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RECENT DEVELOPMENTS ON TAXATION OF UNDISCLOSED INCOME

Recent developments on taxation of undisclosed income can be divided into development under the provisions of the Income-tax Act, 1961 (**'the Act'**) and other developments like the amendments in Prohibition of Benami Transactions Act, 1988 **("the Benami Act")**. As there has been wide and sweeping amendments in the Benami Act, by the Benami Transaction (Prohibition) Amendment Act, 2016, which has virtually substituted the new Act for an old Act, in the present paper, the provisions and relating to the laws on Benami properties and Benami transactions is first dealt with in Part-A, and the amendments in the Act have been dealt with in Part-B.

PART-A
LAWS RELATING TO BENAMI TRANSACTIONS AND BENAMI PROPERTIES

Before dealing with the laws for the 'benami properties' or 'benami transactions' it is first necessary to understand the meaning of the term 'benami'. The term '*Benami*' is a Hindi term which is ordinarily used to denote two types or classes of transactions –

(i) A transaction which is a real transaction of purchase of property wherein the purchaser of the property purchases the property in the name of a third person (Benamidar). This transaction is a real transaction in the sense that the seller has actually sold the property for consideration and there is a transfer of the ownership of the property. However, the name mentioned in the transfer Deed / document is not of the actual purchaser of the property but of benamidar.

(ii) 'Benami' is also sometime referred as denote a sham transaction which would, for example, include a case of a person transferring the property in the name of someone else without the actual intention of transferring the title in the property. In this type of transaction, the validity of the transaction is itself doubtful.

The term 'benami' is more accurately referred to denote the first class of transaction aforesaid and not the latter. The later come in the category of a sham transaction and not a benami transaction.

Originally, there were no provision in the Statute prohibiting an assessee from entering into a transaction which can be referred to as a Benami transaction. However, the burden of proof is on the person who alleged that the transaction is a Benami transaction and the owner as referred to in the document is not the real owner of the property. It is based on the ordinary rule of evidence that the apparent must be considered as real unless it is proved to the contrary i.e., the person named as purchaser in the agreement must be accepted as the owner of the property until it is proved to the contrary by the person who is alleging that the person is not the actual owner. [***See CIT v/s. Daulatgram Rawatmull 87 ITR 349 (SC), Kalwa vs. UOI 49 ITR 165 (SC) and Mahim vs. CIT 249 ITR 71 (Ker)]***.

The above rule of evidence is not without exception. One such exception is when there is an allegation by the Department that the documents relied on are self-serving documents, it is open to the taxing authorities to look into the surrounding circumstances to find out the reality of the transaction and in such a case, the apparent need not necessarily be accepted as real. [***CIT* v/s *Durgaprasad More* 82 ITR 540 (SC) and *Sumati Dayal* v/s *CIT* 214 ITR 801 (SC)]**.

The above position with respect to the benami properties and benami transactions changed from the year 1988, when the law was incorporated prohibiting a person for asserting an ownership of a benami property or defending any proceedings by alleging the real ownership of a benami property. Entering into a benami transaction was prohibited and the same was also made an offence. The development of the Benami law can be discussed as under -

Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988.

The first law on the benami transaction and benami property was by way of the Ordinance passed by the President on 19th May, 1988. The operative part of the Ordinance was Clause (2) which provided that no suit, claim or action to enforce any right in respect of any property in Benami against a person in whose name the property is held Benami or against any other person shall lie by or on behalf of a person claiming to be a real owner of the property. Therefore, after the Ordinance, it was not open to any person to make a claim of actual ownership

contrary to what is actually stated in the documents. Clause (3) of the ordinance provided exception to the aforesaid position with respect to the property held in a Hindu Undivided Family (HUF) for the benefit of the coparceners or properties held by trustees or in fiduciary capacities.

Benami Transactions (Prohibition) Act, 1988

The Ordinance on benami transaction was later enacted into Benami Transactions (Prohibition) Act, 1988 which received the consent of the President on 5th September, 1988. The Act not only enacted clause (2) and (3) of the Ordinance as stated aforesaid but also prohibited a person from entering into a benami transaction. For the first time entering into a benami transaction was treated as an offence, the consequence of which was that the person entering into such a transaction was liable for imprisonment up to three years or fine or both. The benami property was also liable to be acquired by the Government.

The Benami Act was originally enacted with only 9 sections. Section 2(a) of the Act defined Benami transaction to mean 'any transaction in which property is transferred to one person for a consideration paid or provided by another person.' Section 3(1) of the Act prohibited any person from entering into a benami transaction. section 3(2) provided the exceptions to the transaction being a benami transaction. Section 3(3) of the Benami Act provided punishment by way of imprisonment for a term which may extend to three years or fine or both for a person entering into a Benami transaction. Section 4 of the Benami Act incorporated clause (2) of the Ordinance. Section 5 provided for acquisition of the Benami property by the such authority, in such a manner and after following such procedure as may be prescribed.

Although the Parliament had enacted the Benami Act, however, it largely remained inapplicable as the Government did not notify any authority under the Benami Act competent to acquire the property. The government also did not prescribe the procedure to be followed by the Authority for the acquisition of the property. Therefore, for all practical purposes, the provisions of the Act were never given effect to, except the provisions of section 4 which prohibited any person from asserting the right as the real owner of a benamidar property or defending any proceedings by taking any stand as the real owner of a Benami Property.

The issues which arise for consideration under the Benami Act are as under:-

1. Meaning of Benami transaction:

Benami transaction has been defined very widely in the Benami Act to include any transaction where property is purchased by a person for a consideration paid by another person. The issues which arose for consideration was whether the payment of consideration by another person by itself was sufficient to treat a transaction as a Benami transaction. For eg. if a person buys a property in the name of another with the intention to gift the same to another, whether the same could be regarded as a Benami transaction. Even before the enactment of the Benami Act, in interpreting the term 'benami transaction', the Courts have consistently taken the view that the intention of the person who is paying the consideration is of paramount consideration. i.e. to say it is not sufficient that the consideration has been paid by a person other than the purchaser but there must also be an intention by the person paying the consideration to use or enjoy the benefit form the property. [See ***Bhim Singh vs. Kan Singh AIR (1980) SC 727, Heirs of Vrajlal J. Gantra vs. Heirs of Purshottam S. Shah 222 ITR 391 (SC), and First ITO vs. Dhanalakshmi Anmal MR (1978) 112 ITR 413 (Mad)]***

Even though, the intention of the payer of the consideration has not been provided in the Benami Act, the same has to be read into the provision and considered to determine whether a transaction is a Benami transaction or not. To give any other interpretation would render the provision arbitrary and unreasonable as various genuine transactions would also come within the ambit of Benami transaction.

2. Applicability of section 3 of the Benami Act to transactions executed before the enactment of the Benami Act -

The issue which arose for consideration was whether section 3 of the Benami Act which prohibits any person from entering into a Benami transaction and treats the same as an offence would be applicable to Benami transactions which were executed into before the enforcement of the Benami *Act*. This issue came up for consideration before the Apex Court in the case of **Mithilesh Kumari v Prembehari Khare 177 ITR 97,** wherein the Apex Court held section 3(1) of the Benami Act to be applicable prospectively i.e., the said section will be applicable to the Benami transaction executed from the date on which the prohibition came into operation i.e., 5th September, 1988. Relying on Article 20 of the Constitution of India, the Apex Court has held that section 3(3) of the Benami Act creates a new offence for person entering into a Benami transaction and, hence, such offence would have prospective operations. Subsequently, the larger bench of the Supreme Court in **Rajagopala Reddy v Padmini Chandrashekaran 213 ITR 340**, affirmed the decision of the Division Bench in the case of **Mithilesh Kumari**

(supra) to the extent of the finding given with respect to section 3 of the Benami Act.

3. Retrospective applicability of section 4 of the Benami Act:

In so far as retrospective applicability of section 4 of the Banami Act, the Division Bench of the Supreme Court in the case of **Mithilesh Kumari v Prembehari Khare (supra)** held that if the suit or an appeal is pending in any Court as on the date of the enactment of the Benami Act, the provisions of section 4 would be applicable for such proceedings, and, it would be open to parties to base its argument on the provisions of section 4 of the Benami Act. The Supreme Court was itself concerned with a case where the appeal from the High Court was pending before the Supreme Court when the Benami Act was incorporated, and the Apex Court held that the provision of section 4 of the Benami Act would be applicable to such proceedings.

The decision of the Division Bench was, however, partly reversed by the Larger Bench of the Supreme Court in **Rajagopala Reddy v Padmini Chandrashekaran (supra)** wherein the Larger Bench held as under –

(i) Section 4(1) of the Benami Act would only be applicable to Suits filed or proceedings initiated after the Act came into force and cannot be applied to any proceedings initiated before the said date. However, if the suit is filed after the Benami Act was enforced, section 4(1) would be applicable even though the property may have been purchased before that date and to that extent the section is retroactive in operation.

(ii) In so far as section 4(2) of the Act is concerned, the Court held that even though the suit may have been filed before 19th May 1988, if before the stage of filing the defence by the real owner is reached, section 4(2) is operative, then no such defence would be available to the Defendant in view of section 4(2) of the Benami Act. However, if such defence is already allowed in the pending suit prior to the coming into operation of section 4(2), then the court is bound to decide the issue considering the defence already allowed to be taken to the Defendant.

(iii) The Supreme Court also held that the aforesaid interpretation does not make the provision constitutionally invalid.

Prohibition of Benami Property Transactions Act, 1988

The Legislature has extensively amended the Benami Act of 1988 by the Benami Transaction (Prohibition) Amendment Act, 2016 Act, such that the old Act consisting of 9 sections has been amended to now constitute of 72 sections. The Amendment Act of 2016 has virtually replaced the old Act with a new Act. The

rational for amending the old Act and not repealing the old Act and enacting a new Act, was explained by the Finance Minister at the time of introduction of the Amendment Bill in the Rajya Sabha on 2nd August, 2016:-

> *"Now the Act has only nine Sections and the amendments were over 74 or so; so new clauses were to be added. One of the reasons why it was felt necessary that you can't have a new Act altogether —there was one proposal to have a new Act—is that if you have a new Act then the penal provisions on the new Act would not be able to apply retrospectively because of Article 20 of the Constitution. And, because they could not apply retrospectively, all those who have violated the 1988 law would go scot free. As a result of which, these amendments were proposed. The matter went to the Standing Committee, which considered it, and finally, the Lok Sabha dissolved and the Bill lapsed with the Lok Sabha. The present Government again reintroduced this Bill. It has been considered by the Standing Committee and some recommendations have been made. I have accepted most of those recommendations."*

The Finance Minister had made similar statement in the Lok Sabha on 27th July, 2016 at the time of the debate on the Amendment Boll of 2016. Therefore, if the old Act was repealed and substituted by a new Act, it would have been possible for anyone to take the argument that only the offences committed after 2016 (after the new enactment) will be covered in the said Act and, hence, all offences committed from 1988 up to 2016 would become un-punishable.

The Amendment Act of 2016 changed the title of the Act from Benami Transactions (Prohibition) Act,1988 to Prohibition of Benami Properties Transaction Act, 1988. Section 1(2) of the Amendment Act 2016 provides that the Amendment Act of 2016 would come into force on such date as the Central Government may notify. The Central Government has notified the said date vide Notification No. SO 3289(E) dated October 25, 2016 as 1st November, 2016. This means that the amendments by the Amendment Act 2016 have been made in the Benami Act with effect from 1st November, 2016.

The relevant provisions of the Benami Act as amended by the Amendment Act of 2016 and the issues arising their form are discussed as under-

1. Extent and commencement of the Act –

Section 1(2) provides that the Benami Act would extend to the whole of India except the state of Jammu and Kashmir.
Section 1(3) of the Benami Act is peculiarly worded as under -

"(3) The provisions of sections 3, 5 and 8 shall come into force at once, and the remaining provisions of this Act shall be deemed to have come into force on the 19th day of May, 1988."

Subsection (3) of section 1 is one of the few sections which has not been changed by the Amendment Act of 2016. Originally, sub-section (3) was inserted in the Act to provide for sections 3, 5 and 8 to come into force at once. These sections were inserted for the first time in the old Act and there were no corresponding provisions in the Benami Ordinance. These sections treated Benami transactions as offence and provided for the consequences of entering into such a transaction and, hence, these provisions came into force on the date of the receipt of the assent of the President i.e., 5th September, 1988. The other section specially section 4 with respect to prohibition of a person to assert his claim against the benamidar or to defend a suit by making such a claim was deemed to come into force from 19th May, 1988 as section 4 was part of the original Ordinance which was passed on 19th May, 1988. The said section constitutes clause (2) of the Ordinance.

The issues which arise for consideration is the impact of subsection (3) qua the amendments made by the Amendment Act of 2016. In view of sub-section (3) --

- From when would be the provisions of sections 3, 5 and 8 of the Amended Benami Act be applicable? and
- From when would the other provisions of the Amended Act be applicable?

There is no dispute on the fact that the Amendment Act of 2016 would come into force w.e.f. 1st November 2016 and, hence, the amendments made by the Amendment Act would also be with effect from 1st November, 2016. However, if one was to look at the literal meaning of sub-section (3), then the peculiar wording of the provision would mean that sections 3, 5 and 8 of the Benami Act would come into effect from 5th September 1988 and all other sections would come into effect from 19th May, 1988 i.e., all amendments made to the Act would always be having a retrospective applicability irrespective of the nature and purpose of the amendment. If this interpretation is correct, then it would also mean that if there is a change in the numbering of sections, which has indeed happened in the Amendment Act of 2016, same provision would be applicable from different dates. For example, original section 8 in the old Act has been renumbered as section 68 in the new Act. This would mean that the same section, dealing with power to make Rules, would have different dates of

applicability while reading the same in the Old Act i.e. w.e.f. 5th September, 1988 and the Amended Act i.e. w.e.f. 19th may, 1988.

On the other hand, if one reads sub-section (3) of section 1 to be relevant only for the purpose of coming into force of the Act for the first time, then each amendment subsequently would have to be considered from the date from which the amendment has been made effective. If this interpretation is correct, then only if a provision has been specifically inserted with retrospective effect, would the same be required to be treated as being applicable retrospectively.

Although the matter cannot be said to be free from doubt, the later view of reading sub section (3) of section 1 to be applicable only for the enforcement of the Act for the first time seems to be the better interpretation. However, the matter cannot be said to be free from doubt and one cannot rule out the other view i.e. earlier view as being a possible view on this issue.

2. Benami transaction:

The term 'Benami Transaction' has been defined in section 2(9) of the Benami Act and after the Amendment in 2016, 4 types of transactions have been treated as benami transaction –

A. A transaction or arrangement -
   a. where a property is transferred to or held by one person and the consideration for such property has been provided or paid by another person; and
   b. the property is held for the immediate or future benefit, directly or indirectly, of the person who has provided the consideration.
B. A transaction or an arrangement in respect of a property carried out or made in a fictitious name;
C. A transaction or arrangement in respect of a property where the owner of the property is not aware of or denies knowledge of such ownership; and
D. Transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious.

There are 4 exceptions provided to the Benami transaction in clause (A) above-

(i) if the property is held by a Karta or a member of the Hindu Undivided Family (`HUF') and the property is held for the benefit of the members of the HUF;
(ii) if the property is held by a person standing in fiduciary capacity such as trustee, executor, partner, director etc.;
(iii) If the property held in the name of spouse or child of the individual and consideration has been paid from the known source of the individual; and

(iv) If the property is held jointly by the individual and his or her brother or sister or lineal ascendants or descendants, when the joint ownership is reflected in any document and consideration is paid out of known source of individual.

An Explanation has also been inserted to provide that a transaction covered by section 53A of the Transfer of Properties Act would not come within the ambit of the benami transaction if certain conditions as specified therein are fulfilled.
The definition has been enlarged by the Amendment Act to include various other types of transactions within the ambit of benami transaction which was not covered by the Old Benami Act. The issues which arise for consideration while understanding the meaning of the term Benami transaction are as under:

A. Whether the enlarged definition would be applicable retrospectively or prospectively -

If the view that the amendments made by the Amendment Act of 2016 is applicable from 1st November, 2016 is correct then the amended definition would be applicable to the transactions effected or executed after the 1st November, 2016. However, if a transaction was a Benami transaction even as per the un-amended provision, then for such transaction, proceedings can be initiated by the Department even as per the procedure prescribed by the Amendment Act. As the procedural sections would be applicable for any proceedings initiated after the insertion of the procedural section.
Even of the aforesaid view is not accepted and it is held that by virtue of section 1(3) of the Act, all the provisions would be applicable retrospectively, then also only clause (A) of the definition, being similar to the definition of benami transaction in old section 2(a) of the Benami Act, would be held to apply retrospectively i.e. with effect from the enactment of the Act. In so far as clauses (B), (C) and (D) are concerned, the same treats certain transactions as benami transaction for the first time as the same were not treated as Benami transaction in the old Act. In view of Article 20 of the Constitution of India, the same would have to be treated as applicable prospectively i.e., transactions executed after 1st of November, 2016 as an act cannot be made an offence retrospectively, when the said act was not an offence when it was committed. The decision of the Full Bench of the Supreme Court in the case of **Rajagopala Reddy v Padmini Chandrashekaran (supra)** would support the aforesaid interpretation. Similar view has also been expressed by the Appex Court in the cases of ***Shivbahadur Singh Rao* v *State of U.P.* 1953 SCR 1188 and *Sajjan Singh* v *State of Punjab* 1964(4) SCR 630**.

B. Meaning of 'transaction' or 'arrangement':

Section 2(31) of the Benami Act provides that the words or expression used in the Benami Act and are not defined in the Act but definition in the Indian Trust Act, 1882, Indian Succession Act, 1925, Indian Partnership Act, 1932, the Income-tax Act, 1961, the Depositories Act, 1996, the Prevention of Money Laundering Act, 2002, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the same meaning respectively assigned to them in those Acts.

The term 'transaction' is not defined in the Benami Act and does not seem to be defined in any of the aforesaid Act and, therefore, one will have to give natural meaning to the term 'transaction' to understand the scope of the Benami transaction. As per the Black's Law Dictionary, transaction is, *inter alia*, defined as under:-

"Any activity involving two or more persons"

In so far as the term 'arrangement' is concerned, the same has not been defined in definition section of the Income-tax Act, but there is a definition of the term 'arrangement' in section 102(1) of the said Act. Section 102 defines the term 'arrangement' specifically for Chapter X-A of the Income-tax Act which deals with General Anti-Avoidance Provisions. The issue which arises for consideration is whether in looking for meaning of a term in another Act, one can look at only the general definition of the Act or it is also possible to look at specific definition, i.e., definition only for the purpose of a particular section or Chapter. As specified definitions are only for the limited purpose, the same cannot be regarded as meaning assigned to the term in the Act. For eg. if the term arrangement is used in any section which does not come within chapter X-A of the Income-tax Act, the definition of the term 'arrangement' in section 102 cannot be pressed into service. Hence, the said definition cannot be said a meaning assigned to the term 'arrangement' under the Act. Hence, reference cannot be made to such limited definition to understand the meaning of the term in the Benami Act.

Accordingly, one will again have to understand the term 'arrangement' through its natural meaning. The term 'arrangement' is defined in the Black's Law Dictionary to *inter alia* mean

> *"the mode or system in which parts of element have been put or disposed in accordance with some plan or design; the way in which something is organized"*

C. Consideration provided or paid:

A transaction would come within the scope of 'Benami transaction' when the consideration for the transaction is either 'paid' or 'provided' by a person other that the transferee of the property. The scope of the term 'provided' came up

for consideration before the Apex Court in the case of **Pawan Kumar Gupta v Rochiram Nagdeo (1994) 4 SCC 243** wherein the Apex Court was concerned with a case of a father giving the money to the son for the purchase of the property. The Court held that the transaction cannot come within the ambit of a Benami transaction as the consideration for the purchase of the property cannot be said to be provided by the father. The supreme Court held as under –

"The word "provided" in S. 2(a) of the Benami Transactions (Prohibition) Act cannot be construed in relation to the source or sources from which the real transferee made up the funds for buying the sale consideration. The words "paid or provided" are disjunctively employed in the clause and each has to be tagged with the word "consideration". The correct interpretation would be to read it as "consideration paid or consideration provided". If consideration was paid to the transferor, the word provided has no application for such sale. The question of providing the consideration would arise, only if the consideration was not paid in regard to a sale transaction. Any other interpretation may harm the interest of persons involved in genuine transactions, e.g., a purchaser of land might have availed himself of loan facilities from banks to make a purchase money. In such a case it cannot be said that since the money was provided by the bank it was a benami transaction. So even if the appellant had availed himself of the help rendered by his father for making up the sale consideration that would not make the sale deed a benami transaction so as to push it into the forbidden area envisaged in S. 3(1) of the Act."

The Supreme Court in the aforesaid case has given a very restricted and narrow view of what comes within the term "provided'. On the basis of the decision of the Apex Court, one can take the view that in case, the beneficial owner gave the money to the benamidar who in turn purchases a property after making payment to the seller from the said money, the said transaction would not be a Benami transaction as the consideration of for the purchase of the property has neither being 'paid' or 'provided' by any other person. In other words, the decision of the Apex Court has almost rendered the term 'provided' as redundant.

D. Property held for the benefit of the 'beneficial owner':-

For a transaction to be held as a 'Benami transaction', it is not sufficient that the consideration has been paid by a person other than the transferee of the property, but the property must also be held for the immediate or future benefit, directly or indirectly, of the person who has paid the consideration. The issue which arise for consideration is as to what would come within the ambit of the term 'benefit' In interpreting section 62 of the Income-tax Act, which also refers to

direct or indirect benefit to the transferor, the Hon'ble Madras High Court in the case of **Manickavasagan v/s ITO 53 ITR 292, 305** per Jagadishsan, J. held that the characteristic of a benefit is that it has to be real and not notional, concrete and not abstract, certain and not conjectural. It is also held that if the benefit received by a person is illusory or so slight as to be considered negligible, then it would not amount to a direct or indirect benefit to that person. From the above it would seem that for a transaction to be treated as a benami transaction, the person providing the consideration must get some real and tangible benefit from the property. The benefit could be an immediate benefit i.e. at the time of purchase of property or the benefit could be at a future point of time.

The section further treats a transaction to be a Benami Transaction even when there is an indirect benefit to the person who has paid the consideration. The question as to what would come within an indirect benefit is a very subjective question and one will have to look at the facts of a case to determine whether there is an indirect benefit or not. For eg. if the property purchased by Mr. X, for which consideration is paid by Mr. A, is used for the benefit of a company of which Mr. A owns all the share capital. In such a case, one can conclude that it is a case of an indirect benefit and, hence, transaction would be a Benami transaction. however, the contrary i.e. the consideration paid by the Company and property used for the benefit of Mr. A, will not be treated as a Benami transaction as a benefit to as shareholder cannot be regarded as an indirect benefit to the company. The only way the Department can allege Benami transaction in such a case would be by arguing that corporate vile of the Company be lifted and the consideration should be treated as paid by the Mr. A itself.

E. Exceptions to the Benami Transactions covered by Clause (A) –

There are 4 exceptions provided to benami transactions which are covered in clause (A) of the definition. The following interesting issues arise for consideration on the interpretation of the exceptions:-

(I) Property purchased by an individual in the name of his brother or sister would be regarded as a benami property - such transaction would not come within the exceptions provided in clause (iii) as only spouse or child is covered therein or clause (iv) as only joint ownership is exempted in clause (iv). Therefore, such a transaction would be regarded as a benami transaction and both the individual and relative of such individual would be liable to the punishment under the Benami Act and the property will also be confiscated.

(II) Property purchased by an individual in the name of spouse or child not from a known source. The issue which would arise in the present case is whether the spouse / child who has acted in good faith agreed to become a purchaser of a property for which consideration is paid by the husband / father without realizing the same was not paid from a known source, would be liable for punishment under section 3(2) of the Benami Act. Similar issue will arise in the case of a joint purchaser of a property in case of other family members when the consideration is not paid out of a known source. In such a situation, the spouse or the family member of the individual cannot be said to be liable of committing an offence and be punishable under section 3(2) of the Act.

(III) Addition made under section 69B of the Income-tax Act in the hands of a HUF: When an addition is made under section 69B of the Income-tax Act in the case of an HUF, it would mean that the property has been purchased by the HUF not from a known source and, therefore, the same would not come within the exception provided in clause (1) of the section. Would such a property automatically become a benami property liable for consequences provided in the Benami Act?

F. Necessity of the Explanation to section 2(9):

The Explanation to section 2(9) provides that a transaction covered by section 53A of the Transfer of Property Act would not come within the ambit of the Benami transaction if certain conditions as specified therein are fulfilled. The issue which arises for consideration is even if the conditions as specified therein are not fulfilled, would the transaction come within the main part of the definition of the Benami Transaction i.e., would any of clauses (A) to (D) would apply. If the same would not be applicable, then what was the need for the Explanation and what would be the consequence of non-fulfilment of the condition of the Explanation.

G. **Issues for Consideration –** Considering the definition of Benami transaction, the following issues arise for consideration –

a. Whether cash found in the course of search which cash represents undisclosed income of an assessee be said to be benami property?

b. Whether the amount received as loan be regarded as Benami Property, if the person giving the loan is not traceable and addition has been made under section 68 of the Act.

c. Whether the amounts received on sale of goods, where the vendor does not have names of the purchasers, be regarded as benami property?

d. In a bogus purchase case, the allegation of the Revenue is that the person who has purchased the bill has paid cheque and has received back the amount in cash. Can the department take the stand in such case, that the person who has received the cheque is holding the amount on behalf of the person who has issued the cheque and, consequently, it is a case of benami transaction?
e. Whether bogus transactions and sham transactions would come within the ambit of Benami transaction?

3. Benamidar and Beneficial Owner:

Benamidar is defined to mean a person or a fictitious person in whose name the Benami property is transferred or held. Beneficial owner is defined to mean a person, whether his identity is known or not, for whose benefit the Benami property is held by a benamidar. Therefore, the person whose name is mentioned in the document to be the owner, will be regarded as the benamidar of the property and the person who has actually paid the consideration and for whose benefit the property is acquired would be regarded as the beneficial owner of the property. The important point to note is that the person who has paid the consideration is regarded as the Beneficial owner of the property for the purpose of the Benami Act and is not treated or regarded as the owner of the Property.

The issue which arise for consideration in the present case is that in case a person who was a benamidar dies and such benami property is inherited by his legal heirs, will the property still continue as a benami property in the hands of the legal heirs and be subject matter of confiscation or other penal provisions of the Act?

4. Property covered under the Benami Act:

The term 'property' has been defined in in section 2(26) of the Benami Act-
(i) to mean asset of any kind, whether moveable or immovable, tangible or intangible, corporeal or incorporeal,
(ii) to include any right or interest or legal document or instrument evidencing title to or interest in the property;
(iii) when the property is capable of conversion into some other form, then the property in the converted form;
(iv) to include proceeds from the property.

The scope of the term 'property' has been enlarged by the Amendment Act of 2016 to include certain assets as property which would not have been regarded as property before the Amendment. The question that arises for consideration is applicability of the provision for properties coming within the scope of the amended definition of the term "property", but not a property as per the old definition, which were acquired before the amendment. As discussed earlier, an offence cannot be made applicable with retrospective effect and, hence, any asset which comes within the ambit of the term property as per the amended definition but was not a property as per the old definition, the provisions of the Benami Transactions (Prohibition) Amendment Act, 2016 would apply prospectively to such property i.e., from 1st November, 2016.

The following issues arise for the consideration on the basis of the definition of the property-

i) Having regard to the above definition of property, the issue which arise for consdeirstion is whether the following come within the ambit of the term property-
   a. Fixed Deposits;
   b. Land which is mortgaged;
   c. receivables from debtors;
   d. stock-in-trade;
   e. Bank balance;
   f. Balance in PPF Account;
   g. Cash.

ii) In the amended definition of the term property, the 'proceeds from the property' is also held to be a property and, therefore, the issue which arise for consideration is whether this implies that property must be an asset which is capable for realization?

iii) The following issues which arises for consideration can be explained by the following example –
   a) Mr. A purchased a property a benami property in the name of Mr. X in the year 1990. The said property was sold in the year 2015, i.e. before the amendment for Rs. 1,00,00,000/-. Now the question is whether the 'proceeds of the property' would itself be regarded as 'Benami property' or not?
   b) Whether it would make a difference if the property is sold in the year 2017?
   c) Even if the 'proceeds from the property' i.e. Rs. 1,00,00,000/- is regarded as property can the same be treated as benami transaction

as defined in section 2(9) of the Benami Act. And if so, it would come within which clause of the said section?

iv) What is significance of the words `where the property is capable of conversion ….". Does the phrase "where the property is capable of conversion the property in converted form" cover assets acquired by utilization of proceeds realised by sale of another asset e.g. in a case where gold is sold and with the proceeds so realized shares are purchased or alternatively, is it that it is only that property whose form can be converted will be covered by this phrase e.g. where bullion is converted into jewellery or where a loose diamond is used in a necklace, debenture are converted into share, etc.

5. Transfer:

The term 'transfer' has been defined in section 2(29) of the Benami Act as an inclusive definition to include sale, purchase or any other form of transfer of right, title, possession or lien. With respect to the aforesaid definition the issues which arise for consideration is –

(i) As the term 'transfer' has been defined in the Benami Act, but it is merely an inclusive definition to mean any form of transfer of right, title, possession or lien, whether section 2(31) of the Benami Act, which provides that meaning of a term in other Acts can be looked into, in case the term is not defined in the Benami Act? Can it be said that the term 'transfer' is not defined in the Benami Act?

(ii) Even if section 2(31) can be applied, whether one can look at the definition of 'transfer' in section 2(47) of the Income-tax Act considering (i) that the same is also an inclusive definition and (ii) the definition is a restrictive definition which is applicable qua capital assets?

(iii) Whether the definition under the Money Laundering Act, 2001, which defines transfer to include sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien can be considered?

6. Scope and applicability of section 2(31) of the Benami Act

Section 2(31) provides that for the words not defined in the Benami Act, meaning of the term in other specified Acts can be looked into. An interesting issue would arise for consideration is if a term is defined differently in the Acts mentioned therein, then which of the definition will have to be considered for the purpose of the Benami Act. For example, under the Companies Act, 2013,

a 'company' is defined to mean a company incorporated under this Act or under any previous Company Law i.e., a foreign company is not included in the definition of the `company'. Under the Income-tax Act, the term 'company' is defined much widely to mean an Indian company or body corporate incorporated by or under a law of the country outside India. Therefore, the question which arise for consideration is whether a foreign company is covered as a person under the Benami Act? Even if the foreign Company is not regarded as a company, would the same come within the ambit of an artificial juridical person?

7. Substantive Provisions in the Benami Act with respect to Benami Transaction:

The substantive provisions with respect to a Benami transaction covered in Chapter-II of the Benami Act are as under:

A. **Prohibition for entering into a benami transaction** - Section 3(1) of the Benami Act prohibits any person from entering into a transaction which is in the nature of benami transaction.

B. **Consequence of entering into a Benami Transaction -** Section 3(2) provides that any person entering into a benami transaction shall be punishable with imprisonment for a term which may extend to 3 years or with fine or both.

The issue which arises for consideration is whether both the 'benamidar' and 'beneficial owner' are covered within the ambit of sub-section (2) of section 3? There can be no dispute as to the fact that 'beneficial owner' is covered under section 3(2). What needs to be considered is whether the 'benamidar' is covered or not? If the benamidar is covered, would he be liable when his name has been entered as benamidar without his knowledge or concurrence? What about a spouse being purchaser of property purchased by the husband not from a known source? The three possibilities which needs to be considered are – (i) benamidar is covered in all case (ii) Benamidar is not covered in any case and (iii) 'benamidar' may be held for prosecution depending on his conduct and actions.

Sub-section (3) of section 3 provides that any person entering into benami transaction after the commencement of the Amendment Act of 2016, would be punishable in accordance with the provisions contained in Chapter-VII. Chapter-VII consists of sections 53 to 55 dealing with offences and prosecution. Section 53 of the Benami Act provides that when a person entering 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, then the beneficial owner, the benamidar and any other person who abets or induces any person to enter into a benami transaction, shall be guilty of offence of benami transaction. Whoever is found guilty of such an offence, he is punishable with imprisonment which shall not be less than one year but which may extend to seven years and also fine up to 25% of the fair market value of the property. In this section although benamidar is specifically held to be guilty, but the benamidar should be held guilty only if the benami transaction has been carried on with his knowledge and consent.

Section 54 provides for a punishment not less than 6 months but up to 5 years on any person who is required to furnish information under this Act and who knowingly furnishes false information to the Authority or furnishes false documents in any proceedings under the Act. From this provision, it is clear that it is not intended to cover a person who has either in good faith or mistakenly submitted some information which turns out to be false or incorrect.

C. Prohibition for asserting or defending against any claim against a Benami Property.

Section 4 of the Benami Act provides that a person claiming to be the real owner will not be able to enforce his rights in respect of a benami property against the benamidar or against any other person. Similarly, no defence would also be permissible to the person claiming to be the real owner of the property against the benamidar or any other third person. The import of section 4 of the Benami Act, therefore, is that a person who is a beneficial owner of the benami property will not be able to file a suit for the said property either against the benamidar or against any other person. Similarly, in case of a suit or any proceedings for the Benami property, the beneficial owner would not be able to take a defence that he is the real owner of the property.

Section 5 of the Benami Act provides that any property, which is a subject matter of benami transaction, shall be liable to be confiscated by the Central Government. Therefore, if the property is held to be a benami property, the same will be confiscated by the Government when the benamidar or the actual owner receiving any consideration against the same.

Sub-Section (1) of section 6 of the Benami Act provides that the benamidar will not be permitted to retransfer the benami property held by him to the beneficial owner or any other person acting on his behalf. Sub-section (2) provides that if any transfer is made in contravention of sub-section (1), such

transaction shall be deemed to be null and void. The issue which arises for consideration is whether a retransfer made before 1st November, 2016, i.e. before the amendment Act of 2016, by the benamidar to the beneficial owner, would be hit by the provisions of section 6. One needs to keep in mind that no corresponding provision in the old Benami Act which prohibited such a transfer. Therefore, one may take the stand that a transfer which had already happened before section 6 was enacted, would not be hit or covered by this section. However, the Revenue may take the contrary stand and the matter cannot be said to be free from doubt.

Subsection (2) holds the transfer in contravention of sub-section (1) to be null and void. The issue which arises for consideration is whether such transaction can be held to be null and void by the appropriate authority or whether any proceedings would have to be taken for getting the transaction to be declared null and void. In the context of section 281 of the Income-tax Act, which also provides that transactions in certain circumstances, would be null and void, the apex Court in the case of **TRO v Gangadhar Vishwanath Ranade 234 ITR 188 (SC)** has held that it is not in the jurisdiction of the Assessing Officer to declare the transaction void. However, the Assessing Officer would have to file a suit in the Court of competent jurisdiction to get the transaction declared as void. Considering the aforesaid decision, even under the Benami Act, the authority claiming to treat the transaction as void, would be required to file a suit in the Court of competent jurisdiction to get it so declared and it will not be open to the authority to pass an order holding the transaction to be null and void.

8. PROCESS OF ADJUDICATON UNDER THE BENAMI ACT:

A. Initiating proceedings by the Initiating Officer and reference to the Adjudicating Authority under the Benami Act.

Section 24 of the Benami Act provides that if the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar of the property, then, after recording the reasons in writing, he can issue a notice to person asking him to show cause as to why the property should not be treated as a benami property. Sub-section (2) of section 24 requires the Initiating Officer to issue a copy of the notice to the beneficial owner if his identity is known. Sub-section (3) of section 24 further provides that the Initiating Officer will have power to attach the property with the previous approval by the Approving Authority if, in the opinion of the Initiating Officer, the benamidar may alienate the property during the period of the notice. If an order has been passed under sub-section (3) then within the period of 90 days of the issue of the initial notice, the Initiating Officer is required to either –

(1) pass an order with the prior approval of the Approving Authority, continuing the provisional attachment till the passing of the order by the Approving Authority under sub-section (3) of section 26; or
(2) revoke the provisional attachment of the property with the prior approval of the Approving Authority.

In case no attachment has been made under sub-section (3), then Initiating Officer may-

(1) either pass order provisionally attaching the property with the prior approval of the Approving Authority, till the order is passed by the Adjudicating Authority under section 26(3);
(2) decide not to attach the property with the prior approval of approving authority.

Once an order has been passed under sub-section (4) to attach or continue the attached property, then the Initiating Officer shall, within 15 days from the date of attachment, draw up a statement of case and refer the same to the Adjudicating Authority.

The issues which arise in respect of the issue of notice and the passing of order by the initiating authority are as under:-

(1) Whether the notice issued under section 24(1) can be challenged by filing a Writ Petition before the High Court. Section 24(1) requires the Initiating Officer to record the reasons in writing on the basis of material in his possession before initiating the proceedings under the Benami Act. The term "reason to believe" has been interpreted under the Income-tax Act in the context of section 147 of the Act, which provides jurisdiction to the Assessing Officer to initiate reassessment proceedings, to mean a belief which a reasonable person, property instructed in law, would have that income has escapes assessment. (**Lakshman vs. ITO 34 ITR 275 (SC), Narayanappa vs. CIT 63 ITR 219 (SC) & Shenath vs. AAC 82 ITR 147 (SC)**). The Apex Court in the case of **Calcutta Discount Company v CIT 41 ITR 191** has held that notice under section 147 of the Income-tax Act being a jurisdictional notice, can be challenge before the High Court by filing a writ petition under Article 226 of the Constitution of India. The Supreme Court further held that there is no alternate remedy available against the said notice and the right to appeal after the assessment order has been passed cannot be said to be an effective alternate remedy. The Apex Court subsequently in the case of **CIT v/s G.K.N. Driveshaft (I) Ltd. 259 ITR 19**, has laid down the procedures to be followed by an assessee wishing to challenge the jurisdiction of the Assessing Officer before the High Court. The Supreme Court directed that the assessee must file his objection before the Assessing Officer challenging the validity of the

reassessment proceedings and only after the said objection has been rejected, that the assessee can challenge the same by filing a Writ Petition. The question which arise for consideration is whether the same procedure can be adopted under the Benami Act to challenge the notice issued 24(2) of the Act? Whether notice issued under section 24(1) of the Benami Act can be said to be comparable to a notice under section 147 of the Income-tax Act?

(2) Whether the person in receipt of a notice can ask the Initiating Officer to give the material in his possession on the basis of which he has come to the belief that the property is a benami property? Would it be open to the Initiating Officer to take the stand that the said documents are confidential documents and, hence, the same cannot be given to the benamidar or the beneficial owner? If the Initiating Officer does not give the same to the recipient of the notice how would the person be able to establish that Initiating Officer did not have a reason to believe on the basis of the material in his possession that the alleged property is a Benami property?

(3) In case where the benamidar is 'fictitious' (Section 2(9)(B)) how would that Initiating Officer issue the notice to the benamidar. Section 24 of the Act provides for issue of notice to the benamidar and with only a copy of the notice to the beneficial owner. The question which arises for consideration is when the benamidar is a fictitious person how would the Initiating Officer serve a notice to a fictitious person and, if a notice is not validly served to a fictitious person, whether the proceedings under the Benami Act could be continued at all? When the section requires the copy of the notice to be given to the beneficial owner, would it be a sufficient compliance when the notice is only served on the beneficial owner?

(4) **Time limit under sub-sections (4) and (5) – whether discretionary or mandatory?** Sub-section (4) of section 24 provides that the limit of 90 days from the date of the issue of notice to pass an order for continuing or attaching the property by the Initiating Officer. Similarly, sub-section (5) provides for 15 days for the Initiating Officer to draw up the statement and refer the same to the Adjudicating Authority. The section uses the term "shall" for providing the time limit for the Initiating Officer to pass an order. The Supreme Court in the case of **Hemalatha Gargya v CIT 259 ITR 1** has held that the use of the term 'shall' in a statue, ordinarily speaking, means that the statutory provision is mandatory, unless, there is something in the context in which the word is used which would justify the departure from the meaning. Therefore, the question which arise for consideration is considering the whole

scheme of the Benami Act, can it be said that the time limit prescribed in sub-section (4) and (5) are mandatory?

If the aforesaid time-limit is indeed held to be mandatory, whether it would be open to the Initiating Officer to issue a fresh notice under section 24(1) of the Act for the same property and on the basis of the same material, if no order has been passed under section 24(4) within the time limit prescribed? Can the Initiating Officer take the such stand that there is no such bar on issuing a fresh notice as no order has been passed for the initial notice? Lastly, whether the principle of *res judicata* would be applicable to such an attempt by the Initiating Officer?

(5) **Fresh notice under section 24(1) on the basis of fresh material -** Another interesting Question which can arise for consideration is when the Initiating Officer has passed an order under section 24(4)(a)(ii) or section 24(4)(v)(ii) deciding to revoke the provisional attachment or deciding not to attach the property, is it open to the Initiating Officer to issue a fresh notice under section 24(1), on the ground that new or fresh material has come to his possession on the basis of which he has reason to believe that the same property is a Benami Property?. It would also be pertinent to consider that the order under section 24(4)(a)(ii) or section 24(4)(b)(ii) has been passed by the Initiating Officer with the approval of the Approving Authority, in such a case, would it be open to him to independently come to the belief that the alleged property is the banami property and initiate fresh proceedings?

(6) **Seeking approval of the Appropriate Authority:** An order passed under sub-section (3) or sub-section (4) of section 24 is required to be passed after seeking an approval of the Appropriate Authority. The issue which arises for consideration is whether the person aggrieved from such an order can ask a copy of such approval from the Appropriate Authority and challenge the validity of the order so passed in case the approval has not been given appropriately or has been given without application of mind. The Bombay High Court in the case of **Suntan Trading Co. Ltd. (WP No. 763 of 2015 dated July 23, 2015)** has taken the view in the context of approval granted under section 151 of the Act that an assessee has a right to seek the approval of the higher authority which is required to be obtained before initiating reassessment proceedings under the Act. Again, whether the interpretation given in the Income-tax Act shall be applied in the context of the Benbami Act or not, is not free from doubt. However, as the matter of general principle and on the basis of the principles of natural justice, a person aggrieved from an impugned order should be able to seek the approval of the authority so as to seek appropriate relief against the impugned order.

(7) **'Passing an order' under section 24(4)(a)(1):** If one takes the view that the time limit of 90 days is mandatory to pass an order, then the subsidiary issue which arises for consideration is the meaning of the term "pass an order" -- whether it would mean the date of signing of the order or the date of dispatch of the order or the date of receipt of the order? The passing of the order cannot be equated with the receipt of the order. However, whether the same would be the date of the order or the dispatch of the order so as to be beyond the control of the Initiating Officer?

B. Adjudication of benami property by Adjudicating Authority:

Sub-section (1) of section 26 of the Benami Act provides that the Adjudicating Authority shall serve notice for adjudication of the issue to the following parties –

(a) benamidar;
(b) beneficial owner;
(c) any interesting party and
(d) any person who has made a claim in respect of the property.

Sub-section (2) provides that in case of joint property, endeavour shall be made to serve notice to all the persons holding the property. However, the notice will not be invalid merely because all the persons have not been served as long as service is made to any one of the persons.
Sub-section (3) of section 26 requires an opportunity of hearing to be granted to the interested parties and passing of the order, either holding the property to be a benami property or not to be a benami property. Sub-section (3) provides that the opportunity of hearing should be given to the following persons – (1) benamidar, (2) Initiating Officer, and (3) any other person claims to be the owner of the property.

Two things can immediately be seen from the aforesaid. Firstly, no personal hearing is provided to any interested parties or a person making a claim in respect of the said property unless they claim to be the owner of the property. It needs to be considered as to when the order passed by the Adjudicating Authority is going to affect the rights of these persons, whether they should also be given an opportunity of personal hearing or not before the passing of the order?

The second issue which arises for consideration is that an opportunity of hearing is provided to a person who 'claims' to be the owner of the property. In case where a person is alleged by the Initiating Officer to be the beneficial owner thereof, however, the alleged beneficial owner does not accept the finding of the Initiating Officer i.e., alleged beneficial owner is not claiming to be the owner of

the property, then, whether opportunity of hearing would be granted to such a person or not? Can the Revenue take the stand that if the person is not claiming to be the owner of the property, then the said person should not be aggrieved by confiscation of the property and, hence, no opportunity of hearing is required to be given to the alleged beneficial owner? The other way to look at the issue is to interpret the term "claims to be the owner" as has been referred to the beneficial owner of the property in which case no issue would arise with respect to the opportunity of personal hearing being granted to the alleged beneficial owner.

Sub-section (4) of section 26 provides that in case the Adjudicating Authority is satisfied with only a part of the property is a Benami property, however, it is not possible for the Adjudicating Authority to specifically identify such part, the Adjudicating Authority should record a finding to the beast of his judgment as to which part of the property is Benami property. It is not clear as to how the provision of confiscation would be given effect to in case a part of a property has been held to be a Benami property.

Sub-section (5) of section 26 provides that when in the course of proceedings before the Adjudicating Authority, the Authority has reason to believe that a property, other than the property referred to by the Initiating Officer, is benami property, it shall pass provisionally attach the property and the property shall be deemed to be a property referred to it on the date of the receipt of the reference under sub-section (5) of section 24. Various issues which arise from the interpretation of sub-section are as under:-

(1) Whether the Adjudicating Authority is required to pass an order in writing giving reasons as to why it believes that such property is also a Benami property?
(2) Whether the Adjudicating Authority can pass such an order only when the benamidar and the beneficial owner of the new alleged property are the same, or can the Adjudicating Authority pass such an order in a case where the benamidar and/or the beneficial owner are different?
(3) Whether, after the passing of the order, the Adjudicating Authority would be required to issue fresh notice under section 26(1) of the Benami Act to the parties specified therein with respect to the new alleged benami property?

C. Confiscation of the Benami Property:

Sub-section (1) of section 27 provides that when an Adjudicating Authority has held a property to be a Benami property, after giving an opportunity of being heard to the persons concerned, the Adjudicating Authority may make an order confiscating the said property. The issue of interest in the aforesaid provision is as to who will come within the term of 'person concerned'. It would appear that it would encompass all the persons referred to in section 26(1) to whom notice is

required to be issued before adjudication of the benami property. The proviso to sub-section (1) provides that in case an appeal has been filed against the order passed by the Adjudicating Authority, then the confiscation of the property shall be made subject to the order passed by the Appellate Tribunal.
Sub-section (2) of section 27 provides protection to the bona fide buyer of the property from the benamidar prior to the issue of notice under section 24(1), provided that the purchaser was not having the knowledge of the nature of the property being Benami property. Sub-section (3) provides that in case the confiscation of the property, all rights and title in the property shall vest in the Central Government free of all encumbrances and no compensation shall be payable with respect to the same.

Sub-section (4) of section 27 provides that any right of any third person, created in such property with a view to defeat the purpose of this Act, shall be null and void. A combined reading of sub-sections (2) and (4) of section 27 should mean that even before the issue of notice under section 24(1) of the Act, if the property is transferred to a third person only with the intention to defeat the purpose of this Act, then even such transaction would be held to be invalid. Such a view is further fortified by section 57 of the Benami Act which provides that the transfer of the property after the notice under section 24 shall be deemed to be null and void in case the property is confiscated by the Central Government as per the Benami Act.
Sections 28 and 29 of the Benami Act provide that the administrator shall take the possession of the confiscated property and would manage the property so confiscated as per the direction of the Central Government.

No Appeal is provided under the Act against the order of confiscation passed under section 27 of the Benami Act. Therefore, the only option available to a person aggrieved from such an order would be to move the High Court by filing a Writ Petition against the said order of confiscation.

D. Appeal to the Appellate Tribunal:

Sections 30 to 45 of the Benami Act provides for the establishment of the Appellate Tribunal, composition of the Tribunal, qualification and appointment and renewal of the Chairperson and members of the Appellate Tribunal. The provisions also provide the procedure to be followed by the Appellate Tribunal and the functions of the Tribunal.

Section 46 of the Benami Act provides the right to any person including the Initiating Officer who is aggrieved by the order of the Adjudicating Authority to

prefer an Appeal to the Appellate Tribunal against the order by the Adjudicating Authority under section 26(3) of the Benami Act. The Appeal should be filed within the period of 45 days from the date of the order and power has been given to the Appellate Tribunal for condonation of delay in case sufficient cause is shown by the Appellant. The question which arises for consideration is that who can file an appeal against the order of the Adjudicating Authority? Whether (i) the alleged benamidar; (ii) the alleged beneficial owner; or (iii) any other person claiming any interest in the benami property can file an appeal? Whether they can file an appeal jointly or separately? If separate appeals are permitted, then the issue which will also arise is whether the Appellate Tribunal is required to adjudicate the separate Appeals filed by aggrieved parties form the same order together or independently?

Sub-section (4) gives the power to the Appellate Tribunal in deciding the Appeal to be as under:-

(1) To decide the case finally when evidence on record is sufficient;
(2) To take additional evidence or require any evidence to be taken by the Adjudicating Authority;
(3) To require any document to be produced for a witness to be examined;
(4) To frame an issue which appears to the Appellate Tribunal to be essential for adjudication and refer the same to the Adjudicating Authority for determination; and
(5) To pass final order and confirm, vary or reverse an order of adjudication and pass such other order or orders as may be necessary to meet the ends of justice.

Section 47 of the Benami Act provides for the power to the Appellate Tribunal and the Adjudicating Authority to rectify a mistake apparent on the face of the record within the period of one year from the end of the month in which the order was passed.

E. Appeal to the High Court:

Section 49 of the Benami Act provides for an appeal to be filed before the High Court by an aggrieved party within the period of 60 days from the date of communication of the decision of the Appellate Tribunal. The appeal cane be filed before the High Court only on any question of law arising out of such order. The provision of section 49 of the Benami Act is similar to section 260A of the Income-tax Act, with the difference being 120 days provided in the Income-tax Act to file an appeal.

F. Special Court:

Section 50 of the Benami Act provides that by notification, the Central Government in consultation with the Chief Justice of the respective High Court designate any Sessions Court as a Special Court for the trial of an offence punishable under the Benami Act.

G. Offences and prosecution:

Section 53(1) of the Benami Act provides that where a person enters into a benami transaction – (i) in order to defeat the provisions of any law; or (ii) to avoid payment of statutory dues; or (iii) to avoid payment to creditors, the beneficial owner, the benamidar and any other person who abets such transaction, shall be guilty of offence of benami transaction. The punishment provided in sub-section (2) for the offence of benami transaction is imprisonment of a term which will not be less than one year but which may extend to 7 years and also liable to a fine which may extend to 25% of the fair market value of the property. The term 'fair market' has been defined in section 2(16) of the Benami Act to mean a price which the property would ordinarily fetch on sale in the open market or when the price is not ascertainably be determined in such manner as may be prescribed.

The issue which arise for consideration is where five persons jointly hold a benami property (each having 20% share therein), will fine of 25% of the fair market value of the property be levied on each of these persons?

The other issue which arise for consideration is whether prosecution be initiated / fine imposed under Benami Act in a case where the property is not confiscated under section 27?

Section 54 of the Act treats any person who knowingly gives false information to any authority or furnishes false documents in any proceedings under the Act to be guilty of an offence which is punishable by imprisonment of not less than 6 months and which may extend upto 5 years.

PART – B
RECENT AMENDMENTS WITH RESPECT TO UNDISCLOSED INCOME UNDER THE ACT.

Section 68 -- Cash Credit:

Under section 68 of the Act an amount credited in the books of an assessee maintained for any previous year is charged to tax as the income of the assessee

if – (i) the assessee offers no explanation about the nature and source thereof; or (ii) the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory.
A proviso has been inserted by Finance Act, 2012 w.e.f. 1.4.2013 which provides that where an assessee is a company and the credit in the books of the company consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such company shall be treated as unsatisfactory unless – the person, being a resident in whose name such credit is recorded, also offers an explanation about the nature and source of such sum so credited; and such explanation in the opinion of the Assessing Officer is satisfactory.

The issue which arises for consideration with respect to the insertion of the proviso are as under –

(i) Whether the proviso is prospective or retrospective -
The Memorandum explaining the Finance Bill [342 ITR St. 234, Pg. 244] states that the amendment will take effect from 1st April, 2013 and will accordingly apply in relation to the assessment year 2013-14 and subsequent years. Although certain Benches of the Tribunal, (**Shubhalkshmi Vanijya (P.) Ltd. vs. CIT(155 ITD 171) (Kol)** and **Royal Rich Developers Pvt. Ltd. vs. DCIT (ITA No. 1835/Mum/2014 dated August 24, 2016**) had taken the view that the proviso will be applicable retrospectively to all pending proceedings and the additional burden provides in the said proviso will have to be discharged by the assessee even though the credit is reflected in years prior to assessment year 2013-14. This issue had subsequently come up for consideration before the Bombay High Court in the case of **CIT v/s Gangandeep Infrastructure Pvt. Ltd. 394 ITR 680**, wherein the Hon'ble Court has given a clear finding that the proviso to section 68 of the Act has been introduced by the Finance Act, 2012 w.e.f. 1st April, 2013 and, hence, it would be effective only from assessment year 2013-14 onwards. There are no other contrary decisions of any other High Court on this issue.

(ii) It is applicable only in case a credit entry in the nature of share application money, share capital, share premium or any such amount by whatever name it is called. To determine the scope of "any such amount" the principle of *edjudem generis* will have to be applied, meaning thereby, that the general terms following the specific terms will be interpreted to mean similar to specific terms. Accordingly, the scope of "any such amount" would have to mean any amount which has been credited in the books of account with respect to acquisition / purchase of share. Accordingly, the

proviso should not apply to transaction in the nature of loan, debentures, etc.

(iii) Will proviso to section 68 be applicable in the case of receipt of money towards Optionally Convertible Debentures / Compulsorily Convertible Debentures / Optional convertible preference shares? If yes, will it apply in the year of receipt or in the year of conversion of debentures into shares?

(iv) The proviso is applicable only in the case where the person in whose name the credit is recorded is resident in India and it is not clear as to whether the residential status of the person is to be seen in the year of credit of the amount or in the year of the inquiry with respect to such credit. Or one has to see the residential status in the immediately preceding financial year? It seems more logical to see the status as on the date of the credit of the said amount. If you see the status as on the date of enquiry, it may lead to a situation where at the time of original assessment proceedings, the person was non-resident and, hence, the proviso did not apply. However, at the time of reassessment proceedings, the person becomes resident, and the proviso will apply. This cannot be the position. Further, if the enquiry continue for more than a year, and the residential of the person may change, in which case which years status is to be seen. However, the matter cannot be said to be free from doubt.

(v) The insertion of the proviso puts much greater burden of an assessee to establish the genuineness of the transaction as, not only the assessee is required to offer the explanation qua the nature of source of the fund but the person in whose name the credit is reflected is also required to offer explanation about the nature and source. The only question is whether the assessee can take the stand that the burden is on the Revenue to call for the explanation from the person and the burden is not on the assessee?

The only other issue which I would like to discuss in respect of section 68 of the Act is the interpretation of the term 'credit in the books of the assessee'. Two issues which arise for consideration are –

(i) meaning of the term 'books of the assessee'; and
(ii) whether maintenance of books are necessary for addition under section 68 of the Act?

The term `books' or `books of accounts' has been defined in section 2(12A) to include ledgers, day books, cash books, account books and other books, whether kept in written form or as print-outs of data stores in floppy disc, tape or any other form electro-magnetic data stored devices. The definition is an inclusive definition. The issue which arises for consideration is whether a

journal or a diary found at the premises of an assessee during a search or survey recording certain alleged transactions carried on by the assessee, but not reflected in the regular accounts maintained by the assessee, be considered as the "books of accounts"? The Hon'ble Bombay High Court in the case of **CIT v/s Bhaichand N. Gandhi 141 ITR 67** has held that the pass book supplied by the bank to an assessee cannot be regarded as a book maintained by the assessee or under his instruction. Therefore, any deposit reflected only in the pass book cannot come within the ambit of section 68 of the Act as it does not reflect an amount credited in the books of the assessee. This issue had also come up recently before the Bombay Bench of the Tribunal in the case of Mangatram Arora (IT(SS) No. 148/Mum/2006) which has taken a view, following the decision of the Apex Court in the case of **Central Bureau of Investigation v/s V C Shukla (1998) 3 SCC 410**, that even a diary found at the premises of the assessee, recording a transaction carried on by an assessee is to be regarded as books of accounts of the assessee and, consequently, the provisions of section 68 would be applicable. The Tribunal has relied on the decision of the Apex Court which has interpreted the provisions of section 34 of the Evidence Act. In deciding the said issue, the Tribunal has not considered the decision of the Jurisdictional High Court in the case of **Sheraton Apparels v/s ACIT 256 ITR 20**. The Bombay High Court, while interpreting the term `books of accounts' as used in Explanation 5 to section 271(1)(c) has held that the term `books of account' will not include a diary maintained by an assessee. The Bombay High Court has also held that the definition of 'books of accounts' in section 34 cannot be considered for the purpose of the definition in explanation 5 to section 271(1)(c). Therefore, considering the decision of the Bombay High Court, one can conclude that the term 'books of accounts' would not include a diary or loose papers found in the premise of an assessee during the course of search or survey so as to make the assessee liable under the provisions of section 68 of the Act. If a diary and loose papers found during the course of search would also be regarded as `books of accounts', then, it would also mean that any investment reflected in the said diary cannot be added as income of the assessee under section 69 or 69A of the Act, as, then, the assessee would take the stand that these investments are assets and are reflected in the books of accounts of the assessee.

In so far as the second issue is concerned, if there are no books maintained by an assessee, the provisions of section 68 ought not to apply [See **Smt. Madhu Raitani vs. ACIT (45 SOT 231) (TM) and Mehul V. Vyas (164 ITD 296) (Mum)**]. However, if the assessee was required in law to maintain the books of accounts and the assessee has not maintained the same, whether he can also take the stand that section 68 ought not to apply to the assessee? Whether

the revenue can take the stand that the assessee is in breach of law as books of accounts were required to be maintained and, hence, in such a situation can provision of section 68 apply?

Section 69 vis-à-vis Benami Transaction:

Section 69 of the Act provides that where in any financial year the assessee has made investments which are not recorded in the books of accounts and the assessee and offers no explanation about the nature and source of investment, or the explanation offered by him is not satisfactory, the value of investment shall be deemed to be the income of the assessee in the previous year.

There has been no recent amendment in section 69 of the Act, however, the issue which arises for consideration is the impact of benami transaction viz a viz section 69. When a transaction has been held to be a benami transaction and an assessee has been held to be the beneficial owner of such a transaction, can the Income-tax Department assess the value of the benami property as income of the assessee under section 69 of the Act? Whether the Department would be right in taking the stand that the beneficial owner has made investment (in the benami property) which are not reflected in the books of accounts and the beneficial owner assessee has not been able to offer any explanation about the nature or source of such investment? In which case, not only will there be an impact under the Benami Act but also under the Income-tax Act.
Sections 69A – 69D are other sections in the Act which deal with undisclosed income, however, as there are no recent amendments in the said sections, they are not specifically dealt with in this article.

Taxability of undisclosed income:

Section 115BBE was inserted by the Finance Act 2012 w.e.f. 1.4.2013 to provide that in case the income of an assessee includes an income chargeable under sections 68, 69, 69A, 69B, 69C or 69D, the income would be chargeable @ 30% without there being any benefit of slab rate being available to such an assessee. This amendment was inserted to ensure that the undisclosed income is chargeable to tax @ 30% and the assessees' should not be able to take advantage of the basic exemption limit or lower slab of the rate of tax applicable to assessees'.

This section has now been substituted by the Taxation Laws (Second Amendment) Act, 2016 w.e.f. 1.4.2017. The amended provision would accordingly apply from assessment year 2017-18. The amended section specifically provides that the section would be applicable irrespective of whether the income is

disclosed by the assessee in its return of income under sections 68 to 69D or the Assessing Officer makes such an addition. This seems to be clarification of the existing provision so as to remove any doubt that even if the assessee *suo moto* offers income under sections 68 – 69D, the same would also be covered by the section. The crucial amendment which has been made by the Taxation Laws (Second Amendment) Act, 2016 is that the rate of tax has been increased from 30% to 60% w.e.f. 1.4.2017. The purpose of the amendment is to see to it that an assessee depositing money in his bank account pursuant to the de-monetisation on 8th November, 2016 should not get away by offering the same as income @ 30%. Hence, the rate has been increased to 60%. This is also brought out from the Statement of Objects and Reasons provided along with the Taxation Laws (Second Amendment) Bill, 2016.
Can amendment to section 115BBE prescribing rate of tax, for assessment year 2017-18, on income of the nature mentioned in specified sections be challenged on the ground that it is deemed retrospective. To illustrate if a person has a few days before the amendment declared a huge sum in the course of survey or search on the belief that the rate of tax is 30% and then the amendment is made applicable to such a person?

Section 271AAB levies penalty on undisclosed income of a specified previous year at the rates mentioned in the said section. Sub-section (1) and also sub-section (1A) provide various conditions which, if satisfied, penalty is levied at a rate mentioned in the respective sub-section which rate is lower than the rate of penalty which would apply if the assessee does not satisfy those conditions. One of the conditions in these sub-sections is "substantiates the manner in which the undisclosed income was derived;" the issue which arise for consideration is the manner in which the assessee can substantiate the manner of deriving undisclosed income. Can it be said that the assessee is bound to substantiate the manner only if he is asked by the authorities to do so. If he has answered all the questions put to him while recording his statement u/s 132(4) of the Act, can he contend that it should be regarded that this condition has been satisfied by him.

Section 271AAC which has also been inserted by the Taxation Laws (Second Amendment) Act, 2016 w.e.f. 1.4.2017 provides for a penalty of 10% of the tax payable under section 115BBE in case an addition has been made by the Assessing Officer. In case of a disclosure made by an assessee, no penalty would be leviable. Therefore, the effective rate of tax in case an addition has been made under sections 60 to 69D would be 66% plus surcharge plus education cess. In case such additions have been made pursuant to a search carried on by the Income-tax Department, then, the penalty is leviable under section 271AAB.