Amendments to PMLA 2002

INTRODUCTION

Through the Finance Act 2019, which became effective from August 1, 2019, few very important amendments under the Prevention of Money Laundering Act, 2002 ("**Act**") were made. Interestingly, most of them were through addition of an '*explanation*' or a '*proviso*' to the sections. Given the number of matters pertaining to misappropriation of funds and frauds that have surfaced in India in recent times including Vijay Mallya's default to the tune of INR 9,000 crores; the IL&FS crisis; PNB scam that surfaced thanks to Nirav Modi, it seems that the rationale behind all these amendments was to remove the ambiguity that previously existed in the Act, and to create a stricter law to prevent any financial crimes in future.

KEY AMENDMENTS

❖ *Scope of the offence of money laundering widened*

In section 3 of the Act which defines and covers what constitutes the offence of money laundering, an '*explanation*' has been inserted. According to the explanation, a person will be guilty of offence of money laundering if such person is found to have directly or indirectly attempted to indulged or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime such as:

(a) concealment;
(b) possession;
(c) acquisition;
(d) use;
(e) projecting as untainted property; or
(f) claiming as untainted property

Further, it has been clarified that the process or activity connected with proceeds of crime is a **continuing activity** and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment, possession, acquisition, use, or projecting/claiming it as untainted property in any manner whatsoever.

The abovementioned amendment can be credited to the Financial Action Task Force's (FATF) observation in 2010, on the earlier Section 3 – that the said section did not cover concealment, possession, acquisition and use of proceeds of crime as a criminal offence.

❖ *Continuing offence*

The '*explanation*' under Section 3, as discussed above, clearly makes the offence of money laundering a continuing offence. It states that the process or activity which is connected to the proceeds of crime is a continuing offence. Simply put, any process or activity connected with 'proceeds of crime' will be a continuing offence till such time the person enjoys the 'proceeds of crime'.

In *Gokak Patel Volkart Ltd. vs. Dundayya Gurushiddaiah Hiremath*[1], the Supreme Court defined the meaning of 'continuing offence' and observed that "*the concept of continuing offence does not wipe out the original guilt, but it keeps the contravention alive day by day. The expression 'continuing offence' has not been defined in the Code. The question whether a particular offence is a 'continuing offence' or not must, therefore, necessarily depend upon the language of the statute which creates that offence, the nature of the offence, and the purpose intended to be achieved by constituting the particular act as an offence".*

Thus, a bare reading of Section 3 now makes it abundantly clear that it would be incorrect to say that money laundering is a one-time offence that ceases with concealment, possession, acquisition, and/or use of 'proceeds of crime'. Now under the Act, a person will be guilty of money laundering till the time the said person enjoys the 'proceeds of crime'.

❖ *Clarification on meaning of 'Proceeds of Crime'*

Section 2(1)(u) of the Act defined 'proceeds of crime' as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country – then the property equivalent in value held within the country.

Now, an '*explanation*' has been inserted vide the Finance Act, 2019, wherein clarity has been provided that, 'proceeds of crime' includes property not only derived or obtained from the scheduled offence but **also any property which may directly or indirectly be derived or obtained as a result of any criminal activity related to the scheduled offence**.

A related case namely, *Rohit Tandon vs. Enforcement Directorate*[2] was heard in the Supreme Court wherein it was held that *"…indeed the expression 'criminal activity' has not been defined. By its very nature the alleged activities of the accused referred to in predicate offence are criminal activities…However, the stated activity allegedly indulged into by the Accused named in the commission of predicate offence is replete with mens rea.*

In that concealment, possession, acquisition or use of property by projecting or claiming it as untainted property and converting the same by bank drafts, would certainly ***come within the sweep of criminal activity related to a scheduled offence****. That would come within the meaning of Section 3 and punishable under Section 4 of the Act, being a case of money-laundering."*

In light of the aforesaid, it is clear that the ambit of what constitutes 'proceeds of crime' has been widened, by including any proceed arising out of a criminal activity related to the scheduled offences. The authorities under the Act shall now have power to prosecute anybody if they have enough evidence against such person to prove that the properties are derived out of a criminal activity.

❖ *No requirement of FIR/Charge Sheet for Search and Seizure and Search of Persons*

One of the most crucial amendments brought in by the Finance Act 2019 to the Act is the omission of the 'provisos' to section 17(i) (*Search and Seizure*) and 18(i) (*Search of persons*). Before the amendment, sub-section (i) of both sections 17 & 18 contained a 'proviso' which made a first information report (FIR) or a charge-sheet, or any other similar report, a pre-requisite to authorizing a probe under the said sections by other agencies. With the deletion of this 'proviso', any agency may conduct search and seizure operation or search of person operation without the prior requirement of an FIR, charge-sheet, etc. It seems that the said amendment was brought in to give authorities the power to quickly take actions against the culprits, however, the same power may also be abused by the authorities.

[1] *MANU/SC/0535/1991*

[2] *MANU/SC/1403/2017*

❖ *Amendment to Section 45*

Section 45 of the Act - which provides that no person can be granted bail for any offence under the Act unless (i) a government appointed public prosecutor gets a chance to oppose the bail; and (ii) the court is convinced that the accused is not guilty of the crime and is not likely to commit any offence when out on bail - has been amended by adding an '*explanation*' that reads *"offences to be cognizable and non-bailable shall mean and shall be deemed to have always meant that* ***all offences under this Act shall be cognizable offences and non-bailable offences****, notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, and accordingly* ***the officers authorised under this Act are empowered to arrest an accused without warrant****, subject to fulfilment of conditions under Section 19 and subject to the conditions enshrined under this Section."*

It seems that the said amendment has been brought to give the authorities the power to directly arrest criminals, without waiting for the cumbersome process of waiting to obtain an FIR/ charge-sheet.

❖ *Other amendments*

- With the idea of making the Act more effective in terms of detecting and preventing money laundering, certain new reporting obligations have been introduced by way of amendment to the Act. A new Section 12AA has been inserted in the Act, which necessitates authentication of a client who proposes to undertake certain transactions. This amendment will increase the degree of due diligence conducted by the regulators, requiring reporting entities to take more steps to record the purpose behind conducting the specified transaction. To give effect to the same, AADHAAR based verification has been made applicable through the Act.

- A '*proviso*' in section 44 has been inserted, which provides for closure of investigations, wherein no offence of money laundering is found. In such circumstances, the authorities are required to submit a closure report before the special court through the procedure as prescribed under the Act.

CONCLUSION

These major amendments to the Act that have been brought in by the Finance Act, 2019 widens the scope of powers that the authorities earlier had to prosecute offenders. The rationale of the amendments seems to create a more active than passive role of the authorities. Powers to monitor, flag, investigate, and prevent future financial crimes can be considered steps toward the right direction, contrary to how earlier the authorities only acted upon commission of a crime. It is also possible that, given the numerous financial crimes discovered in recent times in India, the government thinks it's appropriate to grant these powers to the authorities under the Act. These amendments are also in line with the Fugitive Economic Offenders Act, 2018 ("**FEOA**"), wherein a special court can declare a person as a 'fugitive economic offender' and take quick action against such person. The declaration of Vijay Mallya as a 'fugitive economic offender' by the special court formed under the Act read with the PEOA is a good example of how the government is trying to strengthen all the relevant laws by making them work together in tandem.

Additionally, it is pertinent to note even though certain scheduled offences under the Act such as attachment of 'proceeds of crime' acquired prior to the Act and predicate offence committed prior to them being declared a scheduled offence have already been challenged in courts, and there is a possibility that the authorities might practically implement the Act with retrospective effect, since they have support of few reported decisions of retrospective application of the Act that have been upheld by courts.

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