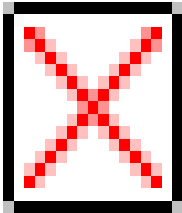


Efficacy of Letter of Request in the context of Cross Border Crimes

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MONEY

Laundering is the process of projecting large amounts of money derived out of commission of criminal activity relating to a Scheduled offence viz., criminal conspiracy, kidnapping for ransom, offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 etc., as untainted and legally earned money. The proceeds derived out of commission of criminal activity relating to a Scheduled offence are known as "**Proceeds of Crime**".

1.1 As per Section 2(1)(u) of the Prevention of Money Laundering Act (PMLA), 2002, "**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 ¹

or where such property is taken or held outside the country, then the property equivalent in value held within the country ² [or abroad]. Further, as per Section 2(1)y of the PMLA, 2002, Scheduled offence means (i) Offences specified under Part A of the Schedule, or (ii) ³the offences specified under Part B of the Schedule if the total value involved in such offences is ⁴ [one crore rupees] or more; or (iii) the offences specified under Part C of the Schedule. Such proceeds are considered to be dirty and through the process of "**Laundering**", criminals project it as untainted and make it appear as if it is derived from legal sources.

1.2 The process of money laundering generally involves three stages viz., (a) Placement - where the money launderer introduces the "**Proceeds of Crime**"

into the financial system by breaking the large amounts of cash into smaller sums which are deposited into a bank account directly. (b) Layering - at this stage, the money launderer engages in a series of continuous conversions or movements of funds within the financial system through numerous accounts so as to hide the true origin of the "**Proceeds of Crime**"

and to distance it from the criminal source and (c) Integration - in which the funds reach the legitimate economy, after getting mixed inseparably with the legitimate money.

2. There are three Schedules to the PMLA, 2002 viz., Part A, Part B & Part C. Part A includes offences under the Indian Penal Code, offences under the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985, offences under Explosive Substances Act, 1908 and offences under the Unlawful Activities (Prevention), Act, 1967 etc. Part B ⁵

includes offences under Section 132 of the Customs Act, 1962 viz., false declaration, false documents. Part C ⁶ encompasses offences which are the offences of Cross Border implications and is specified in: -

(i) Part A; or

⁷(ii) Part B without any monetary threshold; or

(iii) Offences against property under Chapter XVII of the Indian Penal Code and

(iv) the offences of willful attempt to evade tax, penalty or interest referred to in Section 51 of the Black Money (Undisclosed Foreign Income and Assets and Imposition of Tax Act, 2015.

2.1 Offences of Cross Border Implications

(i) Any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A or Part C of the Schedule, to the PMLA, 2002, had it been committed in India and if such person (transfers in any manner) the proceeds of such conduct or part thereof to India; or

(ii) Any offence specified in Part A or Part C of the Schedule which has been committed in India and the "**Proceeds of Crime**" or part of thereof has been transferred to a place outside India or any attempt has been made to transfer the "**Proceeds of Crime**", or part thereof from India to a place outside India, are said to be offences of Cross Border implications.

Illustration

'A' is a person residing outside India. He is involved in Narcotic drugs pedaling activities in foreign country. He generated monies out of commission of such criminal activity involving Narcotics offences in the foreign country. Drug pedaling activity is an offence in the foreign country in which 'A' resides and also is a scheduled offence in India under NDPS Act, 1985 which is included in Part A of the Schedule to the PMLA 2002. In case, 'A' transfers a part/full amount of proceeds derived out of commission of drug pedaling activities in the foreign country in to India, which are "**Proceeds of Crime**"

and attempts to project such proceeds as untainted, such an offence of 'A' is said to be offence of Cross Border Implications and 'A' is said to be guilty of the offence of Money-Laundering. Similarly, a person 'B', who is an Indian citizen had violated Section 63 of the Copy Right Act, 1957, by commission of the offence of infringement of copyright or other rights conferred by the Act, which is included in Part A of the Schedule to the PMLA, 2002, and generated say ten crore rupees by commission of the above offence. The above sum which is generated out of commission of criminal activity relating Scheduled offence (Section 63 of the Copy Right Act, 1957) is "**Proceeds of Crime**". If 'B' attempts to transfer or transfers the above sum or a part of the said sum to a place outside India, such an act of 'B' is an offence involving cross border implications and 'B' is guilty of the offence of money-laundering.

3. Agreements with Foreign Countries

The PMLA, 2002 provides for entering into agreements by the Government of India with the Contracting States viz., any country or place outside India for enforcement of the provisions Act. Section 56 of the PMLA, 2002, provides for entering into agreement, by the Government of India with the Government of any country outside India for exchange of information and for the enforcement of the Provisions of the Act and Prevention of any offence under the Act or investigation of cases relating to any offence under the Act. This is an enabling provision for the Central Government to enter into agreements with the Government of any Country for the purpose of investigation of cases relating to Money Laundering. The objective is to identify and establish with proof that the property was derived from the commission of an offence under Section 3 of the Act viz., offence of Money-Laundering.

4. Letter of Request

Crimes having cross border implications involve persons living/residing in other countries. The trial conducted under the provisions of the Prevention of Money Laundering Act 2002, often demands for production of either ⁸ testimony of a non-resident witness or documentary evidence available abroad. Thereby cooperation from the other countries is a must to prove the guilt of the offender involved in the Money Laundering offence. Thus there is a necessity for cooperation or aid of the other countries in forwarding the evidence available with them to prove the guilt of the money-launderers. The aid rendered by one nation to judicial or quasi-judicial proceedings in another country's courts is known as International Judicial Assistance. The Prevention of Money Laundering Act, 2002 (PMLA), 2002, envisages issue of Letter of Request to a contracting state seeking evidence which is available in the contracting state in connection with investigation into an offence of money laundering under the Act.

4.1 Letter of Requests are the medium through which one country, acting through its own courts and by methods and procedures unique thereto will assist the administration of justice in the foreign country to prove the guilt of the offender. Letters of request were sent to foreign jurisdictions for assistance in collection of evidence and for identification of assets involved in the offence of Money-Laundering. It is the mechanism to obtain evidence required in connection with investigation into an offence where evidence is available in a contracting state. Normally such requests from the courts received from the foreign countries will be considered owing to the cordial relations existing between

nations in ordinary peaceful times. However, this position may not be always true.

5. Letter of Request Procedure

In the course of an investigation into an offence or proceedings under the PMLA, 2002, an application is made to a Special Court by the investigating officer that an evidence required in connection with investigation into an offence or proceedings under the Act is available in any place in a contracting State. The Special Court, on being satisfied that such evidence is required in connection with the investigation into an offence or Proceedings under the Act, may issue a letter of request to a court or an authority in the contracting State competent to deal with such request to (i) examine facts and circumstances of the case, (ii) take such steps as the Special Court may specify in such letter of request, and (iii) forward all the evidence so taken or collected to the Special Court issuing such letter of request.

5.1 Further, Section 57(3) of the PMLA, 2002, stipulates that every statement recorded or document or thing received shall be deemed to be the evidence collected during the course of investigation. The provisions of PMLA, empowered the competent authorities to approach Special Court constituted under Section 43 of the Act, for issue of Letter of Request to the Contracting State on matters concerning evidence available. Further, above said Provisions of Act also provided for confiscation or release of the property as by the Special Court on receipt from a Letter of Request from the Contracting State.

5.2 Thus, the provisions mentioned at above, contained under Sections 57, 58, 58A & 58B of the PMLA, 2002 provides for issue of Letter of Request to a Contracting State seeking assistance towards collection of evidence in connection with the investigation of an offence involving Money-Laundering.

5.3 Further, when a Letter of Request is received by the Central Government from a court or authority in a contracting State requesting for investigation into an offence or proceedings under the Act and to forward any evidence connected therewith, the Central Government may forward such letter of request to the Special Court or to any authority under the Act as it thinks fit for execution of such request in accordance with the provisions of this Act or, as the case may be, any other law for the time being in force. This reciprocal provision will help the Contracting State or a foreign country to collect evidence available in India in connection with the investigation of an offence involving Money-Laundering.

6. Action taken by Special Court on receipt of Letter of Request from Contracting States seeking release/confiscation of property

6.1 The Special Court after receipt of Letter of Request on closure of the criminal case or conclusion of a trial in a criminal court outside India under the corresponding law of any other country and such court finds that the offence of money-laundering has not taken place or the property in India is not involved in money-laundering, the Special Court, may on an application moved by the concerned person or the Director, after notice to the other party, order release of such property to the person entitled to receive it.

6.2 Further, Where the trial under the corresponding law of any other country cannot be conducted by reason of the death of the accused or the accused being declared a 'Proclaimed Offender' or for any other reason or having commenced but could not be concluded, the Central Government shall, on receipt of a letter of request from a court or authority in a contracting State requesting for confiscation or release of property, as the case may be, forward the same to the Director to move an application before the Special Court and upon such application the Special Court shall pass appropriate orders regarding confiscation or release of such property involved in the offence of money-laundering.

7. Attachment/Confiscation of property involved in Money Laundering Abroad

In such cases, after issue of an order for attachment of any property made under Section 5 or freezing under Section 17(1A) or confirmation of attachment by Adjudicating Authority under Section 8 or confiscation by Special Court under Section 8 of the PMLA, 2002, the Special Court, on an application by the Director or the Administrator may issue a Letter of Request to a court or an authority in the Contracting State for execution of such order as per the provisions of corresponding law of that country.

8. Restitution of Properties / assets

Vijay Mallya, Nirav Modi and Mehul Choksi have defrauded Public Sector banks through their companies to the extent of Rs.22,585.83 crores. The E.D. took swift action and unearthed the myriad web of domestic and international transactions and stashed the assets abroad. After the completion of investigation conducted by the Enforcement Directorate (E.D.) under PMLA, 2002, the E.D. has attached assets worth Rs.19,111.20 crores under Section 5 of the PMLA 2002. Out of which, assets worth Rs.15,113.91 crores have been restituted to Banks/confiscated to Government of India. The consortium of Banks led by SBI has realized Rs.7975.27 crores by sale of assets handed over to them by E.D. 9

Letter of Request procedure has played an important/vital role in the identification of properties stashed abroad by the above accused.

9. Reciprocal arrangements for transfer of accused person

(i) Where a Special Court, in relation to an offence punishable under section 4, desires that-(a) a summons to an accused person, or (b) a warrant for the arrest of an accused person, or (c) a summons to any person requiring him to attend and produce a document or other thing or to produce it, or(d) a search warrant, issued by it shall be served or executed at any place in any contracting State, it shall send such summons or warrant in duplicate in such form, to such Court, Judge or Magistrate as the case may be, shall cause the same to be executed. Provided that in a case where a summon or search warrant received from a contracting State has been executed, the documents or other things produced or things found in the search shall be forwarded to the Court issuing the summons or search-warrant through such authority as the Central Government may, by notification, specify in this behalf.

(ii) If any person transferred to a Contracting State is a prisoner in India, the Special Court may impose such conditions as it deems fit. Further, where the person transferred to India is a prisoner in a Contracting State, the Special Court in India shall ensure that the conditions subject to which the prisoner is transferred to India are complied with.

10. Problems in Execution of Letters of Request

The process of sending Letters Request is prescribed under Section 166A of the Criminal Procedure Code also. This provision is being used by the Law Enforcement Agencies. The said provision is inbuilt in PMLA, 2002, which allows, the investigating officer of the E.D. or his higher authority to approach the Special Court for issue of Letter of Request. The Special Court can issue such letter to the Central Government, who will then send it to the court in the Contracting State. From time to time, the Ministry of Home Affairs had issued comprehensive guidelines regarding issue of Letters of Request, extradition request and contact with foreign police. Lengthy judicial process prevalent in a particular country acts as a road block for a timely execution of a Letter of Request. This problem can get accentuated, if any of the Contracting States provides for multiple appellate remedies to the accused and in case the judicial systems prevalent in either of the countries are at variance. In a country like India, there exists several appellate remedies to the accused under PMLA, 2002, viz., appeal to PMLA Adjudicating authority, appeal to the PMLA Tribunal, appeal to High Court and appeal to Supreme Court. Also, the option of filing of a Review Petition before the Hon'ble Supreme Court can also be availed of. This would cause abnormal delay in execution of a letter of request received from abroad. Further, the state of Political Relations between the contracting states is also of vital importance and has bearing on the effective execution of the letters of request. Divergence of judicial procedures between the countries may also affect the execution of Letter of Request. Further the foreign court is under no obligation to execute the letter of request. It depends upon the discretion of the foreign court and the compatibility of Legal systems between the contracting states for the execution of the request. Normally, the letter of request will be considered for the execution provided such execution does not interfere with the requested countries sovereignty and legal system. It is felt that for proper execution of the Letters of Request, there should be a similarity of Judicial and Legal Systems in the requesting country as well as the executing country.

10.1 The basic problem which Letters of Request are designed to remedy has been described as follows:

Since a majority of the states and foreign countries follow the territorial concept of sovereignty as the principal basis for furnishing jurisdiction over a person, problems frequently arise involving the testimony of absent or non-resident witnesses. Often, the forum does not require the witness' physical presence, but his testimony. This power to procure testimony from an absent or non-resident witness is fundamentally a judicial power of any sovereign and is restricted by a sovereign's territorial boundaries. In the absence of a treaty, convention, statute, or judicial authorization, a state may not send a representative outside of the state and into another state or country and there permit him to exercise his power to compel the absent or non-resident witness to testify. This would clearly interfere with the sovereignty of the sister state or foreign country ¹⁰.

10.2 Despite the above limitations, the 'Letter of Request', procedure has helped many countries to collect evidence available in a foreign country/Contracting State during the course of money-laundering investigations. The said procedure has also helped them in serving summons warrants of arrest and search at any place in the Contracting States on the accused through the competent court. The said procedure also helped in the identification of 'Proceeds of Crime' available in the Contracting State, attachment and confiscation of the same. This mechanism has thus helped the investigators in proving the offence of Money Laundering. In order to obviate the difficulties encountered in the execution of Letter of Request mentioned above, the Contracting States may consider evolving a uniform procedure to improve the system.

[The author is working as Additional Commissioner (AR), CESTAT, Hyderabad and the views expressed are strictly personal.]

¹Inserted by Finance Act, 2015 w.e.f. 14-5-2015.

²Inserted by Finance Act, 2018 (Act 13 of 2018) dt. 29-03-2018 w.e.f. 19-4-2018 vide GSR 383(E) dt. 19-4-2018.

³Substituted by Prevention of Money Laundering (Amendment) Act, 2009 (21 of 2009) dt. 6-3-2009, w.e.f. 1-6-2009.

⁴Substituted for "**Thirty Lakh Rupees**" by Finance Act, 2015 w.e.f. 14-5-2015.

⁵Inserted by Finance Act, 2015 w.e.f. 14-5-2015.

⁶Inserted by the Prevention of Money-Laundering (Amendment) Act, 2012 (2 of 2013) dt. 3-1-2013.

⁷Omitted by the Prevention of Money Laundering (Amendment), Act 2012 (2 of 2013) dt. 3-1-2013 w.e.f. 15-2-2013.

⁸Tiedeman V. The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941)

⁹Enforcement Directorate.gov.in/restitution-properties assets

¹⁰ Rafalko, Depositions, Commissions and Letters Rogatory in Conflicts of Law Case, 4 Dug.U.L.Rev 115 (1965)

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