

De-Attachment of Property under PMLA

Date: November 15,2022



Mahi Yadav (Founder, Majesty Legal and Standing Counsel for CGST and ED)



concerned.

The Prevention of Money Laundering Act 2002 (hereinafter referred as **PMLA**) has empowered the law enforcement agency i.e. Enforcement Directorate to seize, attach and confiscate the tainted property of the offender of money laundering. Such tainted property is also known as "proceeds of crime" under PMLA. The Hon'ble Supreme Court in the matter of *Vijay Madanlal Choudhary v. Union of India*[1]/[2] has upheld the power of attachment under Section 5 and 8(4) of PMLA, however, the Hon'ble Court has also directed that the exercise of such power ought to be strictly in compliance of the procedural safeguards provided under the legislation to protect the interest of person

ATTACHMENT OF PROPERTY UNDER PMLA

The PMLA under Section 5 states that a proper officer of rank of not below of Deputy Director on account of written "reason to believe" on the basis of material in possession may attach the "proceeds of crime" of the alleged offender which is necessary to safeguard the interest of revenue otherwise the entire proceedings shall be frustrated. However, during the attachment of the property the law enforcement agency cannot deny the person interested from enjoying of immovable property. The attachment shall be provisional in nature for a period of 180 days from the date of order and shall cease after completion of 180 days unless the adjudicating authority passes an order as per Section 8. As per Section 5(5) the agency is required to file a complaint within 30 days from such attachment before the adjudicating authority.

The Adjudicating Authority shall conduct proceedings and will provide opportunity to the person whose property has been attached to file a reply and/or counter to the complaint. The Adjudicating Authority after consideration of complaint, reply and record, shall pass such an order either confirming the attachment of the property or releasing of such property. In pursuance of confirmation of attachment, the maximum period of attachment is 365 days or pendency of prosecution proceedings before the court.

The provisional attachment order confirmed by Adjudicating Authority under Section 8 may be challenged before PMLA Appellate Tribunal under Section 26 PMLA and thereafter the appeal lies before the jurisdictional Hon'ble High Court under Section 42 PMLA.

RELEASE OF ATTACHED PROPERTY

Section 8(6) and (7) of PMLA prescribes that the Special Court has power to release the attached property on account of following conditions:-

- 1. After the completion of trial the court finds that the offence of money laundering has not been committed or property is not involved in money laundering;
- 2. The trial could not be completed on account of death of the offender or offender has been declared as proclaimed offender or any other reason.

A. PROPERTY MUST BE BEYOND "PROCEEDS OF CRIME"

The *sine qua non* condition for attachment of property under PMLA is that such property is involved in the offence of money laundering, meaning thereby, such property is "proceeds of crime". "Proceeds of crime" essentially means that the property which is derived directly or indirectly from commission of the scheduled offence or any criminal activity relatable to criminal activity. The government vides 3 amendments namely Finance Act 2015, 2018 and 2019 respectively, has enlarged the scope of the definition of "proceeds of crime". The "proceeds of crime" is defined under Section 2(1)(u) of PMLA as:-

"(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" 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 relatable to the scheduled offence;"

Under Section 5(1), the law enforcement agency ought to showcase a "reason to believe" that the property is a "proceeds to crime" and also under Section 8(1), the Adjudicating Authority mandatorily required to state the "reason to believe" that such property is a "proceeds of crime". In the landmark decision by the Hon'ble Supreme Court in the matter of **Radha Krishan Industries v. State of H.P.** has inter alia held that the exercise of discretion should be based upon "reason to believe" which is different from opinion, however, if such opinion is based on tangible material which establish a reasonable nexus to necessity to provisionally attach the property to protect the interest of revenue.

Thus, the person seeking release or de-attachment of his property ought to showcase to the competent authorities that the attached property is not "proceeds of crime" and/or "reason to believe" is erroneous, arbitrary and unreasonable.

B. "PROCEEDS OF CRIME" SHOULD BE FOR RELEVANT PERIOD



The Hon'ble Punjab & Haryana High Court in Seema Garg v Deputy Director, Directorate Enforcement has held that a property which is purchased or possessed by the alleged offender before the commission of the period of alleged offence shall not be attached under Section 5 as such property has not been derived or obtained from commission of scheduled offence. The ED challenged the judgment before the Hon'ble Supreme Court and the Hon'ble Supreme Court has dismissed the petition. Therefore the issue is no more res integra and the proper office must establish a nexus between the property to be attached and the scheduled offence or criminal activity.

C. "PRODUCTIVE ASSETS" ARE NOT PERMISSIBLE TO BE LOCKED UP

As per Rule 5 of Prevention of Money Laundering (taking Possession of Attached or Frozen Properties Confirmed by the Adjudicating Authority) Rules 2013 prescribes that the authorized officer before taking possession in regard to the confirmation order passed by the adjudicating authority shall issue notice of eviction of 10 days. Further protection is provided to "productive assets" or an establishment producing goods or a factory, that such asset shall not lock by the authorized officer but gross income which is generated from such asset is deposited in an account of Enforcement Directorate.

D. PROPERTY CANNOT BE ATTACHED BEYOND PRESCRIBED STATUTORY PERIOD

The PMLA provides limitation of the orders passed by the law enforcement agency and the adjudicating authority. Such statutory timeline ensures that the attachment of property to not continue beyond a reasonable period.

Under Section 5(1), the provisional attachment shall continue for a period of not more than 180 days unless prescribed conditions are duly complied such as the provisional attachment order is confirmed by the adjudicating authority before completion of statutory time period.

Under Section 8(3)(a) of PMLA, the confirmation of attachment by the adjudicating authority shall continue for a period 365 days, however, if the court proceedings relating to the scheduled offence is pending, the attachment shall continue during such pendency.

E. VALUE OF ATTACHED PROPERTY CANNOT BE MORE THAN THE "PROCEEDS OF CRIME"

The PMLA dictates that the proceeds of crime can be attached by the competent authority, however, the value of attached property cannot be more than the alleged proceeds of crime. The power to attach property should be exercised upto the limit of the alleged disputed proceeds of crime. In *Jagati Publications Pvt. Ltd. v. Joint Director, Directorate of Enforcement*, the PMLA Appellate Tribunal held that the power of attachment shall be exercised upto the limit of alleged proceed of crime and excess of attachment shall be *ultra vires* of the PMLA.

CONCLUSION

The person aggrieved by the arbitrary, unreasonable and unlawful actions of the law enforcement agency i.e. ED on account of attachment and confiscation of the property may approach appropriate forum under PMLA for release or de-attachment of the property. The power of the law enforcement agency is to be exercised in just and reasonable manner. Any actions of the law enforcement agency is *ultra vires* to the scope of the provisions of the PMLA shall be without the authority of law and favour the person whose property has been attached.

[1] The <u>review petition</u> against the judgment has been preferred titled as *Karti P Chidambaram v. Directorate of Enforcement* R.P. (Crl.) No. 219/2022.

[2] [LSI-559-SC-2022(NDEL)].