

SALES TAX BAR ASSOCIATION
(STUDY CIRCLE MEETING 2023-24)

*Handling of Prosecution under PMLA,
Benami, Black Money Act, GST and Income
Tax Act*

02.08.2023

BY
AMIT KHEMKA
ADVOCATE
SUPREME COURT OF INDIA &
HIGH COURT OF DELHI

What is Money Laundering?

3. Offence of money-Laundering.-

Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with **proceeds of crime** including its concealment, possession, acquisition or use **and** projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

“Explanation:- For removal of doubts, it is clarified that,-

- i. a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge 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, namely:-
 - a. Concealment; or
 - b. Possession; or
 - c. Acquisition; or
 - d. Use; or
 - e. Projecting as tainted property; or
 - f. Claiming as untainted property,

in any manner whatsoever;

ii. 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 or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever”

What is 'Proceeds of Crime'?

Section 2(1)(u): "proceeds of crime" means 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] [or abroad];

[Explanation - For the removal of doubts, it is hereby clarified that "proceeds of crime" including 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 relatable to the scheduled offence;]

Whether unaccounted money is Proceeds of Crime?

“Similarly, possession of unaccounted property acquired by legal means may be **actionable for tax violation** and yet, will **not be regarded as proceeds of crime** unless the concerned tax legislation prescribes such violation as an offence and **such offence is included in the Schedule** of the 2002 Act. For being regarded as proceeds of crime, the property associated with the scheduled offence must have been derived or obtained by a person “as a result of” criminal activity relating to the concerned scheduled offence.” (*Vijay Madanalal Chaudhary*)

Property ‘derived’ or ‘obtained’, ‘directly’ or ‘indirectly’

“32. Be it noted that the definition clause includes **any property derived or obtained “indirectly”** as well. This would **include property derived or obtained** from the sale proceeds or in a given case **in lieu of or in exchange of the “property”** which had been directly derived or obtained as a result of criminal activity relating to a scheduled offence.

In the earlier part of this judgment, we have already noted that **every crime property need not be termed as proceeds of crime but the converse may be true.** Additionally, some other property is purchased or derived from the proceeds of crime even such subsequently acquired property must be regarded as tainted property and actionable under the Act.” (*Vijay Madanalal Chaudhary*)

“33. Tersely put, it is **only such property** which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime.

No Action on 'Assumption'

“The **authorities** under the 2002 Act **cannot resort to action** against any person for money-laundering **on an assumption** that the property recovered by them must be proceeds of crime and that a **scheduled offence** has been committed, **unless the same is registered with the jurisdictional police or pending inquiry** by way of complaint before the competent forum.” (*Vijay Madanalal Chaudhary*)

No action against a person finally absolved

“In the event the person named in the criminal activity relating to a scheduled offence is **finally absolved by a Court** of competent jurisdiction owing to an **order of discharge, acquittal or because of quashing of the criminal case (scheduled offence)** against him/her, **there can be no action for money-laundering against such a person** or person claiming through him in relation to the property linked to the stated scheduled offence.”

'Projection' as untainted not necessary – every activity independently 'Money laundering'

41. Independent of the above, we have **no hesitation in construing the expression “and” in Section 3 as “or”**, to give full play to the said provision so as to **include “every” process or activity** indulged into by anyone, including projecting or claiming the property as untainted property **to constitute an offence of money-laundering on its own.**

Discovery of an 'Offence' during investigation

It is possible that in a given case after the discovery of huge volume of undisclosed property, the **authorised officer may be advised to send information to the jurisdictional police** (under Section 66(2) of the 2002 Act) **for registration of a scheduled offence.....**

If the offence so reported is a scheduled offence, **only in that eventuality**, the **property recovered** by the authorised officer **would partake the colour of proceeds of crime** under Section 2(1)(u) of the 2002 Act, enabling him to take further action under the Act in that regard.



BURDEN OF PROOF

Time Tested Principle of Criminal Law

“It is well settled that the prosecution, must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view”

Sharad Birdhichand Sarda Vs. State of Maharashtra
Supreme Court (DOD: 17.07.1984)

Section 24 (PMLA) - Burden of Proof

In any proceedings relating to **proceeds of crime** under this Act,-

- (a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the **contrary is proved**, presume that **such proceeds of crime are involved in money-laundering**; and
- (b) in the case of any other person the Authority or Court, **may presume** that such proceeds of crime are involved in money-laundering.

Prior to amendment of 2013 effective till 14.02.2013


Section 24. Burden of proof –

When a person is accused of having committed the offence of money laundering under Section 3, the burden to prove that proceeds of crime are **untainted** property shall be on the accused.

'Foundational Facts' need to be established (Vijay Madanlal)

The legal presumption about the involvement of **'proceeds of crime'** or in **'money-laundering'** can be made by the **Authorities** only when the Prosecution establishes three foundational facts:

1. First, that the **criminal activity relating to a scheduled offence** has been committed.
2. Second, that the **property in question has been derived** or obtained, directly or indirectly, by any person **as a result of that criminal activity**.
3. Third, the person concerned is, directly or indirectly, involved in any process or activity **connected with the said property** being proceeds of crime.




The Reverse Burden also
exists under the Income
Tax Act and Black Money
Act

278E. Presumption as to culpable mental state (Income Tax Act)

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, **the court shall presume the existence of such mental state** but **it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.**

Explanation- In this sub-section, “culpable mental state” includes **intention, motive or knowledge** of a fact or **belief** in, or **reason to believe**, a fact.




(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely **when its existence is established** by a preponderance of probability.



Constitutional Validity upheld:

**Selvi J. Jayalalitha v. UOI and Ors. (2007) 288 ITR 225
(Mad)**

- 
- * Court to presume the existence of mens rea
 - * It is for the accused to prove the contrary
 - * That too beyond reasonable doubt

(Sasi Enterprises vs ACIT (2014 SC))

54.Presumption as to culpable mental state

(Black Money Act)

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.—In this sub-section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

135. Presumption of culpable mental state

(Goods and Services Tax Act)

- In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

- Explanation.—For the purposes of this section,
- (i) the expression —culpable mental state includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact;
- (ii) a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.



INCOME TAX ACT

CHAPTER XXII

- Explanation :

Willful attempt to evade tax for the purpose of the section shall include a case where any person:

- (i) has in his possession or control books or other documents containing **false entry**; or
- (ii) makes or causes to be made any **false entry in the books** or documents; or
- (iii) willfully **omits or causes to be omitted any relevant entry**; or
- (iv) causes any other circumstance which will have the effect of enabling such person to evade any tax, penalty or interest.

Section 276C (2)

If a person **wilfully** attempts in any manner whatsoever **to evade the payment of any tax, penalty or interest** under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall **not be less than three months** but which may extend **to two years** and shall, in the discretion of the court, also be liable to **fine**.

51. Punishment for wilful attempt to evade tax

(Black Money Act)


(1) If a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, **wilfully** attempts in any manner whatsoever to **evade any tax**, penalty or interest chargeable or imposable under this Act, he shall be punishable with rigorous imprisonment for a term which shall **not be less than three years** but which may extend **to ten years** and with fine

(2) If a person **wilfully** attempts in any manner whatsoever **to evade the payment of any tax**, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall **not be less than three months** but which may extend to **three years** and shall, in the discretion of the court, also be liable to fine.

(3) For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person—

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or



(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.

49. Punishment for failure to furnish return in relation to foreign income and asset

(Black Money Act)

If a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, who at any time during the previous year, **held any asset (including financial interest in any entity) located outside India as a beneficial owner or otherwise, or was a beneficiary of such asset or had income from a source outside India** and **wilfully fails to furnish in due time the return of income** which he is required to furnish under sub-section (1) of section 139 of that Act, he shall be punishable with rigorous imprisonment for a term which shall **not be less than six months but which may extend to seven years and with fine:**

50. Punishment for failure to furnish in return of income, any information about an asset (including financial interest in any entity) located outside India

(Black Money Act)

If any person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, who has furnished the return of income for any previous year under sub-section (1) or sub-section (4) or sub-section (5) of section 139 of that Act, **wilfully fails to furnish in such return any information relating to an asset (including financial interest in any entity) located outside India, held by him, as a beneficial owner or otherwise or in which he was a beneficiary, at any time during such previous year, or disclose any income from a source outside India**, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.


132. Punishment for certain offences


(Goods and Services Tax Act)

(1) Whoever commits any of the following offences, namely:—

- (a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;
- (b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

- (c) avails input tax credit using such invoice or bill referred to in clause (b);
- (d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
- (e) evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);

- 
- (f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;
 - (g) obstructs or prevents any officer in the discharge of his duties under this Act;
 - (h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;


- 
- (i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;
 - (j) tampers with or destroys any material evidence or documents;
 - (k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information;


- or (l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section,
- Shall be punishable--
- (i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

- (ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;
- (iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;


- (iv) in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

- 
- (3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.
 - (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in sub-section (5) shall be non- cognizable and bailable.

- 
- (5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.
 - (6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

- Explanation.— For the purposes of this section, the term “tax” shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act.



Is there a relation of
Prosecution Proceedings and
Penalty Proceedings under
Income Tax Act?

**Radheshyam Kejriwal Vs State of West Bengal -
Supreme Court of India 18th February, 2011**

Adjudication proceedings and criminal prosecution

1. Are independent to each other
2. Can be launched simultaneously;
3. Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

4. Findings in the adjudication not binding in the proceeding for criminal prosecution.


5. Exoneration in adjudication proceedings on technical ground and not on merit-

Prosecution may continue


6. Exoneration on merits-

Criminal prosecution cannot be allowed to continue

(Higher standard of proof in criminal cases.)



**IS THERE OR
CAN THERE BE
ANY RELATIONSHIP BETWEEN
OFFENCES UNDER PMLA
&
OFFENCES UNDER INCOME TAX ACT?**

- 
- A. Offences under Section 51 of The Black Money Act.
 - B. Any fraudulent act may attract Sections 417 to 420 IPC or Section 447 Companies Act 2013.
 - C. Any false/ forged document may attract Sections 467, 471, 472 & 473 of IPC.
 - A. If any Public Servant is involved in such fraud or forgery, even provisions of Prevention of Corruption Act may be attracted.


463. Forgery (IPC)

Whoever makes any **false documents** or **false electronic record or part of a document or electronic record**, with intent to cause damage or injury, to the public or to any person, or **to support any claim or title**, or to cause any person to part with property, or to enter into any express or implied contract, or **with intent to commit fraud** or that fraud may be committed, commits forgery.

Section 471 (IPC)

Using as genuine a forged document or electronic record:

Whoever fraudulently or dishonestly uses as genuine any document or electronic record, which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record.



(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a pre-ponderance of probability.



**THE PROHIBITION OF BENAMI PROPERTY
TRANSACTIONS ACT, 1988**

The Benami Transactions (prohibition) Act, 1988

Section 2 (9) :

“benami transaction” means,—

(A) a transaction or an arrangement—

(a) where a property is transferred to, or is held by, a 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, direct or indirect, of the person who has provided the consideration,

except when the property is held by:

(i) a **Karta**, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the **Hindu undivided family**;

(ii) a person standing **in a fiduciary capacity** for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual **in the name of his spouse or in the name of any child of such individual** and the consideration for such property has been provided or paid out of the known sources of the individual;

(iv) any person in the name of his **brother or sister or lineal ascendant or descendant**, where the names of brother or sister or lineal ascendant or descendant and the individual appear **as joint owners in** any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or



(B) a transaction or an arrangement in respect of a property carried out or **made in a fictitious name**; or

(C) a transaction or an arrangement in respect of a property where the **owner of the property is not aware of, or, denies knowledge of, such ownership**;

(D) a transaction or an arrangement in respect of a property where the **person providing the consideration is not traceable or is fictitious**;

Explanation.—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,—

- (i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;
- (ii) stamp duty on such transaction or arrangement has been paid; and
- (iii) the contract has been registered.

Section 3. Prohibition of benami transactions

(1) No person shall enter into any benami transaction.

2 * * * * *

3 [(2)] Whoever **enters** into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

4 [(3)] Whoever enters into any benami transaction on and after the date of commencement (01.11.2016) of the Benami Transactions (Prohibition) Amendment Act, 2016 (43 of 2016) shall, notwithstanding anything contained in sub-section (2), be punishable in accordance with the provisions contained in Chapter VII.]

Section 53 PBPT Act

Penalty for benami transaction

(1) Where any person **enters** 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, the beneficial owner, benamidar** and any other person **who abets or induces** any person to enter into the benami transaction, shall be guilty of the offence of benami transaction.

(2) Punishment:

Not less than **one year**- may extend to **seven years**

And shall **also fine which may extend to twenty-five per cent of the fair market value of the property.**

POWERS OF ARREST

- No powers of arrest under the Income Tax Act, Black Money Act and the Benami Act
- Powers of arrest exist only under Section 19 of PMLA

19. Power to arrest.—(1) If the **Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government** by general or special order, has on the basis of material in his possession, reason to believe (**the reason for such belief to be recorded in writing**) that any person has been guilty of an offence punishable under this Act, **he may arrest such person** and shall, as soon as may be, inform him of the grounds for such arrest

BAIL (Section 45)

45. Offences to be cognizable and non-bailable.—(1)
1[Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence 2[under this Act] shall be released on bail or on his own bond unless—]

(i) the Public Prosecutor has been given a opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

'Twin Conditions'

In **Nikesh Tarachand Shah vs. Union of India** (2018) 11 SCC 1, the Supreme Court declared the 'twin conditions' to be unconstitutional being violative of Articles 14 and 21 of the Constitution.

However, in **Vijay Madanlal Chaudhary**, the Supreme Court has held
*"The provision in the form of Section 45 of the 2002 Act, as applicable post amendment of 2018, **is reasonable and has direct nexus with the purposes and objects** sought to be achieved by the 2002 Act and **does not suffer from the vice of arbitrariness or unreasonableness.**"*

Non-Supply of 'ECIR'

(xviii) (a) In view of special mechanism envisaged by the 2002 Act, **ECIR cannot be equated with an FIR** under the 1973 Code. ECIR is an internal document of the ED and the fact that FIR in respect of scheduled offence has not been recorded does not come in the way of the Authorities referred to in Section 48 to commence inquiry/investigation for initiating “civil action” of “provisional attachment” of property being proceeds of crime.

b) **Supply of a copy of ECIR** in every case to the person concerned is **not mandatory**, it is enough if ED at the time of arrest, discloses the grounds of such arrest.



SANCTION OF PROSECUTION

Note: While there is no requirement for sanction in PMLA, however in all the 3 other acts, i.e., Income Tax Act, Black Money Act and Benami Act, Sanction is required

Section 55 PBPT Act

Previous sanction

No prosecution shall be instituted against any person in respect of any offence under sections 3, 53 or section 54 without the previous sanction of the Board.]

Amendment to Section 55 of the principal Act, w.e.f. 1st September 2019,—

(i) for the word “Board”, the words “competent authority” shall be substituted;

‘Explanation.—For the purposes of this section, “competent authority” means a Commissioner, a Director, a Principal Commissioner of Income-tax or a Principal Director of Income-tax as defined in clause (16), clause (21), clause (34B) and clause (34C), respectively, of section 2 of the Income-tax Act, 1961.’

279. Prosecution to be at the instance of [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner]

[Income Tax Act]

Prosecutions under Sections 275A, 275B, 276, 276A, 276B, 276BB, 276C, 276CC, 276D, 277, 277A or 278 **only with the previous sanction of the [Principal Commissioner or] Commissioner or Commissioner (Appeals) or the appropriate authority:**

55. [*Prosecution to be at instance of Principal Chief Commissioner or Principal Director General or Chief Commissioner or Director General or Principal Commissioner or Commissioner.*] (Black Money act)

(1) A person shall not be proceeded against for an offence under section 49 to section 53 (both inclusive) except with the sanction of the Principal Commissioner or Commissioner or the Commissioner (Appeals), as the case may be.

134. Cognizance of offences

(Goods and Services Tax Act)

- No court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the Commissioner, and no court inferior to that of a Magistrate of the First Class, shall try any such offence.



Whether show cause notice is a must
before initiation of prosecution?



**CIT v. Velliappa Textiles Ltd. (2003) 263 ITR 550
(SC)**

No show cause notice is required by the law before grant of Sanction.

However, the Department, as a practice, is invariably issuing notices, prior to grant of Sanction.


Section 279 (Cont.)

(2) Any offence under this Chapter may, **either before or after the institution of proceedings, be compounded** by the Principal Chief Commissioner or Chief Commissioner or a Principal Director General or Director General.

138. Compounding of offences

(Goods and Services Tax Act)

- (1) Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed:

- 
- Provided that nothing contained in this section shall apply to—
 - (a) a person who has been allowed to compound once in respect of any of the offences specified in clauses (a) to (f) of sub-section (1) of section 132 and the offences specified in clause (1) which are relatable to offences specified in clauses (a) to (f) of the said sub-section;

- (b) a person who has been allowed to compound once in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of supplies of value exceeding one crore rupees;
- (c) a person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force

- (d) a person who has been convicted for an offence under this Act by a court;
- (e) a person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of subsection (1) of section 132; and
- (f) any other class of persons or offences as may be prescribed: Provided further that any compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law: Provided also that compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences.

- (2) The amount for compounding of offences under this section shall be such as may be prescribed, subject to the minimum amount not being less than ten thousand rupees or fifty per cent. of the tax involved, whichever is higher, and the maximum amount not being less than thirty thousand rupees or one hundred and fifty per cent. of the tax, whichever is higher.
- (3) On payment of such compounding amount as may be determined by the Commissioner, no further proceedings shall be initiated under this Act against the accused person in respect of the same offence and any criminal proceedings, if already initiated in respect of the said offence, shall stand abated.

In case of offence committed by Company

1. Company
2. Every person who was **in charge of** and was **responsible to** the company, for the conduct of its business, at the time the contravention was committed
3. Director, Manager, Secretary or other officers, with whose **consent or connivance or neglect** the contravention was committed;

Aneeta Hada vs M/S Godfather Travels & Tours Pvt. Ltd. (dated 27.04.2012)

- Officers (of the company) cannot be prosecuted without prosecution of the Company.
- *Arraigning of a company as an accused is imperative.*
- *The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself.*

SC Constitution Bench - ANZ Grindlays Bank Limited & Ors.,
etc Vs. Directorate of Enforcement & Ors., etc. (05.05.2005)

There is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment.

STATEMENTS UNDER ECONOMIC / SPECIAL LAWS

Designated Authorities possess powers to:-

1. Summon any person either to give evidence or to produce any records
2. Such persons are bound to state truth or would be liable for perjury.

STATEMENTS MADE TO POLICE

Not admissible in evidence

(Section 162 Cr.P.C.) Sections 25 & 26 of the Indian Evidence Act, 1872

- Section 24 of the Indian Evidence Act, 1872,

Confession of an accused irrelevant if obtained by **Threat, Inducement or Promise.**

- Article 20(3) of the Constitution of India,
No person accused of a offence shall be compelled to be a witness against himself.

OFFICERS UNDER SPECIAL ACTS ARE NOT POLICE OFFICERS

Statements given to them are **Admissible** in Evidence

- Romesh Chandra Mehta vs State Of West Bengal (SC Consti. Bench) (1970 AIR 940)
- Illias vs Collector of Customs, Madras (SC Consti. Bench) (1970 AIR 1065)
- Vijay Madanlal Chaudhary – “The Legislative scheme makes it amply clear that the authority authorized under this Act is not a police officer as such”

Evidentiary Value

- SAFEGUARDS AVAILABLE TO STATEMENTS UNDER SPECIAL ACTS;
- COURTS HAVE TO TEST SUCH STATEMENTS ON SAFEGUARDS GIVEN UNDER GENERAL LAW
- SC – Assistant Collector of Central Excise, Vs. Duncan Agro Industries Ltd. & Ors (DOD 07.08.2000)
- SC - Mohtesham Mohd. Ismail vs Spl. Director, Enforcement (DOD 09.10.2007)

STATEMENTS UNDER SPECIAL ACTS

- ALONE CANNOT FORM BASIS OF CONVICTION
- NEED CORROBORATION
- SC - Naresh J. Sukhawani vs Union of India (DOD 06.11.1995)
- SC - Mohtesham Mohd. Ismail vs Spl. Director, Enforcement (DOD 09.10.2007)

RETRACTED STATEMENTS


A retracted confession to be reliable

- 1. Must be substantially corroborated by other independent and cogent evidences*
- 2. Must lend adequate assurance to the court that it may seek to rely thereupon.*
- 3. Accused not expected to prove to the hilt that confession was obtained by any inducement, threat or promise by a person in authority.*


RETRACTED STATEMENTS (Cont.)

4. *Burden still on prosecution to show that confession is **voluntary** and **not obtained by threat, etc.***
5. *Court to consider the pros and cons of both the confession and retraction made by the accused.*


SC - Vinod Solanki vs Union of India & Anr (DOD 18.12.2008)



All prosecutions under the PMLA, PBPT, Black Money Act as well as under Income Tax Act commence with a “Complaint” before the respective Special Courts.
(read with Section 190 & 200 of Cr.P.C.)



Provisions of Criminal Procedure Code
applicable (Section 65 PMLA)
(Section 51 PBPTA)
(Section 280D Income Tax Act)
(Black Money Act Section 84)



In the normal course, Complainant and his witnesses are required to be examined on oath by the Magistrate before the accused can be summoned under Section 200 of the Criminal Procedure Code.

But as the Complainant in the cases under PMLA, PBPTA, Black Money Act or Income Tax Act are “Public Servants” the Magistrate need not examine them on oath before summoning the accused.

Section 204(1) Cr.P.C.

Discretion of the Magistrate to issue
“Summons” or “Warrants”

No summons or warrants shall be issued if a ‘List of prosecution witnesses’ is not filed (Section 204(2) Cr.P.C.)

Section 204(3) Cr.P.C.

Every summons or warrants must be accompanied by copy of such complaint

Must check for Annexures

Section 88 Cr.P.C.

Magistrate will require the accused
to furnish 'Security Bond'

Section 205 Cr.P.C.

Accused has to be present on every date of hearing,
however the Magistrate may dispense with personal appearance of the accused



Whether Sanction & the summoning order were passed:

- after due application of mind to relevant material?
- was the material sufficient?
- are they impacted by extraneous considerations or material?
- are they perverse?
- whether due procedure & legal provisions were followed?

- Whether grounds exist to challenge the summoning order by way of Revision under Section 397 Cr.P.C
- Or seek quashing of proceedings under Section 482 Cr.P.C.
- Or to wait for the stage of framing of charge (in warrant case) or Notice (in summons case) to raise all the pleas against summoning



THANK YOU

Amit Khemka, Advocate

Mobile: 9811502010;

E-mail: amit@khemka.net

Chamber: 490, Lawyers Chambers Block-II, Delhi
High Court,