

PMLA



Prevention of Money Laundering Act

By :-

ASHWANI TANEJA

(FCA, ACS, AICWA, FICA, DISA, NCFM, LL.B, LL.M)

(Ex- Member, Income Tax Appellate Tribunal-
Ministry of Law & Justice-Government of India)

Email: ashwani@taxindia.net

**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”.

❖ 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.

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
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CRIME

STAGE-III
COMMISSION OF
MONEY
LAUNDERING BY:
PLACEMENT
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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

❖ 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;

❖ 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”.

- **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.**

❖ 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

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