

# The Prohibition of Benami Property Transactions Act, 1988

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# KEEP AWAY FROM BENAMI TRANSACTIONS

## PROHIBITION OF BENAMI PROPERTY TRANSACTION ACT, 1988

### Salient Features:

- ◆ The Prohibition of Benami Property Transactions Act, 1988 (the Benami Act) came into effect from 01.11.2016.
- ◆ Benamidar (in whose name benami property is standing), beneficiary (who actually paid consideration) and persons who abet and induce benami transactions are prosecutable and may face Rigorous Imprisonment up to 7 years besides being liable to pay fine upto 25% of fair market value of benami property.
- ◆ Persons who furnish false information to authorities under Prohibition of Benami Property Transactions Act, 2016, are prosecutable and may be imprisoned up to 5 years besides being liable to pay fine up to 10% of fair market value of benami property.
- ◆ Benami property may be attached and confiscated by the Government.
- ◆ These actions are in addition to actions under other laws such as Income-Tax Act, 1961.



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**Income Tax Department**  
**Central Board of Direct Taxes**

# Benami Property Transactions Act Now in Action

effective from 1<sup>st</sup> November, 2016



## Do not enter into Benami Transactions

### Salient features of the PROHIBITION of BENAMI PROPERTY TRANSACTIONS ACT, 1988:

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- Benamidar (in whose name benami property is standing), beneficiary (who actually paid consideration) and persons who abet and induce benami transactions are prosecutable and may face Rigorous Imprisonment up to 7 years besides being liable to pay fine upto 25% of fair market value of benami property.
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- Benami property may be attached and confiscated by the Government.
- These actions are in addition to actions under other laws such as Income-tax Act, 1961.

**Black money is a crime against humanity.  
We urge every conscientious citizen to help the Government in eradicating it**

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# Action begins.....

Income Tax department attaches benami properties worth Rs 39 billion

Show cause notices for provisional attachment of benami properties worth Rs 39 billion

Press Trust of India | New Delhi  
Last Updated at March 13, 2018 15:00

**Benami property secret informers to get reward of Rs 1 crore**  
ANI | Sep 22, 2017, 08:20 PM IST  
I-T dept has identified more than 1,600 benami transactions till end-February  
3,900 crore  
In a written reply, Minister of State for Finance  
PTI | Nov 14, 2017, 09:31 PM IST

**Benami assets: I-T scanning profiles of property registered over Rs 30 lakh**

PTI | Nov 14, 2017, 09:31 PM IST

Centre attaches more than 1,000 benami properties

By NAVTAN KUMAR | NEW DELHI आयकर विभाग ने कुर्क की 3,900 करोड़ की बेनामी संपत्तियां

नई दिल्ली। एजेंसी

Last updated: Tue, 13 Mar 2018 11:13 PM IST



# Action begins.....

## Benami assets worth Rs 1833cr attached: CBDT strong action to continue

Central Board of Direct Taxes (CBDT) chairman Sushil Chandra told P1 department would continue taking "strong" action against benami asset. sustained action plan and that this action "will not stop".

VIDEO OF THE DAY

## Will new benami law be given retrospective effect: HC to I-T

PTI | Oct 11, 2017, 18:47 IST

Taxman may... Department... Modi... Benami Act for unexplained investments

By Sachin

## Taxmen Crack Down on Benami

UNDER SCRUTINY I-T dept sends notices to MF nominees, wives of HNIs and NRIs who have sc

I-T attaches first property of Mehul Cho... Benami Act

प्रीनबी फ्रॉड: 200 शेल कंपनी-बेनामी एसेट्स जांच के दायरे में, ओवरसीज बैंकों के अपराधों पर भी शक

DainikBhaskar.com | Last Modified - Feb 19, 2018, 09:47 AM IST

सीबीआई ने प्रीनबी फ्रॉड केस में आरोपियों के खिलाफ मनी लॉन्ड्रिंग के मामले में 2 एफआईआर दर्ज की हैं।

# Action begins.....

**Shah Rukh Khan faces I-T heat over 'benami' property in Alibaug**

## **Why Shah Rukh Khan's Alibaug bungalow was labelled 'benami'? All you need to know**

In a major setback for Shah Rukh Khan, the income tax department has provisionally attached the Alibaug farmhouse of the actor under the new Benami Transactions (Prohibition) Amended Act, 2016.

**No reprieve for Shah Rukh in Alibaug benami property case as matter reaches New Delhi**

### **POOL ON FARM LAND**

- ▶ I-T provisionally **attaches SRK's bungalow in Alibaug**, calling it a **benami property**
- ▶ Attachment notice was issued to **Deja Vu Farms**
- ▶ **SRK gave unsecured loan of ₹8.5cr to Deja Vu Farms**, which used it to **buy farm land**
- ▶ Land was transferred in firm's name with **condition** that it'll be used for **farming**. A **pool and helipad** made on it

# Parties

- "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.
- "beneficial owner" means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar.

# Benami Property

- "benami property" means any property which is the subject matter of a benami transaction and also includes the proceeds from such property
- "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 also includes the proceeds from the property
- Location of property?
- Undervalued transaction?
- Part property?

# Benami transaction means (A)

- A transaction or an arrangement—
  - 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
  - the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration
- Essentially three conditions:
  - transfer of possession to benamidar;
  - consideration provided / paid by beneficial owner;
  - intention to benefit the beneficial owner



# Ingredients

- Commences with word “means” – exhaustive definition
- Transaction / arrangement not defined under any laws. Income-tax Act defined arrangement for GAAR. General meaning?
- Actual transaction of transfer
  - Sale, purchase, any other form of transfer of viz. right, title, possession or lien
  - PMLA includes mortgage, pledge, gift or loan
- Consideration paid or provided by other person other than transferee
  - Every transaction where consideration is paid by other person cannot be tainted with benami label
  - Father giving money to son who paid consideration – Pawan Kumar Gupta v. Rochiram Nagdeo (1994) 4 SCC 243

# Ingredients (Contd.)

- Property held by benamidar for the benefit of the beneficial owner
- Clause (b) – introduces element of intention [Bhim Singh v Kam Singh AIR 1980 SC 727] [First ITO v M.R. Dhanalakshi Anmal [1978] 112 ITR 413]
  - Surrounding circumstances
  - Relationship with parties
  - The motive of parties in entering transaction
  - Custody and production of title deeds
  - Previous & subsequent conduct of the parties
- Intention to benefit other person - relevant factor?
  - Where a person buys property with his own money but in the name of another person **without any intention to benefit such other person**, the transaction is called benami. In that case the transferee holds the property for the benefit of the person who has contributed the purchase money.
    - Bhim Singh v Kan Singh AIR 1980 SC 727

# Ingredients (Contd.)

- Neither benamidar nor beneficiary is a fictitious person
- Benamidar is aware of transaction and does not deny it
- Possession is with benamidar and held for the benefit of person providing consideration

# Exception (i) - HUF

- Property is held by
  - a Karta, or a member of a HUF, and
  - the property is held for his benefit or benefit of other members in the family and
  - the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family
- Funds provided by HUF & shares in company held in the name of ?
  - Karta
  - Karta's Wife
  - Karta's son
  - Coparcener or any member of HUF
- 'Known sources' means
  - Not defined in the Act and also in the specified other 8 laws
  - Standing committed deleted 'income' from 'known sources of income' – income sources or non-income sources
  - Sec 68 of ITA – ICG test
  - Source of the source?

# Exception (ii) – Fiduciary

- Property held by a
  - person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and
    - Fiduciary refers to a person having a duty to act for the benefit of another, showing good faith and candour where such other person reposes trust and special confidence in the person owning or discharging the duty [CBSE v Adiya Bandopadhyay [2011] 8 SCC 497]
  - **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
- Directors de facto - de jure distinction between CA 1956 & CA 2013
- Condition of payment of known sources is not applied

# Exception (ii) – Fiduciary Contd.

- Property purchased in the name of director payment by company
  - Sec 187(1) Companies Act 2013
- Shares in the subsidiary held by the nominee of Holding company
  - Proviso to S. 187(1) investment in shares, securities
- Shares of a company held by a Partner of the partnership firm?
- Partnership firm owns a car, payment made by a partner and is held in the name of partner?
- Several family members held lease-hold right in property & everyone contributed for converting lease-hold rights into free-hold. But property was registered in name of one person as per rules of corporation. Whether fiduciary capacity?
  - Marcel Matins v. M. Printer 21 taxman.com 7 (SC)

# Exception (iii) – Spouse / Child

- Property 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
- Benefit test?
- Joint ownership or full ownership by spouse / children?
- Known sources?
- Child
  - Minor / major?
  - Sons / daughters?
  - Grandson / granddaughter?
  - Married daughters?
  - Step child?
  - Adopted child?
  - Illegitimate child?

# Exception (iv) – Brothers/Sisters

- Property is held by 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 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
- Brother / sister?
  - Half – brother / sister? E.g. relation between child from 1<sup>st</sup> marriage and 2<sup>nd</sup> marriage
  - Step – brother / sister? E.g. relation between child of one parent from previous marriage with child of spouse from previous marriage
  - Cousin – brother / sister?

# Exception (iv) – Lineal ascendant / descendent

- Descents are of two sorts, lineal and collateral.
  - Lineal descent is descent in a direct or right line, as from father or grandfather to son or grandson.
  - Collateral descent is descent in a collateral or oblique line, that is, up to the common ancestor and then down from him, as from brother to brother, or between cousins.
- ‘Lineal Ascendant’ or ‘Lineal Descendant’ not defined under Indian Succession Act, 1925 too.
  - Sec. 25 of Indian Succession Act, 1925 defines ‘Lineal consanguinity’ and not Lineal Descendant though the word Lineal Descendant appears at many sections within the Act.
  - **Lineal consanguinity** is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line. [Sec 25 of Indian Succession Act, 1925]

# Exception (iv) – Lineal ascendant / descendent (Contd.)

- However, Rajasthan High Court in CIT v Dhannalal Devilal [1956] 29 ITR 165 (Raj) has held as follows:
  - Section 25 of the Indian Succession Act defines "lineal consanguinity", while section 26 defines "collateral consanguinity". **Where the descent is by lineal consanguinity, one may call it a lineal descent**, and the person so descending is a lineal descendant. But where the relationship is by collateral consanguinity, one may be a descendant of the other, but he cannot be said to be lineally descended.
  - “Lineal Descendant“: a person must be descended in a right line without any deviation as from father to son, grandson, great grandson and so on. Similarly, it goes from mother to daughter, and grand-daughter, and great grand-daughter, because here also it is in a right line without any deviation.
  - **A son will be a lineal descendant of the mother as well as of his grandmother irrespective of whether the mother or the grandmother can form a line of succession**

# Joint name necessary ?-

## Exception (iii) v. (iv)

- Joint name not necessary – Exception (iii)
  - Husband, wife, son, daughter
- Joint name necessary – Exception (iv)
  - Brother, sister, half-brother, half-sister, mother, father, grandfather, grandmother, grandson, grand daughter, great grandfather, great grandmother, great grandson, great granddaughter
- Provisions of Act may apply even if property is jointly owned – Not covered by Exception (iv)
  - Cousin, step brother/sister, daughter-in-law, son-in-law, sister-in-law, brother-in-law, nephew, niece, husband's brother's wife, husband's sister's husband, wife's brother's wife, wife's sister's husband, uncle / aunt (from mother's and father's side)

# Benami transaction (B)

- a transaction or an arrangement in respect of a property carried out or made in a fictitious name
  - No person or entity is available
  - Person / entity is not in existence

# Benami transaction (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
- Person not aware of property?
- Business in the name of wife and she is not aware?
- Wife admits that she is partner, but not aware name of firm / share of profit
  - Gaurishanker Omkarmal v. ITO [1990] 37 TTJ (Ahm. Trib) 535

# Benami transaction (D)

- A transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious.
  - Consideration received from 'X' but X is not traceable?
  - What about Sec. 68 additions?
    - Loans borrowed but person granting loan unable to prove its capacity to give loan?

# General Exception

- The 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 (4 of 1882), if, under any law for the time being in force,—
  - 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;
  - stamp duty on such transaction or arrangement has been paid; and
  - the contract has been registered;
- Power Attorney Transactions?

# Benami Law vs. PMLA

- Benami Law vs. PMLA
  - PMLA is restricted to only proceeds of crime
  - Benami Law applies equally to both – a property acquired through proceeds of crime and a property acquired through legitimate means and hence is wider than PMLA in scope

# Benami Law vs. ITA

- Benami vs. ITA
  - Sec. 67 – Benami law to have overriding effect over other laws including ITA. What about Black Money Act?
- Situations:
  - Where the source of acquisition of the property is explained but the property is acquired in the name of benamidar;
  - Where the source of acquisition of the property is unexplained and the property is acquired in the name of benamidar;
  - Where the transaction/arrangement in respect of a property is carried out in a fictitious name;

# Benami Law vs. ITA (Contd.)

- Situations:
  - The transaction/arrangement in respect of a property where the owner of the property is not aware of or denies knowledge of such ownership;
  - The transaction/arrangement in respect of a property where the person providing the consideration (i.e. the real owner) is not traceable or is fictitious;

# Consequences



# Investigation by AO under ITA – SOP dated 10.08.2017

- Identification and examination of legal/apparent owner(s)/ benamidar and beneficial/real owner(s) of the property, inter alia w.r.t. holding/transferring of the property and payment of consideration for such property;
- Whether the property is held/transferred for the immediate or future benefit, direct or indirect, of the person who has provided the consideration;
- Examination of the source of income through which the property was acquired;
- Whether a transaction or an arrangement in respect of the property has been made in a fictitious name;
- Whether the apparent owner is not aware of or denies knowledge of the property? Such a situation may lead to classification of the property as benami property;

# Investigation by AO under ITA – SOP dated 10.08.2017 (Contd.)

- A property where the person providing the consideration is not traceable or is fictitious may also be classified as benami property;
- Who is bearing maintenance charges (including taxes, etc.) in respect of the property?;
- Who is in possession of the title deed of the property?;
- Upon identification of a property as benami property or in case where the Investigating Officer has *prima facie* reason to believe that the property in question may be a benami property, the information is to be passed on to the Initiating Officer without any delay. The Initiating Officer, thereafter, may take necessary action u/s. 24 and under other provisions of the Act.

# Impact

- Punishable imprisonment upto 3 years or fine or both – Transactions before amendment
  - Transaction after amendment, punishable u/s 53
    - Where any person 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,
- the beneficial owner, benamidar and any other person who abets or induces any person to enter into the benami transaction, shall be guilty of the offence of benami transaction.
- Such person shall be punishable
    - rigorous imprisonment for a term – minimum 1 year and upto 7 years (non-cognizable and non-bailable) and
    - also be liable to fine upto twenty-five per cent of the fair market value of the property

# Impact (Contd.)

- Fair value determination
  - Property – ordinarily fetch in open market
  - If it could not be determined valued as per rule 3
    - Unquoted Equity shares higher of
      - (a) Cost of acquisition;
      - (b) Valuation using DCF method;
      - (c) Value as per prescribed method  $(A + B - L) \times (PV)/(PE)$ 
        - A – book value of assets except – bullion, jewellery, precious stone, artistic work, shares, securities, and immovable property
        - B – price that bullion, jewellery, precious stone, artistic work, shares, securities, and immovable property- would fetch in open market on the date of transaction
        - L – liabilities excluding paid up capital , set apart fro dividend, reserves & surplus, tax provision, contingent liability, unascertained provision
        - PE – total amount of paid up equity capital as shown in balance sheet
        - PV – paid up value of each equity share

# Impact (Contd.)

- No suit (Section 4)
  - No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.
  - No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.
- Sec. 4 deals with right of real / beneficial owner vis-à-vis benamidar

# Impact (Contd.)

- Prohibition for re-transfer (Section 6)
  - No person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf
  - Where any property is re-transferred in contravention of the provisions, the transaction of such property shall be deemed to be null and void.
  - The provisions shall not apply to a transfer made in accordance with the provisions of section 190 of the Finance Act, 2016 (28 of 2016) – IDS upto 30-9-2017
- Confiscation

# Some authorities – SOP dated 10/08/2017

- "Initiating Officer"
  - an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the Income-tax Act, 1961 (43 of 1961)
    - Dy./Asst. CIT (Benami Prohibition) under Pr.DIT(Inv.)/DIT(Inv.) Charge
- Approving Authority
  - an Additional Commissioner or a Joint Commissioner as defined in clauses (1C) and (28C) respectively of section 2 of the Income-tax Act, 1961 (43 of 1961);
    - Addtl./Joint CIT (Benami Prohibition) under Pr.DIT(Inv.)/DIT(Inv.) Charge
- Administrator
  - an Income-tax Officer as defined in clause (25) of section 2 of the Income-tax Act, 1961 (43 of 1961);
    - ITO (Benami Prohibition) under Pr.DIT(Inv.)/DIT(Inv.) Charge
- Adjudicating Authority
  - the Adjudicating Authority appointed under section 7
    - Notified adjudicating authority under PMLA

# Questions?

# Thank you!



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