

BENAMI PROPERTY LAW

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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 19th 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 19th 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.

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;

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)

Construction of Shopping Mall JV (Non –documented)

Company A 50%

(Existing Const. Co. with track record)

Company B 50%

(New Company)

Financiers/Customers with
Advances for bookings of space
in mall



Major Infra Company

Project for development of SEZ

Need Vast land parcels

Appoints Land aggregator cos.

A

B

C

D

E

Enters into contract with 5 different companies authorising them to negotiate & purchase land at eco. prices

Where funds advanced, Land,
aggregator company to offer
land as security



Infra Companies securitise
these assets and raises Bank
loans for the SEZ project



Search of IT Department



Statements Recorded of Dir.



Case referred to IO

IO serves
notice
u/s 24(i)
alleging

Paper Company

Dummy Directors

Funds Loaned is
contribution

Low capital base

No other transaction in
company except land
purchases

Defence Arguments

1. Commercial Agreement
principal to principal

2. Contract stipulates purchase of land
by Infra Company from Land
aggregators at cost plus Margin

3. Land aggregators free to sell land to
others

4. Infra Company has first right of
refusal for land on which it gives
advances to Land aggregator company

Section 118- HP Tenancy & Land Reforms Act

118. Transfer of land to non-agriculturists barred. -

[(1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this chapter, no transfer of land (including transfer by a decree of a civil court or for recovery of arrears of land revenue) by way of sale, gift, will, exchange, lease, mortgage with possession, creation of a tenancy or in any other manner shall be valid in favour of a person who is not an agriculturist.]

Section 118 - HP Tenancy & Land Reforms Act

Explanation -For the purpose of this sub-section, the expression “transfer of land include :-

(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non-agriculturist; and

(b) an authorisation made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land.]

Section 42 - Rajasthan Tenancy Reforms Act

General restrictions on sale, gift and bequest— The sale, gift or bequest by a Khatedar tenants of his interest in the whole or part of his holding shall be void, if

(a) Omitted.

Section 42 - Rajasthan Tenancy Reforms Act

(b) such sale, gift or bequest is by a member of Scheduled Caste in favour of a person who is not a member of the Scheduled Caste, or by a member of a Scheduled Tribe in favour of a person who is not a member of the Scheduled Tribe.

[(bb) such sale, gift or bequest, notwithstanding anything contained in clause (b), is by a member of Saharia Scheduled Tribe in favour of a person who is not a member of the said Saharia tribe.]

(c) Omitted.

Thank You