

Business in the age of Anti-Money Laundering law

Presented by:

Sunny Punamiya
Advocate

Date: 9th April 2020

Business in the age of Anti-Money Laundering Law

1. Enforcement Directorate is gaining a reputation of being aggressive and a ruthless investigating agency, not only amongst legal circles but also amongst Pan India Business and Corporate India-- rightly so.
2. Due to their ever-expanding powers on account of frequent amendments to Prevention of Money Laundering Act, 2002, it has become significant to understand the risks in conducting business, both domestically as well as internationally.
3. The Act that governs the offence of money laundering, i.e. Prevention of Money Laundering Act, 2002 [“Act”], has become stricter and provided more ammunition to the Enforcement Directorate [“ED”] to arrest and detect money launderers and money laundering, due to the amendments brought about by the Finance Act, 2019. Finance Act of 2019 received Presidents assent on August 1, 2019.
4. Diving straight into the provisions of the Act, the result of such amendments has provided supplementary power to the investigating agency under the Act, i.e. the ED in terms of attachment of property, investigation of an offence under the Act as well as what constitutes as offence of money laundering.

Offence
5. In order to understand the borders of the Act, it is vital to grasp as to what constitutes an offence under the Act.
6. The offence of money laundering is defined under section 3 of the Act, which has undergone a consequential change.

7. Prior to the Finance Act, 2019 section 3 of the Act covered the following acts of money laundering:
 - a. Concealment *or*
 - b. Possession *or*
 - c. Acquisition *or*
 - d. Use *or*
 - e. Projecting as untainted property *or*
 - f. Claiming as untainted property.
 - g. *In any manner whatsoever [added by the Finance Act, 2019]*
8. As can be seen '*In any manner whatsoever*' has been inserted by the Finance Act, 2019 thereby expanding the scope of the offence of money laundering into an extremely broad hemisphere leaving plenty of scope for interpretation and application of section 3 of the Act. Simply speaking, the said expansion emboldens the hands of ED for the purposes of investigation and attachment of assets.
9. '*In any manner whatsoever*' has an extremely wide connotation, which the Courts have not yet had the occasion to elucidate.
10. Second change brought about by the Finance Act, 2019 is inserting an '*Explanation*' to section 3 of the Act. The '*Explanation*' inserted by the Finance Act 2019 to section 3 of the Act makes the offence of money laundering a '*continuous offence*'.
11. A continuing offence means that the offence would not make come to an end once the collective acts of money laundering, i.e. concealing, layering and/or projecting it as --untainted is over. The offence of money laundering would continue until the time the beneficiary is enjoying or deriving fruits from the '*tainted*' property.
12. Hon'ble Supreme Court and Hon'ble Delhi High Court have contradictory views on the meaning and implication of

continuing offence. However, the ED maintains that the offence of money laundering under section 3 of the Act is correctly explained as a ‘continuing offence’. This is another example of the breadth and length of powers of Enforcement Directorate.

13. Thirdly, the Finance Act, 2019 expanded the scope of the definition of “*proceeds of crime*” too, which is defined under section 2(u) of the Act. In simple words, it now not only includes property derived from a schedule offence but also property derived as a result of any criminal activity relatable to a schedule offence.

14. It is important to observe the latter part of the explanation, which didn’t find its place prior to the Finance Act, 2019. By adding the latter part, i.e. ‘*any criminal activity*’, the Law-makers have expanded the meaning of “*proceeds of crime*” to include -- property

derived from any ‘*criminal activity*’.

15. The term ‘*criminal activity*’ is the key word, which did not find its place prior to the Finance Act of 2019. It is interesting to note that the term ‘*criminal activity*’ is not defined in Code of Criminal Procedure nor mentioned in Prevention of Money Laundering Act, 2002.

16. Thus the interpretation of the term ‘*criminal activity*’ is left to the Courts of Law or the investigating agency to decrypt and apply. Various Courts in India have interpreted the term ‘*criminal activity*’ in context of a particular case. However, it will be futile to attempt to interpret it for the present article as the facts of each case differ and thus the category of ‘*criminal activity*’ will differ in terms of the offence of money laundering.

17. Another controversy put to rest by the Finance Act, 2019 was whether the offences under the

said Act are cognizable or non-cognizable? It assumes importance in terms of pre-arrest bail, bail hearings or for that matter attachment of property.

18. Longstanding contradictory arguments as well as judgments were passed in terms whether or not offences under the Act are cognizable? Finance Act, 2019 has categorized the offences under the Act as 'cognizable and non-bailable'.

19. The meaning of the term 'cognizable' is that when an offence is a cognizable offence, it is deemed to be a serious offence and further that the a police officer may arrest a person without any warrant.

20. The changes brought about by the Finance Act, 2019 is significant and far-reaching. If one traces the intention of the Legislature in bringing the said changes into force, one can ascertain from the parliamentary debates, its

intention to book the persons responsible to plunder the economy and hoard illegal or tainted money outside the country having serious adverse impact to the economy of the State. With this brief intention in mind, the Legislature has brought about swooping changes in the Act.

21. But the question again arises regarding the safety or measures one must take while conducting business in light of the provisions in the Act, some of which were described in the present article.

22. In order to throw a light into the same let us take an example of a Businessman seeking to purchase a property for any purpose, i.e. redevelopment, seeking to make a second home, housing an NGO etc. If the subject-matter property has been purchased from an individual, who is arraigned as an accused for charges of money laundering, *prima facie*, the investigating agency would be acting within four corners of

law in attaching the subject-matter property.

23. All defenses of the concerned businessman that he has purchased the property in a bonafide manner or the defense of the concerned accused that the subject-matter property has not been purchased by laundered or tainted money --would be futile.

24. ED would be acting legally in *prima facie* attaching the property, thereby defeating all claims temporarily, as per the changes brought about by the Finance Act, 2019. This is just one small example of the implication of the changes in the said Act.

25. As can be seen the Act has become more rigorous and has armed the ED of swooping powers enabling them to investigate and attach properties outside the borders of India as well.

26. PMLA empowers the ED to attach any property located

outside the shores of India. ED would also be within its powers to auction the property in the open market. Thus a bonfide purchaser of the property would have to initiate appropriate legal proceedings in order to claim his rightful share upon the property and convince the concerned Court of Law that-- it is bereft of any tainted money.

27. Looking at the power and jurisdiction of ED, it can contrary be argued whether it is a step in the right direction to arm the ED with sweeping powers especially keeping in mind the rampant corruption and degree of control of the Centre which generally wields upon such investigating agencies.

28. It is a known fact that Central Bureau of Investigation has often been termed a 'caged parrot'. It is apprehended and feared that ED does not come under any leash.

29. The changes brought about by the Finance Act of 2019 shows the will to detect and prevent money laundering across the shores but only time will tell whether it still remains a free bird?
