

Frequently Asked Questions on Benami Transactions in India



Committee on Commercial Laws, Economic Advisory & NPO Cooperative
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)

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Foreword

With the aim of curbing the proliferation of benami transactions, the Benami Transactions (Prohibition) Act, 1988, and its subsequent amendments, have been instrumental in tackling the issue. The implementation of Benami Law in India also reinforces the government's commitment to fostering a fair and just society by curbing black money, tax evasion, and fraudulent practices.

As partner in Nation Building, it becomes crucial for Chartered Accountants to stay well-informed and well-prepared about Benami Laws. I am happy to know that the Committee on Commercial Laws, Economic Advisory, and NPO Co-operative of ICAI has brought out Frequently Asked Questions (FAQs) on Benami Transactions. The publication not only demystifies the complexities of Benami Law but also assists professionals in complying with the necessary accounting and reporting obligations.

I extend my heartfelt appreciation to CA. Abhay Kumar Chhajed, Chairman, CA. Mangesh P. Kinare, Vice-Chairman and other members of the Committee on Commercial Laws, Economic Advisory, and NPO Co-operative for their untiring efforts in developing this publication.

I am confident that readers will gain significant insights from this publication.

June 26, 2023
New Delhi

CA. Aniket S. Talati
President, ICAI

Preface

The Prohibition of Benami Property Transactions Act, 1988 has emerged as a crucial legal framework, promoting transparency and combating illicit financial activities.

As Chairman of the Committee, I am honored to present the publication of Frequently Asked Questions (FAQs) on Benami Transactions, developed by the esteemed Committee on Commercial Law, Economic Advisory and NPO Cooperative of the Institute of Chartered Accountants of India (ICAI). I sincerely hope that this comprehensive resource serves as a valuable guide, providing clarity and practical insights on the complexities of the Benami Law.

I commend the dedicated efforts of members of the Group i.e. CA. Anuj Goyal, CA. Pramod Jain, CA. Sumantra Guha and CA. Ashwani Taneja, in compiling these FAQs, which aim to assist professionals and stakeholders in navigating the intricacies of this evolving law. I further owe a word of gratitude to CA. Rajesh Sanghvi for giving his valuable time in reviewing this publication. Their expertise and commitment have ensured the production of a reliable and relevant resource.

I am thankful to CA. Aniket Sunil Talati, President, ICAI and CA. Ranjeet Kumar Agarwal, Vice-President, ICAI for their continued support and guidance to the Committee.

I would also like to express my sincere gratitude to CA. Mangesh P. Kinare, Vice-Chairman, CCLEA&NPO and other members of the Committee for their invaluable contributions to the development of this publication.

I would further like to thank CA. Heena Gupta, Secretary and Team members of the Committee Secretariat for effective coordination in planning this publication.

I trust that the FAQs on Benami Transactions will serve as a vital reference for CA Professionals, Regulators and other stakeholders. May it enhance understanding and foster compliance with legal framework in this domain.

I extend my best wishes to all the readers.

June 23, 2023
Noida, Uttar Pradesh

CA. Abhay Kumar Chhajed
Chairman, Committee on Commercial
Law Economic Advisory, and NPO
Cooperative

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Chapter-I

Evolution and Need for the New Benami Law

Q.1 What is the origin and history of recognition of benami law in India?

Ans. The term “Benami” is an Urdu / Persian word which means “without name” or “no name”. It is used to describe a transaction in which “property is transferred to one person for a consideration paid or provided by another person”. Before 1988 however, Benami transactions were recognised & effect was given to them by the relevant Courts since the legislature did not declare such transactions to be illegal and there was no bar or punishment under any law for the same. The disputes arising in such benami transactions before 1988 were primarily title disputes of property between the beneficial owner and Benamidar and/or their legal heirs, for the determination of who was the actual owner of the impugned benami property. Such benami properties, then, were not liable for confiscation by the Government. In fact, the only thing which was not permitted under the law then was the recovery of the Benami property by the real owner from the Benamidar.

Brief History: In the 19th Century, Benami transactions were recognised legally for the first time in Indian legislature vide Sections 81, 82 & 94 of the Indian Trusts Act, 1882, pursuant to which the Indian Courts were bound to enforce them. Such Benami transactions were also justified at that time, due to Section 5 of the Transfer of Property Act, 1882 (TOPA) according to which there is no prohibition on the transfer of property in the name of one person for the benefit of the other. Eventually, parties started entering such transactions to defraud public revenues. To curb this issue & prohibit the institution of suits with respect to benami properties, Section 281A in the Income Tax Act, 1961 & Section 66 of Civil Procedure Code, 1908 (CPC) were introduced. However, the widespread menace of illegal benami transactions was not effectively curtailed, which ultimately led to the

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abolition of Sections 81, 82 and 94 of the Indian Trusts Act, 1882 as well as Section 281A of the Income-tax Act & Section 66 of CPC.

Meanwhile, following the recommendations of the 57th Law Commission report dated 07.08.1973, the Benami Transaction (Prohibition of Right to Recover Property) Ordinance was promulgated by the Govt on 19-5-1988 which discussed factors accounting for the origin of benami transactions. Then came the recommendations of the 130th Law Commission Report dt 14-8-1988 which inter-alia acknowledged that benami property was not the creation of a statute, based on these recommendations, The Benami Transactions (Prohibition) Act, 1988 came into effect on 5-9-1988. The said Act of 1988 was enacted to “prohibit all benami transactions & to recover property held as benami”. This Act of 1988 consisted of 9 sections out of which Sections 3, 4 & 5 were significant. The Original Act repealed the Ordinance. However, no rules were framed.

Hence, though the Benami Transactions (Prohibition) Act was incorporated in 1988, it was never fully brought into action and remained futile for several years because no rules were made and hence, none of its provisions were used because of other inherent defects. Thus, with time, this Act failed to serve its purpose & became obsolete. To overcome these hurdles, this Act of 1988 was substantially amended in 2016 and renamed as the “Prohibition of Benami Property Transactions Act, 1988”. (PBPT Act)

Q.2 What was the short history, need and objective of enactment of the recent Benami law in India?

Ans. The Benami Transactions (Prohibition) Act (Old/Original Act) was enacted in 1988 with the objective to prohibit all Benami transactions & to recover property held as Benami. However, since 1988 no rules were framed. Further, since there were various lacunae and shortcomings in the 1988 Act, a new Benami Transactions (Prohibition) Bill, 2011 was introduced in the Lok Sabha and the report of the Standing Committee was submitted in June 2012. The 2011 Bill lapsed due to the dissolution of the 15th Lok Sabha and thereafter, a new Benami Transactions (Prohibition) Amendment Bill, 2015 was introduced in the Lok Sabha on 13-5-2015 which, besides other

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changes also provided for renaming the title of the Act as “Prohibition of Benami Property Transactions Act, 1988 (PBPT Act).

The objective and purpose of the Benami Transactions (Prohibition) Amendment Bill, 2015 was not only to efficaciously prohibit benami transactions, confiscate benami properties and provide for prosecution but also to prevent evasion of tax by illegal practices. The 2015 Amendment Bill aimed at removing the infirmities of the 1988 Act and the most significant aspects of the Amendment Bill have been described herein:

- a) amendment to the definition of benami transactions and benami property,
- b) establishment of Adjudicating Authority and Appellate Tribunal to deal with benami transactions,
- c) penalties on benami transactions, etc.

In 2015, while introducing the Benami Transactions (Prohibition) Amendment Bill, Shri Arun Jaitely, the then Finance Minister explained the object of the bill in the following words “*Sir, the principal object behind this Bill is that a lot of people who have unaccounted money invest and buy immovable property in the name of some other person or a non-existent person or a fictitious person or a Benami person. So, these transactions are to be discouraged.*”

The amendment bill 2015 changed the colour and texture of the Original 1988 Act altogether. The Benami Transactions (Prohibition) Amendment Act, 2016 is the result of the passing of 2015 Amendment Bill and has provided an exhaustive definition of “Benami Transaction” u/s 2(9) and detailed machinery for the implementation of the provisions to control Benami transactions efficiently and gave the necessary powers to the authorities to effectively deal with the Benami transactions, including confiscation and prosecution.

Q.3 Explain chronologically how the formal enactment of the Benami law progressed in the country?

Ans. A table explaining the timeline of the introduction and later amendment of this Act (Benami Law) is as under:

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Date	Description
7th August, 1973	Report of the 57th Law Commission
19th May, 1988	On the recommendations of the 57th Law commission Report the President Promulgated the Benami Transactions (Prohibition of Right to recover Property) Ordinance, 1988.
14th August, 1988	Report of the 130th Law Commission
5th Sept, 1988	Following the recommendations of the 130th Law Commission, The Benami Transactions (Prohibition) Act, 1988 came into force (the Original Act).
18th August, 2011	The Benami Transactions (Prohibition) Bill, 2011 introduced.
13th Sept, 2011	The Benami Transactions (Prohibition) Amendment Bill, 2011 referred to Standing Committee.
26th June, 2012	Standing Committee submitted its Report on examination of the Bill.
18th May, 2014	The Benami Transactions (Prohibition) Bill, 2011 lapsed in view of the Dissolution of the 15th Lok Sabha.
13th May, 2015	The Benami Transactions (Prohibition) Amendment Bill, 2015 introduced in Lok Sabha to amend and incorporate certain provisions to the Original Act.
15th May, 2015	The Benami Transactions (Prohibition) Amendment Bill, 2015 referred to Standing Committee.
28th April, 2016	Standing Committee submitted its Report on examination of the Bill.
22nd July, 2016	Government proposed amendments to the Amendment Bill, 2015.
27th July, 2016	Amendment Bill was passed by Lok Sabha.

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2nd August, 2016	Rajya Sabha passed the Amendment Bill.
10th August, 2016	President gave his assent to the Amending Bill thus making it a law.
25th October, 2016	Ministry of Finance through Gazette Notification published the Benami Transactions (Prohibition) Amendment Act, 2016 to come into force from 1st November 2016.
1st November, 2016	The Original Act, now renamed as 'The Prohibition of Benami Property Transactions Act, 1988' (PBPT Act) came into force.

The Prohibition of Benami Property Transactions Rules, 2016 and all the provisions of the Benami Transactions (Prohibition) Amendment Act, 2016 came into force on 1-11-2016.

Q.4 What is the difference between the Benami Transactions (Prohibition) Act, 1988 {Old/Original Act} and the Prohibition of Benami Property Transactions Act (PBPT), 1988 {Amended Act}?

Ans. On comparison of the Old 1988 Act with the amended act of 2016, the 1988 Act did not have any mechanism for confiscation of the benami property, whereas the 2016 Act not only provides for the process of attachment and confiscation of the benami property, but also an administrative set-up for implementation. The 2016 Act has widened the ambit & scope of what all transactions are covered under “benami transactions” and provides for stringent punishment. Some important terms now defined are ‘attachment’, ‘beneficial owner’, ‘Benamidar’, ‘person’, ‘transfer’ etc. In the 2016 Act (PBPT Act), the Government had effectively stated that all benami transactions right from May 1988 till 01-11-2016 would be covered, because the 1988 Act was not repealed but was only amended by the Amendment Act of 2016 and hence it was not militating against Article 20(1) of the Constitution. However, this legal aspect was tested before the Hon. SC in the case of Union of India vs M/s Ganpati Dealcom Pvt Ltd Civil Appeal No. 5783 of 2022 {“Ganpati Dealcom Case”}, decided on 23-08-2022 wherein it was held that Section 3(2) of the old as well as the amended Benami Act was manifestly arbitrary. The Hon. SC thus struck down Section 3(2) of the old and amended Benami Act, declaring it to be

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unconstitutional and held that the PBPT Act would only apply prospectively from 25-10-2016.

The difference between the Old Benami Act and the amended Benami Act (PBPT Act) is provided in tabular format below:

Name	The Benami Transactions (Prohibition) Act, 1988 (Original / Old Act)	The Prohibition of Benami Property Transactions Act, 1988 (Amended Act) - PBPT Act
Number of Sections	9 Sections	74 Sections (In 2016, there were 72 Sections in the amended act but with Finance Act, 2019 two new provisions were inserted. Post further amendments in 2021, Sections. 8 to 17 are omitted and now it effectively has only 64 Sections)
Property when held as Benami	Acquisition of Property without compensation.	Confiscation of Property
Administration/Enforcement	No administration – No rules	The entire mechanism and authorities set up was defined. Procedures were defined – Rules and Forms were prescribed. Concept of Initiating Officer, Approving Authority, Adjudicating

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		Authority, Appellate Tribunal etc. prescribed.
Fine/Imprisonment	Imprisonment up to 3 years or fine or both	Rigorous imprisonment for a period not less than 1 year but which may extend to 7 years & also fine which may extend to 25% of the Fair Market Value (FMV) of the property

Chapter-II

Definition and Scope of Benami Property and Benami Transactions and Consequences Thereof

Q.5 What is the subject matter of the PBPT Act 1988 (the amended Benami law)?

Ans. The PBPT Act 1988 (the amended Benami law) prescribes that no person shall enter into benami transaction. To simplify - when a property is transferred to any person, say Mr. Ram (let's call him as the Benamidar or ostensible owner), but the consideration for such property is paid by another person, say Mr. Bharat (let's call him as the Beneficial or Real Owner), and such property is held by Mr. Ram (Benamidar) not for his own benefit but for the immediate or future benefit & direct or indirect benefit of Mr. Bharat (Beneficial/Real Owner), then such transaction is called a Benami transaction and such property is called a benami property. In such a case Mr. Ram is called Benamidar or the ostensible owner and Mr. Bharat is called the Beneficial or Real owner.

For example - If any person, Mr. Ashok pays the sale consideration and purchases a plot of land in the name of say his driver Mr. Das but such plot is used, enjoyed & thus effectively owned (though not on paper) by him (Mr. Ashok), then this will be considered as a benami transaction and such plot of land is called a benami property. These kinds of transactions are prohibited under benami law and this exactly, is the subject matter of benami law. However, certain exceptions are also provided under the Act.

Q.6 What is the definition of benami property under benami law?

Ans. Benami property is defined u/s 2(8) of the Act and means “any property which is the subject matter of a benami transaction and also includes the proceeds from such property”.

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Q.7 What is the definition of property under Benami law?

Ans. Property is defined u/s 2(26) of the PBPT Act as follows:

“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 includes the proceeds from the property;

Q.8 What is the definition of a benami transaction as per benami law?

Ans. The definition of “benami transaction” is most important and is given u/s 2(9) read with Section 2(9)(A), 2(9)(B), 2(9)(C) & 2(9)(D). Benami Transaction is defined u/s 2(9)(A) of the Act.

2(9)(A) a transaction or an arrangement –

(a) Where a property is transferred to, or is held by, a person, and the consideration of 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 where the property is held by –

(i) a Karta, or a member of a Hindu Undivided Family and the property is held for his benefit or benefit of other members of the family and the consideration of 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

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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

There are three more categories of Benami transactions as per Sections 2(9) (B), (C) and (D) as follows:

2(9)(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

2(9)(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.

2(9)(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious.

There is Explanation to Section 2(9) of Act which reads as follows:

Explanation.—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving or 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.

Q.9 What is the definition of Benamidar as per benami law?

Ans. Benamidar is defined u/s 2(10) of the Act and means “a person or a fictitious person, as the case may be, in whose name the benami

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property is transferred or held and includes a person who lends his name”.

Q.10 What is the definition of beneficial owner as per benami law?

Ans. Beneficial owner or the Real owner is defined u/s 2(12) of the Act and means “a person, whether his identity is known or not, for whose benefit the benami property is held by a Benamidar”.

Q.11 Whether the benami property has been paid out of disclosed income or undisclosed income – Does it make any impact?

Ans. No - It is immaterial whether the benami property has been paid out of disclosed income or undisclosed income. Even if a benami property is purchased out of disclosed income after full payment of applicable income tax, or if it purchased out of Undisclosed income, it can still be subject to the proceedings under the PBPT Act. However, there are certain exceptions under Section 2(9) (A) wherein persons purchasing property from his known sources of income or disclosed income then that property shall not be considered as Benami Property.

Q.12 If any benami property is sold by the Benamidar to a third party, what will be the position of sale proceeds in the hands of Benamidar?

Ans. As per the definition of benami property u/s 2(8), the proceeds from benami property are also covered within the meaning of benami property and therefore, the sale proceeds in the hands of Benamidar shall also be a benami property.

However, there is also a second view that the sale proceeds of benami property are not covered within the meaning of “proceeds from benami property” but such sale proceeds are “proceeds of benami property” and Sale proceeds of benami property are therefore not covered within the meaning of benami property u/s 2(8) of the Act. For example, as per this second view, any rent from a benami property is covered under “proceeds from benami property” but sale proceeds of such property are not covered. However, this being a punitive law to act as a deterrent, a purposive and harmonious interpretation may be put forward.

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Q.13 In case of gifts to anyone, the consideration is always paid by the donor, then whether gifts are covered under the definition of benami transaction?

Ans. No, Gift is never covered for the benefit of the Donor who provides consideration. It is always for the sole benefit of the donee, who exclusively enjoys the property gifted in any way he/she likes. Therefore, pure gifts are not covered under the scope of benami transaction.

Q.14 Whether gifts to persons other than relatives are covered under the definition of benami transaction?

Ans. No. It makes no difference whether the gift is made to any relative or to any other person. That is an issue of relevance under the Income Tax Act. A gift means a transfer of property out of natural love, affection where the property gifted is transferred for the benefit of transferee.

Q.15 Whether a property (movable or immovable) purchased and held in the name of spouse/child, (it is not a gift to spouse/child) but for the Individual contributor's own benefit - is covered under the definition of benami transaction?

Ans. No. But the condition is that the consideration paid for purchasing such property must have been paid or provided out of the known sources of the contributing individual (who must be the parent/spouse) {Refer Section 2(9)(A)(b)(iii)}. It is pertinent to note that the words used in the section are "Known sources" and not "known sources of Income".

Q.16 Whether child means unmarried child / married child / adopted child / illegitimate child/stepchild also?

Ans. Child means both married or unmarried child & includes both son as well as daughter. It also includes adopted child, illegitimate child and step-child. Child is as defined u/s 2(15B) of the Income tax 1961.

Q.17 Whether a property (movable or immovable) purchased & held in the name of brother or sister, (it is not a gift to brother or sister) for the contributing Individual's own benefit is covered under the definition of benami transaction?

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Ans. Normally No, but the condition is that the consideration for such property must have been paid or provided out of the known sources of the contributing individual AND that the brother or sister of contributing individual along with him/her (that contributing individual), appear as joint-owners in the title document {Refer Section 2(9)(A)(b)(iv)}. Here, brother/sister means real brother/sister and not cousins etc. Brother / Sister means having at least one parent in common i.e., Half Brother / Half Sister and which further means that stepbrother/stepsister ARE NOT covered.

Q.18 **Whether a property (movable or immovable) purchased & held in the name of father, grandfather, mother, grandmother, lineal ascendant or descendant (it is not a gift to them) but for the contributing individual's own benefit, is covered under the definition of benami transaction?**

Ans. Normally No, but the condition is that the consideration for such property must have been paid or provided out of the known sources of the contributing individual AND the father, grandfather, mother, grandmother should be in the classification of lineal ascendant or descendant and they should appear as joint owners in the title document of the Property {Refer Section 2(9)(A)(b)(iv)}. Please note that Section 25 of the Indian succession Act 1925 defines Linear co-sanguinity (known as Lineal ascendant/descendant) and the same should be satisfied.

Q.19 **Whether a property purchased and held in the name of Karta or any member of HUF, for the consideration paid by HUF, is covered under the definition of benami transaction?**

Ans. No, but the condition is that the consideration for such property must have been paid or provided out of the known sources of HUF {Refer Section 2(9)(A)(b)(i)}.

Q.20 **Whether a property held by an Executor under a WILL pending the transfer of property of the deceased in Favour of beneficial successors as per WILL is covered under the definition of benami transaction?**

Ans. No, the Executor of such WILL holds the property of the deceased under a fiduciary capacity (trustee) & therefore it is not covered under the definition of benami transaction. Any property held by any person

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in a fiduciary capacity, or a trustee, is not covered under the definition of benami transaction {Refer Section 2(9)(A)(b)(ii)}.

Q.21 Whether Power of Attorney (POA) transactions are Benami transactions?

Ans. Normally No, but there are some critical conditions. The Explanation to Section 2(9) provides that benami transactions shall not include any transaction (be it on POA) 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 the (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 and (ii) stamp duty on such transaction or arrangement has been paid and (iii) the contract for sale has been registered.

If all the above 3 points are satisfied then such transaction, even on POA, may not be held as Benami Transaction. In his reply to the debate on the Amendment Bill in Rajya Sabha on 03-08-2016, the finance minister has clarified as under:

“As far as Power of Attorneys are concerned, I have already said, properties which are transferred in part performance of a contract and possession is given then that possession is protected conventionally u/s 53A of Transfer of Property Act. That is how all the power of attorney transactions in Delhi are protected, even though title is not perfect and legitimate. Now, those properties have also been kept out as per the recommendation made by the Standing Committee.”

It is important to note that this clarification with respect to POAs only removes the cloud of Benami from POAs deals and DOES NOT necessarily confer a perfect legal title on POA holders having possession of properties.

Q.22 Whether charitable and religious trusts are exempt from the provisions of the PBPT Act?

Ans. As per section 58 of the Amended Act, the Central Govt may, by notification (after laying such notification before each house of Parliament) exempt any property relating to charitable or religious

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trusts from the operation of this Act. No such notification has been issued till date.

Q.23 If in whose name the property is held, is found to be a fictitious person or fictitious entity, whether such property is also covered under the definition of benami transaction?

Ans. Yes, Refer Section 2(9)(B)

Q.24 If in whose name the property is held, denies the ownership of the property, whether such property is also covered under the definition of benami transaction?

Ans. Yes {Refer Section 2(9)(C)}. But, care must be taken to see that such a conclusion is not taken to absurd limits because it is possible a person (say parent of the Individual or some aged senior citizen lady or Pardanishin lady) may not be able to remember all details of the property owned by him/her. Hence, due care needs to be taken before drawing inferences.

Q.25 If the property is held by a person but the consideration for such property is not provided by him and the person providing the consideration is not traceable or is fictitious, whether such property is also covered under the definition of benami transaction?

Ans. Yes {Refer Section 2(9)(D)}.

Q.26 If, I give an interest free loan to one of my friends to help him in purchasing a property, whether such property purchased by him is also covered under the definition of benami transaction?

Ans. On the facts, No. But the condition is that, it should be only financial assistance (Example: loan) and the property purchased by your friend is held by your friend for his own benefit and not for your direct/indirect benefit, whether now or in future. Intention plays a critical role in PBPT Act.

Q.27 If I purchase a property, pay entire sale consideration, and take possession of the property from the seller, and execute an “agreement to sell” but the sale deed is not executed, whether such property purchased by me is also covered under the definition of benami transaction?

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Ans. No, but the condition is that the “agreement to sell” must have been registered and the applicable stamp duty has been paid.

Q.28 What is the punishment if any person enters a benami transaction?

Ans. If the benami transaction is entered into on or after 25-10-2016, the person shall be punishable for a term which shall not be less than 1 year but may extend to 7 years and shall also be liable to fine which may extend to 25% of the FMV of the property {Section 53(2)}.

Q.29 Whether all kinds of benami transactions will mandatorily result in Prosecution?

Ans. No. Only those benami transactions which are entered,

- to defeat the provisions of any law, or
- to avoid payment of statutory dues or
- to avoid payment to creditors, will result in prosecution proceedings as per procedure prescribed in the Chapter VII of the Act {Section 53(1)}.

Q.30 What will be the fate of ownership of benami property?

Ans. The benami property (if proved Benami) is subject to attachment and confiscation which there upon shall stand transferred and vested in the Central Government as per procedure prescribed under the Act in Chapter IV (Refer Sections 24-29).

Q.31 Whether the beneficial owner has any right to recover the benami property from the Benamidar?

Ans. No, Please note that No suit, claim or action to enforce any right in respect of any benami property lies by or on behalf of the beneficial owner against the benamidar, by virtue of the provisions of Section 4 of the PBPT Act.

Q.32 Whether Benamidar can re-transfer the benami property to beneficial owner to get rid of benami proceedings?

Ans. No, Refer Section 6.

Q.33 Can Benami proceedings etc. be initiated/continued against legal representative?

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Ans. As per Section 66, where a person dies during the course of any proceeding under the PBPT Act, any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued against the legal representative from the stage at which it stood on the date of the death of the deceased. However, the provisions of Offences & prosecution shall not apply in this situation.

However, as per one school of thought, Benami proceedings can be initiated against the Legal representative to the extent of confiscation but cannot travel on issues of fine and Prosecution.

Q.34 Is it possible for part of a property to be treated as Benami property while the remaining part is NOT Benami?

Ans. Yes. Part of a property can be treated as Benami property even if the remaining part is NOT Benami. This was clarified by the finance minister while replying to a debate on the Amendment Bill in Rajya Sabha on 02-08-2016:

“For example, there is a 20-storeyed building, 10 floors are in your own name and 10 floors are held benami, the ones which are in your own name would not be acquired, but the ones which are benami will be acquired.”

Q.35 How does Benami transaction differ from a sham transaction?

Ans. In a benami transaction, there exists an actual transaction / arrangement which has taken place whereas in a sham / bogus / fictitious transaction, no transaction takes place and the transaction is merely shown to have taken place on paper. In other words, all Benami Transactions are sham transactions but all sham transaction are not Benami.

Thus, the fundamental difference between a benami transaction and a sham transaction is that, in the former, there is an operative transfer resulting in the vesting of title in the transferee and in the latter, there is no such thing, with the transferor continuing to retain the title notwithstanding the execution of the transfer deed.

To conclude, to determine whether a transaction is genuine or sham, the point of decision would NOT be “who has paid the consideration?” but rather, “Whether any consideration was paid?”.

Chapter-III

Authorities Under the Benami Law

Q.36 Which Government department has been assigned the administration of the PBPT Act?

Ans. It is the Income Tax Department (IT Dept) where from, the officers have been appointed to hold different authorities/posts under the Benami Act. Various Benami Prohibition Units (BPU) have been notified by the Government {Refer CBDT Notification dt : 18-05-2017 - S.O. 1621(E)}, to initiate and administer the proceedings under the Act. The IT dept comes under the Dept of Revenue, Ministry of Finance, Govt of India.

Q.37 Which are the authorities under the Act?

Ans. As per Section 18, following are the authorities for the purposes of this Act, namely:

- (a) The Initiating Officer;
- (b) The Approving Authority;
- (c) The Administrator; and
- (d) The Adjudicating Authority.

The Authorities shall exercise all or any of their powers and perform all or any of the functions conferred on, or assigned, as the case may be, to it under this Act or in accordance with such rules as may be prescribed.

Q.38 Who is the Initiating Officer (IO) under the Act?

Ans. IO is of the rank of an Assistant Commissioner or a Deputy Commissioner, in the IT Department, who is designated as Initiating Officer under the Benami Act (Section 2(19)).

Q.39 Who is the Approving Authority (AA) under the Act?

Ans. AA is of the rank of Additional Commissioner or a Joint Commissioner, in the IT Department, who is designated as Approving Authority under the Benami Act (Section 2(4)).

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Q.40 Who is the Administrator under the Act?

Ans. The Administrator is of the rank of Tax Recovery Officer in the Income Tax Department, who is designated as Administrator under the Benami Act (Section 2(2)).

Q.41 Where are the 24 Benami Prohibition Units (BPUs) located?

Ans. 24 BPUs{Refer Schedule under CBDT Notification dt: 18-5-2017 S.O.1621(E)} are located at the following stations:

1	Ahmedabad	13	Kochi
2	Bengaluru	14	Kolkata
3	Bhopal	15	Lucknow
4	Bhubneswar	16	Ludhiana
5	Chandigarh	17	Mumbai-1
6	Chennai	18	Mumbai-2
7	Delhi -1	19	Nagpur
8	Delhi – 2	20	Panaji
9	Guwahati	21	Patna
10	Hyderabad	22	Pune
11	Jaipur	23	Raipur
12	Kanpur	24	Surat

Q.42 What is the constitution of BPU?

Ans. Each BPU consists of one IO of the rank ACIT/DCI, one AA of the rank of Addl.CIT/JCIT and one Administrator of the rank of Tax Recovery Officer.

Q.43 What is the territorial jurisdiction of the BPU?

Ans. Territorial jurisdiction of each of the 24 BPUs have been prescribed by the CBDT vide notification no. S.O. 1621(E) dated 18-5-2017.

Q44 Who is an Adjudicating Authority?

Ans. As defined u/s 2(1) & 7, the Adjudicating Authority is authorized to exercise jurisdiction, powers & authority conferred by or under the PBPT Act. Currently, this Adjudicating Authority is the competent

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Authority under the Smugglers & Foreign Exchange Manipulators (Forfeiture of Property) Act (SAFEMA), 1976.

Q45 Where are the offices of Adjudicating Authority situated in the Country?

Ans. Presently, the offices of Adjudicating Authority (Competent Authority under SAFEMA) under the PBPT Act are situated in New Delhi, Mumbai, Chennai & Kolkata having jurisdiction on the cases referred by Income Tax Authorities/BPUs exercising the powers and performing the functions under the PBPT Act having headquarters {Refer CBDT notification dt : 18-5-2017 – S.O. 1621(E)} in different territories across India.

Q.46 Whether the authorities under the benami law are conferred any powers as vested in a Civil Court under CPC?

Ans. Yes, as per Section 19, the authorities, for the purposes of the Act, 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 the 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 and production of books of accounts and other documents;
- (d) Issuing commissions;
- (e) Receiving evidence on affidavits;
- (f) Any other matter which may be prescribed.

Q.47 Whether the Initiating Officer (IO) must take any approval before conducting any inquiry etc. under the Act?

Ans. Yes. Section 23 of the PBPT Act provides that the IO, after obtaining prior approval of the Approving Authority, shall have the power to conduct or cause to be conducted any inquiry or investigation in respect of any person, place, property, assets, documents, books of

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accounts or other documents, in respect of any other relevant matter under the Act.

Q.48 Whether IO can summon a person for recording statement?

Ans. Yes, Section 19 of the Act confers power to the IO to issue summons to any person for attendance and examination on oath and to produce books, documents etc. (Refer Q.46).

Q.49 Whether authorities under the Act have powers to conduct search or survey and/or arrest a person?

Ans. No.

Q.50 Whether IO can impound and retain documents or books?

Ans. Yes, Section 22 of the Act confers power to IO to impound and retain books of account or documents produced before him, for any inquiry under the Act if he has reasons to believe to do so as per the provision of Section 22.

Chapter-IV

Procedure For Attachment & Confiscation Benami Property, Appeal & Other Misc Issues

Q.51 How attachment proceedings are initiated and carried out under PBPT Act?

Ans. The attachment proceedings with respect to a benami property are initiated or begin by way of a Show Cause Notice (SCN) issued by the Initiating Officer (IO) u/s 24(1) of the Act. Provisional attachment may be done u/s 24(3) consequent to noticing u/s 24(1) if the IO has a reason to believe that the person in possession of the property held benami may alienate the property.

Now, in brief, let us look at the possible outcomes with respect to the property under consideration after issue of notice u/s 24(1) –

At the level of the IO:

- (a) If provisional attachment is made u/s 24(3) r.w.s 24(1), IO shall either pass an order continuing such provisional attachment or revoke such provisional attachment.
- (b) If Provisional attachment is NOT made as per Section 24(3), IO shall either pass an order provisionally attaching the property or deciding not to attach the property.

All this will be done within 90 days from the last day of the month in which the SCN u/s 24(1) is issued. Thereafter the IO refers the case (called as Reference) to his superior authority namely the Adjudicating Authority to decide on the attachment. Remember this Adjudicating Authority is not an appellate authority.

At the level of the Adjudicating Authority: On reference from IO and u/s 26(3), the Adjudicating Authority shall pass an order either holding the property NOT to be a benami property and revoking the attachment order of the IO OR holding the property to be a benami

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property and confirming the attachment order of the IO. The Adjudicating Authority may thus vary the order of the IO u/s 24.

Q.52 Whether the IO must record any reasons before issuing any Notice u/s 24(1) of the Act?

Ans. Yes, when on the basis of material in his possession, the IO has reason to believe that any person is a Benamidar in respect of a property, then he records such reasons to believe, in writing and only thereafter issues a notice u/s 24(1) of the Act to the Benamidar, to show cause why the property should not be treated as a benami property.

Q.53 Whether any notice is also issued to the beneficial owner?

Ans. Yes, as per Section 24(2), a copy of Show Cause Notice [SCN as u/s 24(1)] is also issued upon the beneficial owner if his identity is known.

Q.54 Is there any time limit within which the IO must complete the attachment proceedings after the issue of SCN u/s 24 of the Act?

Ans. Yes. The Benamidar and the beneficial owner (if any) need to submit their reply within the time specified in the SCN or extended time allowed by the IO. As per Section 24(4), the IO must complete the proceedings within 90 days from the last day of the month in which the SCN u/s 24(1) is issued. This is time bound, but any stay/injunction granted by any Court shall extend this period.

Q.55 What is the nature of the order and concept of provisional and final attachment order passed by the IO u/s 24 of the Act?

Ans. The IO, after considering the reply filed by the Benamidar, the beneficial owner or any interested party, to whom notice was issued and all the relevant materials on record, and if satisfied, the IO can decide not to attach the property as specified in the notice u/s 24(1) and drop the proceedings. If the IO is not satisfied with the replies, he may decide to pass a Provisional Attachment Order (PAO) attaching the property as specified in the SCN as u/s 24(3) and if he has not attached it u/s 24(3) earlier, he can attach the property in 24(4). Further details are in Q.51 above.

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Q.56 Whether the IO must take approval of any higher authority before deciding the attachment of the benami property specified in the SCN?

Ans. Yes, whether the IO decides to attach the property or not to attach the property, he must take prior approval of the Approving Authority (Refer Section 24).

Q.57 Whether the IO has any authority to provisionally attach the benami property without hearing and considering the replies of the Benamidar and the beneficial owner in response to SCN?

Ans. Yes, where the IO is of the opinion that the person in possession of the property held benami, may alienate the property during the period specified in the SCN, he may, with the previous approval of the Approving Authority, pass a Provisional Attachment Order (PAO) in writing, for a period not exceeding 90 days from the last day of the month in which the SCN u/s 24(1) is issued {Refer Section 24(3)}. This PAO shall be subject to the final decision of the IO after considering the replies of the Benamidar and beneficial owner whereupon, the aforesaid PAO may be continued or may be revoked, as the case may be, after taking prior approval of the Approving Authority. However, the PBPT Act works on the principle of Natural justice and hence issues can be challenged before the Adj Auth.

Q.58 Whether the IO or the Approving Authority has the final authority to decide that the property specified in the SCN is benami or not? If not, then who decides whether the property is benami or not?

Ans. No, neither the IO nor the Approving Authority have any final jurisdiction to decide whether the property specified in the SCN is a benami property or not.

The IO only conducts inquiry and collects material and after considering the reply filed by the Benamidar and/or beneficial owner and with approval of the Approving authority, the IO may provisionally attach the property and thereafter refer the entire matter to the Adjudicating Authority, for adjudication.

It is the Adjudicating Authority who finally adjudicates/decides whether the property specified in the SCN which has been provisionally attached by the IO, is benami or not {Refer Section

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26(3)}. The order of the Adj Auth can be appealed before the PBPT Appellate Tribunal and this is the first and last appeal on factual issues. Thereafter only questions of law travel to the High Court & Supreme Court.

Q.59 Whether the possession of property is taken immediately after provisional attachment order is passed by the IO? What is the impact at the stage of Provisional Attachment Order (PAO) by the IO?

Ans. No, physical possession of the property is not taken by the IO but the person in whose name property is held, is prohibited from transfer, conversion, disposition or movement of the attached property {Refer Section 2(5)}.

Q.60 What is the consequence if the Benamidar transfers the property specified in the SCN?

Ans. Any transfer of property after the issue of SCN is null and void till the matter is finally decided (Section 57). Any such transfer shall be ignored, if the property is adjudicated to be benami property by the Adjudicating Authority and thereafter it can be confiscated by the Central Government u/s 27.

Q.61 What is the consequence if the Benamidar transfers the benami property before issue of SCN u/s 24 of the Act?

Ans. Any such alleged Benami property sold/transferred before any notice u/s 24 can be sold/transferred in the routine course. However, it should be remembered that the sale proceeds of such benami property (if determined Benami later) will also constitute as benami property (it being a converted form of the original property which was benami) as per definition of the property u/s 2(26) of the Act.

Q.62 What is the consequence in the hands of transferee who purchases such benami property from the Benamidar?

Ans. If the transferee has purchased benami property from the benamidar for adequate consideration, prior to the issue of SCN and without having knowledge of the benami transaction, then such Bonafide purchase by him of such property, shall not be subject to confiscation proceedings {Refer Section 27(2)}. But no such protection after any SCN is issued.

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Q.63 It is understood that the Adjudicating Authority decides/ adjudicates whether the property provisionally attached by the Initiating Officer is benami or not. What is the procedure at the stage of Adjudicating Authority?

Ans. The proceedings before the IO are prescribed u/s 24 of the Act, and the proceedings before the Adjudicating Authority are prescribed u/s 26 of the Act.

The IO completes his provisional attachment &/or continuation of provisional attachment u/s 24(1), 24(3) r.w.s 24(4). Thereafter the IO refers the case to the Adjudicating Authority u/s 24(5). On receipt of a "Reference" from the IO u/s 24(5), the Adjudicating Authority within a period of 30 days, issues a SCN to the parties in the Reference i.e. the Benamidar/Beneficial owner and,

Any person, who has made a claim in respect of the property etc., to furnish such documents, particulars or evidence in response to the reference filed by the IO and the Adjudicating Authority provides an opportunity of hearing to such parties.

Thereafter, Adjudicating Authority shall pass an order either (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 {Refer Section 26(3)(c)(i) & 26(3)(c)(ii)}.

Q.64 Whether the hearing before the Adjudicating Authority is in open court and whether the parties can appoint legal counsel for arguing on their behalf?

Ans. Yes, the hearing before the Adjudicating Authority happens in an open court.

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 – AR (who can be a practicing CA) or through a legal practitioner of his choice to present his case. {Refer Section 26(8)}

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AR means a person authorised in writing, being:

- (i) a person related to the benamidar or such other person in any manner, or a person regularly employed by the benamidar or such other person as the case may be; or
- (ii) any officer of a scheduled bank with which the benamidar or such other person maintains an account or has other regular dealings; or
- (iii) any legal practitioner who is entitled to practice in any civil court in India; or
- (iv) any person who has passed any accountancy examination recognized in this behalf by the Board; or
- (v) any person who has acquired such educational qualifications as the Board may prescribe for this purpose.

Q.65 What are the consequences if the Adjudicating Authority passes an order holding the attached property not to be a benami property and revokes the provisional attachment order passed by the Initiating Officer?

Ans. In such a situation and subject to any appeal filed by any of the aggrieved parties and especially by the IO before the Appellate Tribunal (now at Delhi) and further subject to any stay (if any) granted by such Appellate Authority, the attachment order stands revoked, and the property is free from any restrictions which were imposed by virtue of the said attachment order.

Q.66 What are the consequences if, the Adjudicating Authority passes an order confirming the attached property to be Benami property and confirms the provisional attachment order passed by the Initiating Officer?

Ans. The aggrieved party (normally the Benamidar or Beneficial owner etc.) can file an appeal against the order of the Adjudicating Authority, before the Appellate Tribunal. In the meantime, the property will remain attached and the other proceedings in terms of confiscation of property and Prosecution proceedings may be initiated as per the legal procedure prescribed under the Act.

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Q.67 Whether adjudication proceedings in a Reference before Adjudicating Authority are time bound?

Ans. Yes. The order by the Adjudicating Authority holding the property to be benami, or not to be benami, shall be passed within a period of one year from the end of the month in which the Reference under Section 24(5) from the IO is received by the Adjudicating Authority {Refer Section 26(7)}.

Q.68 Whether physical possession of property is taken immediately after provisional attachment order u/s 24(3) is confirmed by Adjudicating Authority?

Ans. No, Physical possession of the property is not taken but the person in whose name property is held, continues to be prohibited from transfer, conversion, disposition or movement of attached property {Refer Section 2(5)}.

Q.69 Whether the order passed by the Adjudicating Authority can be challenged before a higher forum/court?

Ans. Yes, As per Section 46 of the Act, any person, including the Initiating Officer, aggrieved by an order of the Adjudicating Authority may prefer an appeal to the Appellate Tribunal against the order in prescribed form with prescribed fee. One cannot approach any civil court due to the restriction u/s 45. However, a power of judicial review through a writ petition is not restricted.

Q.70 Is there any time limit for filing appeal in Appellate Tribunal?

Ans. Yes, an appeal to the Appellate Tribunal shall be filed within a period of 45 days from the date of order of the Adjudicating Authority (Refer Section 46). Please note that the period of 45 days is from the date of order and NOT the date of service.

Q.71 How much fee is payable for filing appeal in Appellate Tribunal?

Ans. The prescribed fees is Rs.10,000/- payable by way of demand draft, or such manner, as per rules for appeal against the order of the Adjudicating Authority under the provisions of Section 46 r/w Rule 10 of the PBPT Rules.

Q.72 Whether delay in filing appeal can be condoned by the Appellate Tribunal?

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Ans. Yes, Section 46 of the Act provides that the Appellate Tribunal may entertain any appeal filed beyond limitation, if it is satisfied that the appellant was prevented, by sufficient cause, from filing the appeal in time.

Q.73 Where are the offices of the PBPT Appellate Tribunal situated in the country?

Ans. Presently, the office the PBPT Appellate Tribunal is situated at Lok Nayak Bhavan, Khan Market, New Delhi which is also the PMLA/FEMA Tribunal, and this one single tribunal is having jurisdiction over all PBPT cases from all over India. However, benches at other places can also be notified by the Central Government in consultation with the Chairperson.

Q.74 Whether the order passed by the Appellate Tribunal can be challenged before a High Court?

Ans. Yes, as per provisions of Section 49, any party aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court on any question of law (and NOT on questions of facts) arising from such order.

Q.75 Is there any time limit for filing appeal in High Court & whether any delay in filing the appeal can be condoned by the High Court?

Ans. Yes, as per Section 49, an appeal to the High Court shall be filed within a period of 60 days from the date of communication of the decision or order of the Appellate Tribunal. Section 49 of the Act provides that the High Court may entertain any appeal filed beyond limitation, if it is satisfied that the appellant was prevented, by sufficient cause, from filing an appeal in time.

Q.76 Whether appeal can be filed in Supreme Court?

Ans. The Act does not provide for any statutory appeal before the Supreme Court. But special leave to appeal can be filed before the Supreme Court invoking their discretionary powers under Article 136 of the Constitution.

Q.77 At what stage, benami property can be confiscated under the Act?

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Ans. As per Section 27 of the Act, where an order u/s 26(3) in respect of any property, is passed by the Adjudicating Authority, holding it 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. The confiscation shall be subject to the order passed by the Appellate Tribunal under Section 46 of the Act. Hence, confiscation is a separate proceeding.

Q.78 What is the procedure for confiscation of property under this Act?

Ans. Confiscation of property shall be made in accordance with such procedure as may be prescribed u/s 27 r/w Rule 5, 6, 7, 8, 9 of the PBPT Rules, 2016.

Q.79 Who takes management/possession of confiscated properties?

Ans. After an order of confiscation has been passed u/s 27(1) by the Adjudicating Authority, the Administrator (TRO) shall have the power to receive, manage and take possession of such confiscated property u/s 28 & 29.

Q.80 Whether IO/Adjudicating Authority/Appellate Tribunal have powers to rectify mistakes?

Ans. Yes, u/s 47 any mistake apparent on the fact of the record can be rectified within a period of one year from the end of the month in which such order was passed. Any rectification which is likely to affect a person prejudicially shall be made only after he has been given notice of intention to do so & has been given an opportunity of being heard.

Q.81 Whether giving of false information attracts penalty under the Act and who can impose it?

Ans. Yes, u/s 54 any person who knowingly gives false information to any authority or furnishes any false document in any proceeding under the Act, shall be subjected to rigorous punishment for a term which shall not be less than 6 months but which may extend to 5 years and also be liable to fine which may extend to 10% of the fair market value (FMV) of the property.

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Q.82 Whether non-compliance of notice issued by any authority under the Act attracts penalty and who can impose it?

Ans. Yes, Section 54A - penalty of Rs 25,000/- for each such failure. However, no penalty shall be imposed, if such person proves that there were good & sufficient reasons which prevented him from complying with the summons or furnishing information.

Q.83 Whether, in respect of a property, for which proceedings under the PBPT Act are initiated, proceedings under other laws are barred?

Ans. Section 60 of the Act provides that the provisions of this Act shall be in addition to, and not, save as expressly provided in the Act, in derogation of any other law for the time being in force.

Q.84 Whether provisions of Act are applicable to the area covered by erstwhile State of Jammu & Kashmir?

Ans. Initially, provisions of the Act were not applicable in view of Section 2(1) of the Act as follows: "1(2) It extends to the whole of India except the State of Jammu & Kashmir". The above provision has been amended by the Jammu and Kashmir Reorganization Act, 2019 w.e.f. 31.10.2019 (Sections 95, 96 & Sch V – J&K Reorganization Act, 2019) and consequently, now the provisions of the Act are applicable to whole of India.

Q.85 Whether the provisions of Act are attracted if there is undervaluation of asset at the time of purchase?

Ans. No, the provisions of the Act are applicable only in those cases which are covered under the definition of Benami transaction u/s 2(9) as explained in Q.8 above. Whether the property is undervalued, or part of sale consideration is paid out of unaccounted / undeclared money, may be a subject matter for consideration under the Income Tax Act, 1961 but it has no application under the provisions of Benami Act.

Example: Mr. A purchased a property which is registered in his name for a total sale consideration of Rs. 5 crores. Out of this, Rs. 3 crore is paid from sources declared in ITR and Rs. 2 crores from sources undeclared i.e., "black or undisclosed income" which are not disclosed in ITR. In this case since there is no allegation or prima facie involvement of Benami transaction, the provisions of Benami Act are

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not attracted. At best, the provisions of the Income Tax Act may be attracted.

Q.86 Whether the offence of entering Benami transaction is cognizable/bailable?

Ans. As per Section 61 of the PBPT Act, any offence under the PBPT Act is a non-cognizable (NC) offence as per Section 2(L) of the Code of Criminal Procedure (CrPC), 1973 - an NC case means a case in which a police officer has no authority to arrest without warrant. Information about NC cases and investigation thereof are governed u/s 155 of CrPC. Offences under the PBPT Act are non-cognizable but nothing is mentioned about it being bailable or not.

Chapter-V

Prosecution Mechanism and Special Courts

Q.87 What, how and under what circumstances does the Prosecution take place under the PBPT Act and who are the persons liable to be prosecuted?

Ans. Prosecution is dealt with u/s 3, 53 & 54 of the PBPT Act.

As per Section 53(1), Prosecution can be initiated at any time during the course of proceedings under the PBPT Act provided, any person enters a benami transaction in order (a). to defeat the provisions of any law or (b). to avoid payment of statutory dues or (c). to avoid payment to creditors. The benamidar, beneficial owner or any other person who abets or induces can be prosecuted. It is important to note that the IO or any Authority can initiate Prosecution provisions at any time during the proceedings irrespective of whether the matter is pending before the Adjudicating Authority or the Appellate Tribunal unless the aggrieved party has obtained a stay.

As per Section 54, any person who knowingly gives false information to any authority or furnishes any false document in any proceeding under this Act, can be prosecuted. Prosecution can be initiated only after previous sanction of the Competent Authority namely Commissioner of Income Tax, Principal Commissioner of Income Tax, Director of Income Tax or Principal Director of Income Tax on sanction of that person.

Q.88 What is the punishment for the persons found guilty of offence of benami transactions as prescribed under the law?

Ans. As per Section 53(2), whoever is found guilty of offence of “benami transaction” shall be punishable with rigorous imprisonment for 1 year to 7 years and shall also be liable to fine which may extend to 25% of the FMV of the property.

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Q.89. Who can file Prosecution complaints?

Ans. As per the provisions stated in Section 50(3) of the PBPT Act, any authority defined u/s 2(6) r/w 18(1) i.e., the Initiating Officer (IO), Approving Authority, Administrator and Adjudicating Authority, can file Prosecution complaint under the Act. However, the primary responsibility rests with the IO. So also, any officer of the Central/State Government, authorised in writing by that Government by a general/special order made in that behalf can also file Prosecution complaint under the Act. However prior sanction is needed.

Q.90 Which Courts are designated as Special Courts u/s 50 of the PBPT Act?

Ans. As per the Ministry of Finance Notification No. 67/2018-Income Tax S.O. 5323(E) dt: 16-10-2018, the Central Govt, in consultation with the Chief Justice of India, has designated Court(s) of Session, as Special Court(s) for the area(s) specified, for the trial of offences punishable under the provisions of the Act. There are 34 such sessions courts designated in India.

Q.91 What is the time period for the trial to conclude u/s 50 of The PBPT Act, 1988?

Ans. There is no specific time as provided by the law, although as per Section 50(4) of the PBPT Act,

“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.”

Chapter-VI

What Can Trigger Benami Proceedings

Q.92 What can trigger Benami proceedings?

Ans. Transactions in which name lending is found or fictitious sale purchase/expense involving round-tripping of money/cash is found or typical transactions involving unregistered documents and based on unregistered Power of Attorneys (POAs) or statements on oath by persons denying ownership of properties or such transactions/arrangements which fall within the purview of Sections 2(9)(A), (B), (C), (D) can trigger Benami proceedings. Very often statements of persons recorded by investigation agencies like ED, Police, CBI (Central Bureau of Investigation), SFIO (Serious Fraud Investigation Office), Income Tax Department, GST (Goods and Services Tax), Customs, DRI etc. can also trigger Benami proceedings.

Example:

- (1) During demonetization in 2016, Mr. A gave Rs 5 lakhs in cash in old notes to Mr. B (his friend) asking B to deposit these 5 lakhs in his (Mr. B's) savings account and after that to return these 5 lakhs to Mr. A in cheque. Here, Mr. B has acted as a benamidar for Mr. A and the property is 5 lakhs.
- (2) X purchases a property - let us call it 'Black Acre' ; however, the property is not purchased in his own name, but in the name of 'Y', though the consideration has flown-in from X and the property is kept in beneficial control and dominion of X only and for the direct benefit of X. This would be a classic Benami Transaction.

Chapter-VII

Burden of Proof Under Benami Law and its Interplay with Indian Evidence Act and Other Allied Laws

Q.93 Is The Indian Evidence Act, 1872 applicable on the PBPT Act, 1988?

Ans. The Prohibition of Benami Property Transactions Act, 1988 (PBPT Act) is a specific legislation and contains entire provisions for the purposes of attachment, confiscation and Prosecution w.r.t. Benami transactions. The PBPT Act is governed under the provisions of natural justice. However, this does not mean that Indian Evidence Act is completely excluded from its application.

The Indian Evidence Act inter-alia contains fundamental provisions based upon fine principles of jurisprudence providing guidance as to how the evidence to prove a fact or assertion shall be led, admitted and appreciated in any court of law of the competent Jurisdiction and it also deals with the rights and obligations of the parties involved in the litigation in different situations. There is no provision under PBPT Act which bars the application of any specific provision or puts any general restriction on taking support of provisions of the Indian Evidence Act to deal with the factual controversies arising under the PBPT Act. Section 67 in the PBPT Act provides that provisions of PBPT Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law. Thus, the relevant provisions of the Indian Evidence Act can be taken help of, in the given situations wherever applicable.

Q.94 Who has the onus and burden of proof under the benami law?

Ans. There is no specific provision in the PBPT Act casting obligation upon any party or providing guidance on this issue. However, since the IO has reasons to believe and has thus, triggered the provisions of the PBPT Act u/s 24, prima facie the IO should discharge his onus before the burden of proof shifts to the Benamidar/beneficial owner who will

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discharge their onus. In this way, the onus keeps shifting in accordance with the rules of natural justice. Nevertheless, the provisions contained in general law such as Indian Evidence Act, 1872 and principles laid by the High Courts and Supreme Court of India while dealing with issues arising under litigation with respect to benami transactions, would be used to fix the burden and obligations under this Act.

As a general guiding principle, Sections 101 and 102 r/w Section 106 of the Indian Evidence Act, lays down the principles as to which party will bear the Burden of Proof and lays down that the party who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist (Section 101). Further, burden of proof is on that party who would fail if no evidence at all were given on either side (Section 102). When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him (Section 106).

Since under the PBPT Act, the Initiating Officer (as defined u/s 2(19) of the Act) wants the court to believe that a particular transaction is of benami nature, therefore, the initial burden of proof will be on the said IO. However, the Onus of Proof constantly keeps shifting during the course of proceedings. The Onus shifts when one party successfully produces sufficient evidence supporting its case.

Q.95 What has been the judicial interpretation of the concept of burden of proof under the old Benami law and essential ingredients behind a Benami Transaction?

Ans. The Apex Court, on 21-12-1979, had also observed the same in 'Bhim Singh Vs. Kan Singh', AIR 1980 SC 727:

"The principle governing the determination of the question whether transfer is a benami transaction or not may be summed up thus:

(1) *The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction....."*

The burden of proof regarding Benami is upon the one who alleges Benami. Supreme Court in Valliammal (D) By Lrs vs Subramaniam & Ors (2004) 7 SCC 233

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6 circumstances which can be taken as a guide to determine the nature of the transaction:

- (i) The source from which the purchase money came
- (ii) The nature and possession of the property, after the purchase
- (iii) Motive, if any, for giving the transaction a benami color
- (iv) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar
- (v) The custody of the title deeds after the sale
- (vi) The conduct of the parties concerned in dealing with the property after the sale.

Supreme Court in *G. Mahalingappa vs G. M. Savitha* [2005] 147 Taxman 583 (SC), held that the following findings of fact would conclusively prove that the transaction in question was Benami in nature:

- (i) The appellant had paid the purchase money,
- (ii) The original title deed was with the appellant,
- (iii) The appellant had mortgaged the suit property for raising loan to improve the same,
- (iv) Appellant paid taxes for the suit property,
- (v) Appellant had let out the suit property to defendant Nos. 2 and 5 and collecting rents from them,
- (vi) The motive for purchasing the suit property in the name of Benamidar was that the benamidar was born on an auspicious nakshatra and the appellant believed that if the property was purchased in the name of Benamidar, the appellant would prosper and
- (vii) The circumstances surrounding the transaction, relationship of the parties and subsequent conduct of the appellant tend to show that the transaction was Benami.

Q.96 What has been the judicial interpretation of the concept of burden of proof post the amendment of 2016?

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Ans. The Appellate Tribunal constituted under PBPT Act, has observed in the case of 'Initiating Officer Vs. Manpreet Estates LLP' (FPA PBPT/MUM/206/2018) Order dated 26.03.2019 that:

"Thus, in the facts of present case and documentary evidence proved, the onus of proving a benami transaction rests entirely on the shoulders of the IO who is making the charge."

The Appellate Tribunal has also reiterated this in the case of 'Smt. Pamela Bhardwaj and Sh. Ramneek Singh Vs Initiating Officer, BPU Circle 1(1)' (FPA PBPT/CHD/4/2018) in the order dated 24.06.2019 summed up as:

"Undoubtedly, onus to prove passing of benefit test is upon shoulders of Initiating Officer, which must be discharged for proving benami."

Chapter-VIII

Interplay of PBPT Act, 1988 With Other Economic Offences Laws

Q.97 What are the economic and social effects of Benami Transactions?

Ans. As per reports, the existence of benami transactions has multiple effects such as:

- a) They create a parallel economy;
- b) They give rise to Black money;
- c) They lead to tax evasion;
- d) They lead to the land laws being flouted;
- e) They help the people to defraud their creditors, avoid payment of taxes & defraud Governments/Bankers;
- f) They may also help the people and entities to carry on their businesses and affairs in non-transparent, unclear, unfair and fraudulent manner etc.

Q.98 What is the interplay between PMLA, 2002 and the PBPT Act, 1988?

Ans. From a bare perusal of Section 3 of the PMLA, 2002 and Section 2(9) of the PBPT Act, 1988, inter-alia, it becomes quite evident that a person, who is involved in money laundering may or rather normally enter into a benami transaction with the proceeds of the crime with a view to hide it or to convert it from a tainted to an untainted situation. The process of placement, clearing, integration very often involves a Benami transaction. Therefore, a benami transaction may result from the investment made by a person from the proceeds of crime. Then the benamidar and the beneficial owner can be considered (to some extent and from case to case) to be falling into the definition of a person involved in money laundering and can be proceeded against under the Prevention of Money Laundering Act, 2002. It would be practically noted that while many cases of money laundering may

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result in benami transaction also, the converse is not necessarily true. Thus, the crucial element to note here, is that Benami law applies equally to both a property acquired through proceeds of crime & a property acquired through legitimate means provided the provisions of Section 2(9) are attracted. Hence its scope is wider than PMLA.

Q.99 What is the relevance of benami law to the Income Tax Act?

Ans. There can be situations where the income tax proceedings as well as the benami proceedings can run simultaneously as two distinct/separate proceedings. Under the Income Tax Act, if a person is found to be the registered owner of any immovable or movable asset or is in possession of any money, bullion, jewellery or other valuable article and the same is not recorded in any books of accounts of the person and the source of acquisition / procurement is not explained satisfactorily, in that case, such assets are liable to be taxed as 'income' for such financial year. On the other hand, if during the course, it is found out that the consideration for the said properties is paid by some other person and the beneficial interest therein is being enjoyed by the said other person, directly or indirectly (not being the assessee), then the provisions of the benami law would also become applicable and the initiating officer (IO) can proceed against the benamidar (Assessee), who has lent his name only) and the beneficial owner (real owner) qua the said properties. Thus, there may be situations where cumulative application of both laws is done upon any one transaction.

Q.100 Property situated outside India, whether covered under the Benami Law or the Black Money Law?

Ans. Though the definition of property in the PBPT Act, 1988 is extremely wide, there is prima facie nothing in the Act that excludes the applicability of Benami Act to Benami properties located outside India or explicitly includes it. So also, there is no mechanism or machinery provided under PBPT for foreign properties, unlike as in the PMLA Act 2002 esp. Section 2(1)(u), wherein equivalent value in India can be attached.

However, in a reply to a debate on the Amendment Bill in the Rajya Sabha on 02.08.2016, the Finance Minister went on to say "*What happens if the asset is outside the country? If an asset is outside the*

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Country, it would not be covered under this Act. It would be covered under the Black Money Law, because you own a property or an asset outside the country..."

The reference appears to be to the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 which aims to curb black money and undisclosed foreign assets and income by imposing tax and penalties on such income. A judicial decision or legislative clarification on this point is much awaited.

Chapter-IX

The Benami Transactions Informants Reward Scheme, 2018

Q.101 What is the Benami Transactions Informants Reward Scheme, 2018 (“The Scheme”)?

Ans. The Benami Transactions Informants Reward Scheme, 2018 has been introduced by the Central Board of Direct Taxes {Refer CBDT letter dt : 23-4-2018 F. No. 299/31/2017 (Inv. III)} and provides for a reward of up to Rs 1 Crore, to a person who is an informant under this Scheme and the identity of such informant is to be kept confidential.

Q.102 Who is an “Informant” for the purpose of this Scheme?

Ans. An Informant means a person (individual / group of individuals), who has - (i) at a time, given specific information about one or more movable (FMV as defined under the Act is more than Rs 1 Crore) or immovable (circle rate as defined under this Scheme is more than Rs 1 Crore) benami property(ies), in a single Annexure - A form; (ii) furnished in prescribed form in Annexure - A to the scheme; and (iii) received “Informant Code” from the authority prescribed in the scheme.

Explanation : A person shall not be entitled to any reward under the scheme if he is not an informant under the scheme, even if such person has furnished specific information of benami property in any other manner, e.g., through letter, e-mail, CD, WhatsApp, SMS, phone, posting in social networking site or publishing letter in newspaper or any other media.

Q.103 What is treated as “Specific Information” under this Scheme?

Ans. The information given by the informant can be treated as specific information under the scheme only if it includes:

- i. Verifiable particulars of the benami property;
- ii. Name and address of the person in whose name the property has been acquired (benamidar); and

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- iii. Credible basis including supporting evidence for the information that the property was actually benami property.

Q.104 Is there any procedure prescribed for furnishing information under the Scheme?

Ans. Yes. Point No. 6 of the Scheme {Refer CBDT letter dt : 23-4-2018 F. No. 299/31/2017 (Inv. III)} has prescribed the procedure for furnishing of information to the relevant authorities under the Scheme.

Q.105 Whether furnishing of false information is an offence under the Scheme?

Ans. Yes. Furnishing false information / evidence is an offence as per Point 6(xiii) of the Scheme and a person giving false information / evidence statement will be liable to be prosecuted for such offence.

Q.106 What are the types of rewards under the Scheme?

Ans. “Interim Reward” and “Final Reward” can be granted under the Scheme subject to the fulfilment of conditions and in the manner as prescribed under the Scheme.

Among other things, an interim reward is granted if, pursuant to the furnishing of information by the informant, the benami property has actually been provisionally attached u/s 24(4) of the Act and a Final award is granted if, the benami property has been confiscated u/s 27 of the Act and such confiscation has become final in judicial proceedings after confiscation order is passed. (The confiscation shall be deemed to be final if 2 years have passed from the date of confiscation and there is no litigation pending against such confiscation).

Q.107 What is the amount and stage of granting interim reward and is there a time limit?

Ans. Interim reward up to 1% of the FMV, as defined in the Act, of movable property, and circle rate, as defined in this Scheme, of immovable property, provisionally attached u/s 24(4) of the Act may be granted by the competent authority on fulfilment of eligibility conditions under the scheme subject to the maximum ceiling of an amount of interim reward of Rs. 10 lakhs in respect of information of a single benami property.

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Every endeavour shall be made to grant interim reward within 4 months of actual provisional attachment of the benami property u/s 24(4) of the Act.

Q.108 What is the amount and stage of granting final reward and is there a time limit?

Ans. Final reward up to 5% of the FMV, as defined in the Act, of movable property, and circle rate, as defined in this Scheme, of immovable property, confiscated u/s 27 of the Act may be granted by the competent authority on fulfilment of eligibility conditions and the amount of interim reward paid, if any, shall be reduced from the total final reward. The maximum amount of total reward (interim and final) in respect of a single benami property shall be limited to Rs. One crore subject to the maximum ceiling of an amount of interim reward of Rs. 10 lakhs in respect of information of a single benami property.

Every endeavour shall be made to grant a final reward within 6 months of order of confiscation of benami property becoming final.