

BENAMI PROPERTY AND TRANSACTIONS – A BRIEF ANALYSIS

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Introduction:

The Benami Transactions (Prohibitions) Amendment Act, 2016, (hereinafter referred to as the “Act”) received the President’s assent on August 10, 2016 and has come into force from November 1, 2016. The Act will be effective in washing off and unearthing black money from the country. The Income tax department is regularly collecting data from its various sources such as Statement of Financial Transaction or Reportable Account (SFTRA) previously known as AIR, FIU, Registration authorities. The assessing officers are also sending information of Benami properties or Benami transactions to the concerned officers dealing in such cases. CBDT Chief Sushil Chandra had informed the media on 24.07.2017 that attachment worth Rs.840 Crores in 233 cases have been made. He went on adding that “We have found that many shell companies are owning such (benami) properties. Action will be taken.”

The Amendment Act seeks to cover comprehensively all aspects of transactions or arrangements where the source of funding for acquisition of a benami property has no permissible links to the ownership structure. In other words, a benami transaction encompasses all such transactions in which the real beneficiary of a property is a different entity from the entity who has made the payment for such property, as a result of which, the owner of such property is a mere ‘front’ for the actual beneficiary/ funding entity.

Important Terms:

Certain terms such as ‘benami property’, ‘benamidar’, ‘beneficial owner’, ‘transfer’ and ‘fair market value’ are explained below:-

‘Benami property’ has been defined as a property which is the subject matter of a benamidar. If any property has been disposed off, proceeds of such property will be held to be benami and all consequences will follow.

A ‘Benamidar’ is 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’ means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar.

‘Transfer’ includes sale, purchase or any other form of transfer of right, title, possession or lien.

‘Fair market value’ means the price that the property would fetch, if sold in the open market on the date of transaction. For determining the price of unquoted equity shares, Central Government have framed Rule 3 of the Prohibition of Benami Property Transactions Rules, 2016, which is almost similar to Sub Rule 1 of Rule 11UA of the Income Tax Rules, 1962, notified on 12.07.2017.

Movable and Immovable Property under this Act:

Many people are of view that this Act applies only for immovable properties but this Act applies to properties (assets) whether movable or immovable, tangible or intangible, corporeal or incorporeal. Therefore, this Act applies to jewellery, valuables, cash etc. as movable property and buildings, flats, plot of land etc. as immovable property. As per law dictionary, corporeal and incorporeal property mean the property which affects the senses, and may be seen and handled by the body, as opposed to incorporeal property, which cannot be seen or handled, and exists only in contemplation. Thus a house is corporeal, but the annual rent payable for its occupation is incorporeal. Corporeal property is, if movable, callable of manual transfer; if immovable, possession of it may be delivered up. But incorporeal property cannot be so transferred, but some other means must be adopted for its transfer, of which the most usual is an instrument in writing. Tangible property means Property that has physical substance and can be touched; Anything other than real estate or money, including furniture, cars, jewellery etc. are tangible property. A property which cannot be touched such as cheque amount etc. are called intangible property.

Benami Transactions:

A benami transaction, as defined under Section 2(9) of the Act is a transaction in which:

- a. the property is held by one person and paid for by another; or
- b. it is held in a fictitious name; or
- c. the owner of such property is unaware of or denies having knowledge of such ownership; or
- d. the person financing such transaction is not traceable.

However, the Act prescribes certain exceptions to benami transactions, under Section 2(9). These exceptions include property held by:

- a. Karta for his or his family member’s benefit; or

- b. a person standing in fiduciary capacity for the benefit of another, including a trustee, an executor, a partner, a company director or a depository participant or agent; or
- c. a person for the benefit of his spouse or child; or
- d. a brother or sister or lineal ascendant or descendent.

Provided the consideration paid for such transactions comes from known and traceable resources. Also, the Central Government may, by notification, exempt any property relating to charitable or religious trusts from the operation of this Act. A Benami transaction applies to properties (assets) whether movable or immovable, tangible or intangible, corporeal or incorporeal. All transactions which were carried out even before 1988 are covered under this Act.

Authority under the Act-

The Initiating Officer, the Approving Authority, the Administrator and the Adjudicating Authority are the four major authorities which have been appointed by the Central Government. The office of the Initiating Officer will be held by an officer who is the Assistant Commissioner or a Deputy Commissioner as required by section 2 of the Income Tax Act, 1961. The authorities will have the same powers as those of the Civil Courts under Civil Procedure Code, 1908.

The Initiating Officer-

Such officer shall have reason to believe on the basis of material available to him and shall record the reasons in writing. Thereafter, he shall issue a notice to the parties and after obtaining the replies, if he thinks so, he may provisionally attach the property with prior permission of the approving authority for a period not exceeding 90 days and he may also revoke the provisional attachment with prior permission of the approving authority. He shall have power to conduct enquiry in regard to person, place, property, document, bank etc. He shall pass order for attachment or non attachment of the property within 90 days of issue of notice. If an order for continuing provisional attachment of the property is passed then 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.

The Approving Authority-

The approving authority means an Additional Commissioner or a Joint Commissioner as defined in section 2 of the Income Tax Act, 1961. It shall have powers to give approval for retention of books of accounts and documents impounded within 15 days and will give permission to the initiating officer. He will also give permission or approval to the approving authority for his various actions like continuation of attachment, revocation of attachment, enquiry, investigation, etc.

The Adjudicating Authority-

This authority consisting of at least two members and one chairman will issue notice to the parties with 30 days from the date on which a reference has been received from the initiating officer. The authority may pass an order revoking or confirming attachment after holding that the property is Benami or not. Such order shall be passed within expiry of one year from the end of the month in which reference under this Act was received. This authority shall make an order for confiscation of the property after giving an opportunity of being heard to the person concerned.

The Administrator-

He shall have the power to receive and manage the property, in relation to which an order of confiscation has been made. He is empowered to take such measures as are necessary for managing such property. He also has the powers to enforce possession by giving reasonable notice to the occupier of such property.

Powers of Authorities-

The authorities shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely-

- a) discovery and inspection;
- b) enforcing 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;
- c) compelling the production of books of account and other documents;
- d) issuing commissions;
- e) receiving evidence on affidavits; and
- f) any other matter which may be prescribed.

The above proceedings shall be deemed to be a judicial proceedings within the meaning of section 193 and 228 of IPC. The authorities may requisition the service of any police officer or of any officer of the Central Government or State Government or of both to assist him in above matters.

Appeal-

An appeal can be filed before the Tribunal against order of the adjudicating authority within 45 days of passing of order and against order of Tribunal an appeal can also be filed before the Hon'ble High Court within 60 days of service of

Tribunal order. The Appellate Tribunal is expected to decide the appeal within one year from the last date of the month in which appeal is filed.

Rectification of Order-

In order to rectify any mistake apparent from record, the Appellate Tribunal or the Adjudicating Authority may amend its order passed within a period of 1 year from the end of the month in which the order was passed.

Penalty and prosecution-

The Act prescribes that whoever is found guilty of the offence of a benami transaction 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. Further, if any person knowingly provides false information to any authority or furnishes any false document he/she 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.

Accommodation entries and Benami transactions-

There are various types of accommodation entries for conversion of black money into white money, such as share capital, long term capital gain in penny stock, loans etc. Such accommodation entries are also Benami transactions. Everyone is aware that a large number of companies have been formed in India in which share capital money has been raised and the amount received has been invested in shares of other such companies either by buying the same or by subscribing the same. Such transactions are made on paper only. These transactions are called accommodation transactions. Accommodation transactions are also covered under the Act. Now a days accommodation entries are provided mainly through shell companies. The Income tax department is issuing notices to all such companies which have taken accommodation entries from shell companies and have invested the said fund in immovable properties. Large number of notices have been sent to such companies. The shell company, beneficiary company and the middleman all are covered under this Act.

Conclusion-

The Act is being applied on politicians of repute too. Confiscation of property of Satyendra Jain (AAP Minister) and family members of Lalu Prasad Yadav are recent examples. The Government may further crack down on bureaucrats and other Government servants soon. It is expected that all matters related to confiscation of property will go up to higher court and Supreme Court, so there

will be huge litigation. The income tax department may also issue notices on parties who are involved in accommodation transactions subject to certain evidences under their possession. The tax consultants should advise their clients well in advance about the scope of Benami transactions and Benami property. Proceeding under The Benami Transactions (Prohibition) Amendment Act, 2016 is more painful than action under search and seizure u/s 132 of the Income Tax Act.