

August 19, 2016

Note on Benami Transactions (Prohibition) Act, 2016



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General

This note provides brief understanding of the proposed Benami Act (text of the Act is enclosed) which has been approved on August 16, 2016 by the National Assembly's Standing Committee on Finance and has now been forwarded to the National Assembly for its consideration. This is one of the most important legislation proposed to be introduced in the country and will have far reaching consequences inter alia in the fields of finance, tax and banking sectors.

This brief summary is not expected to provide complete information about the law; however, the purpose of this note is to provide primary understanding and the relevance in current environment.

The purpose of this legislation is to prohibit holding property in 'benami'. The objective of this law is to:

- (a) Prohibit holding property in benami;
- (b) Restrict the right to transfer benami properties; and
- (c) Provide mechanism to confiscate benami properties.

Factors accounting for the origin of benami

Benami transactions are generally undertaken to:

- Fraud on creditors;
- Evade taxes; and
- Avoid social and political risk in holding property.

Significance and Relevance of Benami Law in Pakistan

Benami transactions in Pakistan are generally undertaken to park untaxed money. Accordingly, in such cases, the immediate and future, direct and indirect benefit of the property acquired from untaxed money lies with a person other than the person reflected as owner, whereas the consideration for the acquisition of the property is paid out of untaxed money by the person holding beneficial rights other than the person who is reflected as having ostensible right in the property. 'Benami' also includes cases where owner in form is fictitious.

In countries like Pakistan where tax compliance is not adequate, benami transactions are used to park untaxed money in the form of benami real estates, bank accounts, stocks & shares and other forms of assets.

This legislation has been introduced to provide the right to the Government to identify benami transactions and to 'confiscate' the properties held in benami. This is a step to abolish parking space for money generated from untaxed income. In the absence of benami laws, there can be actions against the income that is not taxed, including charge over properties; however, there is no direct right of the State to confiscate the properties held in benami. This step was essential as otherwise the huge quantum of properties created out of untaxed money are held in benami and there is no direct State's right to confiscate such assets. This will assist in Government's efforts to curb tax evasion.

It is important to note that under the 'transfer of property' laws, transfer of property in 'benami' is not illegal. This new law will have a concurrent application in a particular context.

What is meant by 'benami' transaction?

Benami is a Persian / Urdu language word which means anything 'without name'. In the context of property, this means use and benefit by the person other than the person who is fictitiously and without substance, in form, reflected as the owner.

'Benami' transaction, as per this legislation, means:

1. A transaction or arrangement 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' the property is held for the immediate or future benefit, direct or indirect, of the person providing the consideration;
2. Transaction or arrangement in respect of property carried out in fictitious name;
3. Transaction or arrangement where owner of property denies property's ownership; and
4. Transaction or arrangement where the payer of consideration of property is fictitious or untraceable.

Except for 2 to 4 above, it is essential in all benami transactions to prove two ingredients. First condition is that the consideration has been paid or provided by a person other than the person who is the legal owner. Secondly, the immediate or future, direct or indirect benefit from that property lies with the person who has paid or provided the consideration not the person who appears, in form, as the owner.

The first part is a question of fact. The second is a difficult question that requires circumstantial evidences. Immediate and future benefits, directly or indirectly will have to be proved to be derived by the person who has provided the consideration not being the person who is owner on record.

As an illustration, if Mr. B, being a servant of Mr. A, acquires a house which is registered in the name of Mr. B and the consideration is paid by Mr. A. This transaction will not qualify to be called as benami unless it is proved that the house is for immediate or future benefit directly or indirectly of Mr. A and not Mr. B. The second condition is essential to prove a benami transaction.

Following transactions and arrangements have been excluded from the purview of benami transactions and arrangements:

1. Properties held by a person in fiduciary capacity;
2. Properties acquired out of the known sources of income by an individual in the name of spouse or in the name of any child of such individual; and
3. Properties acquired in the joint name of an individual and his brother or sister or lineal ascendant or descendent and acquired from the know sources of income of the individual.

Any property held under a benami arrangement or transaction (including proceeds from such property) is treated as 'benami property'.

Kind of Property for the Benami Law

For the purposes of benami law, 'Property' means:-

- Asset of any kind, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes rights or interest or legal document evidencing ownership of property.
- Property in the converted form (if the property is converted into any other form) and also the proceeds from the property.

Person holding the benami property is termed as 'benamidar' and person for whose benefit such property is held is called 'beneficial owner'.

Prohibition and Confiscation

After the promulgation of the proposed Act, all benami transactions will be punishable crime in the manner laid down in the Act and all benami properties can be confiscated by the Federal Government, after due process of law. Furthermore, there will be prohibition on the re-transfer of benami property held by benamidar to the beneficial owner.

Effective Date of the Law

The law shall be effective from such date as the Federal Government may notify. It is however considered that once the law is in force, the right to confiscate benami properties will also apply to properties already acquired in the past. Nevertheless, as suggested in the National Assembly's Standing Committee, this aspect has to be further clarified.

Assets held Outside Pakistan

There is no exception in the law to the effect that benami arrangement by Pakistani residents or citizens cannot apply on properties situated outside Pakistan. Accordingly, as per our understanding, this law shall also apply to benami properties 'situated abroad'. The manner of confiscation and administration in such cases, is a separate subject; however, once the law becomes applicable immediate or future benefit cannot accrue on such properties. For example, if shares in a Pakistani company are held in benami where the beneficial owner is a Pakistani, the right of remittance of dividend will face the consequences equivalent to confiscation etc.

Process of Implementation of law

A three tier process has been laid down for initiation and confiscation of benami properties.

The process is:

- Identification of benami properties and notice and action against the benamidar resulting in a reference to the 'Adjudicating Authority' by the 'Initiating Officer'. This action is hereinafter referred to as 'Reference';
- Proceeding by the Adjudicating Authority being the order for confiscation of the benami property. This act is hereafter as 'Confiscation Proceeding';
- Possession of confiscated property by the Administrator.

Draft law has provided a comprehensive mechanism for the formation of Adjudicating Authority under the Act that shall consist of a Chairman and at least two Members to be appointed by the Federal Government.

Initiating Authority shall be Deputy Commissioner Inland Revenue appointed under Section 208 of the Income Tax Ordinance, 2001. Approving Authority shall be the Commissioner Inland Revenue as defined under Section 2(13) of the Income Tax Ordinance, 2001.

Administrator shall be the Assistant Commissioner of Inland Revenue appointed under Section 208 of the Income Tax Ordinance, 2001.

Appeals

The action of the Adjudicating Officer can be challenged before the Federal Appellate Tribunal to be formed under the Act.

The Tribunal shall, in principle, operate in the manner similar to the Tribunal dealing with the case of Inland Revenue and the departmental representative shall be termed as 'presenting officer'. A Chartered Accountant shall inter alia be entitled to appear before the Federal Appellate Tribunal. Order of the Federal Appellate Tribunal can be challenged before the High Court.

Special Courts

Federal Government shall constitute Special Courts to deal with the persons punishable under this Act.

Other laws

There is a need to review the relevance and amendments required to be made in other laws to avoid conflicting positions (if any). Such laws include Trust Act, Protection of Economic Reform Act; Income Tax Ordinance, 2001; Transfer of property Act; Registration Act and others.