

PROHIBITION OF BENAMI PROPERTY TRANSACTIONS ACT, 1988

INTRODUCTION

The Benami Transactions (Prohibition) Act, 1988 was enacted to prohibit benami transactions and the right to recover property held benami. The said Act, inter alia, provides that—

- a) all the properties held benami shall be subject to acquisition by such authority in such manner and after following such procedure as may be prescribed;
- b) no amount shall be payable for the acquisition of any property held benami;
- c) the purchase of property by any person in the name of his wife or unmarried daughter for their benefit would not be benami transaction;
- d) the securities held by a depository as registered owner under the provisions of the Depositories Act, 1996 or participant as an agent of a depository would not be benami transactions.

During the administration of the Benami Transactions (Prohibition) Act, 1988, it was found that the provisions of the aforesaid Act are inadequate to deal with benami transactions as the Act does not—

- a) contain any specific provision for vesting of confiscated property with Central Government;
- b) have any provision for an appellate mechanism against an action taken by the authorities under the Act, while barring the jurisdiction of a civil court;
- c) confer the powers of the civil court upon the authorities for its implementation; and
- d) provide for adequate enabling rule making powers.

There were number of above stated problems in the existing Benami Law, so to solve such problems, law was amended in 2016.

Benami Transactions (Prohibition) Act, 1988 was amended through the **Benami Transactions (Prohibition) Amendment Act, 2016**.

Features of Benami Transactions (Prohibition) Amendment Act, 2016

- The Benami Transactions (Prohibition) Amendment Act, 2016 received the assent of the President on the 10th August, 2016 and came into effect from 1st November, 2016.
- The amended law empowers the specified authorities to provisionally attach benami properties which can eventually be confiscated.
- Besides, if a person is found guilty of offence of benami transaction by the competent court, he shall be punishable with rigorous imprisonment for a term not less than one year but which may extend to 7 years and shall also be liable to fine which may extend to 25% of the fair market value of the property.
- The legislation is also intended to effectively prohibit benami transactions and consequently prevent circumvention of law through unfair practices.
- It empowers the Government to confiscate benami property by following due procedure. It therefore promotes equity across all citizens.

The Salient Features of the Benami Property Transactions Act, 1988 are as under:

- It defines a benami transaction and benami property and also provides for exclusions and transactions which shall not be construed benami
- It provides the consequences of entering into a prohibited benami transactions
- It lays down the procedure for determination and related penal consequences in the case of a prohibited benami transaction
- It also provides that the powers of civil court shall be available to authorities under the said Act
- Miscellaneous Provisions have been provided for service of notice, protection of action taken in good faith, etc.
- Central Government empowers to make rules for the implementation of the provisions of the Bill.
- It enables the Central Government in consultation with the Chief Justice of the High Court to designate one or more Courts of Session as Special Court or Special Courts for the purpose of the Bill.
- It provides penalty for entering into benami transactions and for furnishing any false documents in any proceeding under the Bill
- It provides for transfer of any suit or proceeding in respect of a benami transaction pending in any court (other than High Court) or Tribunal or before any authority to the Appellate Tribunal.

Important Definitions

"Attachment"

Attachment means the prohibition of transfer, conversion, disposition or movement of property, by an order issued under the Act. [Section 2(5)]

"Benami Property"

Benami Property means any property which is the subject matter of a benami transaction and also includes the proceeds from such property. [Section 2(8)]

"Benami Transaction"

As per Section 2 (9) of the 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—

(i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;

(ii) a person standing in a 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 a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint- owners in any document, and the consideration for such property has been provided or paid out of the

known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(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;

Explanation.—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force,—

- (i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;
- (ii) stamp duty on such transaction or arrangement has been paid; and
- (iii) the contract has been registered.

"Benamidar"

Benamidar 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.[Section 2(10)]

"Beneficial Owner"

"Beneficial Owner" means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar.[Section 2(10)]

"Fair Market Value"

Fair market value in relation to a property, means—

- (i) the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and
- (ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with such manner as may be prescribed.[Section 2(16)]

"Firm"

Firm shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932 and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008.[Section 2(17)]

"Initiating Officer"

"Initiating Officer" 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;

"Partner"

Partner shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932, and shall include,—

- a) any person who, being a minor, has been admitted to the benefits of partnership; and
- b) a partner of a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008.[Section 2(22)]

"Partnership"

Partnership shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932, and shall include a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008. [Section 2(23)]

"Person"

Person shall include—

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) a company;
- (iv) a firm;
- (v) an association of persons or a body of individuals, whether incorporated or not;
- (vi) every artificial juridical person, not falling under sub-clauses (i) to (v).[Section 2(23)]

"Property"

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. [Section 2(26)]

"Transfer"

Transfer includes sale, purchase or any other form of transfer of right, title, possession or lien. [Section 2(26)]

Prohibition of benami transactions- Section 3

- 1) No person shall enter into any benami transaction.
- 2) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to 3 years **or** with fine or with both.
- 3) Whoever enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in sub-section (2), be punishable in accordance with the provisions contained in **Chapter VII**.

Chapter VII deals with offences and prosecution. It provides that if a person is found guilty of offence of benami transaction by the competent court, he shall be punishable with rigorous *imprisonment for a term not less than 1 year but which may extend to 7 years and shall also be liable to fine which may extend to 25% of the fair market value of the property.*

Prohibition of the right to recover property held benami

- 1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.
- 2) No defence based on 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 allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

Property held benami liable to confiscation – Section 5

Any property, which is subject matter of benami transaction, shall be liable to be confiscated *by the Central Government.*

Prohibition on re-transfer of property by benamidar – Section 6

- 1) No person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf.
- 2) Where any property is re-transferred in contravention of the provisions of sub-section (1), the transaction of such property shall be deemed to be null and void.

- 3) The provisions of sub-sections (1) and (2) shall not apply to a transfer made in accordance with the provisions of section 190 of the Finance Act, 2016.

Notice and attachment of property involved in benami transaction – Section 24

- 1) Where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.
- 2) Where a notice under sub-section (1) specifies any property as being held by a benamidar referred to in that sub-section, a copy of the notice shall also be issued to the beneficial owner if his identity is known.
- 3) Where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as may be prescribed, for a period not exceeding 90 days from the date of issue of notice under sub-section (1).
- 4) The Initiating Officer, after making such inquiries and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of 90 days from the date of issue of notice under sub-section (1),—
 - a) where the provisional attachment has been made under sub-section (3),—
 - (i) pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section (3) of section 26; or
 - (ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority.
 - (b) where provisional attachment has not been made under sub-section (3),—
 - (i) pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section (3) of section 26; or
 - (ii) decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.
- 5) Where the Initiating Officer passes an order continuing the provisional attachment of the property under sub-clause (i) of clause (a) of sub-section (4) or passes an order provisionally attaching the property under sub-clause (i) of clause (b) of that sub-section, he shall, within 15 days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.

Manner of service of notice – Section 25

(1) A notice under sub-section (1) of section 24 may be served on the person named therein either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, 1908.

(2) Any notice referred to in sub-section (1) may be addressed—

- (i) in case of an individual, to such individual;
- (ii) in the case of a firm, to the managing partner or the manager of the firm;
- (iii) in the case of a Hindu undivided family, to Karta or any member of such family;
- (iv) in the case of a company, to the principal officer thereof;
- (v) in the case of any other association or body of individuals, to the principal officer or any member thereof;
- (vi) in the case of any other person (not being an individual), to the person who manages or controls his affairs.

Adjudication of benami property – Section 26

(1) On receipt of a reference under sub-section (5) of section 24, the Adjudicating Authority shall issue notice, to furnish such documents, particulars or evidence as is considered necessary on a date to be specified therein, on the following persons, namely:—

- a) the person specified as a benamidar therein;
- b) any person referred to as the beneficial owner therein or identified as such;
- c) any interested party, including a banking company;
- d) any person who has made a claim in respect of the property:

Provided that the Adjudicating Authority shall issue notice within a period of 30 days from the date on which a reference has been received:

Provided further that the notice shall provide a period of not less than 30 days to the person to whom the notice is issued to furnish the information sought.

(2) Where the property is held jointly by more than one person, the Adjudicating Authority shall make all endeavours to serve notice to all persons holding the property:

Provided that where the notice is served on any one of the persons, the service of notice shall not be invalid on the ground that the said notice was not served to all the persons holding the property.

(3) The Adjudicating Authority shall, after—

- a) considering the reply, if any, to the notice issued under sub-section (1);
- b) making or causing to be made such inquiries and calling for such reports or evidence as it deems fit; and

- c) taking into account all relevant materials, provide an opportunity of being heard to the person specified as a benamidar therein, the Initiating Officer, and any other person who claims to be the owner of the property, and, thereafter, 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 attachment order, in all other cases.

(4) Where the Adjudicating Authority is satisfied that some part of the properties in respect of which reference has been made to him is benami property, but is not able to specifically identify such part, he shall record a finding to the best of his judgment as to which part of the properties is held benami.

(5) Where in the course of proceedings before it, the Adjudicating Authority has reason to believe that a property, other than a property referred to it by the Initiating Officer is benami property, it shall provisionally attach the property and the property shall be deemed to be a property referred to it on the date of receipt of the reference under sub-section (5) of section 24.

(6) The Adjudicating Authority may, at any stage of the proceedings, either on the application of any party, or suo motu, strike out the name of any party improperly joined or add the name of any person whose presence before the Adjudicating Authority may be necessary to enable him to adjudicate upon and settle all the questions involved in the reference.

(7) No order under sub-section (3) shall be passed after the expiry of one year from the end of the month in which the reference under sub-section (5) of section 24 was received.

(8) The benamidar or any other person who claims to be the owner of the property may either appear in person or take the assistance of an authorised representative of his choice to present his case.

As per section 7 of the Act, the Central Government shall, by notification, appoint one or more Adjudicating Authorities to exercise jurisdiction, powers and authority conferred by or under this Act. An Adjudicating Authority shall consist of a Chairperson and at least two other Members.

Confiscation and vesting of benami property – Section 27

- 1) Where an order is passed in respect of any property under sub-section (3) of section 26 holding such property to be a benami property, the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating the property held to be a benami property:

Where an appeal has been filed against the order of the Adjudicating Authority, the confiscation of property shall be made subject to the order passed by the Appellate Tribunal under section 46:

Confiscation of the property shall be made in accordance with such procedure as may be prescribed Rules.

- 2) Sub-section shall not apply to a property held or acquired by a person from the benamidar for adequate consideration, prior to the issue of notice under sub-section (1) of section 24 without his having knowledge of the benami transaction.
- 3) Where an order of confiscation has been made under sub-section (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.
- 4) Any right of any third person created in such property with a view to defeat the purposes of this Act shall be null and void.
- 5) Where no order of confiscation is made upon the proceedings under this Act attaining finality, no claim shall lie against the Government.

Management of properties confiscated-Section 28

- 1) The Administrator shall have the power to receive and manage the property, in relation to which an order of confiscation under sub-section (1) of section 27 has been made, in such manner and subject to such conditions, as may be prescribed.
- 2) The Central Government may, by order published in the Official Gazette, notify as many of its officers as it thinks fit, to perform the functions of Administrators.
- 3) The Administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is vested in the Central Government under sub-section (3) of section 27, in such manner and subject to such conditions as may be prescribed.]

Possession of the property – Section 29

(1) Where an order of confiscation in respect of a property under sub-section (1) of section 27, has been made, the Administrator shall proceed to take the possession of the property.

(2) The Administrator shall,—

- (a) by notice in writing, order within 7 days of the date of the service of notice to

- any person, who may be in possession of the benami property, to surrender or deliver possession thereof to the Administrator or any other person duly authorised in writing by him in this behalf;
- (b) in the event of non-compliance of the order referred to in clause (a), or if in his opinion, taking over of immediate possession is warranted, for the purpose of forcibly taking over possession, requisition the service of any police officer to assist him and it shall be the duty of the officer to comply with the requisition.

Appellate Tribunal

Chapter V deals with the provisions relating to the Appellate Tribunal. Section 30 deals with establishment of Appellate Tribunal. The said section seeks to provide that the Central Government shall, by notification, establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authority and the authorities under this Act.

Section 40 lays down the procedure and powers of Appellate Tribunal. Subsection (1) of this section provides that the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure.

Appeal to High Court – Section 49

- 1) Any party aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within a period of 60 days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order.
- 2) The High Court may entertain any appeal after the said period of 60 days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the period specified in sub-section (1).
- 3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
- 4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.
- 5) Nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

- 6) The High Court shall decide the question of law so formulated and deliver the judgment thereon containing the grounds on which any decision is founded and may award any cost as it deems fit.
- 7) The High Court may determine any issue which—
 - a) has not been determined by the Appellate Tribunal; or
 - b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section
- 8) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

Special Courts – Section 50

- 1) The Central Government, in consultation with the Chief Justice of the High Court, shall, for trial of an offence punishable under this Act, by notification, designate one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification.
- 2) While trying an offence under this Act, a Special Court shall also try an offence other than an offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.
- 3) The Special Court shall not take cognizance of any offence punishable under this Act except upon a complaint in writing made by—
 - (i) the authority; or
 - (ii) any officer of the Central Government or State Government authorised in writing by that Government by a general or special order made in this behalf.
- 4) Every trial under this section shall be conducted as expeditiously as possible and every endeavour shall be made by the Special Court to conclude the trial within 6 months from the date of filing of the complaint.

Penalty for benami transaction – Section 53

- 1) 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, the beneficial owner, benamidar and any other person who abets or induces any person to enter into the benami transaction, shall be guilty of the offence of benami transaction.
- 2) Whoever is found guilty of the offence of benami transaction referred to in sub-section (1) shall be punishable with rigorous imprisonment for a term which shall not be less than 1 year, but which may extend to 7 years and shall also be liable to fine which may extend to 25% of the fair market value of the property.

Penalty for false information – Section 54

Any person who is required to furnish information under this Act knowingly gives false information to any authority or furnishes any false document in any proceeding under this Act, shall be punishable with rigorous imprisonment for a term which shall not be less than 6 months but which may extend to 5 years and shall also be liable to fine which may extend to 10% of the fair market value of the property.

Previous Sanction – Section 55

No prosecution shall be instituted against any person in respect of any offence under sections 3,53 or section 54 without the previous sanction of the Board

Offences by Companies – Section 62

- 1) Where a person committing contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.
- 2) Nothing contained in sub-section (1), shall render any person liable to punishment if he proves that the contravention took place without his knowledge.
- 3) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, the director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

- a) "company" means a body corporate, and includes—
 - (i) a firm; and
 - (ii) an association of persons or a body of individuals whether incorporated or not; and
- b) "director", in relation to—
 - (i) a firm, means a partner in the firm;
 - (ii) any association of persons or a body of individuals, means any member controlling the affairs thereof.