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'Benami Transaction & Properties

[Benami Transactions (Prohibition) Act 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:

1. The '**source**' of funds from which the asset is purchased
2. The '**title**' of the asset or the person who carry the legal title
3. The '**benefit**' arising from such assets.

A 'Benami' transaction is one where 'title' is held by a person other than then person who has provided the funding for acquisition of such assets and who effectively enjoys the 'benefit' of the said property.

A transaction will only be treated as benami if all three elements are present in a transaction. If title also confers 'benefit' it will be a 'gift' not a benami transaction.

Why 'Benami' transactions are undertaken?

1. To **defraud** the 'creditors'.
2. To **evade** 'tax' on the source of income used for benami transactions.
3. To keep assets **out of public eye**.

The 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 properties to save their holding from invaders etc.

This is the uniqueness of sub continent legacy. Now benami is used a mean to 'park untaxed money'.

Origin of Benami transactions (1)

The first question is why there is a need to introduce Prohibition of Benami Transaction' law in Pakistan?

In other jurisdictions, except India this matter is handled by '**Doctrine of Advancement**' which requires court to presume that the purchase is for the benefit of the person in whose favour the legal title is transferred even though the purchase money has been advanced by another person.

In sub-continent the legal history of benami law is different from other jurisdictions specially UK. This is effectively the only deviation from UK jurisprudence that has been fully adopted in sub-continent.

Sir Goarge Farwell during the hearing of the Privy Council way back in 1915 (*Bilas Kunwar vs. Desraj Ranjit Singh AIR 1915 PC 96*) accepted the prevalence of this system in the sub-continent and conferred recognition to the practice. Present Act has effectively changed that jurisprudence.

Origin of Benami transactions (2)

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

Consequently the answer to the primary question '*being the need for the banami*' law 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 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.

Origin of Benami transactions (3)

Under the income tax law the '**onus**' of proof of a benami transaction lies with the tax department. Though income tax law provides the right to tax the beneficial owner.

As against that under the benami law the '**onus**' shifts to the benamidar to prove that property in 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.

Lastly benami law deals with the whole property. Tax is limited to its charge only.

Benami transactions and Pakistani tax culture (1)

Identification of '**Benami Assets**' and '**Undeclared Assets**' are two different subjects.

In Pakistan, 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 transactions and Pakistani tax culture (2)

Major undeclared assets are 'Bank Accounts' and 'Securities'.

Nevertheless on account of inherent higher risks involved with reference to such assets benami arrangements in such cases are generally not undertaken.

The rationale of benami law, in these circumstances will lie on the matter of onus of proof that is now being 360 degree shifted 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. Almost same is given in the objective statement of the present Pakistan law.

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 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.

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 legal unless it complies with all the condition of benami transaction.

Prohibition is followed by confiscation. It is beyond taxability which is limited to percentage of incidence of tax.

Thus benami law is a confiscatory law, that 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. Same will be consequence of the effect of the provisions of Section 90 of the Income Tax Ordinance, in so far if they are in conflict with benami laws.

Process

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 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 would lie with the 'Adjudicating Authority' formed under the proposed Act.

Effects (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. Indian Committee of Lok Sabha (National Assembly) observed that an effective system can only operate where land records are properly computerized. They also warned abuse in such cases as 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 tune of efficacy will always remain questionable.

Way Forward

1. Right selection of Adjudicating Authority-ICAP/KTBA Role?
2. Appropriate amendment/ lining up with other laws including Trust Act, and Income Tax Ordinance, 2001, Companies Ordinance, 1984 and Securities Act, 2015.
3. Assets held outside Pakistan? Transaction undertaken by Pakistani citizen; assets held outside Pakistan;
4. Identification, documentation of assets;
5. Declaration of assets followed by implementation of 'Benami' law-transitional approach.