Prevention of Money Laundering Act, 2002–An overview

Binod Poddar[*] and Shalini Singh[**]

Money laundering is a cross border activity and it has impacts on economic and political stability of a country. It is usually carried out in an international context so that criminal origin of the funds can be very easily disguised and shown as legitimate money is some other territory where the law on money laundering is not very strict. Indian Parliament has enacted prevention of Money Laundering Act, 2002 to give effect to the resolution of the United States. But still the Act has not been implemented in spirit.

1. Introduction

Money laundering, as the name itself suggests, is cleaning the money received through illegal source, or concealing the illegal source of money. The legal meaning of the term money laundering is to process the money (obtained by illegal means) through a legitimate business or send it abroad to a foreign bank, so that when it comes back nobody knows that it was illegally obtained. The process of money laundering involves cleansing of money earned through illegal activities like extortion, drug trafficking, fire arm supply, organised crime etc. Normally, it is a three-step transaction. First, a criminal places the crime money into the formal financial system (Placement). Secondly, the money, which has been injected into financial system, is layered or spread out into several transactions with the financial system so that the origin or original identity of the crime money be lost or disappeared (Layering). Thirdly, the money gets integrated into the financial system in such a way that the original association with the crime is totally lost and the money could be used by the criminal and his accomplices who get it as clean money (Integration).

The activity of money laundering involves, *inter alia*:

- The larger share of reinvestment in illegal activities.
- The lower aggregate transaction cost of undertaking money laundering.
- The more pressuring need of financing such reinvestment with clean liquidity.
- The wider differentials in expected real returns between illegal and legal activities
- The larger initial volume of illegal revenues that has to be cleaned.

2. Bill/Act

Money laundering is a cross border activity and it has adverse impacts on economic and political stability of a country. It is usually carried out in an International context so that criminal origin of the funds can be very easily disguised and shown as legitimate money in some other territory where the law on money laundering is not very strict. Criminals at one place can give effect to plans by using the money at another place. Before 1980s, money laundering was rarely treated as a crime. But in 1980s, there was a sudden surge in the volume of money laundering mainly due to flow of drug money into the US Financial system. The US authorities, therefore, initiated several legislative and regulatory measures at the domestic level to prevent flow of drug money into the US financial system. This was followed by several actions taken at global level to criminalise money laundering. And finally, in 1990, the General Assembly of United Nations on Political Declaration and Global programme of Action, in a resolution, called upon the member states to enact money laundering legislation and programme. Indian

[*] Senior Advocate, Jharkhand High Court and Former Addl. Advocate General, State of Jharkhand
[**] Advocate

Parliament has enacted Prevention of Money Laundering Act, 2002 to give effect to the said resolution.

In 1996, Ministry of Finance appointed an Inter ministerial committee, which submitted its report and recommended for a comprehensive legislation on the issue. Consequently, in 1998, Prevention of money laundering Bill was introduced in 12th Lok Sabha. The bill was referred to Standing Committee of Finance for examination and report. The committee made some modifications but even before the revised Bill could be represented, the 12th Lok Sabha was dissolved. Subsequently, a new bill incorporating the recommendations of the Standing committee was presented in the 13th Lok Sabha and after it being passed; it was referred to a Select Committee by the chairman of the Rajya Sabha for its examination and approval. The Select committee submitted its report in 2000 and the Prevention of Money Laundering Act came to be enacted in 2002 but the same came into force only by 1st July, 2005.

3. Notable features of the PML Act, 2002

Section 3 of the Act defines offence of money laundering whereas; Section 4 of the Act prescribes the punishments for the offences which have been categorised in Paragraph 2 of part A of the Act. Director, Financial Intelligence Unit (FIU-IND) and Director (Enforcement) have been conferred with exclusive and concurrent powers under the relevant sections of the Act to implement the provisions of the Act.

4. Special Courts

The most debatable issue in the Act is power of Special Courts to try offences mentioned in the Act as well as some other offences but at the same trial. This gives rise to the principle of double jeopardy. Before going into depth, we will have a look on the relevant sections of the Act.

Section 43(1) of the Act talks about establishment of a Special Court of the status of Session Court for the prosecution of the offenders under Section 4 of the Act. Section 43(2) of the Act empowers the Special Courts to try offences other than referred to in sub Section (1), with which the accused may under the Code Of Criminal Procedure, 1973 be charged at the same trial. Section 44 deals with offences triable by Special Courts. Section 44(1) says, notwithstanding anything contained in Code of Criminal Procedure, 1973:

(a) The scheduled offence and offence punishable under Section 4 shall be triable only by Special Court constituted for the area in which the offence has been committed:

Provided that the special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or

(b) A Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of the offence for which the accused is committed to it for trial

While trying an offence under this Act, a Special Court shall also try an offence, other than an offence referred to in Sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

Section 45. Offences to be cognizable and non-bailable:

(1).....

(1-A): Notwithstanding anything contained in the Code of Criminal Procedure, 1973, or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the central Government by a general or special order, and subject to such conditions as may be prescribed.

Section 26 of General Clauses Act, 1897 reads - Provisions as to offences punishable under two or more enactments.–Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.
Section 300 of Cr. PC, 1973 speaks that persons once convicted or acquitted not be tried for same offence.
Art. 20(2) of the Constitution reads–No person shall be prosecuted and punished for the same offence more than once.
Thus, one can find that the PML Act, 2002 gives protection against double jeopardy. This principle has been recognised in many of the existing laws in India and enacted in Section 26 of General Clauses Act, 1897 and Section 300 of Cr.PC, 1973. Further, this doctrine has been adopted as fundamental rights in Art. 20(2) too. But the ambit and the guarantee in the fundamental right is much narrower than Section 300 of Criminal Procedural Code, 1973. Section 300 of Cr.PC gives protection against a second trial irrespective of the fact whether the accused was convicted or acquitted in the first trial. Whereas, the fundament right guarantees protection only against second time punishment (not the acquittal), that too, in a proper prosecution for the same offence.
Now, if we compare these provision with the relevant provisions of PML Act, 2002, it is evident that Section 43(2) and Section 44 of the PML Act only talks about second trial either conviction or acquittal. It is pertinent to mention here that in PML Act, 2002 various offences from different legislations (IPC, Arms Act etc.) are scheduled under different paragraphs. It is very clearly written that these scheduled offences and the offences falling under the definition of money laundering will be tried only by Special Courts. Further, if the accused is charged at the same trial with some other offence under Cr.PC that too are triable by the Special Courts. Thus, we find that the special Courts are given ample power to try the offences of Money laundering and even offences related to it, provided at the same trial. In other words, no other Courts have the jurisdiction to try the offences punishable under Section 4 of or scheduled in PML Act, 2002.
PML Act, 2002 is anonymous in itself. It is very clearly written that Cr.PC. is applicable to this Act only if it is not inconsistent with any of the provisions of this Act (Section 65). The Act confers ample powers to its Authorities and Special Courts and in Section 67 provides that no Civil Court has jurisdiction to set aside or modify any proceeding taken or order made under this Act, neither any prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything done or intended to be done in good faith under this Act. Although High Courts of same Local jurisdiction has right to entertain bail petitions or appeals against the orders of Special Courts.

5. Role of Police

Another issue to be addressed is power of police under PML Act. Like various other Indian legislations, this Act also gives a check to the power of police. Just like a confession made to a police officer or in custody of a Police Officer has no value in the eyes of Law and it can not be proved against the accused (Section 25 and 26 of Indian Evidence Act, 1872, respectively), Sections 44(b) and 45(1)(A) of PML Act categorically subside the role of police officers by conferring the powers to make complain and to investigate into the offence under this Act, to the authorities appointed by Central Government and specifically authorised to do so.
Though the Principal Act, 2002 was enacted by conferring the aforesaid powers to a police officer only, but while planning the effective implementation of the Act, certain difficulties were envisaged and to remove those difficulties, the Principal Act was amended by PML Amendment Act, 2005. The said Amendment Act amended Sections 44 and 45 of the original Act. Section 6 of the Amendment Act omitted the words “Upon

perusal of a police report of the facts which constitute an offence under this Act or" from Section 44(1)(b) and now it reads "a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of the offence for which the accused is committed to it for trial".
Further, Section 7 of the Amendment Act, 2005 inserted Section 45(1A), which reads, "notwithstanding anything contained in the Code of Criminal Procedure, 1973, or any other provisions of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the central Government by a general or special order, and, subject to such conditions as may be prescribed". Such conditions can be prescribed by Central Government by issuing notification (Section 73(2)(ua)).
Similarly, Prevention of money laundering Amendment Act, 2009, made some changes in provisions related to power of search and seizure and proposed to enable the investigating agencies under this Act to take up the matter at the stage of filing of report by police authorities under Section 173 of Cr.PC in those offences, where police authorities are investigating authorities and at the stage of filing of complaint before the Magistrate or Court by authorised persons in respect of those offences in which non-police authorities are the investigating agencies.

6. Duty of other departments to assist Enforcement Authorities under this Act

For the effective implementation of the Act, the need of help and assistance from the officers of the other related departments was felt, and in this regard, Section 54 of the Act proposes to empower and require certain officers from custom and central excise department, officers appointed under Section 5 of Narcotic Drugs And Psychotropic Substances Act, 1985, Income Tax Authorities, officers of Stock exchange, RBI enforcement officers under FEMA, FERA, SEBI and such other officers as the central government, by notification, specify in this behalf. It is pertinent to mention that these officers are not only empowered to assist the enforcement authorities under PML Act in their proceedings, but also this is their duty to do so and the enforcement officers under PML Act are entitled to seek assistance from such officers.
In *Director of Enforcement* v. *Deepak Mahajan*[1] AIR 1994 SC 1775, while referring to Section 151 of the Customs Act containing similar provision, the Supreme Court observed that the section does not empower police officers to exercise the powers conferred upon the custom officers by and under the Act but only authorises and require the police officers to assist custom officers in the exercise of their power. This observation should be considered valid for PML Act too.

7. E-money Laundering

In the era of electronic revolution, Money laundering can be better called as e-money laundering. This e-monetisation has been facilitating money laundering like never before. Through Internet banking, money can be transferred from one account to another, from one bank to other and from one nation to other just by a click of mouse. The attractive feature of e money is that it is:

- Easier to transfer from one geographic location to another and even to circulate within one account to another in any geographic location.
- Easier to hide from law enforcement agencies.
- Easier to invest into legitimate or illegitimate businesses.

---

[1] Ed.: MANU/SC/0422/1994: 1994(2) ALT(Cri) 173: 1994(2) BLJR 912: [1995] 82CompCas 103(SC): 1994 CriLJ 2269: 1994(1) Crimes 892(SC): 1994(46) ECC 255: 1994(70) ELT 12(SC): JT 1994(1) SC 290: 1994(1) SCALE 294: (1994)3 SCC 440: [1994]1 SCR 445

8. Role of Banks in money laundering

Banks are a major prey of money laundering activities and other financial crimes because they provide a number of financial services, through which the real source of money can be easily concealed. A person with criminal motives can very easily misuse (especially through Internet banking) the services provided by the bank. To check this, banks are provided with some guidelines to give due diligence to their customer's accounts and their conducts. The important steps being taken by the banks to curb money laundering are as follows.

8.1 Know your customer

More and more thorough steps are being followed to know the customers who are opening an account. The Reserve Bank of India has issued the norms related to identify the customers, based upon the recommendation of FATF (Financial Action Task Force) on Anti-money laundering. Photo Identity, residential proof, PAN Card, Source of income etc. are must while opening an Account.

8.2 Know your employee

Due diligence is not only required for identifying the customer, but also the bank employees. Bank employees can play a major role in nourishing money laundering.

8.3 Monitoring the transaction

Banks are required to follow the transactions which seem to be suspicious or which are more than 10 lacs or equivalent in foreign currency.

8.4 Preserve information

Banks preserves the information as to date, nature, parties, amount and currency of any transaction which are suspicious or which value is more than ` 10 lacs or equivalent in foreign currency.

8.5 Maintenance of records

Banks are required to maintain the records of the transactions and identification of its clients, domestic or international, for 10 years.

8.6 Reporting to Financial Intelligence Unit India

Banks are required to report information related to cash and suspicious transactions to Director, Financial Intelligence Unit, India (FIU-IND).

9. Hawala Transactions

Hawala is a very old remittance system, which works outside or parallel to the traditional banking or financial system. Hawala works without actually transferring or moving money. In such transactions, some intermediates are there to actually materialise the transfer. It will be easier to understand this transaction with an example. "A" at place "P" wants to transfer money to his relative or business partner "B" at place "Q". "A" finds out that as compared to traditional banking or financial system, Hawala remittance is more effective and faster. "A" contacts "C" at place "P" and hands over the money which he wanted to transfer to "B". Further, "C" contacts his counterpart "D" at place "Q" and asked him to give the equivalent amount to "B". Thus, the amount was not directly transferred from "A" to "B" but "B" received it on behalf of "A".

A (at P)→C (at P)→D (at Q)→B (at Q)

There are two parts of Hawala transactions, first, where "A" contacts "C". This Part is also called as White Hawala, because here nothing is illegal. The second part where "C" contacts "D" is called Black Hawala and is generally illegal. The illegality is the network through which they are connected. The relation between them may be of seller–buyer, creditor–debtor, smugglers or other business partners. While receiving money from "A", any receipt or invoice is not issued and this amount can very easily be used in another business or transaction without showing the actual source of income. In India, any remittance transaction apart from traditional banking or financial system is illegal and so are Hawala transactions.

10. Limitation of the Act

Even though enactment of Prevention of Money Laundering Act is a landmark step towards carving out the illegal pocketing of money especially by government officers, this Act has some limitations. This Act was not accepted with open heart and this is evident from the fact that the Bill was passed in the year 1999 but the Act was enacted in 2002 and it took further three years for Parliament to implement the same and that too with Amendment Act, 2005.

There is limitation/confusion regarding inclusion of offences as money laundering offences. The list of offences is inclusive and not exclusive and thus leaves out many similar and related offences from the ambit of this Act. The proviso to the defining clause of money laundering to the effect that except in the offences related to State, an offence can be classified as money Laundering only if the amount involved is 30 lacs or more, may encourage money launderers to keep the transaction below this limit and be free from the clutches of this Act.

This Act deals with terrorism, organised crime, Drug Trafficking etc. by listing these offences in Indian Penal Code under robbery, dacoity etc. Whereas, such offences cannot be defined properly only with the definitions under IPC, some of the components of IPC crimes are missing in money laundering offences and the money Launderers can very easily be acquitted.

There is a large gap between law and its implication. There has been a controversy as to who could initiate investigation, whether the State Government or the Central Government or both. As per the provisions of the Act, money laundering is a subject matter of Central Government and investigation can be done only by central government but this is a state level crime. This leads to great confusion and is a big hindrance in its enforcement.

The Act does not specify the Agency/Authority that may investigate cases and file charges in the Court for the offence committed. Further, searches are made possible only after charges have been filed. Thus, different stages by different bodies hamper and delay the process of law.

The anonymous powers conferred to the directors and the adjudicating authorities by shifting the burden of proof and with respect to attachment, adjudication and confiscation of properties/records generally leads to vexatious prosecution.

The preventive regime of this Act is very limited. Unlike Financial Action Task Force recommendations and other International Anti-money laundering legislations, which cover businesses such as casinos, certain real estate agents and dealers in jewellery and precious stones, the Indian Act covers only banks, financial institutions and certain securities related services.

Hawala Transactions are considered a threat to the effectiveness of anti-money laundering measures and the fight against terrorist financing. Hawala banking is also described as “underground banking” because it flourishes under the radar of modern supervisory measures for banks and financial institutions. But this underground banking is neither prevented nor regulated by this PML Act.

The Act does not clarify the fate of a person who is found guilty in the adjudication under this Act but not guilty in a Criminal Court and the *vice versa*. It is nowhere mentioned in the Act whether the verdicts of the Special Courts are binding on Criminal Courts. Though in case of Disciplinary Proceedings, the order in a disciplinary proceeding is final and no Criminal Court of same jurisdiction can challenge the same, and the same intention can be inferred in money laundering cases too. It is pertinent to mention here that the order passed by the authorities under this Act cannot be challenged by a civil Court, even through a writ petition under Art. 32(if the order is *intra vires*), 1999 (110) ELT 208 SC.

Another confusing area of the Act is inclusion of offences under various Acts as money laundering under this Act. One such Act is Prevention of Corruption Act, 1988. The

PML Act includes Sections 7, 8 and 9 of Prevention of Corruption Act, which constitutes the offences and penalties for corruption. Further, the major constituent of corruption is the disproportion from any earning for which he/she is legally entitled. And the major constituent of money laundering is intentionally hiding the illegal source of money. Thus, it creates great confusion if the offence falls under the said provisions of Prevention of Corruption Act but there is no concealment of the illegal source of money or there is no attempt to convert the money into a legitimate transaction.
These are some gaps between the policy (the international requirements and practices), the legislation and its effective and real enforcement. And because of these gaps, this Act has become so ineffective that till date there is hardly any conviction under this Act.

11. Conclusion

Like other international communities, India has also formulated measures to counter the problem of money laundering through its extensive legislation on the matter. It has not only made provisions for seizure and confiscation of the proceeds of crime but has also provided for punitive action for persons involved in money laundering. An amply vast definition to money laundering has been given so that there is less chance of any case skipping conviction. PML Act also provides for an adjudicatory authority and special Courts, which can judge and decide upon the offences of money laundering. But even though very extensive steps are being taken for the effective enactment against money laundering, money laundering is still increasing at international level, because of some loops between the Laws and its execution. The enforcement agencies should take more regular and strict steps towards investigations and enquiries. Besides, Banks and other financial institutions should take steps for more transparency in the identity of the customer, source of the money and the dubious transactions.
This law should be implemented in spirit also. Money laundering has complex international cartel and it is a sophisticated crime. It is also evolving with new financial systems and cross border trade. Different states have different privacy rules that prohibit law enforcement agencies to get data. Swiss banks are just one example which does not check the source of money. The solution to the problem may be the effective International Organization with Uniform International Law, so that there will be no place for the launderer to escape.

Reference

1. Prevention of money laundering
Legal and Financial issues by Dr. K.N. Chandrasekharan Pillai and A. Francis Julian.
2. Comments on Prevention of Money Laundering Act, 2002 by Tushar V. Shah.
3. Prevention of Money Laundering Act, 2002: An Overview by Sanjay Singh Somwanshi published at Legal Service India.com
4. The Hawala Alternative Remittance System and its Role in money laundering by Patrick M. Jost and Harjit Singh Sandhu: Prepared by the Financial Crimes Enforcement Network in cooperation with INTERPOL/FOPAC.