

CENTRAL INFORMATION COMMISSION

Appeal No. CIC/AT/A/2009/000353 dated 27.03.2009

Right to Information Act 2005 – Section 19

PARTIES TO THE CASE:

Appellant	:	Shri V.R. Chandran
Public Authority	:	Directorate of Enforcement
Date of Decision	:	28.09.2010

FACTS OF THE CASE:

This second-appeal filed by Shri V.R. Chandran is relating to his RTI-request dated 13.11.2008, wherein he had asked for the following information:-

- “1) *Whether the Ministry of Finance/ GOI is aware of the existence of such secret accounts of Indian citizens in Swiss banks amounting to 1456 billion US dollars.*
- 2) *If yes, has any action been taken o find the identity of the account holders.*
- 3) *If the list of depositors is available, please provide a copy of the same, with complete information about the depositors.*
- 4) *Are the transactions legitimate?*

- 5) *If the deposits are illegal, what action has been contemplated on them?*
- 6) *Has the GOI/MOF addressed the Swiss authorities for repatriating the illegal money? If not, Why not?*
- 7) *Are there such accounts in any other countries?*
- 8) *If all or any of the actions mentioned above have not been done, please furnish the reason there for.*
- 9) *If MOF/GOI holds the view that the said media reports are not to be trusted, what action has been taken or proposed to be taken on them for false propaganda ?”*

2. CPIO, vide his letter dated 8.12.2008, had replied as follows:-

“The requisite information/documents cannot be provided by the Directorate of Enforcement, as this Directorate has been exempted under Section 24 read with the Second Schedule of the Right to Information, Act, 2005.”

3. The first-appeal dated 07.01.2009 was rejected by the Appellate Authority, vide order dated 18.02.2009 indicating inter-alia, as under:-

“I have carefully considered the requests of the appellant before the PIO and also in his appeal. Though, I agree with the appellant that exemption in terms of Section 24 of the Act was not applicable

to the cases of corruption and human rights violations, but the appellant has failed to bring his request with in this category. I therefore, feel that the PIO had rightly rejected the application dated 13.11.2008. Since the appellant has not adduced anything new in his appeal, I do not find any merit in his appeal, I, therefore, reject the same.”

4. In his second-appeal dated 23.02.2009, the appellant stated that the attitude of CPIO & AA in claiming exemption under Section 24 of RTI Act and then asking the appellant to prove the elements of i) human rights violation and ii) corruption to negate the exemption was grossly unjustified. If the deposits are legal and are with the Government's approval, the respondents should say so even if they choose to hold back detailed information. He has therefore, requested that respondents be directed to disclose the requested information.

5. With regard to elements of corruption involved in the matter, the appellant in his written-submission dated 14.07.2009, inter-alia, stated that the Enforcement Directorate can not dispute that exporting Indian currency to foreign countries was illegal. It was possible only because of failure of officers of Government of India under Enforcement Directorate or I.T Department. Because of non-exercising of the powers and duties by

the above said officials, Indian citizens who deposited in the secret accounts got pecuniary advantage to the extent of tax-liability of the said amount. Therefore, non-exercising of the powers by the officers would be nothing but the abuse of power to cause pecuniary advantage to those persons who deposited in secret accounts, which is nothing but Criminal misconduct as defined U/S 13(1)(d) of P.C. Act. Further, the corruptive attitude is glaringly evident that in spite of exposure by the news media the authorities failed to initiate meaningful action to retrieve the money and even did not enlighten the tax paying citizens to know what was happening by furnishing information under RTI Act. Therefore, the whole episode involves corruption and violation of Human Rights of all citizens, specifically 30 crores citizens living in undignified condition in India. As such, the applicant satisfies the stipulations under the first proviso to Sec.24 of RTI Act' 2005 and hence the applicant is entitled to get information sought for and the Enforcement directorate is duty bound to furnish the same along with costs.

6. Single Bench of Central Information Commissioner, Shri A.N.Tiwari heard the matter on 11.06.2009. Appellant was absent, while respondents submitted a written request for adjournment of hearing to next date and the same was granted.

7. The matter was heard through video conferencing on 15.07.2009. Both parties were present. Commission observed that the following important matters of law and fact have been raised in the appeal:-

- (i) Secret accounts of Indian citizens in Swiss Banks and the action taken by the Government of India to retrieve the money from the financial havens;
- (ii) Issues regarding the jurisdiction of the agency which is required to act to bring back the money from the banks abroad; and
- (iii) Availability of information and its locus and disclosure of such information, considering that it is available, is warranted.

8. The Single Bench, therefore, referred the matter to a larger bench for its consideration.

9. Commission constituted a Full Bench consisting of the Chief Central Information Commissioner, Shri Wajahat Habibullah and Central Information Commissioners, viz. Shri A.N. Tiwari, Shri M.L. Sharma and Shri Shailesh Gandhi. It was also decided by the Commission that assistance of Ministry of Finance, Department of Revenue, Department of

Banking and Ministry of Law and Justice be sought in the matter. Accordingly, the comments were invited from them. The matter was earlier scheduled for hearing on 15.10.2009, but hearing could not take place. The matter was heard by the Full Bench on 10.3.2010. The following were present:-

1. Shri Kamlesh Varshney, Director, FT & TRI, M/o Finance.
2. Ms.Priya VK Singh, Director, Coordination, D/o Revenue.
3. Shri R.P. Upadhyaya, Addl. Director, Dte. of Enforcement.
4. Shri Vijay Babu, US (FT&TR-I), M/o Finance.

10. **Comments of Departments:-**

(A) **Ministry of Law & Justice:-**

According to Govt. of India (Allocation of Business) Rules, 1961, the main function of Ministry of Law & Justice is to tender legal advice to various Ministries/Departments of Govt. of India on legal issues including interpretation of various provisions of the Statutes.

Hence, it would not be appropriate for them to express any opinion on the issue on which decision is essentially to be taken by the CIC in discharge of its statutory functions. Expressing of any opinion or view by them, may amount to conflict of interest because public authority against whom the CIC may pass an order can be an officer of the Govt. or a Govt. Department, to which the

Department of Legal Affairs is supposed to tender legal advice in accordance with Govt. of India (Allocation of Business) Rules,. However, if the CIC so desires, it may take assistance of any legal expertise available within the Commission or may appoint amicus-curie, as it may deem fit, in arriving at the decision.

(B) Department of Financial Services:-

The points raised in the appeal relate to the Department of Revenue as both Directorate of Enforcement and Financial Intelligence Unit are under the administrative control of that Department. The Department of Financial Services is not concerned with the points raised in the appeal. As such they do not have any comments to offer in the matter. Further, deputing a senior officer during the hearing of the appeal to assist the Commission, would not serve any purpose.

(C) Department of Revenue:-

In brief, they have stated as under:-

- i) The general impression that all accounts of Indian citizens in foreign banks are illegal is not correct.

- ii) Indian citizens, who are NRIs, can maintain and operate foreign accounts and there is no requirement to get permission or even inform the tax authorities or RBI in India.
- iii) The restriction is only for Indian residents. However, FEMA permit opening of accounts abroad with the knowledge or permission of competent authority. Thus, all foreign accounts of resident Indians are also not illegal.
- iv) Movement of funds from India to outside and vice-versa are now permitted liberally under the FEMA regime.
- v) The details of bank accounts of individuals are protected from disclosure even under the RTI Act etc. As far as foreign accounts are concerned, the foreign banks do not come under the jurisdiction of Indian authorities.
- vi) In order to get the information from the foreign governments on bank accounts suspected to contain proceeds of crime / tax evasion, the Indian authorities have to indicate the Name, A/c. No., crime/tax evasion and the jurisdiction for seeking the information.

- vii) Therefore, none of the agencies hold the full details of such accounts. There will be only the details of specific cases, which are under investigation, adjudication, prosecution etc.

- viii) 'The Income Tax Authorities' and 'the Directorate of Enforcement' are 2 agencies under the Department of Revenue which deal with the illegal money of Indian resident lying abroad.

- ix) In order to bring back illegal Indian money lying abroad, the following actions have been initiated/ taken:
 - a) Income Tax Act, 1961 has been amended through Finance (No.2) Act, 2009, and it would enable the Central Govt. to enter into Agreement for the Exchange of Information and Assistance in Collection of Taxes (AEI&ACT) with non-sovereign jurisdictions.

 - b) In this regard, they have written to Ministry of External Affairs with respect of 19 prioritized countries / jurisdictions, for taking up the matter with them for entering into such Agreements.

- c) Since the existing Tax Treaty with Switzerland does not provide for exchange of bank related information etc., the re-negotiation of Tax Treaty with Switzerland is being under taken. The first round of negotiations was held on 10 - 12 Nov., 2009. Once the protocol amending tax treaty is notified, India would be able to obtain bank related information in specific cases from Switzerland.

- d) MEA has also been approached to renegotiate the remaining Tax Treaties, which are in force, but do not specifically provide for exchange of bank related information.

- e) India has been actively taking part in building global consensus for taking action against those jurisdictions/ countries, who are not transparent or cooperative in exchanging information with other countries.

- x) The Directorate of Enforcement' is listed in the Second Schedule of the RTI Act and therefore, in terms of Section 24 and it is an exempted organization. Assuming but not admitting that information about Indian money lying in foreign bank accounts is

available with the Directorate, no disclosure need be made by the Directorate.

11. The main emphasis of the present petition is with respect to the alleged deposits held by Indian citizens in foreign banks, especially in banks in Switzerland. ED submitted and concurred with the stand of Department of Revenue that there are no authentic figures about the amount of money lying in those bank accounts. Present application presumably pertains to monies lying in foreign accounts which are exclusive of lawful and legitimate deposits which can be made by both Indian Residents and Non-Resident Indians such as -

- a) Corporates/partnership: Direct investment overseas by corporate and registered partnership in WOS/JVs abroad and portfolio investment by Indian listed companies overseas.
- b) Individuals: Liberalized Remittance Scheme (LRS) up to USD 200,000 for permissible capital and current accounts including opening of bank accounts overseas.

- c) Domestic Mutual Funds, registered with the SEBI in various overseas instruments up to USD 7 billion.

12. Department of Revenue stated and ED concurred that India has a Double Taxation Avoidance Agreement, hereinafter referred to as DTAA, with the Swiss Confederation which was notified on April 21, 1995 and amended through a Protocol notified on 7th February, 2001. In accordance with Article 26 of the DTAA, competent authorities of India and Swiss Confederation can exchange information, being information at their disposal under their respective taxation laws in the normal course of administration, as is necessary for carrying out the provisions of the DTAA in relation to taxes. The contracting States are not under an obligation to carry out administrative measures at variance with their regulations or supply particulars not procurable under their legislation. In the past, the Swiss competent authority has consistently refused to share bank information on the grounds that information regarding bank deposits of Indian residents is not necessary for the application of the DTAA but is required only for the enforcement of Indian internal tax laws and that such information was not at their disposal under Swiss laws in the normal course of tax administration. Further, the OECD standards on exchange of information as contained in Article 26 of the OECD Model Tax Convention provide for exchange of information even if there is only

domestic interest of the requesting State i.e. enforcement of tax laws of the requesting State and no provision of DTAA is to be applied. Besides, as per the OECD standards, the limitation of information not being at the disposal of tax administration because of bank secrecy cannot be used to prevent exchange of information held by banks. Swiss Confederation had entered reservations on these OECD standards. It was only in March 2009 that the Swiss Confederation informed OECD that it intended to adopt the OECD standards as per Article 26 of the OECD Model Tax Convention and withdraw the corresponding reservation and enter into negotiations for revising its Double Taxation Agreements. The Government of India has already approached the Swiss Government seeking renegotiation of Article concerning exchange of information in DTAA with them. There are negotiations going on between Swiss Authorities and Indian Government about sharing of these kind of information.

13. Thus Government of India has taken steps to collect authentic and accurate information about the Black Money stashed away. Directorate of Enforcement also brought to the notice of the Commission Writ petition(Civil) No. 176/2009 pending in the Supreme Court on the similar subject matter.

Decision Notice:

14. The issues, which have been raised in this RTI-application, are serious and have understandably raised public concern. The Enforcement Directorate — the principal agency of the government to check and undo illegal stashing away of money from the country — has taken a rather technical position about disclosure of the information relating to it. Their position, briefly stated, is that they cannot either confirm or deny the media reports about the likely volume of black-money stashed away in foreign banks illegally by Indian nationals. While this position is, doubtless, defensible, it leaves unanswered the perennial question as to what resources the country has lost to the evil of money laundering. We would like this matter to be taken beyond technicalities and to address the larger issue related to transparency in this vital field, about which the citizens of our country are keen for answers.

15. While the Enforcement Directorate may take the position that they have no way of assessing the total volume of illegally-held-money by Indians in foreign banks, they can surely provide an estimate of the total volume of such money involved in the investigations they are presently conducting. In other words, the Enforcement Directorate can let the country know as to how much is the total sum of such money they are

dealing with in their current investigations. This figure can be arrived at through the simple contrivance of aggregating the sums of money in all such investigations currently underway. The Enforcement Directorate need not disclose the nature of such investigations or the parties' names. Surely, it is within its power to disclose the total amount of monies covered by these investigations.

16. Enforcement Directorate had strenuously argued before us that they stand exempted from disclosure-obligation under RTI Act by virtue of their inclusion in the Second Schedule, under Section 24 of the RTI Act. We would like to dwell upon this aspect of argument in the context of a proviso built into the Section-24 itself, i.e. that these exemptions are subject to their not being matters of "human rights violations" or "allegations of corruption". In our view, all matters now investigated by the Enforcement Directorate in the matter of stashing away of Indian money in foreign banks, come within the definition of allegations of corruption in Section 24. There is eminent and compelling reason why this exception must be applied in the present case.

17. We direct the Enforcement Directorate to provide the information on Point Nos.(1) and (8) as per the direction in the preceding paragraphs. Point Nos.(2), (3) and (5) have been answered extensively in the fore-

going discussions. Point Nos.(4) and (9) are questions which are in the form of seeking views and opinions and cannot be the subject matter of RTI-applications. Point No.(7) has been answered before us by the Department of Revenue.

18. Matter accordingly disposed of.

(WAJAHAT HABIBULLAH) **(A.N. TIWARI)** **(M.L. SHARMA)** **(SHAILESH GANDHI)**
Chief Information Commissioner Information Commissioner Information Commissioner Information Commissioner

Authenticated true copy. Additional copies of orders shall be supplied against application and payment of the charges, prescribed under the Act, to the CPIO of this Commission.

(D.C. SINGH)
Deputy Registrar