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IN THE INTERMEDIATE COURT OF MAURITIUS

(Criminal Division)

In the matter of :-
C.No.1153/2009

ICAC v 1. Zainool Abedeen MORABY

2. Nazeemuddin MORABY

J U D G M E N T

Accused Zainool Abedeen Moraby, a pharmacist since 1988 (hereinafter referred to as "*Accused No.1*") and Accused Nazeemuddin Moraby, a Human Resources Officer (hereinafter referred to as "*Accused No.2*") are brothers. They are prosecuted under six counts of Money Laundering in breach of section 3(1)(b), 6(3) & 8 of the Financial Intelligence & Anti Money Laundering Act (hereinafter referred to as 'FIAMLA") to which they have respectively pleaded **Not Guilty**.

Mr Domingue SC appears for the Accused parties and Mr Goburdhun appears for the Prosecuting Authority.

The offences occurred on various dates between 22 January 2003 and April 2007.

The gist of the case is as follow :-

As per the Prosecution, the predicate crime is particularized as being ***'conspiracy** to conceal funds that should have been subject to tax assessment under the law'* – *see pg 8 of court record – entry of 29 July 2010.*

The particulars of the information concern generally transfers of funds by Accused No.1 and possession of funds by Accused No.2 - which said funds are considered by the Prosecution as being ***proceeds of crime.***

Those legitimate funds which at all times belonged to Accused No.1 were transferred (mainly via bank cheques) from bank accounts initially held by Accused No.2 (who consented being holder of his brother's bank accounts and signed all the relevant paperwork, without having any control thereon or knowledge as to the deposits) to other new bank accounts held by Accused No.2 himself and the mother/sister of Accused Nos.1 & 2 in their capacity as *prête-noms*. Those bank accounts are mainly operated by Accused No.1 in his capacity as Proxy. Accused No.1 concedes that he had not paid tax on the funds in the bank accounts.

The details of the bank accounts as per the charges faced by each Accused party are set down below at pgs 5 & 6.

It is not disputed

(a) *by Accused No.1 that he effected those transfers from 2003 to 2007,*

(b) *by Accused No.2 that he was holder of bank accounts opened with Accused No.1's funds, albeit without any control thereon,*

(c) *by the Prosecution that the funds placed in the various bank accounts as per information were legitimate proceeds from Accused No.1's pharmacy and rental of his bungalow – see testimony of PC René at pg 13 of transcript dated 4 March 2013 - and interests accrued from Fixed Deposit terms & from purchase of Treasury Bills,*

(d) *The same 'legitimate' funds were flowing in and out of the accounts and there was no injection of fresh funds.*

In .July 2007 Accused No.1 decided to make full & timely disclosure under the Voluntary Disclosure Incentive Scheme ["VDIS"] enacted by section 161A(1) of the Income Tax Act ["ITA"] spearheaded by the Mauritius Revenue Authority ["MRA"]. The services of Accountant Mr Beedassy were retained in **July 2007** to do needful as regards his tax assessment from years 2002 to 2006, as well as the services of tax consultant Mr Gunness, as regards the audit trail/*Doc Z onwards.*

A Disclosure Order to all banks as regards Accused No.2 and his mother and an Attachment Order as regards funds of various members of the Moraby

family held by the Barclays Bank was also applied for by the Prosecuting Authority and same were granted on **3 December 2007** – see ***Doc Y*** - and it is the case for the Prosecution that the Order was thereafter published in the Government Gazette and two newspapers – albeit no evidence of same was produced..

On **20 December 2007**, the Accused parties (amongst others) applied for Revocation of the Attachment Order on the main ground that Accused No.1's attached funds were not derived otherwise than legitimately - see *Doc AC.*

During the course of his deposition under oath, **Accused No.1** conceded that at the time he applied to be considered eligible for VDIS, he was aware of the prosecuting body's investigation into his (tax) affairs and had taken due note of *Clauses 12 & 15 of the VDIS pamphlet* - see *extract at pg 15 below*. He did not consider himself so excluded in as much as he had *not* been prosecuted/convicted under the various statutes therein mentioned at the material time and intended to avail himself fully of all the benefits offered by VDIS.

Formal Disclosure under VDIS was made on **28 December 2007** – see *Doc AA* and Accused No.1 was assessed to pay Rs.316, 591.- as tax liability - which has been settled as per the scheduled payments. Accused No.1 was aware at that time/28 December 2007 that his funds had been attached by the prosecuting body but not aware of the type of enquiry carried out by the prosecuting authority.

Mr Bissoon from the MRA was referred to *Annex 4 of Doc AA* which mentions " *no prosecution shall be initiated against me …*" - *see pg 23 and onwards of transcript of 4 March 2013* and he clarified that this proviso meant " … *no prosecution under the **Income Tax Act…".***

Defence Witness Accountant Mr Beedassy started working on Accused No.1's VDIS Disclosure in September 2007 as the MRA had yet to finalise the VIDIS regulations (which were issued in September 2007) and information had to be sought from banks. Being found eligible under the VDIS scheme, Accused No.1 subsequently made good, within the statutory delay/ before **31st *December 2007***, all outstanding taxes – subject to the scheduled subsequent payments.

Because of the delay and complications in compiling the accounts, Mr Beedassy solemnly affirmed an affidavit- *Doc AC -* that his services had been

retained by Accused No.1 since July 2007 to effect a VDIS Disclosure and as at 18 December 2007, he had not yet finished the accounting exercise. Mr Beedassy stated that *he* filled in all Accused No.1's MRA forms pursuant to the VDIS Application. He was at that time aware of an ICAC enquiry but was not aware that Accused No.1's funds had been Attached at the time in as much as neither Accused No.1 informed him of same, neither was he informed by the bank/s nor had he read any such newspaper publication. He added that he had not breached any of the VDIS Qualifying Provisions as at the material time there had been no *" conviction"* as regards Accused No.1 under the prescribed statutes – see *Clause 15 of the Salient Features of VDIS at pg 15 below.*

All the funds in those bank accounts/Barclays Bank – Vacoas Branch & Banque des Mascareignes were subsequently subject to an Attachment Order on **13 August 2009** pending determination of the present case – *see Doc W.*

Accused No.2 did not depose under oath or otherwise or cause any evidence to be adduced on his behalf. His defence statements are on record.

The Court notes that the present case was lodged on **30 November 2009.**

It is the case for the Prosecution that it is irrelevant that the offence is a tax-related one as opposed to a typically crime-related one *per se* and/or funds do not emanate from a tainted source in as much as, according to the Prosecution, the mere fact of Accused No.1 *conspiring to evade paying tax* by concealing his taxable income in various bank accounts in family member/s names is sufficient to transform those funds into ***"proceeds of crime" – see R v K (I.) [2007] 2 Cr.App.R 10 CA*** – the relevant extract is reproduced below at *page 8* for ease of perusal..

It is also the contention of the Prosecution that Accused No.1 cannot plead in the teeth of *sections 19, 146 to 149 ITA* that he had been granted immunity from prosecution for *any* offence under the law.

The defence has submitted that Accused's No.1's accrued source of income which albeit was later placed in various family members' bank accounts is unimpeacheable. It would therefore be incumbent on the Prosecution to establish that -

1. *Accused No.1's funds*" emanates *"… wholly and directly from a crime or criminal activity…."* in line with *section 125(2) District & Intermediate Courts (Criminal Jurisdiction) Act* - which it has not proved,
2. in as much as unlawful "transfer/possession" cannot be inferred - as per the principles of ***Beekhan v The Queen [1976 MR 3],***
3. *the Accused parties suspected those funds were of tainted origin &*
4. *as regards Count 1 a Roll Over of funds - see Doc Q cannot be equated to a "transfer".*

In the alternative, it was submitted by the Defence that

(a) Accused parties are shielded by the *immunity* conferred by law by *section 161A(19) ITA* - reproduced at pg 14 below,

(b) *Accused No.2 was never in possession of property wholly and directly the proceeds of crime - in as much as the elements of "knowledge" & "consent" were lacking and neither did he have any reason to suspect that such property was derived wholly & directly from crime.*

It is furthermore the case for the defence that Particulars are inconsistent with and negate all the charges and that the Prosecution should have given *notice* of the activity that generated the alleged illicit proceeds – see ***DPP v Bholah [2011 UKPC 44 PC.***

❖ **<u>The four charges against Accused No.1 by order of date</u>**

Accused No.1 stands charged under **Counts 1, 3, 5 & 6** of **transferring property/money held by his brother Accused No.2** which in whole directly represented ***proceeds of a crime*** which he suspected was derived in whole, directly from a crime to other bank account/s in Accused No.2's name. The grid below gives details of money transferred. Accused No.1 does not dispute

making those monetary transfers and Accused No.2 does not dispute that bank accounts were in his name.

	sum of Rs.1.5 M	cheque.	00 at Mascareignes.	
Count 6	Accused No.2 held account No,1002184 at Barclays Bank in the sum of Rs.820,000.-	n 27 March 2007, Accused No.1 Rs.820,000 transferred to another account	Rs.820,000.- transferred to Account No.7022063 at Barclays Bank	Accused No.1
Count 1	Accused No.2 held account No.7047908 at Barclays Bank in the sum of Rs.1 M	*In April 2007, Rs.1 M rolled over to another bank account	Rs.1 M rolled over to Account No.7026891 at Barclays Bank – see RollOver Certificate-*Doc Q*	Accused No.2

- **<u>The two charges against Accused No.2 by order of date – see information</u>**

(a) ***Count 4*** *- Accused No.2 was on 22 January 2003 in possession of Rs.2.715,000.- in bank account No.4245088 at Barclays Bank which sum represented the proceeds of crime where he suspected that same was derived in whole, directly from a crime.*

(b) Count 2 *- Accused No.2 was in April 2007 in possession of Rs.1 M in bank account No.7026891 at Barclays Bank which sum was represented the proceeds of crime where he suspected that same was derived in whole, directly from a crime.*

It is the contention of the defence that this *"possession"* is linked to Count 1 and was the result of a Roll Over exercise.

ISSUES CONSIDERED BY THE COURT WHICH ARE TO BE READ COMPREHENSIVELY

A. **Roll Over of funds from one bank account to another v "Transfer" of funds from one account to another**

Refer to testimony of **Mr Jomadar of Barclays Bank** at *pg 34 onwards of transcript 4 March 2013.*

Much has been said about fixed deposit accounts *rolling over*/carrying over those same matured funds to another account. But as per instructions given/not given by account holder, those same funds could end up in a differently

numbered account if the terms and conditions do not remain the same and new KYC [“Know Your Customer”] documents might have to be drawn up.

Albeit funds of the accounts being those very same initial (legitimate) funds have been *rolled over*, they are/could be in a manner of speaking *“transferred”* to another differently numbered account, subject to instructions.

The Court does not see the actual difference in a *“Roll Over”* or a *“Transfer”* that would warrant distinguishing same.

B. **Predicate Offence - *‘Conspiracy to conceal funds that should have been subject to tax assessment under the law’.***

A reading of the ITA reveals that the most proximate section of the tax law relating to the **“predicate offence”** of which Notice was not given to the Defence until after the case was lodged/29 July 2010 - albeit the Prosecution’s case is based entirely on same, would be **sections 148(e) ITA** which reads as follows :-

148. Other offences

Any person who - …

(e) fails to pay any tax payable under this Act or

shall commit an offence and shall on conviction, be liable to a fine not exceeding Rs.5,000.- and to imprisonment for a term not exceeding 6 months.

C. ***Section 3(1) FIAMLA & “proceeds of crime”***

The enabling enactment of the FIAMLA reads as follows :-

3. Money Laundering

(1) Any person who -
(a) ---
(b) receives, is in possession of, conceals, disguises, ***transfers,*** *converts, disposes of, removes from or brings into Mauritius* ***any property*** *which is, or in whole or in part directly or indirectly represents, the* ***proceeds of any crime****, where he* ***suspects*** *or has reasonable grounds for suspecting that the* ***property is derived*** *or realized, in whole or in part, directly or indirectly* ***from any crime****, shall commit an offence.*

There is no definition in the FIAMLA of what *"proceeds of crime"* means although there is a definition for *"property"* and this includes "*currency*".

The position in Mauritius as per the FIAMLA is that a person would be guilty of money laundering if he commits **one of the acts listed** above as regards ***proceeds of crime*** AND where he ***suspects*** same to be derived directly/indirectly from any crime.

Mr Goburdhun's Argument based on *"pecuniary advantage in the form of tax avoidance"* – see ***R v K(I) [supra]****,* is deceptively attractive.

It was held therein that " … *where a person cheats the revenue by under declaring the takings of a legitimate trade, he obtains a pecuniary advantage in the form of tax avoided and is said to have obtained … a sum of money equal to the value of the pecuniary advantage and that he further* ***"benefitted"*** *from his conduct and the value of his benefit was the value of the sum of money he was treated as having obtained… It would have been open to the jury to infer that the cash represented the underdeclared takings … so it would then be " criminal property" ….*

In the present case, there has been no *"under declaring of the takings of a legitimate trade" per se* as in *R v K [supra]* but the rationale is similar to the Prosecution's case i.e – by concealing his legitimate funds under various *prête noms* accounts, Accused No.1 ***benefitted*** from a pecuniary advantage by not paying tax thereon.

The Prosecution's "Argument" advances further when it invites the Court to infer that the *" family conspiracy to evade taxes"* is a *"criminal activity" which* automatically transmutes legitimate funds into *"proceeds of crime"* that are the subject matter/s of the 6 charges of *money laundering*, as per information from which Accused No.1 *benefitted*.

It has always been the case for the Defence that the transferred funds were legitimate funds and this has not been rebutted by the Prosecution.

The Prosecution's Arguments as regards *"proceeds of crime'* do not find favour with the Court.

References to the UK's Proceeds of Crime Act 2002 **[POCA-UK]** and UK legislation have been made for a better understanding of the break down of the case below - ***R v Loizou & Ors [2005] ECWA Crim 1579, [2005] 2 Cr App R 618, [2005] Crim LR 885*** and are not to be construed otherwise or as criticism.

Part 7 of **POCA-UK** defines *"property"* as *'criminal property'* if it constitutes a *person's benefit* (be it in whole or part or directly or indirectly) *from criminal conduct* in the UK - irrespective of who carried out the conduct or who benefitted from it. A person *"benefits from conduct"* if he obtains property as a result of or in connection with the *conduct* - see sections 340(5), 340(6) & 340(8) on *"… benefits from conduct…"*- ***para 790- Halsbury's Laws of England – 4th Edition – 2006 Reissue -Volume 11(2).*** The Court notes the reference to *"benefit"* in *R v K [supra].*

It is noted that-

(i) The FIAMLA does not have a definition of what constitutes *"proceeds of crime",*

(ii) Under section 327(1)(d) POCA-UK, there exists a specific charge of *"transferring criminal property"* as opposed to all-encompassing charges of *"money laundering"* under the FIAMLA.

(iii) It is the procedure in UK, in disputed cases and for serious/complex/long matters, for the trial Court to be invited to hold *"preparatory hearings"* pursuant to section 29 Criminal Procedure & Investigations Act 1996, to assess what can be considered as *"criminal property"* before proceeding with a Trial proper.

(iv) Inviting this Court to *infer* that the *conspiracy* to transfer Accused No.1's legitimate funds to *prête noms* accounts in order to pay less tax and thereby defraud the MRA is a *"criminal activity"* that automatically transmutes Accused No.1's funds into *" proceeds of crime" which the Accused parties suspected as being derived from a crime"*' is too much inference for a Court of law to make in a legal vacuum and in the teeth of the evidence on record.

(v) The facts (as reproduced below) in ***R v Loizou & Ors [supra]*** appear to be practically on all fours with the Prosecution's case.

D. A [regretfully extensive] break-down of R v Loizou & Ors [supra] to set matters straight and avoid further repetition. Reference is made to the commentary reported in the *Criminal Appeal Report* as listed above.

At Trial stage, ***Loizou & Ors*** had been due to stand Trial for transferring criminal property contrary to section 327(1)(d) POCA-UK. The Particulars being *transferring criminal property/£ 87,010.-in cash* (in a car park when one of the Appellants walked from a car to another and back whilst carrying a pouch during the last trip) whilst knowing or **suspecting** that the cash constituted a **personal benefit** from **criminal conduct**.

By section 327(1)(d) POCA-OK, a person commits an offence if he **conceals, disguises, converts or transfers** criminal property. *The Court notes that some of these elements, as highlighted above, are echoed to a certain extent in enabling section 3 FIAMLA.*

A preparatory hearing as regards the meaning of "*criminal property*" was held. The Judge ruled that for the purposes of section 340 POCA-UK it was open to the Crown to **prove** that the property being transferred became *criminal property* when it was transferred for a criminal purpose and the Trial started.

The Appellants subsequently appealed against the Interlocutory Ruling. On Appeal, albeit declining jurisdiction because the case did not fall within the specific criteria whereby such appeal was permissible, the Appellate Court was invited by the Prosecution and the Defence to express its views on the point/s, as permitted by law.

The Crown in ***Loizou*** had submitted that –

1. *The Appellants were parties to a conspiracy to evade duty on imported cigarettes,*
2. *The agreement forming the conspiracy was made before the transfer of the cash relied upon in the indictment,*
3. *It was that conspiracy which was "criminal conduct" within the meaning of section 340(3) POCA-UK,*
4. *The recipient of the cash obtained property as a result of or in connection with the conspiracy,*

5. *It follows that he benefitted from the criminal conduct and therefore that the property was criminal property.*

This Argument is similar to Prosecution's.

The Court's view generally was that the meaning of section 327(1) POCA-UK was that property concealed, disguised, converted, transferred ***had to be criminal property*** ***<u>at the time</u>*** ***it was so concealed, disguised, converted or transferred.***

The Judges of the Appellate Court held that " … *[The Crown's] analysis is correct so far as it goes, but in our judgment, it is not sufficient for the Crown's purposes because the recipient did not* ***benefit*** *until* ***after*** *the transfer was made. Thus when the cash was* ***transferred****, which is when the alleged offence occurred,* ***the cash was not criminal property*** *because it did* ***not*** *constitute anyone's benefit from criminal conduct, which on this hypothesis, was the* ***conspiracy****. The cash was* ***not*** *criminal property until it was in the hands of the recipient, which was* ***after*** *the alleged criminal offence occurred. It is important to note that the Crown do not say, on the facts of this case, that there was any transfer of cash pursuant to the alleged conspiracy before the transfer on 20 June, which is the subject of the indictment. We are not therefore concerned with a case in which there was an antecedent transfer, pursuant to the conspiracy, such that it may be said that someone had received a benefit from criminal conduct (the conspiracy) before the transfer [of] the subject matter of the indictment. …"*

And the Judges Declared that had they had jurisdiction, they would have Allowed the appeal.

E. **The Prosecution's case in "Loizou" [supra] juxtaposed against the Prosecution's case in the present matter.**

Refer to the Crown's case in ***Loizou*** as detailed above.

In the present case, similarly as in **Loizou**, the Prosecution is inviting the Court to consider that -

(a) *Accused parties were part of a family conspiracy to assist Accused No.1 in evading taxes – thereby defrauding the MRA,*

(b) *The agreement forming the conspiracy was made before the transfer of the monies relied upon in the information,*

(c) It was that conspiracy which is the "criminal conduct" that transmutes the money into "proceeds of crime",

(d) The recipient of the money (which was Accused No.1 as Proxy retaining all proprietary rights on the bank accounts as opposed to Accused No.2) obtained a benefit/"property"/untaxed money and unpaid taxes as a result of or in connection with the conspiracy,

(e) It follows that, according to the Prosecution and its cited case of R v K(I.) [supra], Accused No.1 benefitted from the criminal conduct and therefore that the property was" criminal proceeds".

(f) And Accused No.2, being a consenting party and party to the conspiracy, was aware that he was in possession of such property.

In the teeth of ***Loizou*** [supra] which has several similarities to the Prosecution's case. It is abundantly clear that however skillfully the Prosecution might couch it and despite the lack of the element of *"benefit"* - which is not in our law , the rationale remains that the *transferred legitimate funds* cannot be considered as *"proceeds of crime"* <u>at the time</u> it was transferred albeit in pursuance of the *"conspiracy"*.

As per the enabling enactment and **Loizou -** for the offence to be successfully consummated, the transferred funds would have had to be **"** *proceeds of crime"* at the time of transfer - which they could not have been because those funds remained legitimate until Accused No.1 perceived a benefit from same / by not paying tax AND at the time of *"transfer/possession"* the Accused parties must have knowledge that those funds were *"proceeds of crime"*.

For the sake of legal argument and as an example - what would have been the stand of the Prosecution had those funds been indeed transferred as part of the tax avoidance conspiracy but well before the filing of the next Annual Tax Return, Accused No.1 has a change of heart, decides to pay all taxes due for that financial year and indeed does so? And that is why the Legislator, in his wisdom, has prescribed that the **funds have to be "proceeds of crime" at the time of transfer**.

The Court notes that the predicate offence as per Prosecution is *not " … transfer of funds …"* but *"<u>conspiracy</u> to conceal funds"*. It is a moot point how much concealment there could have been when Accused No.1 was at all times the Proxy of the accounts – but that is another matter the Court does not wish to delve into AND even if the predicate offence had been a straightforward *"transfer"* of funds - the Prosecution would have had to prove that Accused parties knew those transferred funds were *"proceeds of crime" at the time of transfer.*

A conspiracy *per se* cannot automatically transmute the funds into *"proceeds of crime"* - it is the actual *"transfer of funds knowing same to be proceeds of crime"-* which would be constitutive of *"conduct*' that brings to life the offence charged.

A successful Prosecution as per information would furthermore entail the Prosecution proving that **at the time of transfer, the Accused parties knew/suspected** those monies were **proceeds of crime.** And the Prosecution has not proved to the satisfaction of this Court that the transferred funds were at the time of transfer *"proceeds of crime"* AND Accused parties ever *knew/suspected* that these funds were such *"proceeds of crime".*

Accused No.1's legitimate money (albeit transferred to the *prête-noms accounts* wherein he retained all proprietary rights) cannot be considered as "*proceeds of crime*" since as per *ratio* in ***Loizou [supra]*** it had *not* yet transformed itself into *"proceeds of crime"* which could only occur **after** Accused No.1 *" benefitted"* from same AND at the time of transfer Accused No.1 had **not** yet benefitted from same as he would have *"benefitted"* only after that relevant financial year's Tax Assessment AND at no time has it been proved that he or Accused No.2 ever suspected that those legitimate funds- albeit transferred - were *"proceeds of crime"* .

For all the reasons given above, the Court declines to make any finding that the transferred funds are or could be considered as " proceeds of crime" And that Accused parties were aware that those funds were "proceeds of crime".

F. Alternative Defence - Immunity under section 161A(19) ITA

Albeit that the Court has not ruled in favour of the Prosecution as regards the material issues of *" proceeds of crime"* and *"knowledge"*, the Court nevertheless addresses the alternative "*immunity*" defence.

The legal frame work of VDIS is reproduced below for ease of reference and perusal.

Section 161A(17) & **(19) ITA** are enacted by **para (zf) Finance Act 2007**

Voluntary Disclosure Incentive scheme (VDIS)

(17) Where a person makes, by 31 December 2007, a voluntary disclosure of his undeclared or underdeclared income in respect of the 5 years of assessment ended 30 June 2007, he shall, at the same time, pay tax in accordance with the disclosure at the appropriate rate in force in respect of each of the years of assessment, together with interest at the rate 0.5 per cent per month as from the date the tax was due and payable.

(18) Where the tax and interest under subsection (17) is not paid at the time of the disclosure,any unpaid tax and interest shall carry interest at the rate of 14 per cent per annum.

(19) Where a person makes a voluntary disclosure under subsection (17) and the Director-General is satisfied with such disclosure, that person shall be deemed, notwithstanding sections 146, 147, 148 and 149, not to have committed an offence.*

(20) The disclosure under subsection (17) shall be made in such form and manner as may be determined by the Director-General.

Furthermore, according to Answer 1 of the Questions & Answers on VDIS scheme at *pg 7 of Doc N,* VDIS *allows persons to* ***correct errors committed by them in the past by disclosing actual undisclosed income/turnover or amending any incorrect claim o****f deduction, allowance, relief or credit and* ***paying tax on the same*** *at the rates applicable to those years or taxable periods.*

Clauses 12 & 15 of the Salient Features of the [VDIS] Scheme/see *pg 6 of Doc N* are reproduced below for ease of perusal :-

12. Immunity from penalties and prosecution *: The declarant shall not be liable to any penalty or prosecution under the Income Tax Act or Value Added Tax Act to the extent it relates to the amount declared under the Scheme.*

15. Persons excluded from the Scheme *– Persons convicted on or after 1st July 2001 or persons in respect of whom prosecution proceedings are in progress under the Dangerous Drugs Act for drug trafficking, Prevention of Terrorism Act, Prevention of Corruption Act and Financial Intelligence & Anti Money Laundering Act are excluded from the Scheme.*

The Prosecution laid due emphasis on the limitations of "Immunity' clause No.12.

On the evidence on record, it has not been proved that Accused No.1 had *after* 2001 been "**convicted"** under any of the enactments listed above and/or had such **"proceedings in progress**" against him. That there had been an *Ex Parte* Attachment – see *Doc Y,* however cannot be disputed, albeit known only to Accused No.1; however that is certainly not to be considered as a *"conviction"* or *"proceedings in progress"*. The Court notes the absence of the Praecipe to the Attachment Order and reasons for initiating such Attachment.

The purport of the MRA initiating the incentive-based VDIS (in as much as the rate of interest under VDIS at 0.5% is at half the normal rate of 1%) is to provide a *"moratorium"* to defaulting income tax payers- excluding those specified by *Clause 15* [*supra*] - by bringing in a new category of tax payer into the fold and as diplomatically set out, permitting them to … ***correct errors committed by them in the past*** **…** and pay taxes that would have become due at the time***.*** It follows that once the taxes for the relevant financial years are paid, those ***errors*** are deemed to have been ***corrected*** - leading to the impossibility of that tax payer being prosecuted for (past) tax evasion under ITA - hence the application of *section 161A(19) ITA* [supra].

For successful acceptance into VDIS, the MRA would have had to be satisfied that Accused's No.1's funds were legitimate and free of any suspicious taint as the MRA cannot be seen to countenance any illegal activity - hence the Qualifying Proviso of not having been *convicted for the listed offences by 2001*. The fact that Accused No.1 did not reveal under VDIS that his funds had been attached was not part of the Qualifying Provisos he had to adhere to.

Once the Director General of the MRA is satisfied with an Applicant's Disclosure and an Applicant is accepted into the VDIS scheme and makes good his taxes, he is immune from any prosecution as per *Clause 12 [supra]* under ITA or VAT Act as regards the amount declared under the Scheme **AND** as per *section 161A(19) ITA [supra]* he is **deemed *not to have committed an offence.***

It is this Court's opinion that the term *" …deemed not to have committed an offence…"* would mean that the successful Applicant shall be considered **not** *to have committed an offence under the ITA at the material time/ section 148(e) ITA* reproduced *at page 7 above.* And if the MRA has therefore considered - albeit at a later date - that there has been no *"failure to pay tax",* there could have been **no *conspiracy to conceal funds that should have been subject to tax assessment*** - as such tax assessment for the relevant financial years has been raised and all dues paid – albeit at a later date and under VDIS.

The Prosecuting Authority cannot be more concerned for the MRA as regards Accused No.1's unpaid taxes when the MRA has already set matters right by subsequently accepting the payment of the allegedly then unpaid taxes under VDIS.

However the Court is of considered opinion that section 161A(19) ITA is limited to the ITA (as buttressed by the testimony of Mr Bissoon) and could not have offered an all encompassing immunity against ANY future prosecution - if there was an enactment under which the Accused parties could have been prosecuted.

The Court furthermore notes that the Undertaking annexed to the VDIS document emanating from the MRA – *Annex 4 annexed to Doc AA* states at ***(a) … no prosecution shall be initiated against me ….*** . This is the clause where Mr Bissoon from the MRA had hastily clarified that this meant … "no prosecution ***under the ITA***" …- *refer to para 3 at pg 3 above.*

It is _not_ part of Accused No.1's case that he relied upon that Annex 4 " ***no prosecution"*** clause but due reliance was placed upon *section 161A(19) ITA* and this section cannot reasonably be understood to have meant that Accused No.1 would, in the future, have been immune from prosecution under *any* other law *per se*.

For the sake of legal argument, had Accused No.1's *"immunity"* defence included the " *no prosecution…"* proviso in *Annex 4 of Doc AA,* the following case coupled with Mr Bissoon's testimony would have provided food for thought :-

As per ***Cameron & Ors v Revenue & Customs Commissioners [2012] EWHC 1174 (Admin], [2012] All ER D 79 (May)*** **…** *a taxpayer is entitled to rely upon a statement made in a formal publication unless and until the statement was revoked, withdrawn or altered in a prescribed manner. If a taxpayer legitimately relied upon a statement made by the Revenue which was contained within a document published by the Revenue and aimed at a class of taxpayers of which the taxpayer was one, reliance upon the document ought not to be regarded as unreasonable simply because an employee of the Revenue expressed a view which was contrary to that contained in the document …*

In the absence of any description in ***Item (a)*** above that such Prosecution meant … *any prosecution under ITA …* , it would have been arguable that the ratio in ***Cameron [supra]*** meant that Accused No.1 would have been perfectly entitled to rely upon the MRA's *Annex 4 to Doc AA "no prosecution"* clause and construe same as being *" no prosecution under any law".*

For all the reasons given above and as the Prosecution has failed to proved its case against Accused Nos. 1 & 2 beyond all reasonable doubt, this Court **DISMISSES Counts 1,3, 5 & 6 against Accused Zainool Abedeen Moraby & DISMISSES Counts 2 & 4 AGAINST Accused Nazeemuddin Moraby.**

Dated this 10th day of March 2014.

N.Ramsoondar,Magistrate, Intermediate Court (Criminal)