

# BENAMI PROPERTY LAW

By :-

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# The Prohibition of Benami Property Transactions Act, 1988

As amended by

## The Benami Transactions (Prohibition) Amendment Act, 2016

(w.e.f. 01.11.2016)

[Earlier known as the Benami Transaction  
(Prohibition) Act, 1988 ]

## SECTION - 82

### (Indian Trusts Act, 1882)

Where property is transferred to one person for consideration paid or provided by another person, and it appears that such person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

## SECTION - 81 (Indian Trusts Act, 1882)

Where the owner of property transfers or bequeaths it; and it cannot be inferred, consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

## SECTION - 94

### (Indian Trusts Act, 1882)

In any of the case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

# SECTION - 66

## (Civil Procedure Code)

No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims.

# SECTION - 281A

## (Income Tax Act, 1961)

Effect of failure to furnish information in respect of properties held benami - No suit to enforce any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be instituted in any court by or on behalf of a person (hereafter in this section referred to as the claimant).....

Continued.....

## SECTION - 281A of the Income Tax Act, 1961

.....claiming to be the real owner of such property unless notice in the prescribed form and containing the prescribed particulars in respect of the property has been given by the claimant within a period of one year from the date of acquisition of the property to the Chief Commissioner or Commissioner.



(OLD ACT)  
**THE BENAMI TRANSACTIONS  
(PROHIBITION) ACT, 1988**

**Section 1(3)**

The provisions of section 3, 5 and 8 shall come into force at once, and the remaining provisions of this Act shall be deemed to have come into force on the 19<sup>th</sup> May, 1988.

(OLD ACT)  
**THE BENAMI TRANSACTIONS  
(PROHIBITION) ACT, 1988**  
Section 2(a)

Benami transaction means any transaction in which property is transferred to one person for a consideration paid or provided by another person.

**(OLD ACT)**

## **SECTION - 3**

# **PROHIBITION OF BENAMI TRANSACTIONS**

- (1)** No person shall enter into any benami transaction.
- (2)** Nothing in sub-section(1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter.

(OLD ACT)  
SECTION - 3

**PROHIBITION OF BENAMI TRANSACTIONS**

- (3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years **OR** fine or with both.
- (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this section shall be **non-cognizable and bailable**.

**(OLD ACT)**  
**SECTION - 5**  
**PROPERTY OF BENAMI LIABLE TO**  
**ACQUISITION**

- (1)** All properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure as may be prescribed.
- (2)** For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1).

The New Act  
(called as)  
The Prohibition of  
Benami Property Transactions Act, 1988  
(notified to be effective from 01.11.2016)

Section 1(3)

The provisions of section 3, 5 and 8 shall come into force at once, and the remaining provisions of this Act shall be deemed to have come into force on the 19<sup>th</sup> May, 1988.

# New Act called as PBPT Act, 1988

## Benami Transaction

Defined in Section 2(9) of  
the PBPT Act 1988

# Section 2(9)

## 'Benami Transaction' means :-

- A.** A transaction or an arrangement -
- (a) 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**
  - (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by :



- B. A transaction or an arrangement in respect of a property carried out or made in a fictitious name;
- C. A transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;
- D. A transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious

## Exception/Exclusions :-

- i. Property held by Karta, or a member of HUF for his benefit or the benefit of other members in the family.
- ii. Property held by a person standing in a fiduciary capacity for the benefit of another person and includes Trustee, Executor, Partners, Directors of a company or a depository under the Depositories Act, 1996 *and* any other person as may be notified by the central government for this purpose
- iii. Property held in the name of spouse or in the name of any child
- iv. Property held as joint owner in the name of brother, sister lineal ascendant or descendant
- v. Possession of any property taken or retained in part performance to a contract referred to in section 53A of the Transfer of Property Act, 1882.

# FIDUCIARY CAPACITY

## Section 88 of The Indian Trust Act

**Advantage gained by fiduciary.-** Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

## Shri P.V. Sankara Kurup v. Leelavathy, (1994) (Supreme Court) 6 SCC 68

In execution a court auction for recovery of the arrears of rent, the suit property was purchased by the petitioner in his name. The expenses incurred for the litigation till obtaining the sale certificate were all credited to the account of respondent-plaintiff. For laying coconut grove the expenses incurred were credited to the account of the respondent. Thus the consideration for the purchase as well as the improvements of the property were met with the funds of the respondent for whom the petitioner was acting as an agent and power of attorney. He, thereby, obviously had acted in a fiduciary capacity as agent of the respondent. The sale certificate though ostensibly stands in his name but obviously he obtained it while acting as an agent and power of attorney of the respondent. The sale certificate thus was obtained without her knowledge and consent playing fraud on her. The facts manifest that the petitioner had purchased the property for the benefit of the estate of the respondent.

## Shri P.V. Sankara Kurup v. Leelavathy, (1994) (Supreme Court) 6 SCC 68

*In the light of the facts recorded earlier, it is clear that a real purchaser is the respondent, the petitioner as an agent and power of attorney, had purchased the property but ostensibly had his name entered in the sale certificate, fraudulently and without her consent. That apart under Section 88 of the Indian Trusts Act, 1882, an agent or other person bound in a fiduciary character to protect the interests of the principal and the former would hold the property for the benefit of the principal or the person on whose behalf he acted as an agent. The question of benami, therefore, does not arise, though Section 4 of the Benami Transactions (Prohibition) Act, prohibits such a plea. Sub-section (3)(b) provides that:*

*“Nothing in this section shall apply,-  
(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.”*

## Shri P.V. Sankara Kurup v. Leelavathy, (1994) (Supreme Court) 6 SCC 68

Section 7 does not repeal Section 88 of Trust Act. When an agent was employed to purchase the property on behalf of his principal and does so in his own name, then, upon conveyance or transfer of the property to the agent he stands as a trustee for the principal. The property in the hands of the agent is for the principal and the agent stands in the fiduciary capacity for the beneficial interest he had in the property as a trustee. The petitioner has acted as an agent, as a cestui que trust, is a trustee and he held the property in trust for the respondent in his fiduciary capacity as an agent or trustee and he has a duty and responsibility to make over unauthorized profits or benefits he derived while acting as an agent or a trustee and properly account for the same to the principal.

# Benami Property

As per Section 2(8) : It means

Any property which is the subject matter of a benami transaction and also includes the proceeds from such property;

# Property

As per Section 2(26) : It means

“Assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property;”



# BENAMIDAR

As per Section 2(10) : It means

A person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

# Beneficial Owner

As per Section 2(12) : It means

A person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar;

# Initiating Officer

As per Section 2(19) : It means

An Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the Income-tax Act, 1961.

# Approving Authority

As per Section 2(4) : It means

An Additional Commissioner or a Joint Commissioner as defined in clause (1C) and (28C) respectively of section 2 of the Income-tax Act, 1961.

# Adjudicating Authority

It means the Adjudicating Authority appointed u/s 7

(Though, No Authority is appointed u/s 7 so far, however AA appointed u/s 71)

# Section 71

Adjudicating Authority  
appointed u/s 6(1) of  
the Prevention of  
Money Laundering Act,  
2002

# Appellate Tribunal

To be established u/s 30 to hear appeals against orders of Adjudicating Authority

Though not yet established under section 30, however charge given u/s 71

# Section 71

Appellate Tribunal  
established u/s 25 of  
PMLA to discharge the  
function here.



# “Administrator”

means an Income-tax Officer as defined in section 2(25) of the Income-tax Act, 1961

# Brief Procedure:-

- The Initiating Officer (IO), if he has reason to believe that any person is Benamidar in respect of a property he may issue notice u/s 24(1).  
(after recording reasons in writing)
- Notice to be sent to Beneficiary Owner also if his identity is known

- IO may make provisional attachment of a property upto a period of 90 days thereafter IO is obliged to :-

**(i)** pass an order for continuation of the provisional attachment of the property, or

**(ii)** Revoke the provisional attachment of the property

(prior approval of Approving Authority is mandatory in both situations)

In case provisional attachment is continued, the IO shall within 15 days draw up a STATEMENT OF CASE and refer it to the Adjudicating Authority.

# Hearing before Adjudicating Authority

Notice of hearing u/s 26 to be issued to Benamidar, Beneficial Owner, any interested Party (including a Banking Company) and any person who has made a claim in respect of the property.

The Adjudicating  
Authority may suo  
moto or on  
application strike out  
or add the name of  
any party

The Adjudicating Authority to decide whether the property referred is Benami or not

If it is held to be Benami than attachment order to be confirmed

if it is not held as Benami, then attachment order to be revoked

The order to be passed by AA within one year from the end of the month in which reference/ statement of case/ documents received from IO.



Aggrieved Party  
has right of  
appeal before  
Appellate Tribunal  
u/s 30

Confiscation of  
the property only  
after the order  
passed by the  
Appellate Tribunal

# Prohibition on re-transfer:-

## As per Section 6(1)

The Benamidar shall not re-transfer the benami property as held by him to the beneficial owner or any other person and if it is done so, such transaction shall be deemed to be null & void.

# Section 57

Any transfer made after the issuance of notice u/s 24 shall be ignored notwithstanding the provisions of Transfer of Property Act, 1882.

Further, on confiscation of the Property u/s 27, any transfer of the Property shall be deemed to be null & void.

No compensation  
payable by the  
Government on  
acquisition or  
confiscation of the  
Benami Property.

No claim shall lie  
against the Central  
Government for  
attachment or vacation  
of attachment of the  
Benami Property.

# Liability for prosecution under chapter VII

As per Section 53 :-

A Person would be guilty of offence of Benami transaction and shall be liable for prosecution in following circumstances:-

- Where Benami Transaction is done in order to defeat the provision of any law or
- To avoid payment of statutory dues or
- To avoid payment to creditors



Following persons may be held guilty of offence of Benami Transactions u/s 53:-

- The Benamidar
- The Beneficial Owner
- Any person who abets or induces any person to enter into Benami Transaction.

# Punishment

u/s 53

for being guilty of offence of  
Benami Transaction :-

- Rigorous imprisonment  
between 1 year to 7 years.  
and
- Fine up to 25% of Fair Market  
Value of property.

# u/s 54

## On furnishing false information / document:

- Rigorous imprisonment for 6 months to 5 years.
- Fine upto 10% of FMV of property.

# Section 61

- Earlier : Non-Cognizable  
Bailable
- Now : Non-Cognizable  
(Non-Bailable)

# Section 62

Offences by ‘Companies’:

‘Company’ includes :

- Companies
- Firms
- AOPs
- BOIs (whether Incorporated or not)

# Section 62

- Person in charge and responsible to the company
- If contravention takes place with consent or connivance of or attributable to any neglect on the part of any Director, Manager, Secretary or any other officer.

Standard Operating  
Procedures (SOP) on  
implementation of  
PBPT Act issued by  
CBDT.

# Constitution of Benami Property Units (BPUs): 24 BPUs created across the country under the charge of Principle DIT (Investigation)



- Each BPU to consist of :-
1. Additional/Joint CIT  
(Benami Prohibition)
  2. Deputy/Assistant CIT  
(Benami Prohibition)
  3. ITO (Benami Prohibition)
  4. Other Officials/Officers  
(Benami Prohibition)

# Functions of BPU

- A. All functions under the PBPT Act :-  
Duties & functions of IO/AA and administrator
- B. Criminal Prosecution related monitoring and coordination functions under Black Money Act & Income-tax Act.

Guidance note issued by the CBDT on 2 Dec, 2016 to the officials to gather information:

The Board has advised its officers that while carrying out actions of searches, surveys, summons, etc they should also collect evidences, information which may be useful for PBPT Act on the following lines:-

- a) Identification and examination of legal/apparent owner(s) and beneficial/real owner(s) of the property, inter alia w.r.t. holding/transferring of the property and payment of consideration for such property.
- b) Whether the property is held/transferred for the immediate or future benefit, direct or indirect, of a person other than the person who has provided the consideration.
- c) Examination of the source of fund through which the property was acquired.

- d) Whether a transaction or an arrangement in respect of the property has been made in a fictitious name.
- e) Whether the apparent owner is not aware of or denies knowledge of the property? Such a situation may lead to classification of the property as benami property.
- f) A property where the person providing the consideration is not traceable or is fictitious may also be classified as benami property.

e) Upon identification of a property as benami property or in case where the investigating Officer has prima facie reason to believe that the property in question may be a benami property, the information, after the approval of the controlling officer, should be passed on to the Initiating Officer within a period of 60 days. The Initiating Officer, thereafter, may take necessary action u/s 24 and under other provisions of the Act.

Ingredients for  
categorising a  
property as Benami  
Property under the  
common law:-

Jay Dayal Poddar vs. BIBI  
Hazra & Others  
(dt. 19.10.1973 1974 AIR  
171)

**Followed again in**

Rajinder Prasad Malik vs.  
Shanti Devi Malik (AIR 2003  
P&H 29)

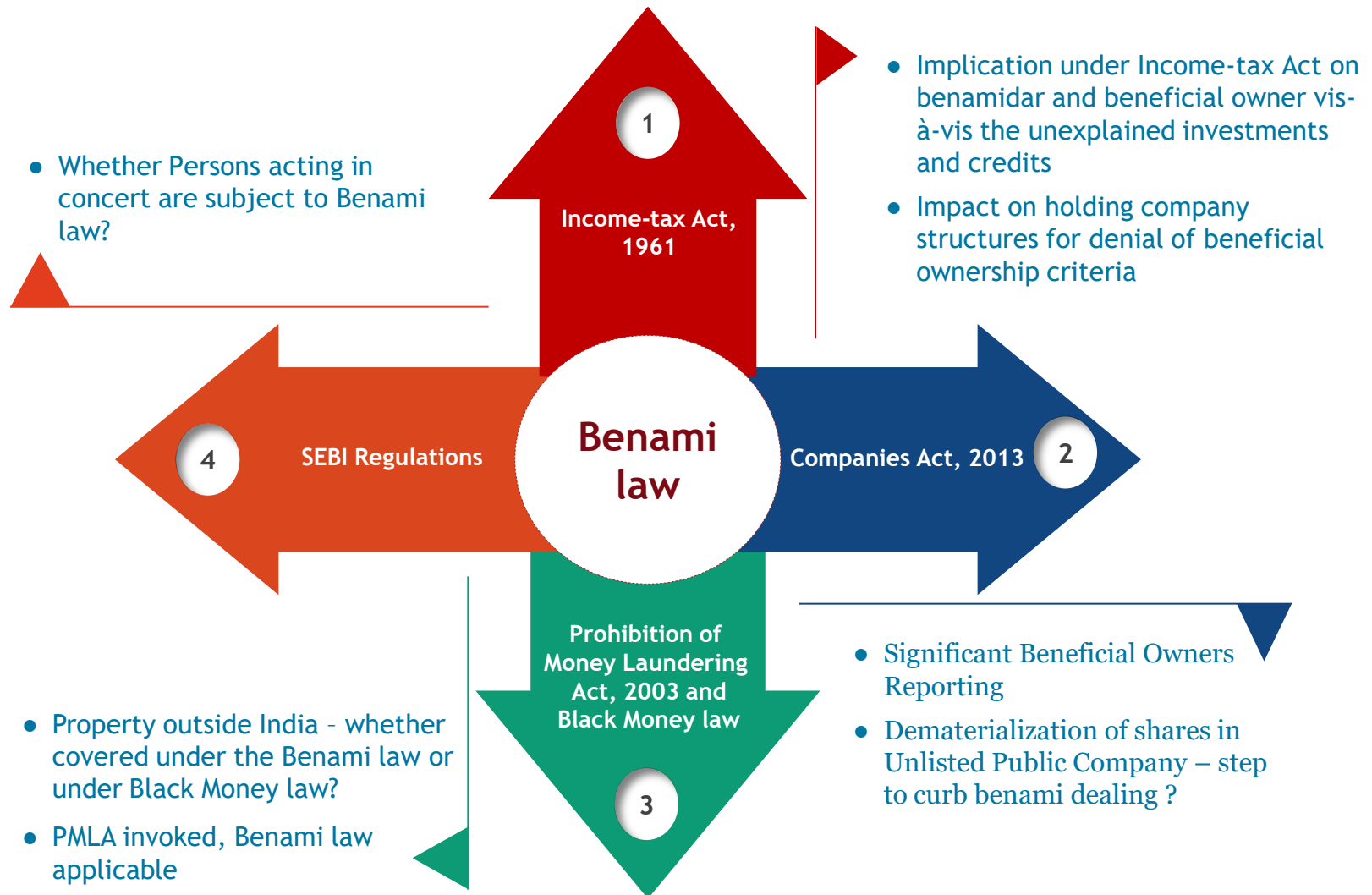


It was held in the said judgment that though there is no absolute formula or acid test, however the courts are usually guided by following circumstances:-

1. The source from which the purchase money came;
2. The nature and possession of the property, after the purchase;

3. Motive, if any, for giving the transaction a benami colour;
4. The position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
5. The custody of the title deeds after the sale;
6. The conduct of parties concerned in dealing with the property after the sale;

# Benami law - Interplay with other laws



# Interplay with Income Tax Act

Whether provisions of Benami law can apply to the transaction covered under section 68 and 69A ?

01



Implication under section 56(2)(x) ?

02



Whether application of both the law is mutually exclusive or it can be cumulative also ?

04



Whether a transaction subjected to GAAR be also exposed to the Benami Law ?

03



# Comparison & Interplay between PMLA & PBPT:

- Objective & Scope: Laundering of Crime Money and extends to whole of India
- Powers of Arrest, Search and Survey and Impounding of Documents and attachment of property without notice
- Area of operation: International
- Section 62 of PMLA makes officers liable for conviction and fine on illegal search, detention or arrest
- If PMLA is invoked, PBPT would most likely be applicable. But vice-versa not mandatory

Certain Unimagined  
situations where  
PBPT Act shall get  
attracted.

# Undisclosed investment in property :-

- a) Joint Ownership - Ratio found different from recorded in Title Deed;
- b) Name of any contributor not found in Title Deeds;

Title deeds recovered  
during search  
proceedings of other  
persons

If possession of property  
is with person searched



Jewellery found during search and explained to be belonging to some other persons.  
(however AO treats it as unexplained)

If Jewellery is found in  
A's premises,  
purchased in B's name  
Interplay between  
Income Tax Law &  
Benami Law?

If AO taxes its income  
u/s 69 in A's Hands

Then Benami law can  
also be invoked

If AO taxes it in B's hand

Then Benami Law cannot  
be invoked.

Loan/Share Capital  
received admitted to  
be bogus in the  
statement recorded  
during survey/search.

Goods sold in the normal course of business, but purchaser found to be part of racket of entry operators.

Cash recovered  
by Police  
interceptors  
during transit

Suppose immovable property is transferred by 'A' to 'B'

Allegation of the department

'A' is Beneficial owner

'B' is Benamidar

Whether only Benami law shall get extracted or income tax law shall also get attracted?

If AO makes assessment of income in B's hands, then Benami Law cannot be enforced.

In that case, only one law shall get attracted.



If AO taxes it in A's Hands  
Then Benami Law can  
also be invoked.

'A' may be treated as  
beneficiary owner

'B' may be treated as  
Benamidar

Property gifted by 'A'  
to 'B'

Whether only Income  
Tax Law can be  
attracted only or  
Benami Law also

If AO invokes provisions of section 56(2)(x) of Income Tax Act,

Then Benami Law cannot be invoked

But if IO invokes Benami Law, then AO cannot invoke 56(2)(x)

Thank You

# PMLA



## Prevention of Money Laundering Act

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**PRACTICAL  
ASPECTS OF THE  
MONEY  
LAUNDERING LAW  
IN THE COUNTRY**

# Definition - Money Laundering

## OFFENCE OF MONEY LAUNDERING:-

- Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming ] it as untainted **property** shall be guilty of offence of money-laundering.



- In easier terms, any action which leads to conversion of Illegal money/assets into legitimate fund/assets shall be considered as an "Offence of Money Laundering" .

# Some of the Popular Activities through which Money is laundered...

False Export-Import Invoices



Stock Markets



Agricultural Products



Showing Loans



Popular Activities



Creating Bogus Companies

**BEWARE OF  
FAKE  
COMPANIES**

Property Markets



# LEGISLATION AND AUTHORITIES GOVERNING THE ANTI MONEY LAUNDERING LAW IN INDIA

- **Which Legislation governs Money Laundering ?**
- The Prevention of Money Laundering Act, 2002 (PMLA), prohibits and penalizes the Money Laundering activities in India.
  
- ❖ **What are the Agencies and Judicial Authorities under the Act?**
- 1. **The Enforcement Directorate (E.D.)**
- The Executive functions under the Act like Search, Seizure, Provisional Attachment, Arrests, Initiate Prosecution etc. are performed by the Authorised Officers under the Act.

## 2. Adjudicating Authority (AA)

This is the quasi-judicial authority established under the Act, which exclusively adjudicates matters connected with and incidental to the Attachment and Retention of property/records. The AA has the power to lay down its own procedure and is governed by the Principles of Natural Justice. Although the AA has the powers of a Civil Court regarding issuance of summons, production of documents and evidence.

- The AA consists of a Chairman and 2 other members. The Chairman and members are persons having expertise in field of law, administration, finance and Accounting.
- The bench of AA constitutes of a single member, however at the discretion of the Chairman, proceedings can be heard by a bench of 2 members.

### **3. Appellate Tribunal under PMLA**

- The Appellate Tribunal has been established under section 25 of the Act which hears the appeals from the final orders of the AA.
- The Appeal is to be filed within a period of 45 days from the date of the receipt of the order of the AA.
- The Appeal from the decision/order of the Appellate Tribunal lie to the jurisdictional High Court where the aggrieved party resides/carries on business.

#### **4. Special Court (Court of Sessions)**

- This is the Designated Court of Sessions established under the Act for conducting the trial for the offence of Money Laundering. The Special Court while trying the offence of Money Laundering shall be governed by the procedure laid down in the Cr.P.C. for conducting the trial before the Court of Sessions.
- The Trial for the Schedule Offence along with offence of Money Laundering shall be conducted in the Special Court if an application is made by the Enforcement Officer to club the trial of the schedule offence with the offence under the PMLA.



# IMPORTANT DEFINITIONS AND PROCESS OF MONEY LAUNDERING

## ❖ MONEY LAUNDERING:

The PMLA defines the offence of Money Laundering u/s 3 as “Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming as untainted property shall be guilty of offence of Money Laundering”.

# New Amendment wef 1.8.2019

Explanation.—For the removal of doubts, it is hereby clarified that—

- (i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—
  - (a) concealment; or
  - (b) possession; or
  - (c) acquisition; or
  - (d) use; or
  - (e) projecting as untainted property; or
  - (f) claiming as untainted property, in any manner whatsoever,

*CONTD.....*

.....*CONTD*....

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.



## PROCEEDS OF CRIME 2 (1)(u):

**It is defined as:**

“proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a *scheduled offence* or the value of any such property **or** where such property is taken or held outside the country, then the property equivalent in the value held within the country or abroad;

*CONTD.....*

.....contd.....

## New Amendment wef 1.8.2019

Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence

## ❖ SCHEDULED OFFENCE

- The Scheduled Offences are the offences as prescribed in the schedule to the PMLA, which is divided in 3 parts i.e. Part 'A' 'B' 'C'.
- The Schedule Offence is the genesis of the offence of Money laundering, as there cannot be any offence of Money Laundering unless and until an Offence provided in the Schedule of the PMLA has been first committed.

# PROCESS OF MONEY LAUNDERING

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graph TD; A[PROCESS OF MONEY LAUNDERING] --> B[STAGE -I  
COMMISSION OF THE SCHEDULED OFFENCE  
STAGE-II  
GENERATION OF PROCEEDS OF CRIME]; A --> C[STAGE-III  
COMMISSION OF MONEY LAUNDERING BY:  
PLACEMENT  
LAYERING  
INTEGRATION];
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STAGE -I  
COMMISSION OF  
THE SCHEDULED  
OFFENCE

STAGE-II  
GENERATION OF  
PROCEEDS OF  
CRIME

STAGE-III  
COMMISSION OF  
MONEY  
LAUNDERING BY:  
PLACEMENT  
LAYERING  
INTEGRATION

# MONEY LAUNDERING INVOLVES 3 STAGES

## PLACEMENT

- ASSIMILATING OF PROCEEDS OF CRIME INTO FINANCIAL SYSTEM

## LAYERING

- ROUTING OF ASSIMILATED PROCEEDS OF CRIME TO HIDE ITS SOURCE

## INTEGRATION

- RE INTRODUCTION OF THE PROCEEDS OF CRIME SUBSEQUENT TO ABOVE TWO STAGES TO PROJECT SUCH PROCEEDS OF CRIME AS WHITE MONEY.

# COMMENCEMENT OF PROCEEDINGS UNDER PMLA

## ENQUIRY AND INVESTIGATION

- The Enforcement Officer conducts enquiry and investigation upon the Accused/Suspected and any other person on the basis of the information received from other agencies like CBI, FIU, EOW, Income Tax Authorities and other authorities

## SUMMONS U/S 50 PMLA

- The Enforcement Officer issues Summons to the persons for recording their statement and for the production of any document. Any statement recorded u/s 50 of the Act is admissible as evidence in the Courts.

## SURVEY, SEARCH AND SEIZURE U/S 16, 17 PMLA

- The Enforcement Officer on the basis of information gathered through enquiry and investigation and qua the result of summons issued, may after being duly satisfied of commission of the offence of Money Laundering, may conduct Search and Seizure operations.



PROCEEDING FOR RETENTION OF RECORDS AND PROPERTIES	• Original Application (OA) filed u/s 17(4) of PMLA before the AA.
PROCEEDING FOR CONFIRMATION OF PROVISIONAL ATTACHMENT OF PROPERTIES	• Original Complaint (OC) filed U/S 5(5) OF PMLA before the AA.
PROCEEDING FOR CRIMINAL PROSECUTION	• Prosecution Complaint filed u/s 45 of PMLA before the special court.

## ❖ OA (Original Application)

- Search u/s 17 is conducted by the Enforcement Officer on the basis of information in his possession that any person has either committed the offence of money laundering, or is in possession of proceeds of crime or is in possession of any records relating to Money Laundering.
- However, no search can be conducted unless a report u/s 157 of Cr.P.C. has been forwarded to the Magistrate in relation to the scheduled offence.
- While the search is being conducted, u/s 17(1), if the Enforcement Officer finds any property or record, he may seize/retain it and prepare a memo of the items seized/retained. **Such seizure/retention is valid for 180 days only.**
- Once search and seizure procedure is completed, the Enforcement Officer will draw up the OA and forward it to the AA **within 30 days from such seizure**, requesting the continuation of the seizure beyond the period of 180 days.



## ❖ OC (Original Complaint)

- Where the Authorised Officer has reason to believe that any person is in possession of Proceeds of Crime and such person is likely to alienate such proceeds of crime to frustrate the proceedings under the Act, then the Authorised Officer has power u/s 5 (1) to make an order for provisional attachment of such proceeds of crime and such attachment is valid for a period of 180 days.
- However no such attachment can be done unless a charge-sheet (report u/s 173 Cr.P.C.) in relation to the scheduled offence has been forwarded to the Magistrate for taking the cognizance.

- Although, the Authorised Officer may proceed directly with the attachment of the Proceeds of Crime before a report u/s Section 173 Cr.P.C has been forwarded to the magistrate, if he has strong reasons to believe on the basis of cogent material in his possession that if such property is not attached immediately, the proceedings under the Act would be frustrated.
- The Authorised Officer, as per the provisions of **Section 5(5) of PMLA** after attaching the property shall forward a complaint (OC) to the AA **within 30 days of the Provisional Attachment**, for authorizing the attachment **beyond the period of 180 days**.

# ❖ VALIDITY (SHELF LIFE) OF THE ORDER OF THE AA

- The AA has to decide upon the OA/OC as the case may be within the time when the Provisional Attachment/Retention is alive i.e. within period of 180 days from the date of passing of such Provisional Attachment/Retention order.
- The AA if it finds that the property/record is involved in Money laundering may confirm the Provisional Attachment/Retention order, otherwise it may set-aside such order and release the property/record from encumbrance placed upon by the ED.
- The order of the AA confirming the OA/OC is valid for a period of 365 days or till the pendency of criminal prosecution under this act.

# CRIMINAL PROSECUTION

- The offence of Money laundering as per the Section 3 of the PMLA is punishable with Rigorous Imprisonment for a term not less than 3 years but which may exceed to 7 years and shall also be liable to fine.
- Where the scheduled offence has been committed under paragraph 2 of Part A (offences under NDPS Act) of the Schedule to the PMLA, then the maximum imprisonment is 10 years and fine.
- The Prosecution under PMLA unlike other criminal prosecutions is initiated qua filing of Prosecution Complaint as prescribed u/s 45 of the Act. The trial under PMLA is a sessions trial and is governed by the provisions of Cr.P.C.



# LAW IN BOOKS AND LAW IN PRACTICE

# Inter-ministerial Co-ordination Committee (Section 72A)

The Central Government may, by notification, constitute an Inter-ministerial Co-ordination Committee for inter-departmental and inter-agency co-ordination for the following purposes, namely:—

- (a) operational co-operation between the Government, law enforcement agencies, the Financial Intelligence Unit, India and the regulators or supervisors;
- (b) policy co-operation and co-ordination across all relevant or competent authorities;
- (c) such consultation among the concerned authorities, the financial sector and other sectors, as are appropriate, and are related to anti money-laundering or countering the financing of terrorism laws, regulations and guidelines;
- (d) development and implementing policies on anti money-laundering or countering the financing of terrorism; and
- (e) any other matter as the Central Government may, by notification, specify in this behalf.

# CONTROVERSIES RELATING TO CERTAIN PROVISIONS IN PMLA

## ❖ PROCEEDS OF CRIME 2 (1)(u):

It is defined as

“proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in the value held within the country or abroad;

Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence

❖ Two Situations envisaged under the law:

**First Situation:** when property is held in India:

- *“Proceeds of crime” means any property derived or obtained, directly indirectly, by any person as result of criminal activity relating to the scheduled offence or the value of any such property.....*

**Second Situation:** when property is taken or held abroad:

- *“Proceeds of crime” means any property derived or obtained, directly indirectly, by any person as result of criminal activity relating to the scheduled offence..... or..... the **property equivalent in value** held within the country or abroad*
- Thus, from the above, it is clear from the bare reading that the legislature has made distinction while using two expressions differently in two different situations.



- The ‘property **equivalent** in value’ is used only for the second situation and thus it can be read and interpreted as such in that situation alone.
- For the first situation, the expression used is ‘**value** of any **such** property’. The expression ‘**such**’ denotes property derived or obtained result of criminal activity relating to the scheduled offence. Thus, it can be read and interpreted in that manner only.
- If the legislature would have intended to cover any property **equivalent** in value in first situation also, then there was no need for the legislature to incorporate two different situations and use two different expressions therein.

- It is well accepted position that the legislature uses any particular expression that too in contradistinction to the other very consciously and for an intended reason.
- Here, it may be noted that the expression 'equivalent' has been used for the second situation only. Thus, it can be used for second situation only.
- Thus, for first situation, any other property 'equivalent' in value cannot be treated as 'proceeds of crime' unless that property falls in the category of 'any such property derived or obtained result of criminal activity relating to the scheduled offence'.

- Thus, from the perusal of the above, it is clear that the Enforcement Directorate cannot attach any property other than the property derived or obtained as a result of criminal activity related to a scheduled crime, when all of the properties are undisputedly held in India.

## ❖ SECTION 3 VIS-À-VIS SECTION 24 PMLA

- While Section 3 defines the offence of Money Laundering, whereas Section 24 lays down the burden of proof to be discharged.
- Section 3:- “Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming as untainted property shall be guilty of offence of Money Laundering”.

Explanation.—For the removal of doubts, it is hereby clarified that,—

- (i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—
  - (a) concealment; or
  - (b) possession; or
  - (c) acquisition; or
  - (d) use; or
  - (e) projecting as untainted property; or
  - (f) claiming as untainted property, in any manner whatsoever,
  
- (ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

- **Section 24:-** “In any proceedings relating to proceeds of crime under this act-
  - a) in case of person charged with offence of Money Laundering, the authority or the court shall unless the contrary is proved, presume that such proceeds of crime are involved in Money Laundering.
  - b) in case of any other person the authority or court may presume that such proceeds of crime are involved in Money Laundering.”

- Although the Act provides exception to general rule of evidence for burden of proof, however the authorities have occasionally misinterpreted Section 24 by making presumptions of the following facts:-
- A) that he has committed the Scheduled Offence
- B) that the proceeds of crime are generated from the commission of scheduled offence
- Whereas the Law, u/s 24 or any where else in the Act, has **not** contemplated the presumption of commission of the scheduled offence or for generation of proceeds. The law clearly provides for a singular presumption i.e. for proceeds of crime being involved in Money Laundering.

- Since the offence of Money Laundering initiates essentially from the commission of the scheduled offence and generation of proceeds of crime thereof, hence there cannot be any presumption with regards to Proceeds of Crime being involved in Money Laundering unless it is proved beyond reasonable doubt that a scheduled offence has been committed.
- **The unfortunate scenario currently going on before the AA is that the order confirming the Provisional Attachment is passed by taking such presumption, even when no charges of Money Laundering are framed before the Special Court.**



## ❖ SECTION 5 OF PMLA/ CONTROVERSY PERTAINING TO TWIN REASONS TO BELIEVE

- The section prescribes for attachment of property, for which a prerequisite is that “Reasons to Believe” have to be recorded in writing that:
  - a) Any person is in possession of any proceeds of Crime; **and**
  - b) Such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such POC.

Another pre-requisite is that such an attachment order can be passed only subsequent to forwarding of a report u/s 173 Cr.P.C., to the Magistrate.

- Proviso has been carved out for emergent situations when without the report u/s 173, attachment order can be passed, but for the exercise of such power, the Authorised officer has to again record “**Reasons to Believe**” in writing for immediate attachment of property without report u/s 173 being forwarded to the Magistrate. Therefore the legislature clearly provided for separate reasons to be recorded for such immediate and emergent action.
- **However, it is seen that the Authorities have generally neglected to adhere to this twin requirement of recording of “reasons to believe” and utilize the power as given in proviso without recording any separate reason to believe.**

# POWER OF ED OF SEARCH AND SEIZURE (Section 17)

As per Section 17 (1): Where the Director [or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section], on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person—

- (i) has committed any act which constitutes money-laundering, or
- (ii) is in possession of any proceeds of crime involved in money-laundering, or
- (iii) is in possession of any records relating to money-laundering, [or]
- [(iv) is in possession of any property related to crime,]

then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to—

- (a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;
- (b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;
- (c) seize any record or property found as a result of such search;
- (d) place marks of identification on such record or [property, if required or] make or cause to be made extracts or copies therefrom;
- (e) make a note or an inventory of such record or property;
- (f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act.

Proviso of Section 17(1) has been omitted by the Finance (No. 2) Act, 2019, it read as follows:

**Provided that no search shall be conducted unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 157 of the Code of Criminal Procedure, 1973, (2 of 1974) or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or any other officer who may be authorised by the Central Government, by notification, for this purpose.**

## SEARCH OF PERSONS (SECTION 18)

**As per Section 18(1):** If an authority, authorised in this behalf by the Central Government by general or special order, has reason to believe (the reason for such belief to be recorded in writing) that any person has secreted about his person or in anything under his possession, ownership or control, any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, he may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act.

Proviso of Section 18(1) has been omitted by the Finance (No. 2) Act, 2019, it read as follows:

Provided that no search of any person shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 157 of the Code of Criminal Procedure, 1973, (2 of 1974), or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or in cases where such report is not required to be forwarded, a similar report of information received or otherwise has been submitted by an officer authorised to investigate a scheduled offence to an officer not below the rank of Additional Secretary to the Government of India or equivalent being head of the office or Ministry or Department or Unit, as the case may be, or any other officer who may be authorised by the Central Government, by notification, for this purpose.

## ❖ INTER-PLAY BETWEEN SECTION 17, 20 & 21 PMLA

- When the Enforcement Officer conducts search and subsequently seizes any property u/s 17(1), then he has to record reasons in writing as per section 20(1) & 21(1) that such property needs to be retained for the purpose of adjudication u/s 8 and subsequent to procedure as prescribed u/s 20 and 21, then only can the Enforcement Officer forward an application for extension of the retention/seizure order.

❖ **Section 20 (1) Retention of property.**-(1) Where any property has been seized under section 17 or section 18 or frozen under sub-section (IA) of section 17 and the officer authorised by the Director in this behalf has, on the basis of material in his possession, reason to believe (the reason for such belief to be recorded by him in writing) that such property is required to be retained for the purposes of adjudication under section 8, such property may, if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such property was seized or frozen, as the case may be.



- **Section 20 (4):** The Adjudicating Authority, before authorising the retention or continuation of freezing of such property beyond the period specified in subsection (1), **shall satisfy himself that the property is prima facie involved in money-laundering and the property is required for the purposes of adjudication under section 8.**

- In addition to the recording of reasons, the Enforcement Officer also has to pass an order u/s 20(2) for the provisional retention of the property/record for a period of 180 days and has to forward the copy of the order, along-with the material in his possession to the AA.
- The AA will also scrutinize the same and record its separate satisfaction as per section 20(4) that such property/record is required for the purpose of adjudication before issuing the SCN u/s 8(1).
- **However, the Enforcement Officer would generally without complying with the provisions of Section 20 and 21, straight-away forward the application for confirmation of retention/seizure to the AA u/s 17(4).**

## ❖ SECTION 8 (1) PMLA/ CONTROVERSY REGARDING NON-RECORDING OF REASONS TO BELIEVE BY ADJUDICATING AUTHORITY

- Section 8(1) of PMLA, clearly lays down that after the receipt of OA/OC, the AA has to form independent “Reason to Believe” that any person has committed the offence of Money Laundering or is in possession of POC, and only after forming of such Reason to Believe can the AA issue SCN to a person.
- However it is generally observed that no Reason to Believe are provided to the defendants neither there is any mechanism for the inspection of the same.

## ❖ SECTION 8(4) PMLA/ CONTROVERSEY REGARDING CONSTRUCTIVE POSSESSION OF ATTACHED PROPERTY

- Section 8(4) provides that the Enforcement Officer can forthwith take possession of the property of whose attachment has been confirmed by the AA.
- Further the Rule 5(2) of the PMLA (Taking possession of attached or frozen properties confirmed by the Adjudicating Authority) Rules, 2013, prescribes that if the property confirmed for attachment is immovable property then, the Enforcement Officer may serve an eviction notice of 10 days to the occupants of such immovable property.
- However this power of taking possession of the property by Enforcement Officer is a draconian, harsh and a case of giving unfettered power to the agency as without proving the guilt of the person in trial, not only he is barred from alienating his property but he is evicted from such property.

## ❖ OTHER PROBLEMS/CONTROVERSIES

- NO- JUDICIAL MEMBERS IN THE ADJUDICATING AUTHORITY
- SUMMARY PROCEDURE BEFORE AA MAKES THE ADJUDICATION BASED ONLY ON INCOMPLETE FACTS AND PRIMA-FACIE EVIDENCES
- NON-COMPLIANCE OF SECTION 21(2) BY THE DEPARTMENT BY NOT GIVING THE COPIES OF THE RECORDS SEIZED.
- THE ORDER OF CONFIRMATION OF THE ATTACHMENT PASSED BY THE AA IS WITHOUT ANY FINDINGS TO THE EFFECT WHETHER ANY SCHEDULED OFFENCE IS COMMITTED OR PROCEEDS OF CRIME HAVE BEEN GENERATED.

# CASE-STUDY-I

1. FACTORY PURCHASED IN THE YEAR 2005



2. ALLEGED VIOLATION OF ENVIRONMENT PROTECTION ACT AND WATER POLLUTION ACT IN THE YEAR 2009



3. POC ILLEGALLY CALCULATED FROM THE YEAR 2007-08 TILL 2012-13



4. FACTORY ACQUIRED IN 2005 HAVING NO NEXUS WITH POC ATTACHED



# CASE-STUDY -II

Bitcoin scheme floated in the year 2015 which ended in the year 2017




FDR created in the bank in the year 2018 out of funds having no nexus with the scheme



FDR attached by ED without identifying any transaction linking POC with the attached property





**ROLE OF CHARTERED  
ACCOUNTANTS AND TAX  
LAWYERS IN HANDLING  
NOTICES AND ATTACHMENT  
ORDERS ISSUED BY THE ED**



- Identifying the source of the attached properties and differentiating it with the alleged POC.
- Identifying Loan utilization in the attached property.
- Calculation of the correct value of any alleged POC.
- Valuation of the property attached and comparison with the alleged POC.
- Proper Financial Accounting and Analysis.
- Preparation of Money Trail for the attached properties to demarcate the source of fund.

# Thank You

**ASHWANI TANEJA**

**(FCA, ACS, AICWA, FICA, DISA, NCFM, LL.B,  
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