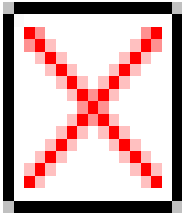


Attachment of Properties Equivalent in Value Under PMLA -A Critical Analysis

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UNTIL

the pronouncement of supreme court larger bench decision in the matter of Vijay Madanlal Choudhary Versus Union of India & Others, reported in [2022-TIOL-60-SC-LB](#)

it was widely believed that properties acquired directly or indirectly as a result of criminal activity relating to a scheduled offence which constitutes "**Proceeds of Crime**"

, alone can be provisionally attached under section 5 of the Prevention of Money Laundering Act (PMLA), 2002. It was also felt that where such property is taken or held outside the country, property equivalent in value held within the country or abroad can be attached provisionally under section 5 of the Act. However, the Apex court's interpretation of "**Value of any such property**" incorporated in the definition of "**Proceeds of Crime**"

, under section 2(1) (u) of PMLA, 2002, paved the way for the provisional attachment of other properties equivalent in value from persons who are involved in the offence of money - laundering as well. The objective of this article is to study the impact of the supreme court judgement on attachment of other properties under PMLA, 2002.

2. It is axiomatic that Section 2(1) (u) of the PMLA, defines "**Proceeds of Crime**" (POC) 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 or abroad.

An explanation which is effective from 1-8-2019 has been inserted to section 2(1) (u) of PMLA clarifying that proceeds of crime include property not only derived or obtained from 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. From the definition of Proceeds of Crime and use of the phrase "**value of any such property**"

in the said definition under section 2(1) (u) under PMLA , the following inferences to understand what constitutes proceeds of crime can be drawn viz; (i) property derived or obtained either directly or indirectly as a result of criminal activity relating to a scheduled offence (ii) the value of such property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence and (iii) where such property is taken or held outside the country, the property equivalent in value held within the country or abroad.

3. The above inferences would suggest that provisional attachment of properties "**equivalent in value**"

is limited to cases where the property was taken abroad or held outside the country. In support of the above argument, the following judicial decisions were relied upon:

- (a) The Delhi High court in the matter of "Abdullah Ali Balsharaf Vs Directorate of Enforcement held that Enforcement Directorate would be entitled to initiate proceedings against any property held in India to the extent of value of "**proceeds of crime**" held overseas.

(b) In the case

of Seema Garg Vs Deputy Directorate (2020) 116 taxmann.com 202 (P&H), the High Court of Punjab and Haryana relied upon the decision of the Abdullah Ali. Balsharaf Vs DOE [2019] 105 taxmann.com 108 (Delhi) wherein the Hon'ble court clarified the nuances of the following three limbs of the expression of the **"Proceeds of Crime"** viz;

- The property derived or obtained, directly or indirectly as a result of criminal activity relating to the scheduled offence.
 - The value of such property
 - The property equivalent in value held within the country or abroad, where such property is taken or held outside the country.
- The prominent observations of the Hon'ble High Court are re-produced herein below:

"The first limb deals with property directly or indirectly obtained from criminal activity. The third limb is applicable where property obtained from criminal activity is held or taken out side India. In case property derived/obtained from criminal activity is held or taken outside India, property of equivalent value held in India or abroad would be proceeds of crime. The second limb, which is the core issue involved in present appeals cover' value of property 'derived/obtained from criminal activity".

"The moot question arises that whether property of equivalent value may be attached where property derived or obtained from scheduled offence is not held or taken outside India. If any property is permitted or held liable to be attached irrespective of its date of purchase, it would amount to declaring second and third limb of definitions of "Proceeds of crime" one and two same. As pointed out- by Counsel for appellants, the third limb of definition clause was inserted by Act 20 of 2015. The aforesaid 3rd limb that if phrases "Value of such property and property equivalent in Value held within the Country or abroad" are of same connotation and carry same meaning, there was no need to insert third limb in the definition of "Proceeds of crime". The amendment made by Legislature cannot be meaning-less or without reasons. Use of different words and insertion of third limb in the definition cannot be ignored or interpreted causally. Every word chosen by Legislature deserves to be given full meaning and effect. Accordingly, words "Value of such property" and property equivalent in Value held within the country or abroad cannot be given same meaning and effect. Had there been intention of Legislature to include any property in the hand of any person within the ambit of "Proceeds of Crime" there was no need to make three limbs of definition of "Proceeds of Crime". It is very easy and convenient to declare that any property in the hands of a person who has directly or indirectly at any point of time had obtained or derived property from scheduled offence. There was even no need to declare property derived or obtained from scheduled offence as "Proceeds of Crime". The Legislature w.e.f 1-8-2019 has inserted explanation in section 2 (1) (u) of PMLA. As per Mr. Mittal, Counsel for the Respondent, the said explanation enlarges, scope of first limb of scope of definition of "Proceeds of Crime" and does not affect second limb of definition. We find some substance in the contention of the Respondents; however, it is trite law that entire scheme of the Act must be read as a whole in its entirety and every provision should be read in such a manner that it makes other provisions and scheme of the Act covenant and meaningful. A provision cannot be read in isolation. The definition part does not credit right and liabilities

. As per section 8(1) of the PMLA, the Adjudicating Authority has to serve notice calling upon the person to indicate the source of his income, earnings or assets out of which or by means of which he has acquired the property attached under Section 5 of PMLA. Seeking explanation about source of property and furnishing explanation is meaningless, if property in spite of genuine and explained source may be attached. As per section 24 of the PMLA, the burden to prove that property is not involved in money-laundering is upon the person whose property is attached. There is no sense on the part of any person to discharge burden Qua source of property - if any property may be attached, irrespective of its source [emphasis supplied]

4. The Hon'ble High Court in the abovementioned decisions explicitly clarified that the competent authority can attach any property held in India or abroad to the extent of value of **"Proceeds of Crime"** held overseas. However, the High Court ruled negative for attachment of other properties **"equivalent in value"**

acquired from other sources by the persons involved in money - laundering in cases where property acquired out of commission of criminal activity relating to a scheduled offence is not taken or held abroad. The court observed that such act will impair

"seeking explanation about source of property by the Adjudicating Authority from the person charged with the offence and furnishing explanation about the source of such property to the Adjudicating Authority by such person mandated under section 8(1) of PMLA and held that the process will become meaningless, if property in spite of genuine and explained source is attached. The court finally observed that there will be no need to such person to discharge burden Qua source of property stipulated under section 24 of the Act".

5. In the above scenario, it is relevant to consider the arguments advanced against attachment of other properties equivalent in value viz ; (i) based on the explanation inserted w.e.f 1-8-2019, it cannot be interpreted that proceeds of crime would include 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 relating to the scheduled offence. (ii) explanation to the term **"property"**,

would include property used in the commission of an offence. (iii) property should be generated from the scheduled offence alone and not from criminal activity. (iv) attachment of property of equivalent value where the proceeds are not available is similar to other Acts, such as NDPS Act, UAPA etc. (v) took objection to the term **"property equivalent in value"** (vi) broader interpretation of the term **"Value thereof"**, would be contrary to section 8(5) and 8(6) of the PMLA and (vii) where original proceeds of crime are interchanged and mixed with the legitimate money, giving broader interpretation to the term **"Value thereof"** would be unreasonable.

6. The above issue was agitated before the Supreme Court larger bench in the matter of VIJAY MADANLAL CHOUDHARY VERSUS UNION OF INDIA & OTHERS - [2022-TIOL-60-SC-PMLA-LB](#)

by the petitioners submitting that the attachment of property must be equivalent in value of proceeds of crime only if the proceeds of crime are situated outside India. After hearing both sides, the Apex Court adjudicated the above issue and observed as under;

"This argument in our view is tenuous. For, the definition of "Proceeds of Crime" is wide enough to not only to refer to property derived or obtained as a result of criminal activity relating to a scheduled offence, but also of the value of any such property. If the property is taken or held outside the country, even such a case, the property equivalent in value held within the country or abroad can be proceeded with. The definition of "property "as in section 2(1)(v) is equally wide enough to encompass the value of property of proceeds of crime. Such interpretation would further the legislative intent in recovery of the proceeds of crime and vesting it in the central Government for effective prevention of money- laundering."

Accordingly

, in cases where any property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence is either consumed or is not available for attachment under section 5 of the PMLA, 2002, other properties of **"equivalent in value"** were being attached under the provisions of section 5 of the PMLA, 2002.

7. If we carefully analyze the attachment of other properties of equivalent in value of the persons charged with the offence of money - laundering available in India, it may appear that such attachments may impact the rights of the person charged with the offence of money - laundering available under sections 8 and 24 of PMLA viz;- furnishing explanation about the source of provisionally attached property to the Adjudicating Authority, and discharging the burden of proving that the attached property was acquired through legal means. However, the above assumption may not be true in as much as the Apex court in the above cited judgement explicitly clarified that the definition of **"property"** under section 2(1)(v) is equally wide enough to encompass the value of property of proceeds of crime.

8. In view of the above, it can be concluded that provisional attachment of properties under section 5 of the PMLA, 2002 extends to other properties **"equivalent in value"**

belonging to the person involved in the offence of money-laundering, in case any property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence is either consumed by him or is not available for attachment under section 5 of the PMLA, 2002.

[The author is Commissioner of Customs & GST, (Retd) and the views expressed are strictly personal.]

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