath, had subsequently retracted from his statement. The statement of Mr. G L Lath has no evidentiary value, and Revenue is bound by Instruction No. F.NO.286/2/2003 - IT (INV. II), dated 10 March 2003 issued by CBDT and CBDT Letter No. F.NO.286/98/ 2013-IT (INV.II)], dated 18 December 2014 wherein it is made clear time and again that admissions retracted</p>  |

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|     |                    | <p>subsequently do not serve any useful purpose. Reliance is also placed on the ruling of <b>D.S. Agencies &amp; Associates v. ACIT [(2017) 82 taxmann.com 252 (Mum. Trib.) – Para 24]</b> wherein it was held that additions made on the basis of retracted statements are without any basis and deserved to be deleted absent corroborative material on record.</p> <p>b) In any event, Mr. Lath has made statements inconsistent with documentary material available on record with the Revenue as to beneficial ownership of Kinetic Holdings Limited and/or Avit Investments Limited of Shri Pratap Malpani, which has also been conceded by PCIT letter dated 28 August 2017 (Vol.1, Page 311).</p> <p>c) In the course of cross-examination of Mr. Lath the Appellant established that the Appellant was not a contributor of any asset in any form, from India or any foreign asset, the Appellant was not a contributor to the corpus of Banyan Trust or any other entities therein, and further that the Appellant has not received any distribution as a beneficiary in his individual capacity in India or abroad (refer question no.2 of cross examination, PB Vol.1 @ page no.60-61).</p> <p>d) The investigating officer elected not to re-examine Mr. Lath after the cross-examination conducted behalf the Appellant, despite opportunity available.</p> |

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|     |                                   | <p>in law under sections 137 and 138 of Evidence Act, 1872, and in the circumstances, the statements made in cross-examination by Mr. Lath that the Appellant is not a contributory or settlor and that there is no distribution are liable to be treated as standing established.</p> <p>e) Having failed to ensure that the statements of G L Lath fulfil the minimum criterion prescribed in law for admissibility into evidence, it was not available to the Commissioner (Appeals) to rely upon such contentions, all culled out of an impugned ITSC order, to the detriment of the Appellant.</p>  |
| 8.  | Statements of Ms. Nita Shivdasani | <p>a) The Appellant has not been offered opportunity to cross-examine Ms. Nita Shivdasani, and as such her alleged statement is incapable of reliance.</p> <p>b) The Revenue claims that the Appellant instructed Ms. Nita to delete email messages from her Gmail account purportedly containing specific details about the bank account statements, investment details. No purpose can have been served in issuing such instructions since Tax Information Exchange Agreements can easily procure such information, and since these bank statements pertained to bank accounts of the Trust, there was no purpose to be achieved through instructing Ms. Nita on lines alleged by the Revenue.</p> <p>c) The Appellant at no point instructed Ms. Nita Shivdasani to convey to Mr. Andrew Hart to delete</p> |

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|     |                                      | <p>his name as beneficiary of Mokopane Ltd. By virtue of Mokopane Limited being a trust vehicle, Form A declaration had no bearing in law, as explained in detail in the foregoing.</p> <p>d) Having failed to fulfil the minimum criterion prescribed in law for admissibility into evidence of such purported statements, it was not available to the Commissioner (Appeals) to rely upon such purported statement and conclusions, all culled out of an impugned ITSC order, to the detriment of the Appellant.</p>  |
| 9.  | Statements of sons of Pratap Malpani | <p>a) The reliance placed on statements of sons of Pratap Malpani recorded during search proceedings under IT Act, wherein the sons of Pratap Malpani allegedly confirmed that they did not execute any renunciations of their rights under the Trust have not been produced to the Appellant in order to enable the Appellant to cross-examine the sons who are claimed to have issued statements. Copies of such statements were bound to have been furnished to the Appellant. Instead, the Revenue claims that since one of the sons was resident in the house of the Appellant, therefore, the Appellant was bound to be aware of such statements. The law prescribes that a statement that is being relied upon by the Revenue must be produced to the party against whom such a statement is intended to be used, and an opportunity for cross-examination is liable to be afforded. Having failed to fulfil the minimum</p> |

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|     |  | <p>critereon prescribed in law for admissibility into evidence of such purported statements, it was not available to the Commissioner (Appeals) to rely upon such contentions, all culled out of an impugned ITSC order, to the detriment of the Appellant.</p>   |
| 10. | Appellant is sole beneficiary of the Trust | <p>a) The Revenue submission is significant, for the reason that it is inconsistent with the case of the Revenue that the authenticity of the Instrument of Trust is in question.</p> <p>b) There is error on the part of the Revenue in cherry-picking clauses of the Instrument of Trust. A complete list of beneficiaries (Vol.1, page 8) is available in the Instrument of Trust i.e., the class of beneficiaries being lineal descendants, charitable organizations in India and Guernsey. Therefore, the Appellant cannot be regarded as sole beneficiary of the Trust, in manner oblivious to express stipulations to the contrary, in the Instrument of Trust.</p> <p>c) To the extent that Revenue seeks to base its submission on the power of appointment and removal of trustees, the submission overlooks that if the power of appointment and removal of trustees was the basis for rendering any person as sole beneficiary, then in such event the power of appointment and removal hitherto vested first in the Late Pratap Malpani, later in Ashokvardhan Birla, then in Sunanda Birla, and finally the</p> |

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|     |                    | <p>Appellant. Thus, such an interpretation would result in the incongruity that since the Settlor remained the sole beneficiary and beneficial owner of its assets and income, the Trust was revocable. Then that the assets of the Trust vested in Ashokvardhan Birla who also had the power of appointment and removal, and so on. Such a theory of revolving 'beneficial ownership' depending on who is vested with power of appointment and removal, is completely inconsistent with the provisions of the Instrument of Trust.</p> <p>d) No evidence has been led by Revenue to prove that Appellant exercised power of appointment and removal of trustees, and has completely overlooked (A) clause 8(3) of the Instrument of Trust (PB Vol.1, page 4), which expressly confers absolute power and authority upon the trustees to appoint new trustees, and (B) Clause 8(4) of the Instrument of Trust (PB Vol-1, page 5) wherein express powers for migration of trust assets to new trustees, that may in turn be appointed by existing trustees. Thus, in circumstances where trustee appointments and migrations have occurred, without exercise of the power of appointment or removal of trustees by the Appellant, in consonance with the framework of the Instrument of Trust, it cannot be reasonably contended by the Revenue that the vestiture of power of appointments and removal vests control of the Trust with the Appellant.</p> |

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|     |                    | <p>e) In any event, the Revenue submission is founded on the assumption that Form A only discloses the Appellant's name as the person having beneficial ownership, which is mere conjecture at best, since the framework of tax information exchange, encapsulated in TIEAs has the limitation of delivering documents strictly pertaining to the person in respect of whom an enquiry is initiated for information request, and no further.</p> <p>f) The Revenue submission also completely disregards order of this Hon'ble Tribunal, which has already rejected this very contention in the WT proceedings, and concluded that the case of the Revenue as to the Appellant being the sole beneficiary is unsustainable (refer para 29- page 2014).</p> <p>g) No scope exists for treating the Appellant as sole beneficiary of the entire assets and income of the Trust exigible to BMA in the hands of the Appellant. Such an interpretation would result in denuding and eviscerating lawful rights and entitlements of other beneficiaries under the Instrument of Trust.</p> <p>h) The Appellant, by virtue of having ceased to remain a member of the class of beneficiaries of the Trust, in July 2014, cannot be treated as a beneficiary at all, much less a sole beneficiary.</p> |

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| 11. | To determine beneficial ownership under BMA section 139(1) Explanation 4 & 5 cannot be relied upon | <p>a) The Revenue contends section 139(1) of IT Act is not referred in section 84 of the BMA and thus in order to interpret the provisions of BMA, this section cannot be relied upon.</p> <p>b) The contention of Revenue is fatally flawed in light of the fifth proviso to s.139(1) which stipulates that where a person holds as "beneficial owner" any asset located outside India or is a "beneficiary" of an asset located outside India, he shall furnish a return of income, declaring such asset. This amendment (fifth proviso) which came onto the statute book on 1 April 2012 was synchronized with a revision to the prescribed form for filing of returns of income for AY 2012-13 and was the precursor to disclosure of foreign assets and income, which would ultimately be brought within the sweep of BMA.</p> <p>c) The fact that BMA refers extensively across various sections to s.139(1), and also through s.2(15) imports definitions in the IT Act, puts it beyond doubt that the legislative intent was for Explanation 4 &amp; 5 to s.139(1) to be determinative of "beneficial ownership" for purposes of BMA.</p> <p>d) In addition to s.59 BMA which envisages a declaration to be filed only for those assets and / or income which an assessee has failed to disclose in return of income filed under section 139 of IT Act, FAQ no. 31 of CBDT Circular No.13 of 2015</p> |

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|     |                    | <p>dated 6 July 2015 also refers to Explanation 4 and 5 of section 139 of the IT Act.</p> <p>e) The contention of Revenue that section 139 of IT Act is not the repository, for purposes of BMA, of the scope and ambit of 'beneficial ownership' is erroneous.</p> <p>f) In any event, the Revenue has not placed which definition of beneficial ownership is liable to be applied.</p> |

**Date: 20 August 2021**

**Place: Mumbai**