

Prohibition of Benami Property Transactions Act, 1988

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BENAMI PROPERTY (Sec 2(8))

- ▶ Any property which is the subject matter of a ***Benami*** transaction and also includes the proceeds of such property.
- ▶ “**Property**” means property of any kind, whether movable/ immovable, tangible/ intangible, ***corporeal/ incorporeal*** and includes any right ***or interest or legal documents or instruments evidencing title or interest.***

BENAMI PROPERTY COVERS:

1. Any property as defined by this act
2. Any right or interest or legal documents or instruments evidencing title or interest in the property, and also
3. The proceeds from the property
4. Any property located abroad.
5. **DOES NOT** include any undervalued property.

BENAMI TRANSACTION (Sec 2(9))

Transaction in which property is transferred to one person for a consideration paid or provided by another person.

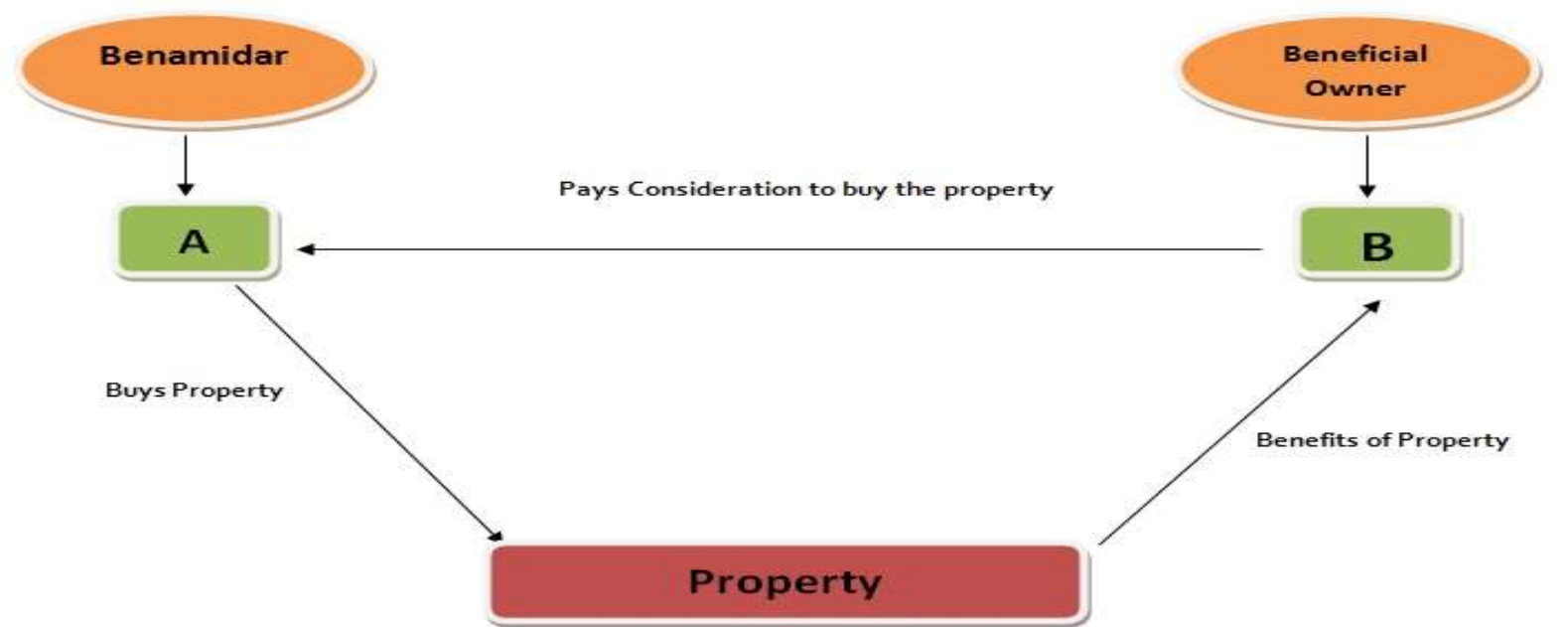


Fig. Benami Transaction

ELEMENTS OF BENAMI TRANSACTION

- ▶ Benamidar is on *record owner* in whose name property is held.
- ▶ Beneficial owner is the *real owner* who provides or pays consideration for the property.
- ▶ Any property which is subject matter of the benami transaction is “*Benami Property*”
- ▶ Either Benamidar or Beneficial owner may be fictitious or untraceable or both.

Contd...

- ▶ The transaction where cash is paid to person in lieu of a *future promise* is *not* a “*Benami Transaction*” as there is no lending of name.
- ▶ There can be no “Benami transaction” if the future benefit is due from the person who is also the holder of the property.
- ▶ Benamidar and Beneficial owner may be *any person* namely
 - Individual (or)
 - HUF (or)
 - Firm (or)
 - Company (or)
 - AOP/BOI (or)
 - Artificial Juridical Person

Essential Ingredients of “Benami transaction” involves

- ▶ A property which is the subject matter of any transaction or arrangement (ie. *Benami Property*)
- ▶ A *benamidar*
- ▶ A *beneficial owner*
- ▶ A *transaction or arrangement* whereby the benami property is transferred or in respect of which a transaction or arrangement is made.

How benami transactions are detected

Information collected from Registration Authorities

Builders & development authorities

Annual information returns

Suspicious transactions information from FIU

SUB CLAUSES OF SEC 2(9)

Sub clause	Category	Nature of Transaction
A	I	Transaction or arrangement where consideration provided by person <i>other than the transferee</i> or the person in whose name property is held
B	II	Transaction or arrangement in respect of property carried out in a <i>fictitious name</i> .
C	III	Transaction or arrangement in respect of property where owner <i>denies knowledge of ownership</i> or not aware of the ownership.
D	IV	Property Transaction or arrangement where <i>person providing consideration is not traceable</i> or is <i>fictitious</i>

CATEGORY I

- ▶ Benami transaction – consideration provided by person other than the transferee.
- ▶ **CONDITIONS FOR A BENAMI TRANSACTION**
 1. The transaction or arrangement actually takes place.
 2. Transaction or arrangement results in property being transferred to, or property being held, by a person (*benamidar*)
 3. Consideration paid or provided by person other than the benamidar (Beneficial Owner)
 4. Neither the *benamidar* nor the *beneficial owner* is fictitious / untraceable
 5. The property is held by the benamidar for the immediate or future benefit, direct/indirect, of the beneficial owner.

Exceptions to Category I transaction

Karta or member of HUF holding HUF property if consideration for property provided or paid out of known sources of HUF.

Property held in the name of spouse / any child of an individual & consideration for property paid or provided out of known sources of individual

Property held by a person standing in fiduciary position as

1. Trustee
2. Executor
3. Partner
4. Agent
5. Director
6. A depository/ a participant
7. Any other person notified by CG

Genuine stamp duty paid power of attorney transactions referred to in Sec 53A of Transfer of Property Act

Property held jointly in the names of an individual & his brother/sister/lineal ascendant/lineal descendant where consideration for property paid or provided out of known sources.

Relatives in whose name property can be bought without violating the provisions of the Act

S.No	Relative of the individual	Purchasing in the name of the relative	Purchasing in the joint names of self and the relative
1	Husband	Yes	Yes
2	Wife	Yes	Yes
3	Son	Yes	Yes
4	Daughter	Yes	Yes
5	Brother/Half- Brother	No	Yes
6	Sister/Half- Sister	No	Yes
7	Cousin	No	No
8	Step-Brother	No	No
9	Step-Sister	No	No
10	Mother	No	Yes
11	Father	No	Yes

Contd...

S.No	Relative of the individual	Purchasing in the name of the relative	Purchasing in the joint names of self and the relative
12	Grand-father	No	Yes
13	Grand-mother	No	Yes
14	Grand-son	No	Yes
15	Grand-daughter	No	Yes
16	Great Grandfather	No	Yes
17	Great Grandmother	No	Yes
18	Great Grandson	No	Yes
19	Great Grand-daughter	Yes	Yes
20	Son's Wife	No	No
21	Daughter's husband	No	No
22	Brother's wife	No	No
23	Sister's Husband	No	No

Contd...

S.No	Relative of the individual	Purchasing in the name of the relative	Purchasing in the joint names of self and the relative
24	Brother's son/daughter	No	No
25	Sister's son/daughter	No	No
26	Husband's brother/sister and their spouse	No	No
27	Wife's brother/sister and their spouse	No	No
28	Father's brother & his spouse	No	No
29	Father's sister & her spouse	No	No
30	Mother's Brother & his spouse	No	No
31	Mother's sister & her spouse	No	No

CATEGORY II

- ▶ Transaction or arrangement in respect of property is *benami transaction* if transaction is carried out or made in a fictitious name.
- ▶ In other words, the *benamidar* is fictitious person /entity (or) non existent person/entity.
- ▶ Eg., Demonetised notes deposited in a bank account opened in the name of a fictitious person is a benami transaction falling under Category II(*Sahara India Real estate Corpn. Vs SEBI, 25 Taxman.com 18*).

CATEGORY III

- ▶ Transaction or arrangement in respect of property is *benami transaction* if owner is not aware of, or denies knowledge of, such ownership.

CATEGORY IV

- ▶ Transaction or arrangement in respect of property is *benami transaction* if beneficial owner is fictitious or is untraceable.
- ▶ Transactions not falling within the scope of the Four categories is *not benami transaction and the property is not a benami property.*
- ▶ *Can ITRs' filed be considered as evidentiary?*
 - ▶ *State of Karnataka vs Selvi J Jayalalitha (2017) 78 Taxman.com 161 (SC). Held that IT Returns and orders passed would not ipso facto prove or disprove charge of disproportionate assets and they can at best be pieces of evidence along with other materials on record.*

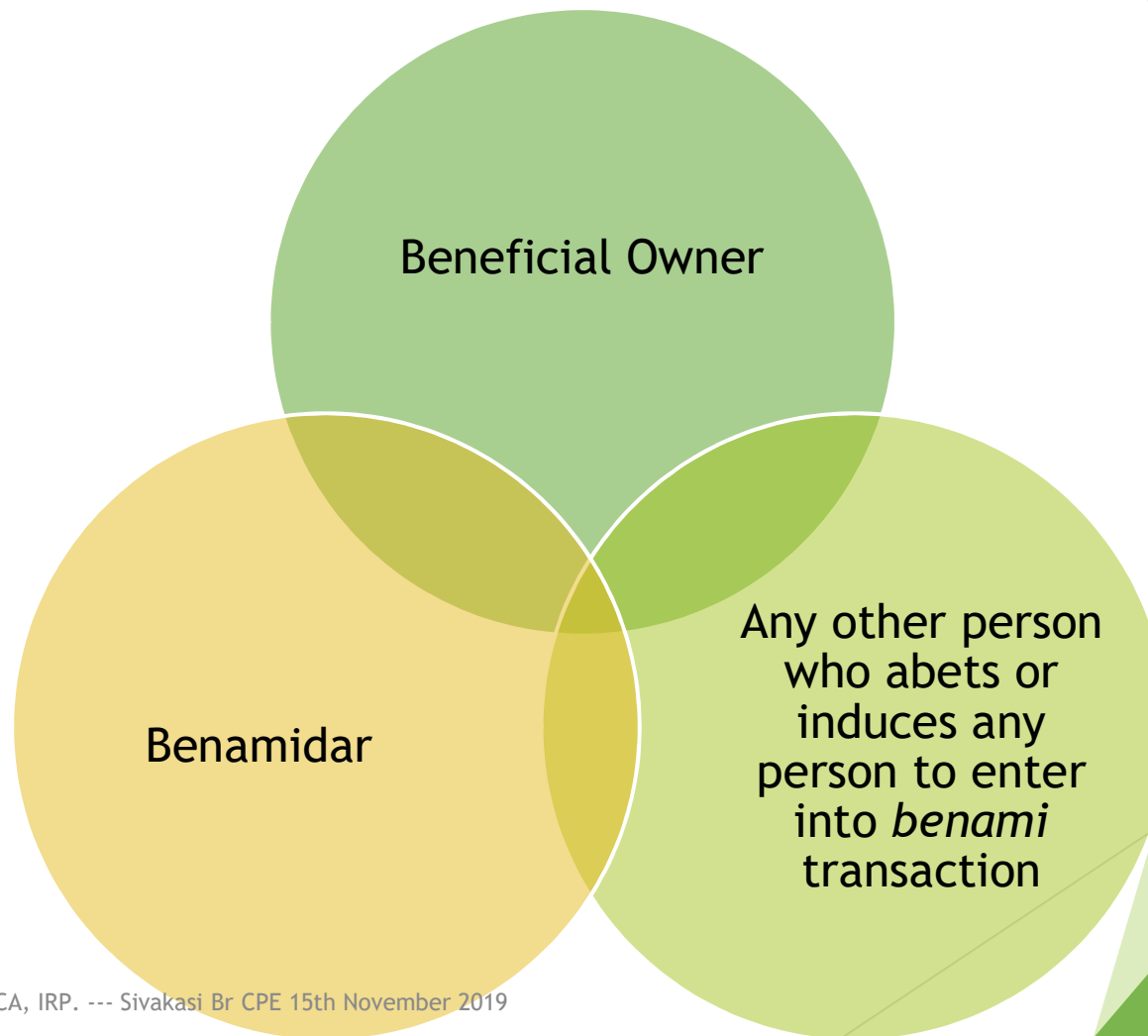
PBPT Act Vs. PML Act

- ▶ Objectives of both act are not same.
- ▶ PBPT Act has a wider concept than the Money Laundering Act.
- ▶ PML Act is restricted only to *proceeds of crime*.
- ▶ PBPT Act applies equally to both *property acquired through legitimate means* and property acquired through *proceeds of crime*.

Person liable to prove the Benamiship

- ▶ In case income tax department holds another person to be the benamidar of assessee, *department is not required to prove by positive evidence* the case of benamiship.
- ▶ Penalty: 53(2)
- ▶ Whoever enters into any *benami transaction be it the Benamidar, beneficial owner or any other person abetting to that, and proved of the offence*, shall be punishable with *imprisonment* for a term which may which shall *not be less than One year but may extend to 7 years and be liable for fine up to 75%* of the FMV of the property or with both.

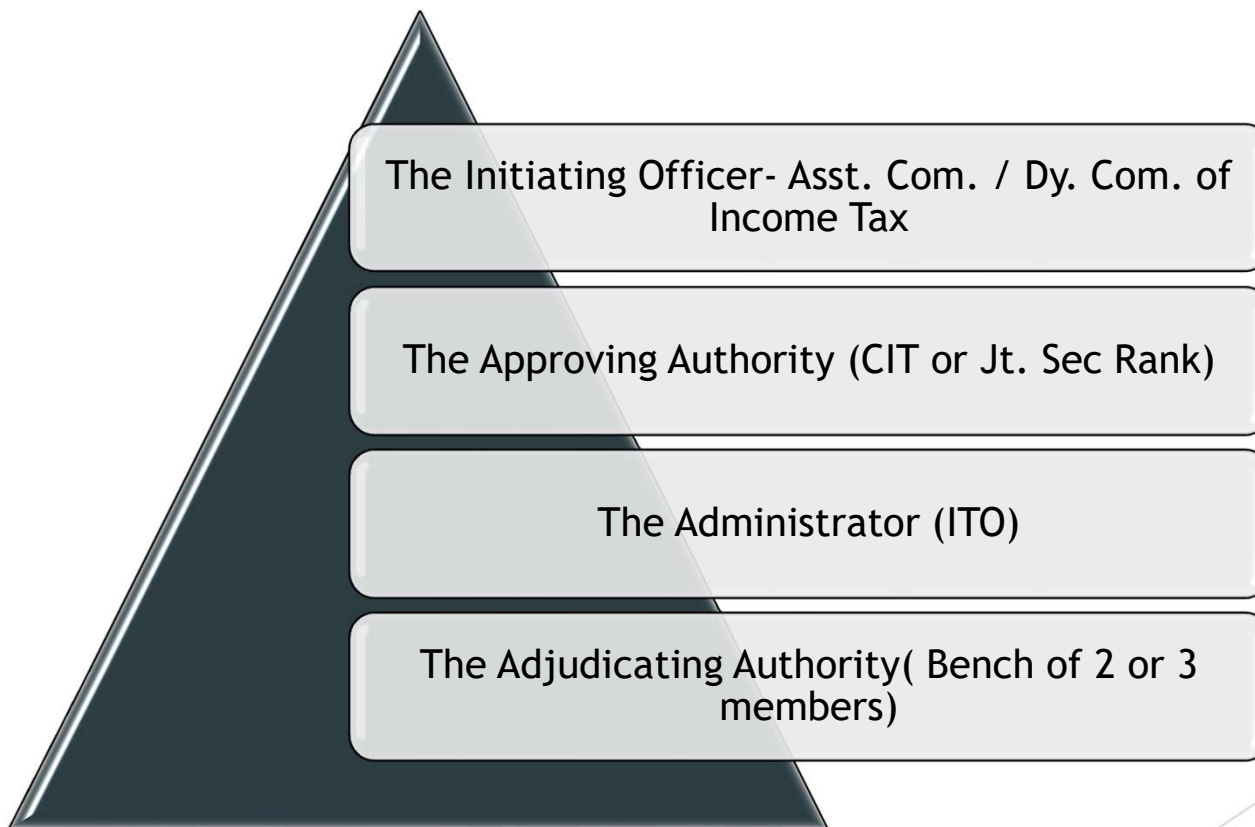
Guilty of the offence of benami transaction



Provisions made in Companies Act. (BEN 2) (31/12/2019)

- ▶ Section 90 of Companies Act, 2013 provides that a ***declaration*** be given to the company by every individual acting alone or together or through one or more persons including a trust and persons resident outside India, who holds ***beneficial interest of not less than 25%*** or other prescribed percentage in shares of the company or ***the right to exercise*** or the actual exercising of significant influence or control under Sec 2(27) of the Companies Act, 2013 (*to be called Significant Beneficial Owner*)

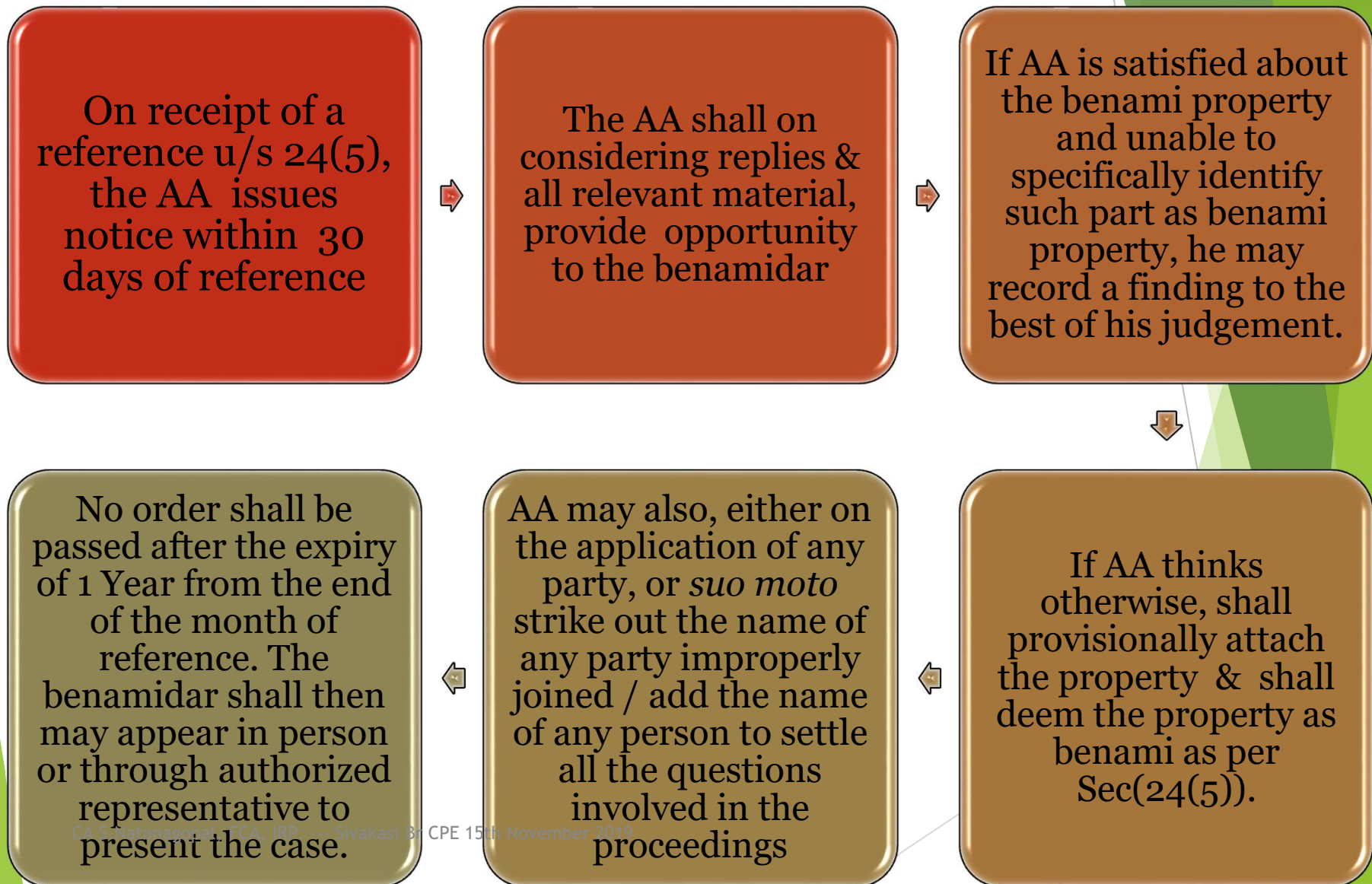
AUTHORITIES (Sec (2)(6))



Initiating Officer 2(19)

- ▶ Sets the process in motion by issuing SCN u/s 24(1)
- ▶ Provides preliminary report and takes instructions from AA.
- ▶ Seeks approval from AA for attachment of property
- ▶ Seeks approval for release of property also.

Approving Authority (Sec 2(4))



Administrator (Sec2(2))

- ▶ Administrator is a Income Tax Officer
Sec 2(25) of the IT Act
- ▶ His role is to
 - ▶ take possession of confiscated property.
 - ▶ manage the property
 - ▶ dispose the property as prescribed.

Fair Market Value

- ▶ FMV means
 - ▶ Price that would ordinarily fetch on sale
 - ▶ If price is unascertainable, price as prescribed in *Rule 3*.
- ▶ Rule 3 of Sec 2(16)(ii)
 - ▶ Cost of acquisition
 - ▶ FMV of equity shares determined by *a Merchant Banker* as per the *Discounted Free Cash Flow Method*.
 - ▶ Value of equity shares as determined in this rule.

REWARD TO INFORMANT

- ▶ As per the “ *The Benami Transactions Informants Reward Scheme, 2018*” the informant may be rewarded upto **Rs. 1 Crore** on giving specific information about the benami property.
- ▶ The identity of informant shall be kept *confidential*.

Statutory remedies for the Benamidars

Nature of Order	Person passing the Order	Remedy
Provisional attachment of property (Sec 24(3))	IO	No Appeal
Order following provisional attachment / provisional attachment if not done so earlier (Sec 24(4))	IO	No Appeal
Order holding property to be benami & confirming order by the IO (Sec 26(3))	AA	Appeal
Order provisionally attaching a property other than that referred by IO (Sec 26(5))	AA	No Appeal
Order confiscating a property adjudged to benami property u/s 26(3) (Sec 27(1))	AA	No Appeal
Order to person in possession of confiscated benami property to surrender deliver possession to Administrator or his authorised person (Sec 29(2))	Administrator	No Appeal
Order amending earlier order passed u/s 47 (Sec 47)	Any Authority	No Appeal
Order imposing penalty (Sec 54 A)	By authority who issued summons u/s 19	Appeal

Safeguards

- ▶ The initiating Officer can act only based on information in his possession
- ▶ Can issue show cause notice only after recording the reasons in writing and get orders from AA.
- ▶ Give opportunity of being heard
- ▶ Prior approval of AA required for attachment
- ▶ Separate tribunal headed by the retired judge of HC shall hear appeals
- ▶ Prior approval of CBDT required to launch prosecution
- ▶ No power of arrest.

Interesting facets of the law

- ▶ Factors which weigh a great deal with the Courts are:
- ▶ The source from which the purchase money came;
- ▶ The nature and possession of the property, after the purchase;
- ▶ Motive, if any, for giving the transaction a benami colour;
- ▶ The position of the parties and the relationship, if any between the claimant and the alleged benamidar;
- ▶ The custody of the title-deeds after the sale; and
- ▶ The conduct of the parties concerned in dealing with the property after the sale.

Interesting facets of the law ...

- ▶ In *Jaydayal Poddar (Deceased) through L.Rs. and Anr. vs. Mst. Bibi Hazra and Ors. (1974)1SCC3*, whether a transfer is a benami transaction or not, was summed by the Supreme Court in the following words:
 1. The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction;
 2. if it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary;
 3. the true character of the transaction is governed by the intention of the person who has contributed the purchase money; and
 4. the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct etc.

Interesting facets of the law ...

- ▶ In Hemangini Finance and Leasing Private Ltd. and Others v. Tamilnad Mercantile Bank Ltd. and Others (1996) 86 Comp Cas 875 (CLB) the Supreme Court interpreted the phrase 'consideration paid or provided by another person' used u/s 2(a) of the Benami Act and held as follows:
- ▶ Section 2(a) of the Benami Act defines benami transaction as "any transaction in which property is transferred to one person for a consideration paid or provided by another person.
- ▶ " The word "provided" in the said clause cannot be construed in relation to the source or sources from which the real transferee made up funds for buying the sale consideration.
- ▶ The words "paid or provided" are disjunctively employed in the clause and each has to be tagged with the word "consideration".
- ▶ The correct interpretation would be to read it as "consideration paid or consideration provided".

Interesting facets of the law ...

- ▶ Is the new Benami Law applicable to older transactions or only those entered-into after 25.10.2016?
- ▶ Section 3(2) of the Act before amendment, “whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.
- ▶ Sec 53 - “Whoever is found guilty of the offence of benami transaction shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five per cent of the fair market value of the property.
- ▶ SC held that “more harsher remedy cannot apply retrospectively for transactions entered into prior to the 2016 law which is in alignment with the constitutional protection against ex-post facto/retrospective criminal legislations.

Income Tax Act, 1961 and the PBPT Act.

- ▶ Under the IT Act, if a person is found to be the owner of any money, bullion, jewellery or other valuable article and the same is not recorded in any books of account of the person and the source of acquisition/ procurement is not explained satisfactorily, is liable to be taxed as 'income' for such financial year at a flat rate of 77.25%, without allowing any deduction or threshold exemption.
- ▶ This applies only if the amount of such income is disclosed voluntarily and the applicable tax to the tune of 77.25% being paid on or before 31st of March of the relevant financial year. The penalty rate is even higher in case of non-disclosure.
- ▶ However, in a Benami transaction, the person in whose accounts such assets are held is not the real owner but only a benamidar the above provision may not be attracted,
- ▶ The individual assessee and the beneficial owner (or true owner!) would be liable to be under civil as well as criminal proceedings under the Benami Act.

Recent decision

- ▶ The recent, first decision under the amended provisions, the Adjudicating Authority at Delhi (AA u/s 71 of PBPT Act, 1988') in **Shri. Sunder Lal & Kol & Ors.** is interesting:
- ▶ Order u/s 26(3) of the Act,
- ▶ **1. The reference to Approving Authority has been beyond the time limit.**
- ▶ **2. Reference to provisional attachment order u/s 24(4) was passed in a most cryptic manner without specifying under what provisions of section 24(4) it was passed by him.**
- ▶ **3. There were no reasons whatsoever specified in the said order by the IO.**
- ▶ It seems the concerned officers also may have to reorient the approach to administer the Law.

Conclusion

- ▶ November 2016, demonetisation not only brought out hoarding black money as cash, but also investment of illegal money in Benami properties, as land, building or gold.
- ▶ This allowed evasion of taxes and money laundering.
- ▶ The amended Act, seeks to plug the loop hole.
- ▶ There are concerns on important clauses on
- ▶ Application of the Act to properties located outside India, Retrospective application to transactions entered-into prior to 2016,
- ▶ Alignment with Income Disclosure/ Income Tax/ Black Money and Company Law etc.
- ▶ Some of these issues may get resolve in courts and/ or the law makers may introduce changes to clarify the concerns.

Thank you for your active participation



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