

PRACTICAL ASPECTS OF NEW BENAMI LAW

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CONSEQUENCES OF BENAMI TRANSACTIONS

- Attachment/Confiscation of Benami Property or proceeds thereof.
- Prosecution and RI of the persons who are found guilty of offence of Benami Transactions and fine up to 25% of Fair Market Value of property payable by each person held guilty of offence of Benami Transaction.
- Prosecution for false information :
RI from 6 months up to 5 years for any person knowingly giving false information/document and fine up to 10% of Fair market Value.

Attachment/Confiscation of Benami Property or proceeds thereof

- Provisional attachment by the Initiating Officer u/s 24(3) for maximum period of 90 days from SCN.
- Continuing the provisional attachment by the Initiating officer u/s 24(4) (a) till adjudication by Adjudicating Authority u/s 26(3).

REQUISITE CONDITIONS FOR MAKING PROVISIONAL ATTACHMENT U/S 24(3)

- Issue of SCN u/s 24(1)
- Possession of property with the person held *benami*.
- IO fears alienation of the property during the period specified in notice issued u/s 24(1)
- Prior approval of Approving Authority.

MEANING AND SCOPE OF PROPERTY

- **Section 2(26):** ‘PROPERTY’ 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**.

MEANING AND SCOPE OF BENAMI PROPERTY

Section 2(8)

Benami property means any property which is the subject matter of a *benami* transaction and also includes the **proceeds from such property.**

EFFECT OF ATTACHMENT

Whether all rights with respect to enjoyment of property come to an end or only right to transfer the property becomes restricted ? ?

ATTACHMENT DEFINED

u/s 2(5)

“ attachment means the prohibition of transfer, conversion, disposition or movement of property, by an order issued under this Act”

Section 57

CERTAIN TRANSFERS TO BE NULL & VOID

Notwithstanding anything contained in the Transfer of the Property Act, 1882 or any other law for the time being in force, where, after the issue of a notice under section 24, any property referred to in the said notice is transferred by any mode whatsoever, the transfer shall, for the purpose of the proceedings under this Act, be ignored and if the property is subsequently confiscated by the Central Government under section 27, then, the transfer of the property shall be deemed to be null and void.


CONFISCATION AND VESTING OF BENAMI PROPERTY

Section 27(3)

Where an order of confiscation has been made under sec. 27(1), all the rights and title in such property shall vest absolutely in the Central Government free of all encumbrances and no compensation shall be payable in respect of such confiscation.

IMPLICATIONS OF SHARES BEING ATTACHED U/S 24

- Restriction on right of voting?
- Restriction on right to participate in shareholder's meeting?
- Restriction on right to receive dividend?
- Restriction to pledge shares?
- Restriction to sell / transfer of shares?



**BALKRISHAN GUPTA AND ORS
VS.
SWADESHI POLYTEX LTD. AND ORS
(Supreme Court)**

Attachment of shares do not deprive the shareholders of their right to vote at a meeting and other allied rights.

ATTACHMENT OF LAND AND BUILDING

- Right of usage of property
- Right to keep tenant / sub-tenant.
- Right to receive rent.
- Right of construction / development.
- Right to mortgage.
- Right of sub-division of plots.
- Right of entering into development agreement.
- Right to sell / transfer.

CONFISCATION AND VESTING OF BENAMI PROPERTY

SECTION 27

- Confiscation not to take place after the order of Adjudicating Authority unless order is passed in the appeal filed u/s 46 with Appellate Tribunal
- The confiscation shall be done by Adjudicating Authority after giving opportunity of hearing to the **person concerned**
- Procedure for confiscation to be prescribed
- After confiscation all rights and title in the property to vest absolutely in the Central Government
- No compensation payable in respect of confiscation

PROTECTION TO BONAFIDE PURCHASER

Provisions of Confiscation (Section 27) not to apply to any property held or acquired by a person from the benamidar provided the said property was acquired:-

- (i) For adequate consideration
- (ii) Prior to issue of notice u/s 24(1) and
- (iii) the purchaser had no knowledge of the *benami* Transaction

PROSECUTION

(Imprisonment and fine)

Section 53 provides three things:-

- The situations in which a person may be held guilty for offence of Benami Transaction.
- The persons who may be held guilty for Benami Transaction.
- Quantum of penalty in the form of imprisonment and fine.

SITUATIONS IN WHICH A PERSON MAY BE HELD GUILTY OF BENAMI TRANSACTION

Where any person enters into a *benami* transaction:

- in order to defeat the provisions of any law or
- to avoid payment of statutory dues or
- to avoid payment to creditors,

PERSON WHO MAY BE HELD GUILTY FOR BENAMI TRANSACTION.

- the beneficial owner,
- benamidar and
- any other person who **abets or induces** any person to enter into the *benami* transaction

QUANTUM OF PUNISHMENT

Person found guilty of offence of Benami Transaction liable for:-

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

PENALTY FOR FALSE INFORMATION AS PER SECTION 54

- Rigorous imprisonment for 6 months to 5 years.
- Fine up to 10% of Fair market value of the property.

AUTHORITIES UNDER THE ACT

Section 18(1) :- The following shall be authorities for the purposes of this Act, namely:-

- the Initiating Officer (IO)
- the Approving Authority (AA)
- the Administrator
- the Adjudicating Authority
- The Appellate Tribunal – (Sec 30 – 40)
- Special Courts (Sec.50)

POWERS OF AUTHORITIES

Section 19(1) provides that the authorities shall for the purposes of this Act have the same powers as are vested in a civil court under the Court of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:-

- ❖ Discovery and inspection
- ❖ Enforcing the attendance of any person, including any official of a banking company or a public financial institution or any other intermediary or reporting entity, and examining him on oath;
- ❖ Compelling the production of books of account and other documents
- ❖ Issuing commissions
- ❖ Receiving evidence on affidavits

CERTAIN OFFICERS TO ASSIST IN ENQUIRY MADE BY THE AUTHORITIES UNDER BENAMI LAW

Section 20 provides that following officers shall assist the authorities in the enforcement of this Act, namely:-

- Income tax authorities appointed under section 117(1) of Income-tax Act, 1961.
- Officers of Customs and Central Excise Departments.
- Officers appointed under section 5(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985.
- Officers of stock exchange recognised under section 4 of Securities Contracts (Regulation) Act, 1956.

- Officers of the Reserve Bank of India constituted under section 3(1) of the Reserve Bank Of India, 1934
- Police
- Officers of enforcement appointed under section 36(1) of the Foreign Exchange Management Act, 1999.
- Officers of the securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992.
- Officers of any other body corporate constituted or established under a Central or a State Act
- Such other officers of the Central Government, State Government, local authorities or banking companies as the Central Government may specify.



SECTION 21

POWER TO CALL FOR INFORMATION



SECTION 22

POWER OF AUTHORITIES TO IMPOUND DOCUMENTS



SECTION 23

**POWER OF AUTHORITY TO
CONDUCT INQUIRY, ETC.**



SECTION 24(3) AND 24(4)

**POWER TO MAKE PROVISIONAL
ATTACHMENT**



SECTION 26(6)

Power of Adjudicating Authority to strike out the name of any party improperly joined or add the name of the person whose presence before Adjudicating Authority may be necessary.

SECTION 26(3)

**Power to declare a property
Benami Property or not a
Benami Property**



SECTION 27(1)

**Confiscation of property by
Adjudicating Authority**


SECTION 28 AND 29

**Management, Possession and
Disposal of properties
confiscated by the
Administrator.**

JURISDICTION OF THE INITIATING OFFICER

Jurisdiction of the Initiating officer can be based on any one of the following three-:

- Location of Benami Transaction/Property
- Location of Benamidar
- Location of Beneficial Owner



**Standard Operating Procedure (SOP) issued
by
the CBDT
vide notification dated 10th August, 2017**

JURISDICTION OF THE INITIATING OFFICER, APPROVING AUTHORITY AND ADMINISTRATOR

“Section 3(1) states that no person shall enter into any Benami Transaction. The scheme of the Act revolves around consequences of violation of this section. It is, therefore, appropriate that the jurisdiction is assumed by a BPU when any of the 3 limbs viz. Benami Transaction / Property, Benamidar or Beneficial owner falls under its assigned territorial jurisdiction.”

Conti...

In cases where the Benami Property / Transaction , Beneficial owner and/or Benamidar are located in territorial jurisdictions of different BPUs, the BPU from which the first show cause notice u/s 24 of Prohibition of Benami Property Transaction Act has been issued shall assume jurisdiction over the case and shall intimate the other BPUs concerned regarding assumption of jurisdiction in that particular involving Benami Property/ Transaction, Benamidar and Beneficial owner.



**EACH BENAMI TRANSACTION / PROPERTY
MAY BE CONSIDERED AS A SEPARATE
CASE**

Many Combinations:

One Property-One Benamidar-One Beneficial Owner

One Property-Two Benamidars-Three Beneficial Owners

Two Properties-One Benamidar-Two Beneficial Owners

Two Properties-Two Benamidars- Two Beneficial Owners

OTHER IMPORTANT ISSUES HIGHLIGHTED IN SOP

- The Act to have overriding effect as per Section 67
- “The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

SECTION 60 'APPLICATION OF OTHER LAWS NOT BARRED'


- The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of any other law for the time being in force.

THE ACT IS APPLICABLE FROM 1988

- Benami property / transaction and the persons involved are liable for consequences in accordance with the law prevalent at that point of time. Prosecution provisions in respect of *benami* transaction entered into on or **after 01.11.2016** are more rigorous.

IMPORTANT STAGES IN IMPLEMENTING OF THE ACT


- The first stage is, prima facie, detection/ identification of benami transaction / property and bringing it to the notice of the Initiating officer (ACIT/DCIT), if detection is by an authority other than the initiating officer.
- Detection/ identification of benami transaction / property is followed by the statutory process of provisional attachment, adjudication and confiscation of the property involved in benami transaction, as provided in Chapter IV of the Act. **Opportunity of being heard is to be provided before any adverse inference is drawn.**



➤ The Initiating officer is required to process the case for prosecution of the persons concerned under sections 3, 53 and 54, **at any stage depending on the facts of the case.**

Stage of Filing Prosecution Complaints

- As per relevant provision of the act, filing of prosecution complaints is not linked with attachment or confiscation of benami property. Therefore, attachment or confiscation is not a pre-requisite for filing prosecution complaint under the act. However, fulfillment of necessary ingredients of the offence(s) under the Act is necessary for filing prosecution complaint(s), subject to requisite previous sanction of the CBDT.



**Issues relevant for Prohibition
of Benami Property Transaction
Act, 1988 , to be kept in view
while investigating a case under
the Income Tax Act.**

Seizure under Income Tax Act And Attachment Under the Provision of Benami Property Transaction Act

- During the course of search and seizure under the Income Tax Act, the authorized officer may put prohibitory order (PO) u/s 132(3) or seize an unexplained asset. However, in the light of the overriding effect of Prohibition of Benami Property Transaction Act (section 67), such PO or seizure may not be a bar to the provisional attachment under the Prohibition of Benami Property Transaction Act.



**IMPORTANT AVERMENTS AND
COGENT DEFENCES BEFORE
INITIATING OFFICER**

PROCEEDINGS BEFORE THE IO

- Principles of natural justice.
- Rules of evidences to apply.
- Opportunity of cross examination etc is also mandatory
- All the provisions of CPC, Indian Evidence Act, Indian Penal code, Criminal Procedure Code or any other Act to apply so long as these are not inconsistent with the provisions of PBPT Act,1988.

PROHIBITION OF BENAMI PROPERTY TRANSACTIONS ACT,1988

Fiduciary vs Benami

Section 2(9)(A): exception:

(ii): a person standing in fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of depository under the depositories Act,1996 and any other person as may be notified by the Central Government for this purpose.

BENAMI PROHIBITIONS TRANSACTIONS ACT,1988

Section 4 Prohibition of right to recover property held Benami –

(3) Nothing in this section shall apply-

(a).....

(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.

Fiduciary Capacity/ Relationship
needs to be

EXPLICIT

OR

It can be

IMPLICIT

as well.

SUPREME COURT OF INDIA



Marcel Martin v. M. Printer
[2012] 21 taxmann.com 7



WHETHER INITIATING OFFICER CAN
DISREGARD PROVISIONS OF
SECTION 91 & 92 OF INDIAN
EVIDENCE ACT ON THE GROUND
THAT PROVISIONS OF PBPT ACT, 1988
HAS GOT OVERRIDING EFFECT.



**POWERS GIVEN IN SECTION 19 TO
23 FOR CARRYING OUT
INVESTIGATION**

NO TIME LIMIT PRESCRIBED

ENQUIRY U/S 24

**Provisional attachment
cannot exceed 90 days from
the issue of Show cause
Notice u/s 24(1)**

PRIOR APPROVAL IS REQUIRED u/s 23 FOR MAKING ENQUIRY

For investigation u/s 19 to 22 from
Approving Authority.

Whereas no such approval is required
for recording of reasons and issuing
Show Cause notice u/s 24(1).



Notice u/s 24(1) is required to be issued to Benamidar.

Whereas only copy of notice to be issued to Benamidar u/s 24(2), where **his identity is known.**

Section 24(4)

Provides an obligation upon the initiating officer for making requisite enquiries, calling for reports, evidences, and all the relevant material before deciding whether the property is Benami Property and provisional attachment is to be continued or not.



ADJUDICATING AUTHORITY

**NOTICE TO BE ISSUED TO
FOLLOWING PERSONS u/s 26(1)
WITHIN A PERIOD OF 30 DAYS**

- Benamidar/s
- Beneficial owner/s
- Interested party, if any, including banking company
- Any person who has made a claim in respect of the property.


Section 26(3)

The opportunity of hearing is required to be given to-:

- Benamidar
- Initiating Officer
- Any other person who claims to be the owner of the property.

The Adjudicating Authority to pass an order :-

- i. Holding the property **not** to be a benami property and revoking the attachment order,
or
- ii. Holding the property to be a benami property and confirming the provisional attachment order, in all other cases.



**Whether Adjudicating Authority is
required to give a conclusive finding
as to who are Benamidar and
Beneficial Owner ?**

Section 26(6)

The Adjudicating Authority may strike out the name of any party improperly joined or add the name of any person whose presence before Adjudicating Authority may be necessary.

Section 26(7)


This section prescribes that no order under section 26(3) shall be passed after the expiry of one year from the end of the one month in which the reference under section 24(5) was received.

HEARING BEFORE APPELLATE TRIBUNAL

- Appeal to be filed within 45 days from date of order.
- Appeal to be heard by division bench.
- No time limit to pass order by the Tribunal.
- CAs are authorized to appear before Appellate Tribunal u/s 48.

APPEAL BEFORE APPELLATE TRIBUNAL

At present jurisdiction is with the Appellate Tribunal established under section 25 of Prevention of Money Laundering Act (PMLA) located at New Delhi.



**Time limit of filing the appeal is
45 days from the date of order
passed by the Adjudicating
Authority.**

THE APPELLATE TRIBUNAL HAS THE POWER TO PASS FINAL ORDER

Section 46(4)(e):

To pass final order and affirm, vary or reverse an order of adjudication passed by the Adjudicating Authority and pass such other order or orders as may be necessary to meet the ends of justice

WRIT JURISDICTION

Whether remedy invoking writ jurisdiction of the High Court can be availed for any harsh action under Benami Law.

CIRCUMSTANCES UNDER WHICH WRIT CAN BE FILED

- Palpable injustice.
- Total go-by to the procedures.
- Perversity in actions/orders.
- Gross violation of principles of natural justice.
- Actions/orders apparently filled with malafide intentions/approach
- Actions/orders patently arbitrary.

OPTIONS AVAILABLE BEFORE HIGH COURT

- To admit the writ and issue requisite direction/orders.
- Dismiss the Writ (on merits)
- Sending the issues back to the Executive/Appellate Authority.

REQUISITE INGREDIENTS FOR ADMISSION OF WRIT

Though High Court enjoys absolute power under Article 226 of The Constitution of India but these are not exercised in an unfettered manner:

- The petitioner must approach with clean hands, full fairness and transparency.
- No disputes on facts.
- Issues involved are purely legal.



➤ Absence of efficacious alternate remedy.


➤ Pursuing alternate remedy would frustrate the purpose of seeking justice.

➤ The time delay to seek alternate remedy may cause irreparable damage.

MOST COMMON WRITS THAT MAY BE ISSUED UNDER BENAMI LAW

➤ Writ of Certiorari


➤ Writ of Mandamus.



Illustrative examples where writ jurisdiction can be invoked to seek justice under Benami law.

➤ To challenge the vires of the provisions of Prohibition of Benami Property Transactions Act, 1988.

- To challenge retrospective operation of law
- Attachments done without proper Show Cause Notice.
- Attachments done of the property purchased by the bonafide purchaser that too without following proper procedure.
- Notice issued by an officer who does not have any jurisdiction (**In any manner**).
- Notice issued u/s 24(1) without recording reasons and without obtaining requisite approval.

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- Provisional attachment made beyond prescribed mandatory period of 90 days
 - Statement of case not drafted and referred to the Adjudicating Authority within the period of 15 days
 - Adjudicating Authority does not pass order within 1 year and provisional attachment continues.

WRITS TO BE FILED IN HIGH COURT

- Where property is located.
- Where parties are located.
- Where IO is located.
- Where Adjudicating Authority is located.
- Where interested parties are located.

INTERPLAY BETWEEN INCOME TAX ACT AND BENAMI LAW

- Whether application of both the law is mutually exclusive or it can be cumulative also?
- Whether application of Income Tax Law shall debar application of Benami Law?
- Whether application of Benami Law shall debar application of Income Tax Law?

- Where undisclosed income is assessed in the hands of R and the underlying assets are also held in the name of R, then only Income Tax Act can be invoked
- If undisclosed income is assessed in the hands of R and underlying assets are held in the name of B, then both Income Tax Law and Benami Law can be invoked.
- However in the second situation, if Assessing Officer makes assessment in the hands of B, then it may be difficult for the Benami Law Officer to invoke the provisions of the Benami Law and take contradictory stand by treating B as Benamidar and R as Real owner.



THE FUGITIVE ECONOMIC OFFENDERS ORDINANCE 2018

The bill was introduced in the Lok Sabha on 12.03.2018 but could not be passed. Therefore, it was introduced as an ordinance

WHO IS FUGITIVE ECONOMIC OFFENDER?


Section 2(1)(f)


Any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India who –


- has left India so as to avoid criminal prosecutions;
- or
- being abroad, refuses to return to India to face criminal prosecutions

SCHEDULED OFFENCE

- Offence under the Indian Penal Code (approximately 28 offences included).
- Offence under the Negotiable Instrument Act, 1881
- Offence under the Reserve Bank of India Act, 1934
- Offences under the Customs Act, 1962
- Offences under the Prohibition Of Benami Property Transaction Act, 1988

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- Offences under the Securities and Exchange Board of India ACT, 1992
 - Offences under the Prevention of Money Laundering ACT, 2002
 - Offences under the Limited Liability Partnership Act, 2008
 - Offences under the Foreign Contribution (Regulation) Act, 2010

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- Offences under the Companies Act, 2013
 - Offences under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
 - offences under the insolvency and Bankruptcy Code, 2016
 - offences under the Central Goods and Services Tax Act, 2017



As per section 4, Director or Deputy Director may file an application in the special court for an individual to be declared as fugitive economic offender.

SECTION 12

After declaration of an individual as fugitive economic offenders by the special court, it may order for confiscation of

- a) the proceeds of crime in India or abroad, whether or not such property is owned by the fugitive economic offender; and
- b) any other property or Benami Property in India or abroad, owned by the fugitive economic offender

SECTION 14

Any Court / Tribunal may disallow such individual or any other entity in which such individual has substantial interest from defending any civil claim.

*Thank
you*

