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Memorandum on the proposed Benami Transactions (Prohibition) Act 2016

Tax Commentary



This electronic version of our publication contains a summary of the proposed Benami Transactions (Prohibition) Act, 2016.

Our comments represent our interpretation of the legislation, and we recommend that while considering their application to any particular case, reference be made to the specific wordings of the relevant statutes.

26 August 2016



Proposed Benami Transactions (Prohibition) Act 2016 – A review

A Bill for proposed Benami Transactions (Prohibition) Act, 2016 has been approved by the Standing Committees (on Finance) of National Assembly and Senate and will now be presented for consideration and approval of the National Assembly.

We have summarized some key aspects of the proposed Act in this memorandum.

Background of legislation

A Statement of Objects and Reasons issued along with the Bill specifies the background of the proposed Act as follows:

- Property held *benami* has been causing concern to the tax authorities and past practice and experience has shown that *benami* transactions have often been resorted to for furthering illegal or questionable objectives, including the evasion of taxes. The assets which are taken through illegally earned money can be used for tax evasion or something more serious like financing terrorism. There is a realization that the Benami Transaction (Prohibition) Act is in operation in other countries of the region including neighboring country whereas Pakistan is at least two decades behind in this respect.
- The bill is therefore being introduced to deal with the problem of tax evasion and black money especially in the real estate sector and to target transactions that are carried out in other people's names.
- One of the major objectives of the proposed Act is to put an end to *benami* transactions and to empower the government to recover such property. By defining *benami* transaction, the legislature

intends to prohibit all persons from entering into such transactions.

- Other objectives specified in the Statement of Objects and Reasons are:
 - To ensure that if any person enters into a *benami* transaction in order to evade tax or avoid payment to creditors, the ultimate beneficial owner and persons who abet or induce any person to undertake such a transaction, suffer rigorous punishment.
 - To strengthen the law through empowering provisions prohibiting holding property as *benami* and restrict the right to recover or transfer property held in *benami*.
 - To establish Adjudicating Authority, set up Appellate Tribunal and specify the penalty for entering into a *benami* transaction and provisions for confiscation of *benami* properties.

The need for this legislation was felt for a long time not only to deal with the problem of tax evasion and black money as spelt out in in the Statement of Objects and Reasons reproduced above but also to meet the obligations of Pakistan toward the global community as Pakistan is a signatory to and has ratified the United Nations Convention Against Corruption (UNCAC) as far back as on 31 August 2007 and according to Article 23 of this Convention each State has inter alia agreed to adopt such legislative and other measures as may be necessary, to establish the following acts as criminal offences, when committed intentionally:

- The conversion or transfer of property, knowing that such property is the proceeds of crime, for the

purpose of concealing or disguising the illicit origin of the property or of helping any person, who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

- The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

Further under Article 31 of UNCAC, each State has interalia agreed to take such measures as may be necessary to:

- (a) enable confiscation of the following:
 - Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
 - Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.
- (b) enable the identification, tracing, freezing or seizure of any item referred to in above paragraph for the purpose of eventual confiscation.
- (c) regulate the administration by the competent authorities of frozen, seized or confiscated property covered in the above paragraphs.

This legislation was also necessary because currently there is no law in Pakistan that directly empowers the Government to confiscate benami properties and because in view of certain provisions of interalia Transfer of Property Act 1882, The Trust Act 1882, and Code of Civil Procedure 1908 etc. property transferred or held 'benami' may not be considered illegal *per se*. In fact, in some specified situations, Pakistan and

Indian courts have recognized and accepted the concept of "benami transactions".

In view of the above, while implementing the proposed Act, the government may need to review the relevance and amendments required to be made in other laws like Transfer of Property Act, Registration Act, Trust Act, Protection of Economic Reform Act, Income Tax Ordinance 2001 etc. to avoid conflicting situations, if any.

Effective date

The law shall be effective from such date as the Federal Government may notify. However, the Government may need to clarify whether this law will have any effect on benami properties which were acquired in past before the promulgation of this law.

Scope and extent

The law shall extend to the whole of Pakistan. Therefore, the question whether the properties of Pakistani residents situated outside Pakistan under benami arrangement would also fall within the ambit of this law needs to be clarified. If yes, than the modalities for confiscation of such foreign properties may need to be worked out in the light of existing / proposed agreements or arrangements with the foreign countries for confiscation of such foreign properties.

Key Definitions

Benami Transaction

Benami transaction, as per this Act, means:

1. A transaction or arrangement
 - (a) where a property is transferred to, or held by, a person and the consideration for such property have 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 providing the consideration;

1. A transaction or arrangement in respect of a property carried out or made in a fictitious name;
2. A transaction or arrangement in respect of a property where the owner of property is not aware of, or, denies knowledge of, such ownership; and
3. A transaction or arrangement in respect of a property where the person providing the consideration of property is not traceable or fictitious.

Certain transactions and arrangements have been excluded from the ambit of benami transactions and arrangements in the proposed Act. These include:

1. Properties held by a person in a fiduciary capacity and includes a trustee, executor, partner, director of a company, agent or legal adviser, and any other person as may be notified by the Federal Government for this purpose; or
2. Properties held by any person being an individual in the name of his spouse, child, brother and sister or lineal ascendant or descendent and the individual appear as joint owner in any document of such individual and the consideration for such property has been provided or paid out of the know sources of income of the individual.

Benami property

Any property which is the subject matter of benami transaction including proceeds from such property will be considered as 'benami property'.

Property

Under this law, 'Property' means:-

- Asset of any kind, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes rights or interest or legal documents or instruments evidencing title or interest in the property.

- Property in the converted form, if the property is capable of conversion into some other form including the proceeds from the property.

Benamidar and Beneficial owner

A person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and a person who lends his name are included in the definition of 'benamidar'.

A person whether his identity is known or not, for whose benefit the benami property is held by a benamidar, is termed as 'beneficial owner'.

Person

Person shall include;

- (a) An individual
- (b) A company
- (c) A firm
- (d) An association of person or a body of individuals, whether incorporated or not.
- (e) Every artificial juridical person, not falling under sub clause (a) to (d)

Authorities

The authorities for the purpose of this Act shall include:

- (a) Initiating Officer means a Deputy Commissioner of Inland Revenue appointed under section 208 of the Income Tax Ordinance 2001.
- (b) Adjudicating Authority shall consist of a Chairman and at least two other members to be appointed by the Federal Government.

A member of Inland Revenue Service who has held the post of Chief Commissioner or equivalent post in that service or a member of any Federal Service and who has held the post of Additional Secretary or equivalent post in that

service and has masters degree in law will be appointed as Chairman and members of the Adjudicating Authority.

- (c) Approving Authority means Commissioner Inland Revenue as defined under clause 13 of section 2 of the Income Tax Ordinance 2001, and
- (d) Administrator means Assistant Commissioner Inland Revenue appointed under section 208 of the Income Tax Ordinance 2001.

Prohibition on transfer of property

The benamidar will be prohibited from retransfer of benami property to the beneficial owner.

Imprisonment and fine

Where any person enters into a benami transaction in order to defeat the provision of law or to avoid payment of statutory dues or payment to creditors and any other person who abets or induces another person to enter into such transactions, he shall be punishable with imprisonment between one to seven years and shall also be liable to fine of up to 25 per cent of the fair market value of the property.

In addition, where any person who is required to furnish information under this law, wilfully gives false information, he shall be liable to imprisonment between six months to five years and shall also be liable to fine of up to 10 per cent of the market value of the property.

Procedure for confiscation

- Upon identification of any benami property, the Initiating Officer will conduct an inquiry or investigation against the benamidar, beneficial owner and the benami property.
- The Initiating Officer shall within 90 days from the date of issue of notice, with the prior approval of

Approving Authority, pass an order for provisionally attaching the property.

- Within 60 days from the date of attachment the Initiating Officer shall draw up a statement of the case and refer it to the Adjudicating Authority for further proceedings.
- Adjudicating Authority shall, after conducting appropriate proceedings, pass an order for revoking the attachment order or confirming the attachment order and make an order for confiscating the property.
- The Administrator would then have the powers to receive and manage the property and dispose such property in the prescribed manner as well as to obtain possession of the confiscated property.

Time limit for passing the Order of confiscation

No order for confiscating the Property shall be passed by the Adjudicating Authority after the expiry of one year from the end of financial year in which the reference is made by the Initiating Officer to the Adjudicating Authority.

Power to rectify Orders

Adjudicating authority or Tribunal may by an order in writing amend any order passed by it to rectify any mistake apparent from record on its own motion or on application made to them within a period of one year from the end of financial year in which the order is passed.

Appeal to Federal Appellate Tribunal and High Court

Any person, including the Initiating Officer, may prefer an appeal to the Federal Appellate Tribunal against the order passed by the Adjudicating Authority confirming or revoking the attachment order in respect of a

benami property within forty five days from the date of receipt of order.

Any party aggrieved by any decision or order of Federal Appellate Tribunal may file an appeal to the High Court within sixty days from the date of service of the decision or order of the Tribunal on any question of law arising out of such order.

Special Courts

The Federal Government in consultation with the Chief Justice of High Court shall by notification designate one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification for trial of an offence punishable under the proposed Act.



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