

INTERPLAY of LAWS
dealing with
ECONOMIC OFFENCES
(With Emphasis on International
Transactions)

Ashwani Taneja

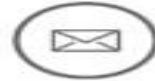
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INDIA

In a first, ED attaches chimpanzees, marmosets under PMLA

PTI | Updated: Sep 21, 2019, 22:49 IST



HIGHLIGHTS

- ED said the chimpanzees that were seized by customs from the smuggler's house were being kept at the Alipore Zoological Garden in Kolkata.
- The agency said the first-of-its-kind attachment under the Prevention of Money Laundering Act (PMLA) "enabled" the zoo authorities to retain the animals as the smuggling attempts to take them away.

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CASE-STUDY

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 BY THE ED UNDER PMLA IN 2018



Recent news

Modi's benami law has companies running for cover

BY SUGATA GHOSH, ET BUREAU | UPDATED: JAN 03, 2019, 04.08 PM IST

Post a Comment

Indian tax authorities are inundated with pleas from various trade bodies — some believed to be acting as proxies for large industry lobbies — to soften the benami law that was activated two years ago to tackle the menace of holding properties and assets in someone else's name to escape tax, sidestep regulations and even fool creditors.

The tax department has invoked the law to question a string of transactions which includes outright sham deals such as borrowing from shell companies in Kolkata to roping

Confiscated benami assets worth Rs 6,900-cr: I-T department

The tax department started initiating action under this law, implemented by the Modi government, from November 1, 2016.

PTI | Updated: Jan 29, 2019, 11.00 AM IST



18 Comments



NEW DELHI: The [Income Tax Department](#) has confiscated assets worth Rs 6,900 crore till now as part of its action under the anti-benami transactions law, the agency said in a public advertisement on Tuesday.

The message issued in leading dailies said people who "abet and induce" [benami transactions](#), benamidar (in

RELATED VIDEO



partner in a firm

SC/ST member acting as front to acquire land in Rajasthan

Infra cos building land bank via opaque structures

Buying properties in friends' name

1,777 properties worth ₹6,588 cr provisionally attached

CBI, ED action may now follow I-T default probes

Rajeev Jayaswal

■ rajeev.jayaswal@htlive.com

NEW DELHI: Trouble will now descend in threes for income tax defaulters with tax investigations coinciding or being followed by probes by the Enforcement Directorate and the Central Bureau of Investigation, with the three agencies coordinating among themselves as well as using the power of higher-order data analytics, two government officials said on condition of anonymity.

The idea is to identify major crimes behind tax cases, they added.

This doesn't currently happen, one of the officials explained, which means that sometimes people get away lightly.

"Most of the violations under the income-tax law are compoundable and people used to get

MULTI-AGENCY SCRUTINY

The three agencies are coordinating among themselves as well as using the power of higher-order data analytics

- I-T officials said the CBI and the ED along with the tax dept have been successfully able to detect and act swiftly against financial crimes in recent months because of the help they get from data analytics, and mutual coordination.
- "HDIL is one such case where data analytics played a significant role and the ED could effectively act against the

accused," said an official.

- The revenue department is using technology to reduce the compliance burden on honest taxpayers, but at the same time, nab wilful defaulters, who earlier used to defraud the system, the officials said.
- As a result, in about 10 days, the I-T dept has detected about a half-a-dozen serious cases of evasion and fraud, they added.

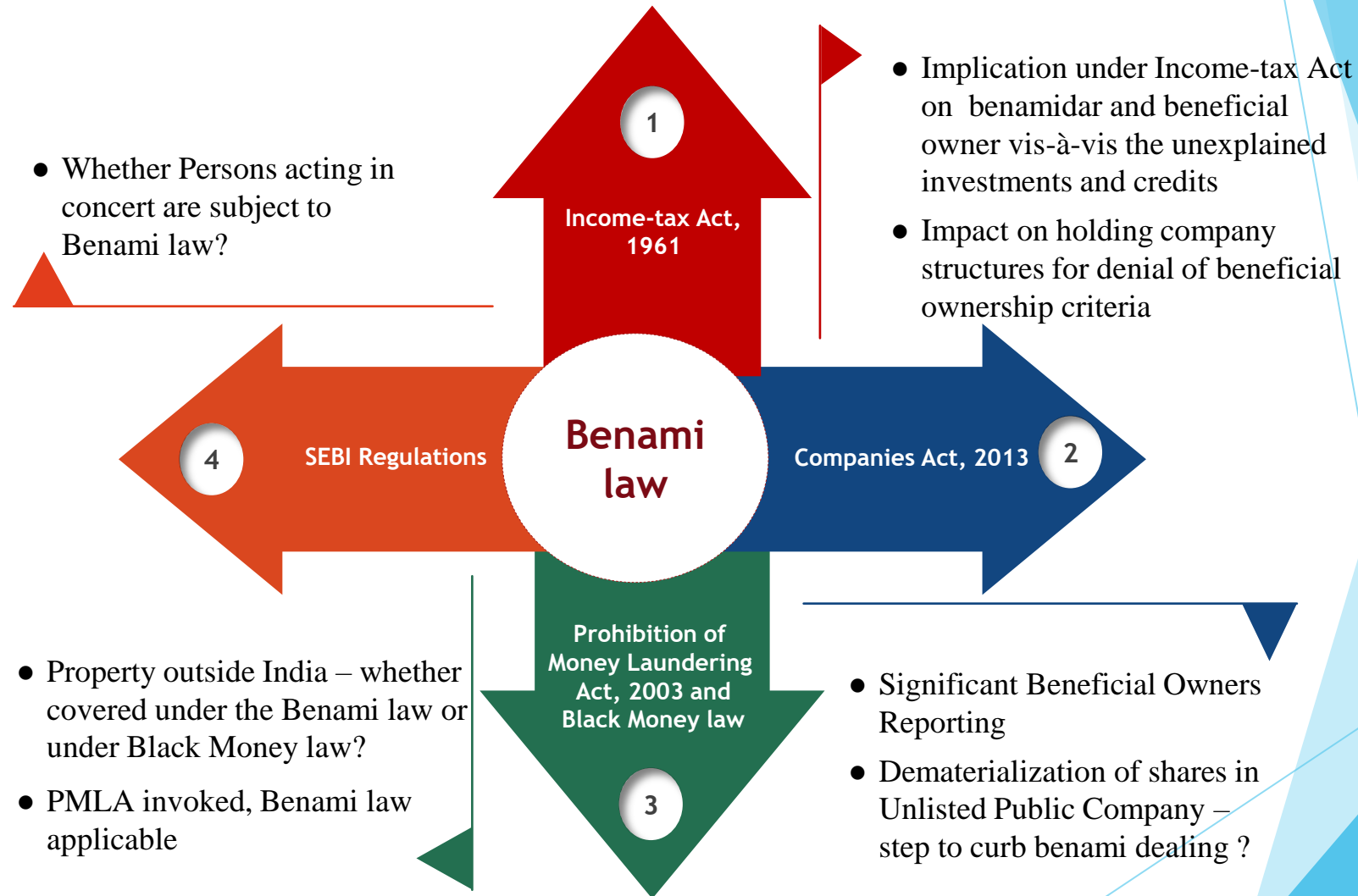
away easily by paying a penalty of 20% or so... serious crimes hidden behind tax violations can no longer remain hidden," one of the officials cited above said.

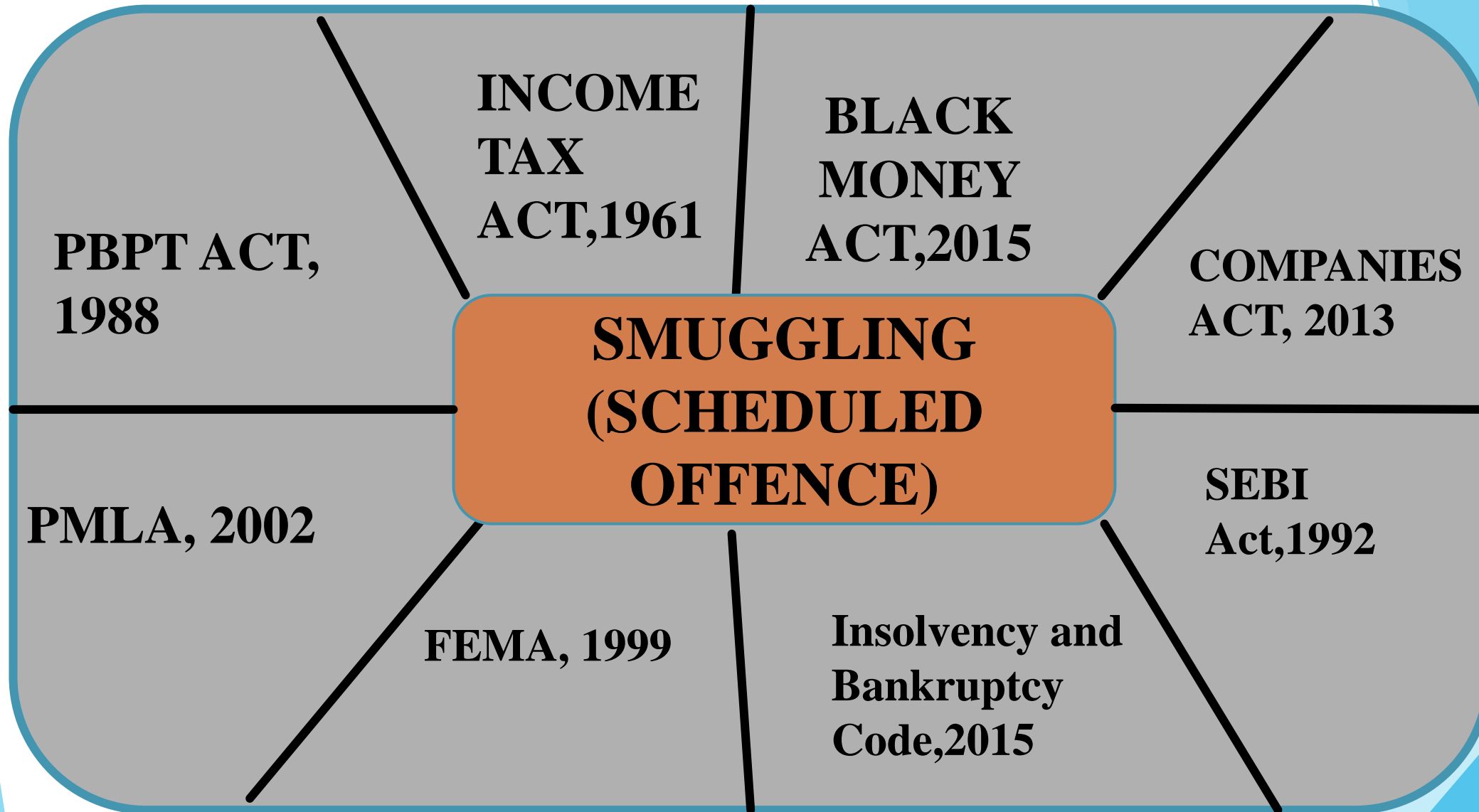
The officials said that the two agencies and the tax department

have been successfully able to detect and act swiftly against crimes of financial nature in recent months because of the help they get from data analytics and mutual cooperation and

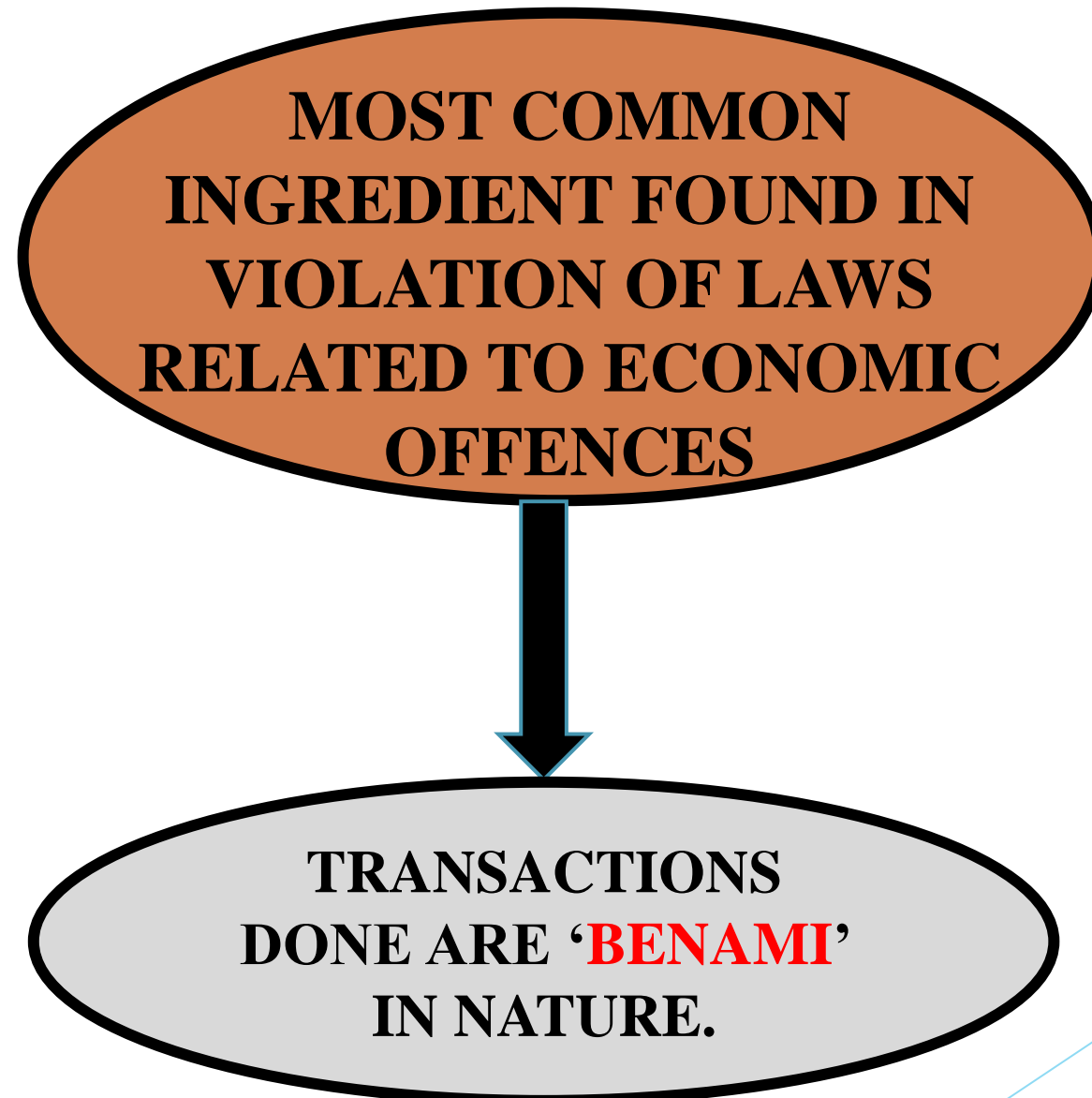
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Interplay of various Laws Dealing With Economic Offences.

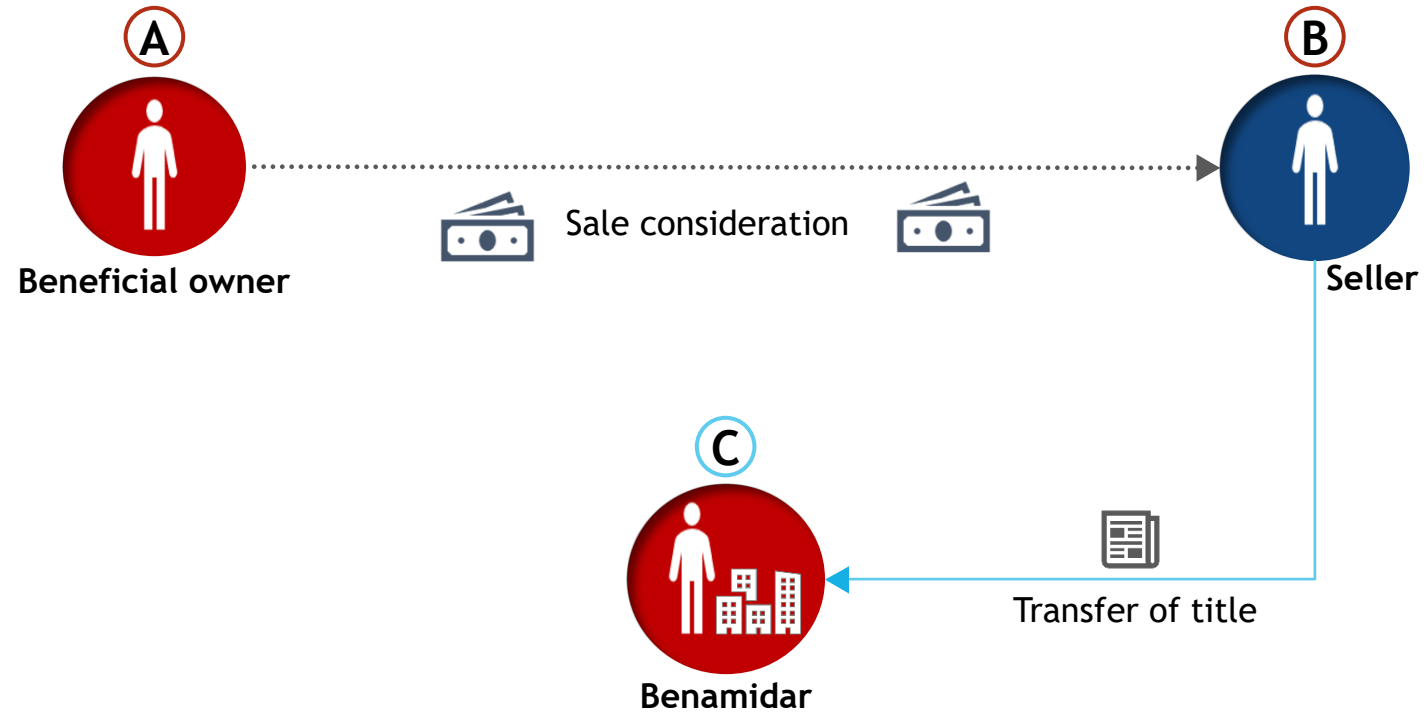




NEW FINDINGS of INVESTIGATION AGENCIES



Benami Transaction – Background



Factors leading to the origin of Benami law

Fraud on creditors

Tax evasion

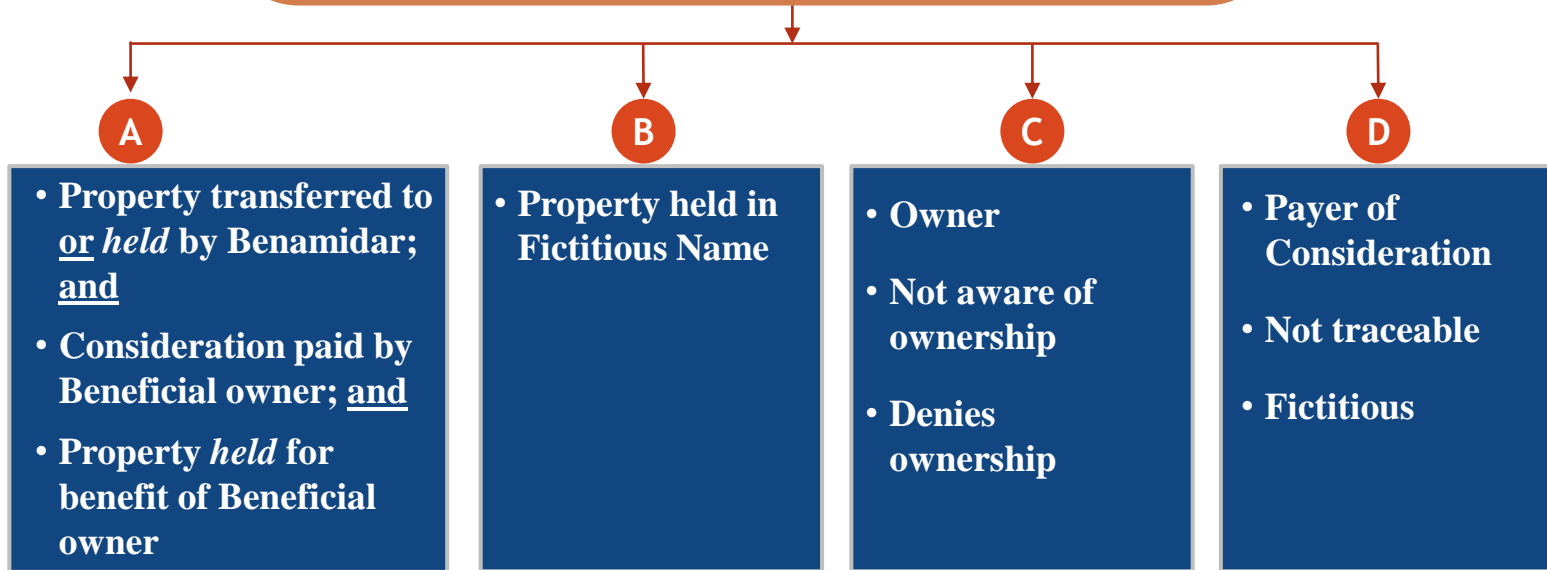
Black Money

Corrupt practices



What is a Benami Transaction?

TRANSACTION / ARRANGEMENT



Exception

- Person acting in fiduciary capacity - Executor, Trustee, Partner, Director
- Karta
- Spouse / child
- Brother, Sister, lineal D/A (Jt. Ownership)

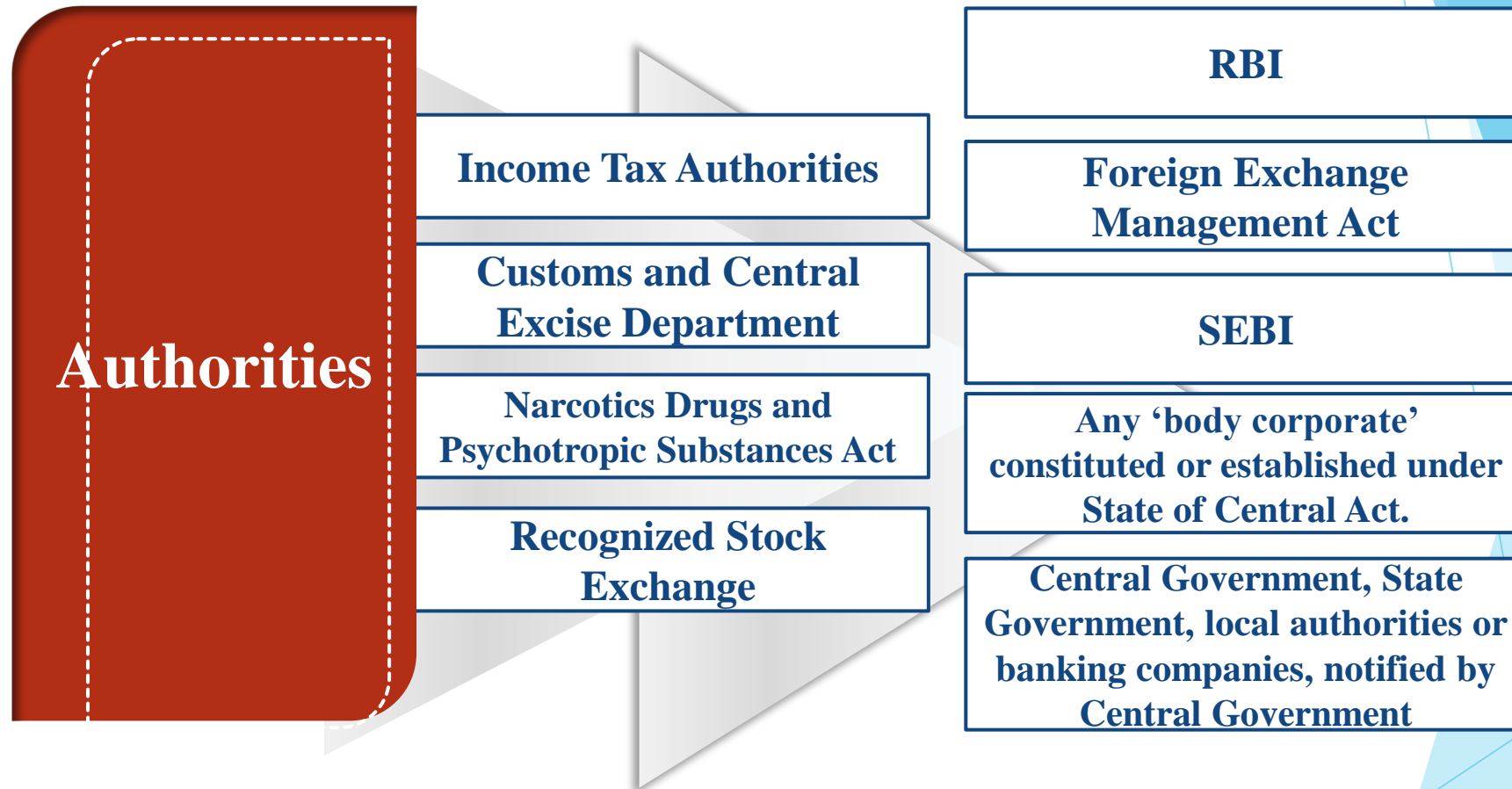
Consideration
paid out of
known sources

Authorities under Benami law

Authorities				
Initiating Officer (IO)	Approving Authority	Adjudicating Authority	Appellate Tribunal	Administrator
Assistant / Deputy Commissioner of Income Tax	Additional / Joint Commissioner of Income Tax	Bench of three Members chaired by CIT / Joint Secretary	Bench of three Members	Income Tax Officer
<ul style="list-style-type: none"> • Conducting inquiries, impound documents • Provisional attachment of property 	<ul style="list-style-type: none"> • Grants approval to IO 	<ul style="list-style-type: none"> • Pass order confirming or revoking the provisional attachment • Pass order for confiscation of property 	<ul style="list-style-type: none"> • Review the order passed by Adjudicating Authority 	<ul style="list-style-type: none"> • To receive and manage the property • To dispose of the property

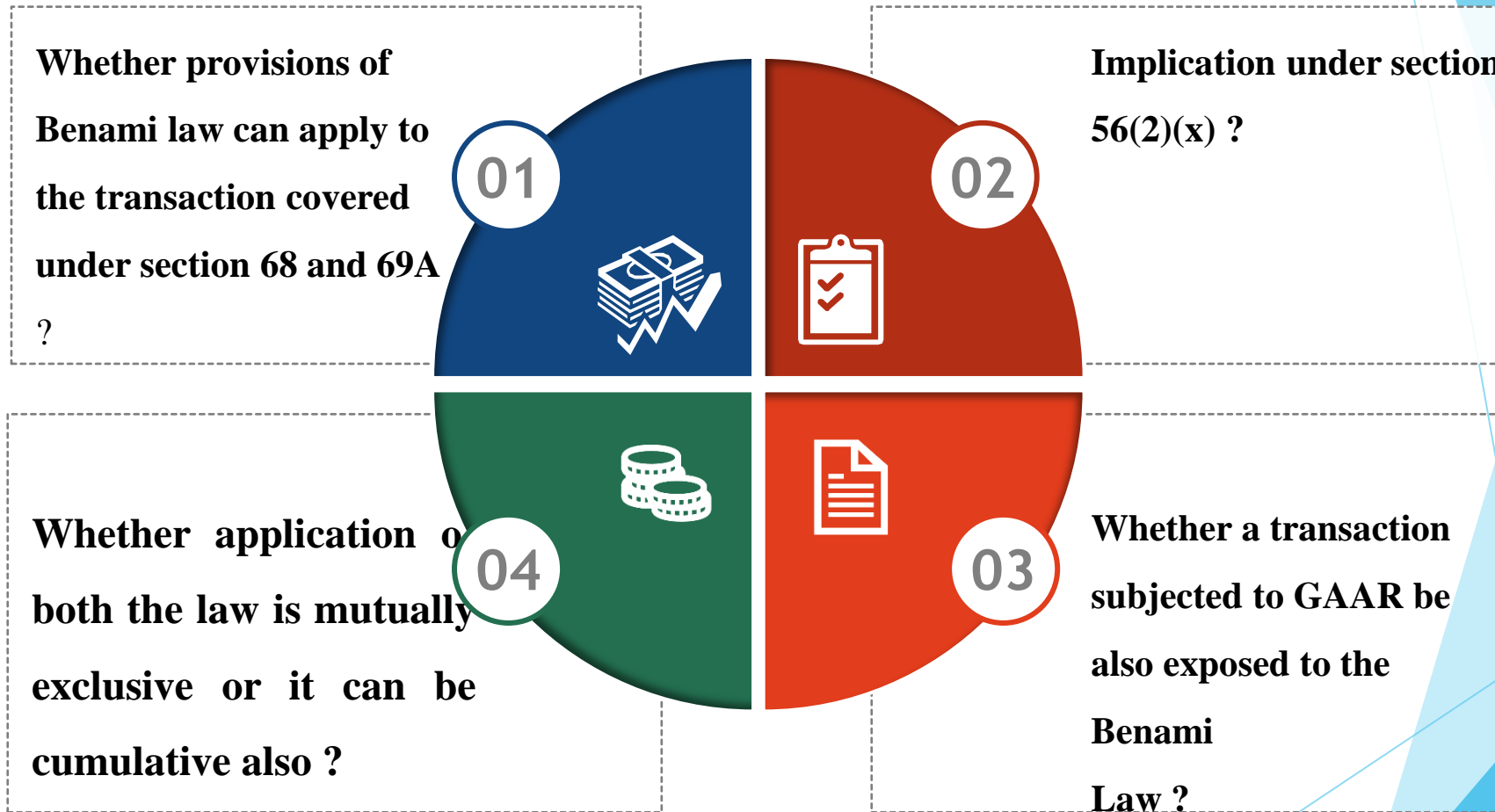
Adjudicating authority to pass order confirming / revoking the provisional attachment within one year from the date of reference made by the IO

Assistance from other Authorities

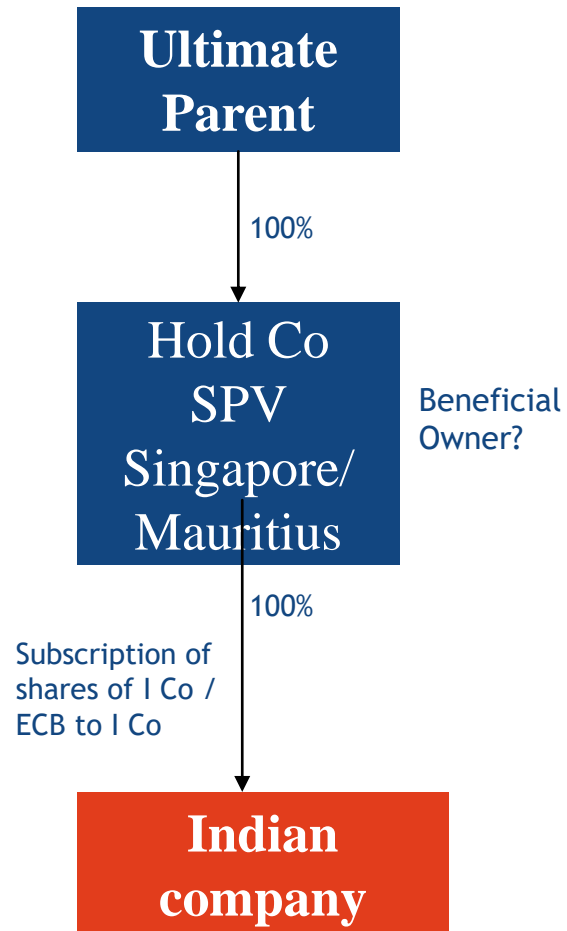


'Shell Companies' - PMO set up a task force in February 2017 under the joint chairmanship of the Revenue Secretary and Secretary, MCA

Interplay with Income Tax Act



Interplay with Income Tax Act - Holding Structures



Typical issues in holding company structures

- Benefits under tax treaties available to beneficial owners
- Beneficial Ownership of Assets and Income of SPV under challenge under the Income Tax Proceedings
- Can denial of tax treaties on beneficial ownership criterion be the basis for invoking Benami law?

Implications under Benami law

- Is the Ultimate Parent a Beneficial Owner?
- Is SPV a Benamidar? Holding Property for the Ultimate Parent- Consideration provided by Ultimate Parent
- Can shares held in Indian company be held as Benami Property? Subject to provisional attachment?
- Holding company structures – recognized under various commercial laws – Can it be subject to challenge under Benami law?

Burden of showing that transaction is benami lies on the IO

Significant Beneficial Owner disclosure under Companies Act 2013 - uncover Benami holding?

Significant Beneficial Owner (SBO)

Individual – acting alone or *together*, or through one or more persons or trust, possess one or more of the following rights or entitlements in reporting company

1.

Holds indirectly, or together with any direct holdings, not less than 10% of the shares

2.

Holds indirectly, or together with any direct holdings, not less than 10% of the voting rights in the shares

3.

Has right to receive or participate in not less than 10% of the total distributable dividend, through indirect holdings alone, or together with any direct holdings

4.

Has right to exercise or actually exercises, significant influence or control, in any manner other than through direct holdings alone

Objective threshold

Subjective threshold

Key considerations

- SBO required to make disclosures of his beneficial interest to the Reporting Company, which in turn to be reported to Registrar of Companies
- SBO disclosures would enable the authorities to “follow the money” in monetary examinations including suspect accounts/assets held by Benamidars
- Holding of persons “acting together” is clubbed in respect of their shareholding / influence / control. However, this term has not been defined
 - For determining situations of “acting together”, can one take reference from definition of “Persons acting in concert (PAC)” from SEBI Takeover Regulations, 2011?

Burden of proof and Intention of the person

P. Leelavathi (D) v. Shankaranarayana Rao (SC - Civil Appeal No. 1099 of 2008) (2019)

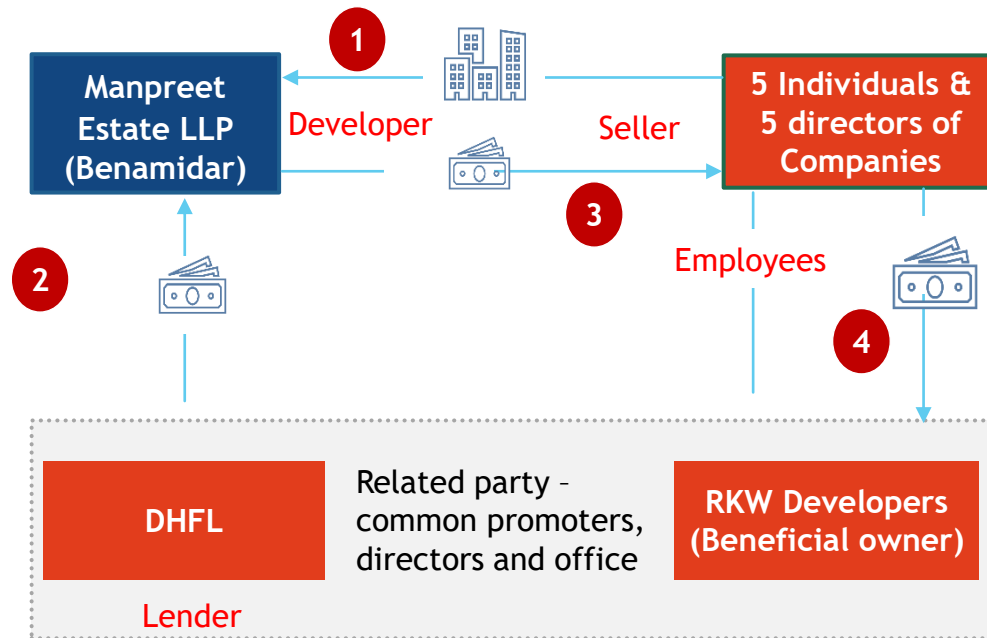
- Burden of proof on the person who assert the transaction is benami which is to be discharged by legal evidence

Mangathai Ammal (Died) vs. Rajeshwari and Ors. (SC - Civil Appeal No. 4805 of 2019) (SC)

- Intention of the person contributed to the purchase money relevant to determine the nature of transaction as benami
- The Amendment Act would not be applicable retrospectively

Followed in *Smt. Pamela Bhardwaj* case by Tribunal under the amended Benami law

Determination of beneficial owner of alleged property prerequisite for treating transaction as Benami



IO Allegation

- Manpreet Estate LLP (MEL) has taken loan from DHFL which was related party of RKW Developers P L (RKW)
- Consideration received by sellers transferred to RKW or to its related concerns
- RKW was beneficiary of development activity undertaken by MEL on said property

- Prerequisite for determining transaction as benami – identification of beneficial owner of alleged property
- Evidences establishing the genuineness of transaction which are at arm's length relevant to determine nature of transaction as benami
- Admissibility of written evidences vs. oral evidence
- Attachment of properties as per rules prescribed

IO v. M/s. Manpreet Estates LLP (FPA-PBPT-206/MUM/2018)(2019)



Remits funds to his friend who is resident in India



buys land in his name



Search by ITD takes place



He (Indian Friend) makes a statement that he is mere facilitator for transactions done by NRI friend

Land acquisition in India by an NRI (based in USA) (cannot buy agricultural land in India being a non-resident)

BENAMI LAW PROCEEDINGS

INCOME TAX PROCEEDINGS

FEMA PROCEEDINGS

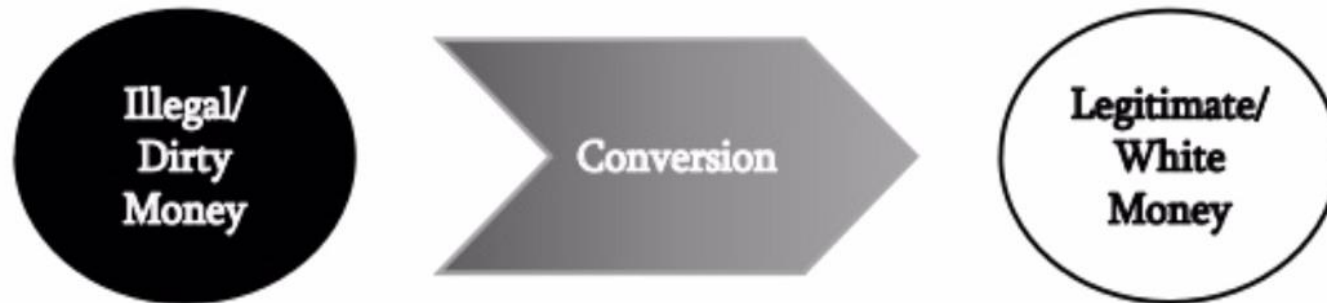
MONEY LAUNDERING:

The Prevention of Money Laundering Act, 2002 defines the offence of Money Laundering u/s 3 as

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...



PROCESS OF MONEY LAUNDERING

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graph TD; Title[PROCESS OF MONEY LAUNDERING] --> Stage1[STAGE -I  
COMMISSION OF THE SCHEDULED OFFENCE  
STAGE-II  
GENERATION OF PROCEEDS OF CRIME]; Title --> Stage3[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.

❖ 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;

❖ 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.

REVERSE BURDEN OF PROOF

- ▶ **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.”

BANK



**LOAN OBTAINED BY
FRAUD**

COMPANY



**PROPERTY
ACQUIRED QUA
BANK LOAN
ACQUIRED
THROUGH FRAUD**

**PROPERTY IS THUS
PROCEEDS OF
CRIME**

PROPERTY



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



STEPS INVOLVED
in
CORRECT APPROACH

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

- ▶ **Finding out the source(s) and quantifying amount of Proceeds of Crime (POC) from commission of an offence**
- ▶ **Identifying the Properties to be attached (acquired with POC)**
- ▶ **Identifying the source of such properties and connecting it with the POC.**
- ▶ **Identifying Loan utilization in the attached property.**
- ▶ **Calculation of the correct value of the 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 demonstrate the source(s) of funds.**

Thank You.



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