



Alaknanda CPE Study Circle



OVERVIEW OF BENAMI PROPERTY LAW AND ITS INTERPLAY WITH THE INCOME TAX ACT, 1961

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Presented by

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AGENDA FOR TODAY

- Evolution of Benami Law
- Why an amendment and not a new Act ?
- Prohibition of Benami Property Transactions Act, 1988
 - Important Definitions
 - Case Studies
 - Section 3, 4, 5 and 6
 - Authorities under Benami Law and their powers
 - Attachment, Adjudication and Confiscation
 - Appeals
 - Offences and Prosecution
- Practical Issues under Benami Law
 - Jurisdiction
 - Impact of demonetization
 - Retrospective Application of Benamai Law

Evolution of Benami Law

1969

- First time Benami transactions were referred considered
- Select Committee to the Taxation Laws (Amendment) Bill, 1969 suggested that Govt. to examine whether Benami transactions should be prohibited.

1971

- Suggestion on prohibiting was reiterated in Parliament during the debate on the Taxation Laws (Amendment) Bill, 1971

1972

- First Step by Parliament by inserting section 281A in Income Tax Act
- Provided that real owner has to intimate Income Tax Department before filing suit to claim Benami Property

Evolution of Benami Law

1973

- The Law Commission recommended a law to prohibit Benami transactions

1988

- President's Ordinance on 19th May 1988 to implement Law Commission's suggestions
- Merely prevented any suit by Real owner to recover Benami Property

1988

- Law Commission submitted detailed report on 14th August 1988 on Benami Transaction

1988

- Govt. accepted LC's suggestions and Benami Transaction (Prohibition) Act 1988 (45 of 1988) was passed in both Houses of Parliament and received President's assent on 5th September 1988
- Made entering into Benami Transaction an offence punishable with 3 years of imprisonment

Evolution of Benami Law

2011

- Benami Transactions (Prohibition) Bill 2011 introduced on 18th August 2011 in the Parliament.
- Was intended to replace to 1988 Act

2015

- Benami Transactions (Prohibition) **'AMMENDMENT'** Bill 2015 introduced in Parliament on 13th May 2015 by Shri. Arun Jaitely
- Unlike 2011 Bill, the 2015 didn't replace the 1988 Act
- It instead amended the 1988 Act

2016

- Benami Transactions (Prohibition) Amendment Act, 2016 passed
- President's assent received on 10 August, 2016
- 1st November, 2016 appointed as date on which Amendment Act would come into force

Why an Amendment Act and not a new Act ?

This question was also asked by Shri Kalyan Banjerjee to Shri Arun Jaitley at the time when the Bill was being debated in Lok Sabha

Why an Amendment Act and not a new Act



Why an Amendment Act and not a new Act

The then Finance Minister, Shri. Arun Jaitley ji's reply:

*“So, if we had accepted the recommendation of the Standing Committee – repealed the 1988 Act and recreated a new law in 2016 – **that would have been granting immunity to all people who acquired properties benami between 1988 and 2016.***

*Obviously, the acquisition now cannot take place, but the penal provisions of the 1988 Act also would have stood repealed. **When a new Act with a similar provision would have come, it could only apply for a penal provision to properties which are benami and entered into after 2016.***

Anybody will know that a law can be made retrospective, but under Article 20 of the Constitution of India, penal laws cannot be made retrospective.

Why an Amendment Act and not a new Act

Jaitley ji's reply:

The simple answer to the question why we did not bring a new law is that a new law would have meant giving immunity to everybody from the penal provisions during the period 1988 to 2016 and giving a 28-year immunity would not have been in larger public interest, particularly if large amounts of unaccounted and black money have been used to transact those transactions. That was the principal object.

Therefore, prima facie the argument looks attractive that 'there is a 9-section law and you are inserting 71 sections into it. So, you bring a new law.', but a new law would have had consequences which would have been detrimental to public interest.



Prohibition of Benami Property Transactions Act, 1988

Important Definitions

- **Section 2(2) – Administrator**
Means Income Tax Officer as defined in Income-tax Act, 1961
- **Section 2(4) – Approving Authority**
Means Additional Commissioner or a Joint Commissioner as defined in Income-tax Act, 1961
- **Section 2(13) – Board**
Means the Central Board of Direct Taxes
- **Section 2(19) – Initiating Officer**
Means Assistant Commissioner or a Deputy Commissioner as defined in Income-tax Act, 1961

Important Definitions

- **Section 2(26) – Property**

- Means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and
- includes
 - any right or interest in the property or
 - legal documents or instruments evidencing title to or interest in the property
 - and where the property is capable of conversion into some other form, then the property in the converted form
- and also includes the proceeds from the property;

Important Definitions

- **Section 2(29) – Transfer**

Includes

- sale,
- purchase or
- any other form of transfer of right, title, possession or lien;

- **Section 2(8) – Benami Property**

- means any property which is the subject matter of a ***benami transaction***
- and also includes the proceeds from such property;

Important Definitions

- Pre Amendment definition of 'Benami Transaction' - Section 2(a)

Benami transaction means

any transaction in which property is transferred to one person

for a consideration paid or provided by another person;

Important Definitions

- **Section 2(9) – Benami Transaction**

Means -

A. a transaction or an arrangement –

a) where a property is transferred to, or is **held by**, a person, and the consideration for such property has been provided, or paid by, another person;

AND

b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

Important Definitions

- **Section 2(9) – Benami Transaction**

Exception to above rule in clause A of section 2 (9)

- i. **HUF**

- Property is held by a Karta, or a member of a HUF 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;

- What is the meaning of ‘KNOWN SOURCES’ ?
 - Whether the scope here is same as section 68, 69, 69A, 68B and 69C of Income Tax Act ?

Important Definitions

- **Section 2(9) – Benami Transaction**

Exception to above rule in clause A of section 2 (9)

- ii. **Fiduciary Capacity**

- Property is held by 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
 - any other person as may be notified by the Central Government for this purpose;

Important Definitions

- **Section 2(9) – Benami Transaction**

Exception to above rule in clause A of section 2 (9)

iii. **Spouse / Children**

- Property is held by 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

Important Definitions

- **Section 2(9) – Benami Transaction**

Exception to above rule in clause A of section 2 (9)

iv. **Relative**

- Property is held by any person in the name of
 - his brother or
 - sister or
 - lineal ascendant or descendant,
- And names of brother or sister or lineal ascendant or descendent 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

Important Definitions

- **Section 2(9) – Benami Transaction**

Means -

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

Important Definitions

- Section 2(9) – Benami Transaction

Explanation – Exception in case of Section 53A of Transfer of Property Act, 1882 transaction

Benami transaction shall not include –

- any transaction involving the allowing of possession of any property to be taken or retained
- in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force,—
 - i. Consideration has been provided by the person to whom possession of property has been allowed
 - ii. But the person who has granted possession thereof continues to hold ownership of such property;
 - iii. stamp duty on such transaction or arrangement has been paid; and
 - iv. the contract has been registered;

Important Definitions

- **Section 2(9) – Benami Transaction means**

A

- Property held by A, consideration by B
- and held for immediate or future benefit of B
- 4 exception – 1. HUF; 2. Fiduciary capacity; 3. Wife/Son/Daughter 4. Joint ownership with relatives

B

- Transaction in fictitious name

C

- Owner not aware or denies knowledge of ownership

D

- Person providing consideration is not traceable or is fictitious

Exception

- Part performance of contract u/s 53A of TOPA if
 - Consideration provided
 - Ownership not transferred
 - Stamp Duty paid
 - Contract is registered

Test to identify Benami Transaction as per Supreme Court

- **Valliammal v. Subramaniam [2004] 7 SCC 233**

- While considering whether a particular transaction is benami in nature, the following six circumstances can be taken as a guides

1. the **source** from which the purchase money came;
2. the **nature and possession** of the property, after the purchase;
3. **motive**, if any, for giving the transaction a benami colour;
4. the **position of the parties** and the **relationship**, if any, between the claimant and the alleged benamidar;
5. the **custody of the title deeds** after the sale; and
6. the **conduct of the parties** concerned in dealing with the property after the sale.

K. Renuga v. K. Visakh, ACIT, Chennai (PBPTA – AT) - 2018

- The Hon'ble Appellate Tribunal For Prohibition Of Benami Property Transactions Act, New Delhi (PBPTA) held that –
 - Every cash transaction cannot be termed as a "benami" transaction. As per section 2(9) A of the Act, the following twin conditions need to be satisfied
 - 1) the property being held by a person who has not provided the consideration,
 - 2) the property is held by that person for the immediate or future benefit, direct or indirect of the person who has provided the said consideration.
 - The characteristic of a "benami" transaction is **that there must be a mere lending of name without any intention to benefit the person in whose name it is made i.e. a mere name lender.**
 - The mischief sought to be punished by the Act are **only such transactions which have a name lending element without deriving any benefit therein** i.e. "benami" transactions.

Case Studies

1. Mr. X acquires the house property in his own name out of black money?
2. Mr. X acquires the house property out of black money in the name of his wife?
3. Mr. X acquired the house property in the name of his brother?
4. XYZ Ltd. purchases car in the name of its director Mr.X?
5. Mr. X, the trustee of ABC Charitable Trust holds property in his own name out of unknown source of the trust?
6. Mr. X paid the consideration and acquired the property in the name of his married daughter?
7. During the search action on Mr. X, huge amount of cash is found in his lockers?
What if he is a public servant?

Case Studies

8. During the search action on Mr. X, bank lockers full of valuables are found. According to him those valuables belong to his wife. However wife denies knowledge or ownership of those valuables?

9. During the search action on Mr.X, his wife Mrs.X admits that she is a partner in a firm but she is not aware of her share or other details of the firm?

10. Unregistered Agreement to sale + Payment of Full Consideration + Transfer of Possession ?

11. Mr. X purchased a house property in the name of his father?

12. Loan disbursement transactions?

13. Deposits in Jan Dhan Bank accounts post demonetization of 500 and 1000 notes? With consent? Without consent?

Case Studies

14. Mr. X acquired the shares of a company in the name of his driver and servant?
15. One of the four promoters pays the share application money and shares are allotted to four of them equally?
16. Huge amount of disclosure under IDS by Ahmedabad person?
17. Property acquired under Home Loan
18. Search on X results in discovery of property whose title deed is in name of Y. Possession is with X
19. X transferred Rs. 1,00,00,000/- in the accounts of Y which is used to buy a residential property. X and his family lives in that property. Assessment of Y happens and this amount of Rs. 1,00,00,000/- is treated as unexplained income u/s 68. Case is further referred to Benami Unit

Case Studies

20. X lends her jewelry to her sister Y. Jewelry was legitimately acquired by X in her own name from known sources of income.

21. Property transferred through GPA

22. During survey, entry operator accepted that he provided bogus sale entries. Impact on people purchasing from him

23. Goods sold in normal course of business. Purchaser later surveyed, found to have been taking bogus purchase entries

24. X gifts money to his daughter in law who later buy a house in her name. Entire family lives in that house

Important Definitions

- **Section 2(10) – Benamidar**

Means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name

- **Section 2(12) – Beneficial owner**

Means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar

- **Section 2(31) –Miscellaneous**

Words and expressions used herein and not defined in this Act but defined in the Indian Trusts Act, 1882, the Indian Succession Act, 1925, the Indian Partnership Act, 1932, the Income-tax Act, 1961, the Depositories Act, 1996, the Prevention of Money-Laundering Act, 2002, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the same meanings respectively assigned to them in those Acts.

Section 3 - Prohibition of benami transactions

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

Section 4 - Prohibition of the right to recover property held benami.

- 1) Real Owner / Beneficial owner can not file any suit, claim or action against the Benamidar in respect of any Benami Property
- 2) No defence will be allowed to Benamidar in respect of any Benami Property on any suit, claim or action by the Real Owner

Section 5 - Property held benami liable to confiscation

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

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

- 1) Benamidar shall not re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf.
- 2) Where any property is re-transferred in contravention of the provisions of sub-section (1), the transaction of such property shall be deemed to be null and void.
- 3) The provisions of sub-sections (1) and (2) shall not apply to a transfer made in accordance with the provisions of section 190 of the Finance Act, 2016 (i.e. **Income Declaration Scheme**)

Section 18 - Authorities



• Adjudicating Authority



• Approving Authority



• Initiating Officer



• Administrator

Section 19 – Powers of Authorities

- 1) Have same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), such as
 - enforcing the attendance of any person and examining him on oath
 - compelling the production of books of account and other documents
- 2) Persons summoned under sub-section (1) shall be bound to attend in person or through authorised agents, as any authority under this Act may direct.
- 3) ...
- 4) Authority may requisition the service of any police officer or of any officer of the Central Government or State Government or of both to assist him

Section 21 – Power to call for information

- 1) The Initiating Officer or the Approving Authority or the Adjudicating Authority
 - shall have power to require any officer of the
 - Central Government or
 - State Government or
 - a local body
 - or any person or officer who is responsible for registering and maintaining books of account or other documents containing a record of any transaction relating to any property
 - or any other person
 - to furnish **any information in relation to any person, point or matter as in his opinion shall be useful for or relevant for the purposes of this Act.**

Amendment by Finance Bill 2019

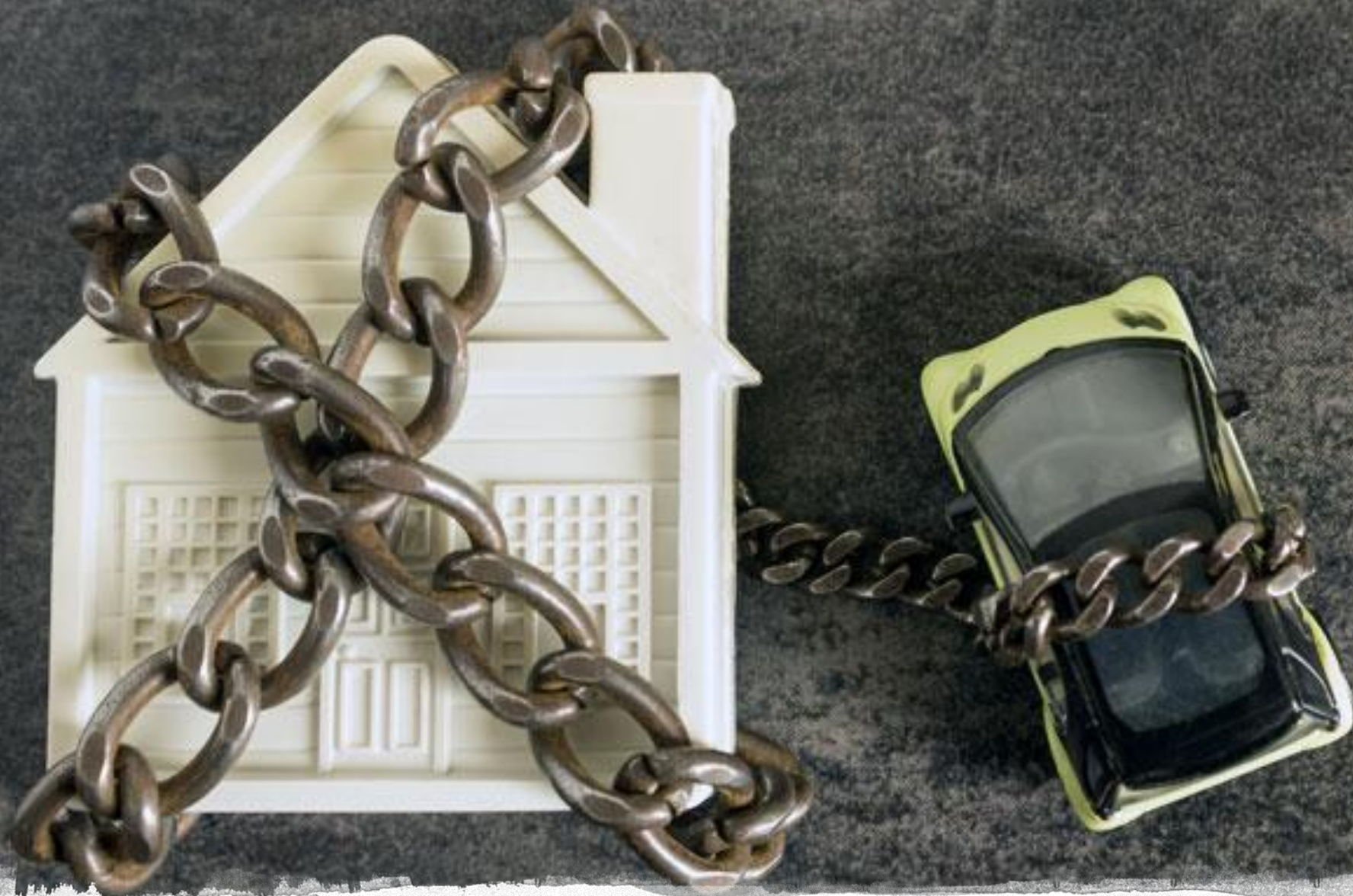
To be effective from 1st September 2019

a. Section 54A inserted

- Any person who fails to,—
 - comply with summons issued u/s 19(1); or
 - furnish information as required u/s 21,
- shall be liable to pay **penalty of twenty-five thousand rupees for each such failure.**
- No penalty order unless the person on whom the penalty is to be imposed has **been given an opportunity of being heard:**
- No penalty shall be imposed if, there were good and sufficient reasons which prevented him from complying with the summons or furnishing information.

Section 23 – Power of authority to conduct inquiry

- The Initiating Officer,
- after obtaining prior approval of the Approving Authority,
- shall have power to conduct or cause to be conducted **any** inquiry or investigation
- in respect of any
 - person,
 - place,
 - property,
 - assets,
 - documents,
 - books of account or
 - other documents in respect of any other relevant matters under this Act



Attachment / Confiscation – Adjudication

Section 24 – Attachment of property involved in benami transaction

1) Starting of Benami Proceedings

- Where the Initiating Officer,
- on the basis of material in his possession,
- has reason to believe that
- any person is a benamidar in respect of a property,
- he may, after recording reasons in writing,
- issue a notice to the person
- to show cause why the property should not be treated as benami property.

Section 24 – Attachment of property involved in benami transaction

Safeguards under section 24(1) -

- i. There should be some material in possession of IO
- ii. There should be a reason to belief on the basis of such material
 - Entire jurisprudence of section 147 of Income Tax Act imported
 - Reason to belief and not reason to suspect
 - RTB of IO and not of any higher authority
 - Live nexus of material in possession and RTB
 - Can not be vague, non-specific, irrelevant
 - There should be application of mind & not mere mechanical recording of RTB
- iii. RTB should be that any person is benamidar in respect of a property

Section 24 – Attachment of property involved in benami transaction

- iv. Recording of reasons must precede issue of notice
- Can assessee claim copy of Reasons like under Income Tax Act ?
 - Can assessee challenge the notice like he does under Income Tax Act ?
- In Recording K. Renuga v. K. Visakh, ACIT, Chennai (PBPTA – AT) – 2018, it was held that –
- It is imperative that the IO must form a reason to believe based on application of mind and appreciation of the material on record (**Asstt. CIT v. Dhariya Construction Co. [2010] 328 ITR 515/[2011] 197 Taxman 202 (SC) & CIT v. Kelvinator India Ltd.[2010] 320 ITR 561/187 Taxman 312 (SC)**)
 - The notice shows that it is mechanical in nature and only talks about receipt of cash. In fact all notices are identical except for the amount mentioned. It shows a lack of application of mind, thus making the jurisdiction assumed under section 24 is invalid.

Section 24 – Attachment of property involved in benami transaction

2) Where a notice is issued to a benamidar, a copy of the notice shall also be issued to the beneficial owner if his identity is known

3) Provisional Attachment

- Where the Initiating Officer is of the opinion that
- the person in possession of the property held benami
- may alienate the property
- during the period specified in the notice,
- he may, with the previous approval of the Approving Authority,
- by order in writing, attach provisionally the property
- for a period not exceeding 90 days from the date of issue of notice under sub-section (1).

Section 24 – Attachment of property involved in benami transaction

4) Provisional Attachment continue / discontinue order

The Initiating Officer, after taking into account all evidences **shall**, within a period of ninety days from the date of issue of SCN —

a) Incase there was provisional attachment

- i. Pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority till order of Adjudicating Authority
- ii. Revoke provisional attachment of the property with the prior approval of the Approving Authority.

b) Incase there was NO provisional attachment

- i. Pass an order provisionally attaching the property with the prior approval of the Approving Authority till order of Adjudicating Authority or
- ii. decide not to attach the property with the prior approval of the Approving Authority

Section 24 – Attachment of property involved in benami transaction

5) Reference to Adjudicating Authority

- Where the Initiating Officer attaches property u/s 24(4),
- he **shall**, within fifteen days from the date of the attachment,
- draw up a statement of the case and
- refer it to the Adjudicating Authority.

Section 24 amended by Finance Bill 2019

To be effective from 1st September 2019

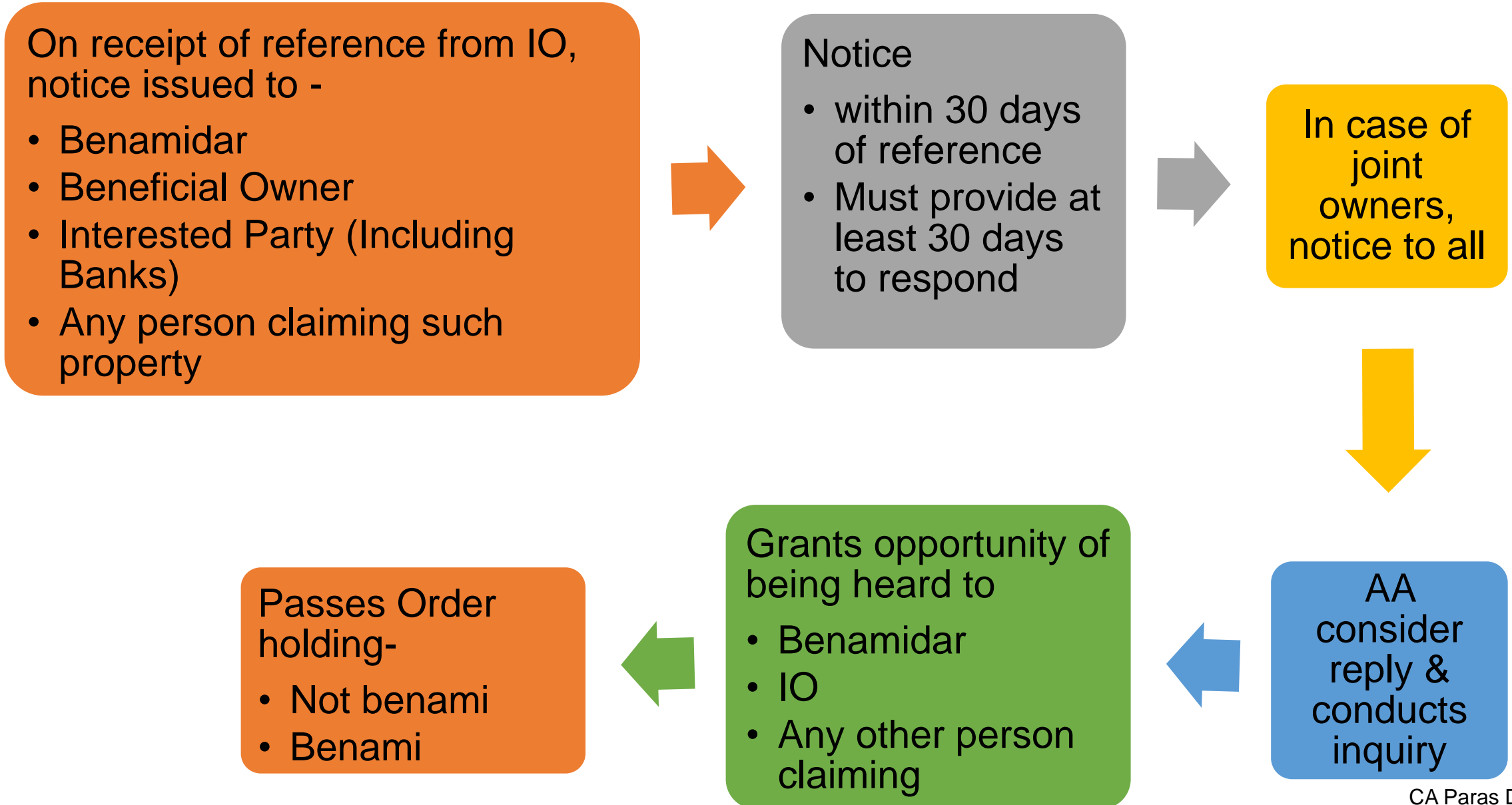
- a. in sub-section (3), for the words, brackets and figure “from the date of issue of notice under sub-section (1)”, the words, brackets and figure **“from the last day of the month in which the notice under sub-section (1) is issued”** shall be substituted;
- b. in sub-section (4), for the words, brackets and figure “from the date of issue of notice under sub-section (1)”, the words, brackets and figure **“from the last day of the month in which the notice under sub-section (1) is issued”** shall be substituted
- c. **New Explanation inserted**
 - in computing the period of limitation, the **period during which the proceeding is stayed** by an order or injunction of any court shall be **excluded**

Section 24 amended by Finance Bill 2019

To be effective from 1st September 2019

- After the exclusion of the aforesaid period, the **period of limitation** referred to in **sub-section (4)** available to the Initiating Officer for passing order of attachment is **less than thirty days**, such remaining period shall be **deemed to be extended to thirty days**:
- After the exclusion of the aforesaid period, the **period of limitation** referred to in **sub-section (5)** available to the Initiating Officer to refer the **order of attachment** to Adjudicating Authority is **less than seven days**, such remaining period shall be **deemed to be extended to seven day**

Section 26 – Adjudication of Benami Property



Section 26 – Adjudication of Benami Property

Other important issued during proceedings before Adjudicating Authority

- Where in the course of proceedings before it, the Adjudicating Authority has reason to believe that a property, other than a property referred to it by the Initiating Officer is benami property, it shall provisionally attach the property and the property shall be deemed to be a property referred to it on the date of receipt of the reference under sub-section (5) of section 24.
- **Time Limit for Order**
No order under section 26(3) shall **be passed after the expiry of one year** from the end of the month in which the reference under sub-section (5) of section 24 was received.

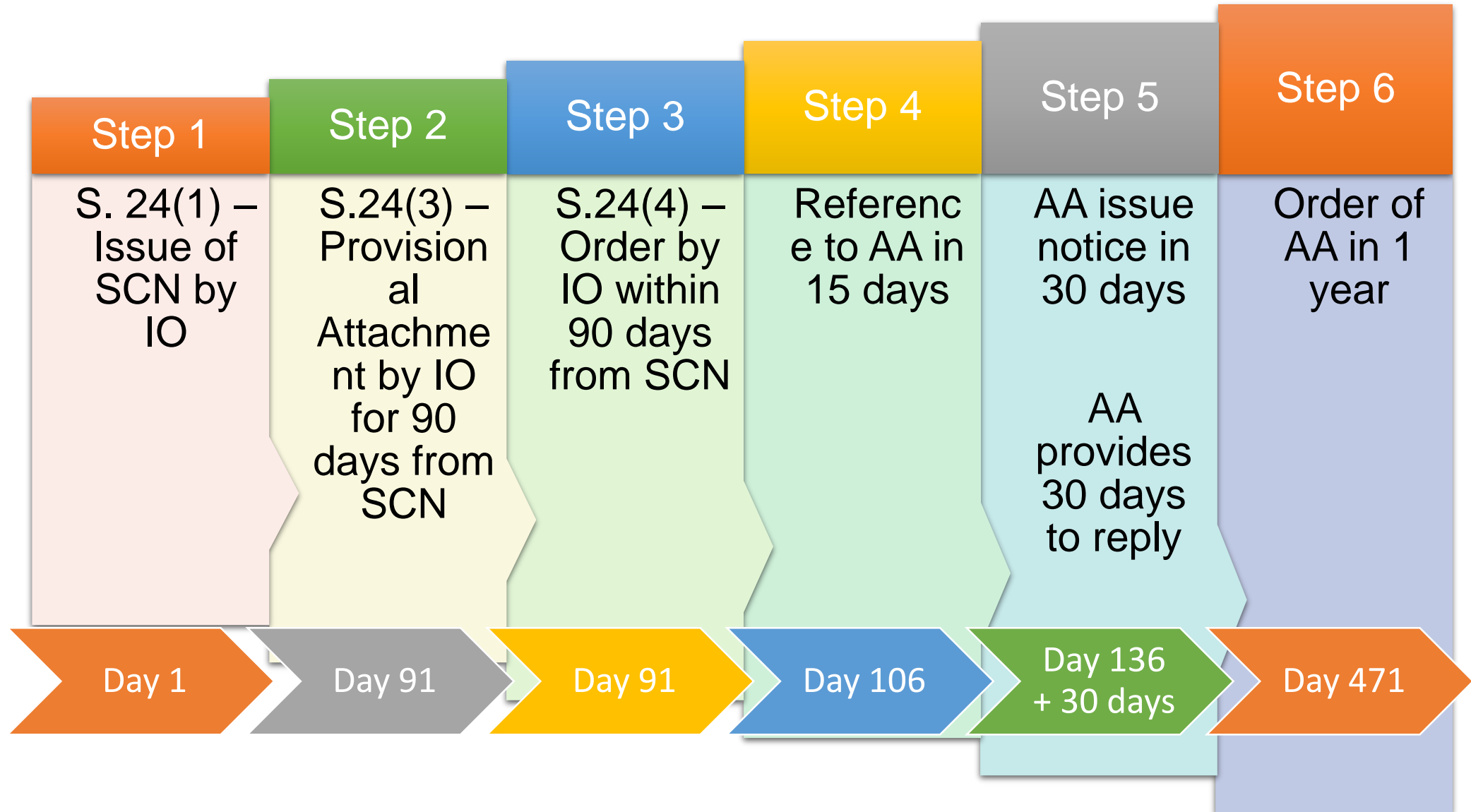
Section 26 amended by Finance Bill 2019

To be effective from 1st September 2019

a. New Explanation inserted

- in computing the period of limitation, the period during which the proceeding is stayed by an order or injunction of any court shall be excluded
- Provided that where immediately after the exclusion of the aforesaid period, the period of limitation available to the Adjudicating Authority for passing order is less than sixty days, such remaining period shall be deemed to be extended to sixty days

Time Limits under Benami Law



Section 27 – Confiscation and vesting of benami property

1) Confiscation

- Where property is held benami u/s 26(3) 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.
- Appeal filed against the order of the AA, the confiscation of property shall be made subject to the order passed by the Appellate Tribunal under section 46

2) Property acquired by *bona fide* buyer from Benamidar

- Nothing in sub-section (1) shall apply
- to a property held or acquired by a person from the benamidar
- for adequate consideration,
- prior to the issue of notice under sub-section (1) of section 24
- without his having knowledge of the benami transaction.

Section 27 – Confiscation and vesting of benami property

Status after confiscation of property

- All rights & title in such property shall vest absolutely in the Central Government
- Property shall be free of all encumbrances
- No compensation shall be payable in respect of such confiscation.
- Any right of any third person created in such property with a view to defeat the purposes of this Act shall be null and void.
- Administrator shall take over possession of Benami property
- Administrator shall have the power to receive and manage the property.
- Administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is vested in the Central Government.

Section 46 – Appeal to Appellate Tribunal

- Any person, including the Initiating Officer, aggrieved by an order of the Adjudicating Authority
- appeal to the Appellate Tribunal against the order passed by the Adjudicating Authority under sub-section (3) of section 26,
- Appeal in 45 days from the date of the order
- Appeal in Form 3
- Appeal fee is Rs. 10,000/-
- Condonation of delay in case of appeal after 45 days subject to tribunal's satisfaction that the appellant was prevented, by sufficient cause, from filing the appeal in time.

Section 49 – Appeal to High Court

- Party aggrieved by order of the Appellate Tribunal - Appeal to the High Court within a period of sixty days from the date of communication of order on any question of law arising out of such order.
- Appeal after 60 days - The High Court may entertain if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal
- High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
- High Court shall adjudicate such question

Appeal to Supreme Court

- No provision under the Act for filing of Appeal before Supreme Court
- But Constitutional remedy to file Special Leave Petition under Article 136 before the Supreme Court



Offences & Prosecution

Section 53 – Penalty for benami transaction

Offence of benami transaction

- Person shall be guilty of the offence of benami transaction if he enters into a benami transaction in order
 - to defeat the provisions of any law or
 - to avoid payment of statutory dues or
 - to avoid payment to creditors
- Persons who can be prosecuted
 - Beneficial owner
 - Benamidar
 - Any other person who abets or induces any person to enter into the benami transaction

Section 53 – Penalty for benami transaction

Punishment

- Punishable with rigorous imprisonment from 1 to 7 years

and

- Fine up to 25% of fair market value of the property.

Section 58 –Penalty for false information

On furnishing false information/ document:

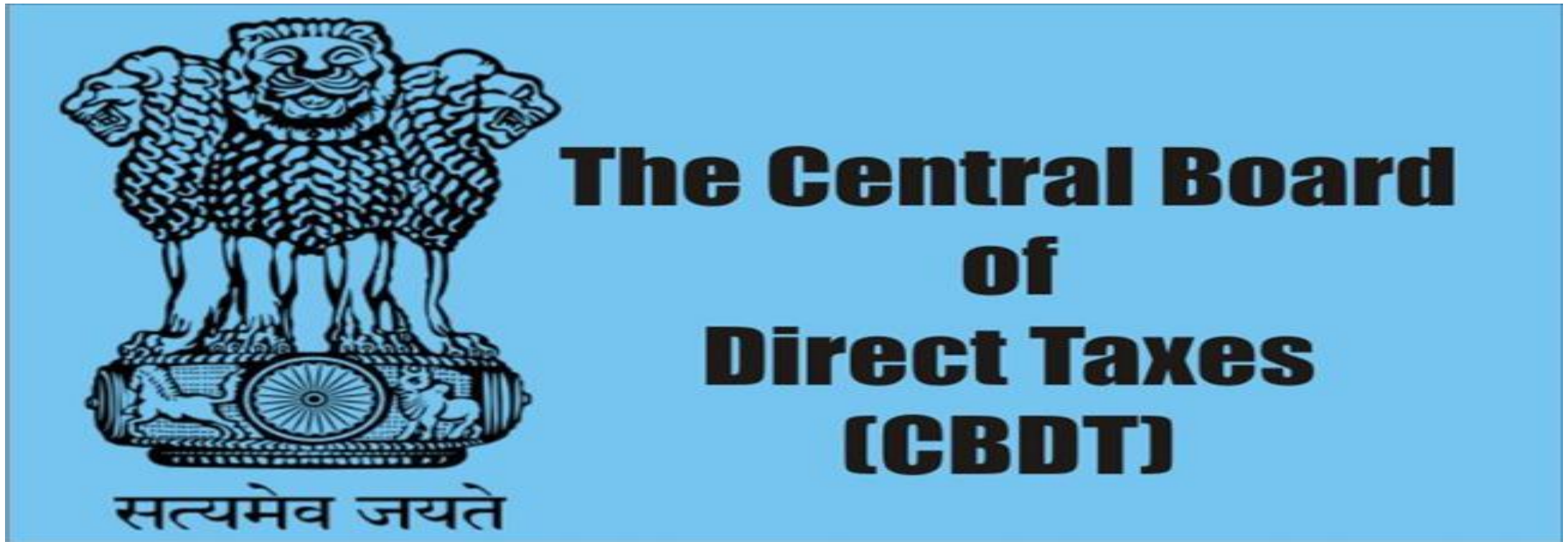
- Punishable with rigorous imprisonment from 6 months to 5 years

and

- Fine up to 10% of fair market value of the property.

Section 55 – Sanctions before prosecution

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



Section 55 amended by Finance Bill 2019

To be effective from 1st September 2019

- for the word “Board”, the words “competent authority” shall be substituted;
- “competent authority” means a Commissioner, a Director, a Principal Commissioner of Income-tax or a Principal Director of Income-tax as defined in clause (16), clause (21), clause (34B) and clause (34C), respectively, of section 2 of the Income-tax Act, 1961.’

Section 59 – Certain transfers to be null and void

- After the issue of a notice under section 24
- any property referred to in the said notice is transferred
- the transfer shall, be ignored and if the property is subsequently confiscated, then, the transfer of the property shall be deemed to be null and void.

Section 61 – Penalty for false information

Offence under this Act shall be non-cognizable.

PRACTICAL ISSUES UNDER BENAMI LAW

Practical Issues

Onus

- The existence of the "benami" transaction has to be proved by the authorities i.e. the person who alleges the transaction. (*Recording K. Renuga v. K. Visakh, ACIT, Chennai (PBPTA – AT) – 2018*)

Jurisdiction

- Jurisdiction based on location of benami property, benamidar and beneficial owner.
- Where all 3 in different locations, benami unit from where 1st SCN is issued shall assume jurisdiction
- No bar where 1 benamidar is assessed by 2 different IOs for 2 properties located at different places.

Practical Issues

Can IO directly issue SCN u/s 24 without any notice u/s 19 or 23

- Yes. There is no link between the 3 sections

Stage of commencement of prosecution

- Any stage. Independent proceedings not connected with attachment, adjudication or confiscation.

Impact of Demonetization

1. Cash deposited in account of X by Y (Y is X's employee / servant). Y withdrew cash from bank and gave it back to X.
2. X gave old cash to Y, an entry operator. Y deposited money in the bank account of one shell company ABC Ltd. which further transferred this amount by bank transfer to the account of X
3. X bought jewelry with his old cash after 8 Nov 2016 and Jeweler deposited cash into his bank account by referring it as cash sale prior to 8 Nov 2016.

Practical Issues

Impact of Demonetization

4. X got his old notes exchanged by giving a commission of 10%
5. X deposited his old notes in the account of his wife and she does not deny knowledge of ownership of the money deposited.
6. X deposited his old notes in his own bank account
7. Jeweler accepts old cash from customers post 8 Nov 2016 and deposits the cash in his bank account by backdating the receipt
8. Jeweler deposits his own old cash and deposits it in his bank account by camouflaging it as cash sales before 8 Nov 2016
9. X owed money to Y on 8 Nov 2016. X repaid this money in old cash.

Practical Issues

Impact of Demonetization

10. X gave old cash as advance to his suppliers for his future purchases.
11. X deposited money his father's account
12. X deposited money his father's account of which he is a joint owner
13. X deposited money his daughter in law's account of which he is a joint owner

Whether Benami Law is retrospective ?

Article 20(1) of the Constitution - Protection in respect of conviction for offences

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Points to be considered

- Laws are presumed to be prospective, except where it is stated otherwise.
- Vide Notification No. 98/2016 dated October 25 , 2016, Central Government appointed 1st day of November, 2016 as the date on which provisions of the Amednent Act shall come into force.

Whether Benami Law is retrospective ?

- By no stretch of imagination Benami Amendment Act of 2016 can be called clarificatory amendment to the 1988 Act.
- The Amendment Act of 2016 brought in new substantive provisions and enlarged the scope of earlier provisions.
- It provided for 2 kinds of punishment –
 1. Makes entering into benami transaction an offence punishable with imprisonment
 2. Confiscation of benami property
- While conviction on account of benami is a penal provision, some experts argue that confiscation is a civil remedy

Whether Benami Law is retrospective ?

Conviction on entering into Benami Transaction

- Article 20(1) of the Constitution acts as an absolute safeguard against any conviction on account of any offence which was not at offence at the time of its commission.
- **Thus, no person can be imprisoned on account of entering into a benami transaction before 1 Nov 2016.**

Confiscation of Benami Property

- A section of experts argue that confiscation is a civil remedy and not protected by article 20(1)
- While others are of the opinion that confiscation is a penalty which is levied as a result of entering into a Benami transaction. If transaction was not benami at the time of entering it, any penalty levied retrospectively would be in contravention of Article 20(1).

Whether Benami Law is retrospective ?

Judicial View

- Andhra Pradesh HC in B. Rama Raju vs Union of India allowed retrospective application of attachment provision under PMLA by holding that :

“57. The huge quanta of illegally acquired wealth; acquired from crime and economic and corporate malfeasance corrodes the vitals of rule of law; the fragile patina of integrity of some of our public officials and State actors; and consequently threatens the sovereignty and integrity of the Nation. The Parliament has the authority to legislate and provide for forfeiture of proceeds of crime which is a produce of specified criminality acquired prior to the enactment of the Act as well. It has also the authority to recognise the degrees of harm an identified pejorative conduct has on the fabric of our society and to determine the appropriate remedy for the pathology.”

Whether Benami Law is retrospective ?

Judicial View

- This view was upheld by Gujarat HC in the case of Alive Hospitality and Food Private Limited Vs. Union of India wherein it was held that:

*“On the text and authority of our Constitution while it may perhaps gainfully be contended that conviction for the offence of money-laundering cannot be recorded if the said offence is committed prior to the enforcement of Section 3 of the Act, **such a contention cannot be advanced to target proceedings for attachment and confiscation, as these fall outside the pale of the prohibitions of the Constitution, in particular Article 20(1).**”*

Whether Benami Law is retrospective ?

Judicial View

- However, Delhi HC in the case of Mahanivesh Oils & Foods Pvt. Ltd. Vs. Directorate of Enforcement disallowed retrospective application of attachment provision under PMLA and held that :

*“Thus, it is **not possible to envisage provisional attachment of any property in absence of an offence of money-laundering.** Consequently, in a given case where the **offence of money-laundering cannot be made out as the acts constituting such offence were prior to the Act being brought in force,** it would be impermissible for the authorities concerned to attach the property representing the proceeds of crime.”*

Questions ???



THANK YOU



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