

The Benami Transactions (Prohibition) Amendment Act, 2016 - New Perspective Post Amendment



Benami Transactions (Prohibition) Act, 1988 has been amended and renamed as Prohibition of Benami Property Transactions Act, 1988 (PBPT Act). Benami Act mainly focuses on finding real names behind nameless real estate transactions. The amended act clearly defines the benami transactions, establishes adjudicating authorities and an Appellate Tribunal to deal with benami transactions, and specifies the penalty for entering into benami transactions. Read on to know more....



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Introduction and terms used

A property purchased by an individual not under his or her name is known as Benami property. Benamidar is the person in whose name the benami property is held or transferred. Thus, the property is Benami and the person Benamidar. A Beneficial owner is

the person for whose benefit the property is being held by the benamidar and the person who finances the deal is the Real owner. Benami Act is aimed to check tax evaders and to give transparency to the financial transactions and improve transparency in the economy.

Our CA Motto in the verse '*Ya esa supteshu Jagarathi*,' precisely emphasises the importance of Transparency- "*Tadeva shukram tad Brahma*". '*Shukram*'- means that which is pure. When a substance or a thing is pure, it is transparent, hence clearly visible and that is Brahman. In the same way, transaction and its audit trail should be transparent.

The Act Renamed

The 28-year-old original Benami Transactions (Prohibition) Act, 1988 has been amended and modified into The Benami Transactions (Prohibition) Amendment Act, 2016. The Income Tax department has notified that this is renamed as Prohibition of Benami Property Transactions Act, 1988 (PBPT Act) and has come into force from 1st November, 2016.

Benami Act-Reasons for an Amendment

The most important reason for an amendment was that the primary act was not comprehensive and there was lack of proper implementation mechanism. The other reasons were - absence of appellate authority and lack of provisions for vesting of the confiscated property with the Central government. In addition to these, there were loopholes in the Act and the definition lent itself to ambiguities in its interpretation.

The justification for bringing an Amendment Act instead of a new Act

If a new Benami Act had come into force, in place of the old one, then the penal provisions, which are there in the primary act, could not be applied retrospectively. This would mean giving immunity to black money transactions of 28 years and who acquired benami properties before 2016, from the penal provisions.

Whether the amendment has retrospective effect?

Any property held benami is not limited to any particular time, date or duration. It is applicable to past transactions as well. Section 4(1) will apply at whatever stage the litigation might be pending in the hierarchy of the proceedings. Necessarily, by

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implication, it would apply to all pending proceedings wherein right to property allegedly held benami is in dispute between the parties.

What is a Benami Property?

As per Section 2(8) of Prohibition of Benami Property Transaction Act, 'Benami' property is any asset (also includes proceeds from such property), that is not held in the name of the person or people who may have actually paid to acquire it.

It also includes assets held in the names of family members, associates, friends, and employees. But the person on whose name such a property is held may not have any means of establishing a trail of income using which it was paid for.

'Property' in Benami Transaction includes

Any asset having an intrinsic value, movable, immovable, tangible, intangible, any right or interest, or legal documents, real estate, jewellery, financial securities, gold or silver artifacts, cash deposits into bank etc.

Instance of new Benami transactions- cash deposits (Post Demonetisation)

Arrangements, where a person (beneficial owner) deposited demonetised currency in the bank account of another person (benamidar) with an understanding that the account holder shall return his money in new currency are being treated as benami transaction under the law.

Tests- whether a transaction is Benami or not?

Who paid the price for acquiring the asset? And what is the 'Source' of the money used? Who has the possession of the property after the purchase? i.e. the nature of possession of the property. What is the motive/intention and surrounding circumstances of the transaction? What is the relationship between the parties i.e., whether the real owner and the

ostensible owner were related to each other or were strangers or friends? Who has the control over the property? i.e. the conduct of the parties in dealing with the property. Who has the custody of the title deeds after the sale? While filing income tax return, is there any disclosure of the income from the property?

Definition

Section 2(9) of the Benami Transactions (Prohibition) Amendment Act, 2016 defines “Benami Transaction” to mean:-

- 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*
 OR
- B) *A Transaction or an arrangement, in respect of the property is carried out or made in a fictitious name; or*
- C) *A Transaction or an arrangement, in respect of the property where the owner of such property is unaware of or denies having knowledge of such ownership;*
- D) *A Transaction or an arrangement, where the person providing consideration is not traceable or is fictitious.*

Kinds of Benami Transactions – two types

Type I)- A person, purchases a property, with his own money but in the name of another person without any intention to benefit such other person. The transferee holds the property for the immediate/



future/direct/indirect benefit of the person who has contributed the purchase money, then the purchaser/ financier is the real owner.

Type II)- A person holds the real ownership rights while transferring the ownership for namesake to someone else or the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder Or the real owner would typically keep the original papers of the property in his or her possession, and execute a power of attorney, which will allow the sale of property whenever required. Again, the new owner would keep holding the property by way of a power of attorney, while in records the owner remains the same as before.

The common feature, however, in both these cases is that the real title is divorced from the ostensible title and they are vested in different persons.

Note- Post Amendment – In place of words “Known sources of Income” the word ‘Income’ has been omitted and only “Known sources” has been retained

Exceptions to Benami Transactions under Section 2(9) – Legitimate relaxations -

Property 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.

Corporate & Allied Laws

This means, by law, if one buys a property in name of their parents, that too, can be declared as benami.

Further exceptions to Benami Transactions are:-

- v) The Central Government may, by notification, exempt any property relating to charitable or religious trusts from the operation of this Act.
- vi) The properties in tribal areas can be exempted from the purview of the law by the Governor of the respective state.

An exception to exceptions

There are 4 exceptions to clause (A) of Section 2(9) of BTP Act. One can notice that in all the four exceptions except (ii), the requirement is that the owner should have paid for the property out of "known sources". Hence, if a person is holding a property which is purchased out of unknown source of funds by the person for whom he stands in a fiduciary capacity, then the said transaction will not be considered as benami transaction. The way clause (ii) is drafted does give room for persons in fiduciary capacity to escape the provisions of BTP Act.

Following are not a Benami Property

If a property has been transferred and the contract has been executed partly, under the Transfer of Property Act 1882, subject to the fulfillment of few conditions, namely stamp duty on such a transaction has been paid, and the contract has been registered or if the eligible benami property has been declared under the Income Declaration Scheme or if the property transaction is done based on General Power of Attorney (GPA), through a registered contract and even stamp duty is paid, such property is not considered as benami property.

The prohibitions under Benami Property Act

No person shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf. It prohibits recovery of the property held benami from benamidar by the real owner. Where any property is re-transferred in

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contravention of above provision, the transaction of such property shall be deemed to be null and void.

Prohibition of the right to recover property held - Section 4

Prohibition of the right to recover property held benami.—

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.

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.

What will happen to the Benami Property? Procedure

An Initiating Officer may issue a notice to show cause why the property should not be treated as benami property. If any person, attempts to alienate that property, after receiving a show cause notice, such a transaction will be held null and void. The Initiating Officer, may attach provisionally the property (and hold the property for 90 days, subject to permission from the Approving Authority) in the manner as may be prescribed. At the end of the notice period,

the Initiating Officer may, within fifteen days refer it to the Adjudicating Authority. The Adjudicating Authority may pass an order either revoking or confirming the order of Attachment, within a period of 30 days. The Administrator will receive and manage the property in a manner and subject to conditions as prescribed. An Appellate Tribunal shall hear appeals against any orders passed by the Adjudicating Authority, within 45 days of the date of such order.

What are the Penalties under this Act?

Penalty: The offences are non-cognisable and non-bailable.

Offence	Fine	Imprisonment
For guilty of offence of a benami transaction	Upto 25% of the Fair Market Value	Minimum 1 year upto 7 years
For providing false information	Upto 10% of the Fair Market Value	Minimum 6 months upto 5 years

Those facilitating a benami deal are also to be punished.

Power to make rules (Section 8)

Central Government may by notification in the official gazette, make rules for carrying out this act.

Following are the sources of data for tracking a benami transaction

Aadhaar seeding of revenue data of agricultural lands, property tax data of buildings, vacant land tax of open plots which will help identify original owners of properties, a search for high-value transactions, information sent by banks, mutual funds and other such institutions in the form of Annual Information Reports, transactions that attract tax collected at source (TCS) and tax deducted at source (TDS) and the transactions that require the PAN to be quoted.

Declaration of Benami Properties

The beneficiary had to declare the Benami transactions before March 31, 2017. The money from these illegal transactions must be declared and deposited under the Prime Minister Garib Kalyan Yojana, 2016.

Post Demonetisation/post Amendment

It is aimed at increasing transparency and professionalism in the industry.



The Act seeks to give the Government powers to confiscate benami properties-assets held in the name of another person or under a fictitious name to avoid taxation and conceal unaccounted- for wealth.

Important points in summary

Right to property was a fundamental right but now it is a creation of statute. According to the amended Act, property can be bought only in the name of spouse or children's name without being a joint holder.

Conclusion

Prohibition of Benami Property Transactions Act, 1988 (PBPT Act) aims to curb the corruption, black money, money laundering, tax evasion and acquisition of land resulting in land concentration.

The practice of including the correct name in property transactions will bring transparency in the real estate market. With increased transparency, title risks would be minimised and buyer confidence in residential property transactions will be enhanced. The Government directly or indirectly has led the nation towards a cashless (transactions) society.

To sum it up, we may conclude, 'Transparency' of the transactions is the key word. Thus, we Chartered Accountants, as "Partners in Nation building" as said in our CA Motto - "*Kaamam kaamam purushor nirmimaanaha*", have a vital role in this regard. Our role as CAs is in emphasising the Transparency of transactions - (quoting our CA Motto - "*Tadeva shukram tad brahma*") so that there is no transaction which is without a valid name. Every transaction shall have an audit trail and shall have the transparency of the transactions. ■