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'Benami Transaction & Properties

[Benami Transactions (Prohibition) Bill 2016]

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What is a 'Benami' transaction?

'Benami' transaction means a transaction 'without name'. In every commercial transaction there are following essential elements:

The '**source**' of funds from which the asset is purchased/transaction undertaken;

The '**title**' of the asset or the person who carry the legal title;

The person to whom the '**benefits**' arising from such assets/ transaction relate (the beneficiary)

'Benami' transaction is one where title is held by a person other than the person who has provided the funds and who effectively enjoys the benefit of the said property. A transaction can only be treated as 'benami' if all three elements are non-coherent. If title also confers benefit it will be gift not a benami transaction. There are other deemed benami under the law.

Why 'Benami' transactions are undertaken?

To def**raud** the 'creditors'.

To **evade** 'tax' on the source of income used for benami transactions.

To keep assets **out of public eye**.

As then English jurists in sub-continent way back in early 1900 observed that constant invasion of India by outsiders in the past centuries, and abuse of powers by such invaders encouraged Indians to enter into 'benami' holding of their [landed] properties to save intrusions by the invaders. There is a complete history of the legacy.

This is a unique Indian legacy. That historical reality has changed. Now benami is an effective way to 'park untaxed money'. This justifies the introduction of law as proposed, prohibiting benami transactions.

Why 'Benami' Law? Need and the status jurisdiction (1)

First question is why there is a need to introduce prohibition of 'Benami' law in Pakistan?

In other jurisdictions, specially in England, this aspect is also dealt by 'doctrine of presumption'. Under that doctrine courts presume that property is held by the person having legal ownership. This doctrine comes into operation only if there is rebuttal by the legal ownership. Otherwise, the property is presumed to be held under trust of the beneficial owner.

In sub-continent the legal history of benami law is different from other jurisdictions specially England and from where we have borrowed whole of the present legal system. This is effectively the only deviation from English laws which have been fully adopted/prevalent the in sub-continent.

Justice Lord Macmillan during the hearing of the Privy Council way back in 1915 (*Bilas Kunwar vs. Raj Ranjit Singh AIR 1915 PC 96*) accepted the prevalence of this system in the sub-continent conferring recognition of the same. That has been followed by all courts.

Why 'Benami' Law? Need and the status jurisdiction (2)

Itself a 'Benami' transaction is not illegal because transfer of property does not itself by its definition require that transfer in favour of one person can be in the name of another person. The right of transfer cannot be altered by the benami law.

Consequently the answer to the primary question *'being the need for prohibiting the benami'* remains open. In India when similar law was introduced in 1988 this question was asked.

Notwithstanding, the answer of this question, even in India there were questions on the effectiveness of the said 'Benami' law.

Accordingly after detailed review, it was concluded that in the present circumstances in India a revised and effective law is required. India introduced the revised 'Benami' Act in 2016.

It is good that Pakistan law has adopted the said Indian Law in toto. Thus primary homework has been done in almost similar circumstances.

Why 'Benami' Law? Need and the status jurisdiction (3)

Under the income tax law the '**onus**' of proof of a benami transaction lies with the tax department. That primary concept in the taxation law cannot be disturbed.

Therefore if benami is highly prevalent its effectiveness of enforcement remains low.

Against that under the benami law the '**onus**' shifts to the 'benamidar' to prove that proper consideration is 'not benami'. That can only be done under a separate benami law.

Secondly, under the benami law entering into a benami transaction is a crime subject to imprisonment. That leverage is not directly available under the present income tax law.

Thirdly, effective confiscation is not possible under other laws. Now that will be a possibility available to avoid evasion.

Level of prevalence in Pakistan and forms of 'Benami' assets (1)

'Benami' and '**Undeclared Assets**' are two different things. In Pakistan. Benami transactions are common there, however on account of lack of tax compliance, the main issue is 'undeclared assets'.

The real benefit of benami law will therefore be in relation to onus to proof and the easier manner of confiscation. However that too depends on compliance of the new law. In India between 1988 to 2016 there were very few confiscations.

Benami prevails culturally and historically in land in rural sector. Urban properties are also not in benami but mostly in the cases where the sources are illegal ab-initio.

Level of prevalence in Pakistan and forms of 'Benami' assets (2)

Other major undeclared assets are 'Bank Accounts' and 'Securities'. Nevertheless on account of inherent higher risks involved, benami arrangements in such cases are generally not highly prevalent. Accordingly volume is limited.

The rationale of benami law, in these circumstances will lie on the matter of onus of proof that a 180 degree shift resulting in ease in confiscation and criminality of action.

This is the only reason given by the Indian Standing Committee whilst approving the new law. The same is given in the objective statement of the present Pakistan law. I support the Government action. There is a need for the said law.

Effective Date? Prospective or Retrospective

Section 54 of the Proposed 'Benami' law states that any transfer of property after the issue of notice under Section 22 of the proposed benami law will be void. This provides a clear prospective application of the proposed law.

Transactions undertaken prior to application of this law will therefore fall outside the ambit of the benami law. Nevertheless that will not affect the existing right conferred under the income tax law.

Whether a notice under Section 22 can be issued to a benami property transferred in the name of a benamidar prior to the promulgation of this law is the question to be decided by the courts. The apparent answer seems to be in affirmative. There is a view that law should necessarily be prospective.

Prohibition & Confiscation versus Taxability?

Benami is a very severe law. It prohibits 'benami' transactions. This prohibition is not be confused with Transfer of Property laws. Having property in somebody else's name, will remain illegal.

Prohibition in this case is followed by confiscation. It is a step further to 'taxability' which is limited to percentage of incidence of tax. This means 100% disentanglement.

Thus benami law is a confiscatory law, but justified in present circumstances.

It would effectively override the present Section 82 of the Trust Act, that allows holding benami assets in trusts. Consequently Section 82 of the Trust Act will be overridden by the benami law. The same will be the consequence of the effect of the provisions of Section 90 of the Income Tax Ordinance, in so far as if they are in conflict with benami laws.

Process Envisaged

A three tiered process has been envisaged:

1. Initiation;
2. Reference;
3. Confiscation.

There is provision of a 'provisional' order also. At present the power of initiation has been given to the Income Tax Officer having jurisdiction over the property and the place where transaction has been undertaken.

This effectively means that powers to execute the function of handling with the banami property should lie with the 'Adjudicating Authority' formed under the proposed Act.

Expected Action and results: Handicaps (1)

Results of Indian law between 1988 to 2016 were not very encouraging despite the fact that prevalence of undeclared assets in India is substantially lower than Pakistan.

The essence and compulsory ingredient for the proper application of law lies with the documentation and available information about the transaction.

A Joint Committee of Lok Sabha (National Assembly) observed that an effective system can operate where land records are properly computerized. They also warned abuse in such cases. In many circumstances the evidence of source may not be available.

There is a need for unearthing such undeclared and or benami assets however the efficacy and scope of efficacy will always remain questionable.

olutions and Suggestion.

Right selection of Adjudicating Authority-ICAP/KTBA Role?

Appropriate amendment/ lining up with other laws including Trust Act, and Income Tax Ordinance, 2001, Companies Ordinance, 1984 and Securities Act, 2015.

Assets held outside Pakistan? Transaction undertaken by Pakistani citizen; assets held outside Pakistan;

Identification, documentation of assets;

Declaration of assets followed by implementation of 'Benami' law: Transitional approach.