

# Prevention of Money Laundering

## Lesson 7

### KEY CONCEPTS

■ Placement ■ Layering ■ Integration ■ Money Laundering ■ Reporting Entity

### Learning Objectives

#### To understand:

- Problem and Adverse Effect of Money Laundering
- Methods of Money Laundering
- Offence of Money Laundering
- Attachment, Adjudication and Confiscation
- General Assembly of the United Nations to Prevent Money Laundering

### Lesson Outline

- Concept of Money Laundering
- Money Laundering Process
- Impact of Money Laundering on Economic Development
- Global initiatives for prevention of Money Laundering
- FATF Recommendation
- Overview of Prevention of Money Laundering Act, 2002
- Adjudication and Adjudicating Authority
- Obligation of Banking Companies, Financial Institutions and Intermediaries
- Summon, Searches, Seizures
- Retention of Property
- Retention of Record
- Appellate Tribunal
- Special Court
- KYC Guidelines
- KYC Policy
- Power of Central Government
- Agreement with Foreign Countries
- Attachment of Property
- Lesson Round-Up
- Test Yourself
- List of Further Readings
- Other References

## REGULATORY FRAMEWORK

- The Prevention of Money- laundering Act, 2002

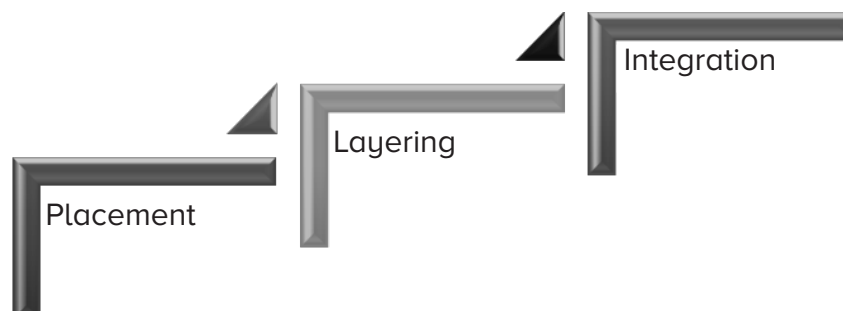
## INTRODUCTION

Money laundering is the processing of criminal proceeds to disguise its illegal origin. Terrorism, illegal arms sales, financial crimes, smuggling, and the activities of organised crime, including drug trafficking and prostitution rings etc., generate huge sums. Embezzlement, insider trading, bribery and computer fraud also produce large profits and create an incentive to legitimise the ill-gotten gains through money laundering. When a criminal activity generates substantial profits, the individual or group involved in such activities route the funds to safe heavens by disguising the sources, changing the form, or moving the funds to a place where they are less likely to attract attention.

*Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generates it. In essence, the laundering enables criminal activity to continue.*

## Process of Money Laundering

The process of money laundering can be classified into three stages, namely, placement, layering and integration.



In the initial or placement stage of money laundering, the launderer introduces his illegal profits into the financial system, by breaking up large amounts of cash into less conspicuous smaller sums that are then deposited directly into a bank account, or by purchasing a series of monetary instruments that are later collected and deposited into accounts at another location.

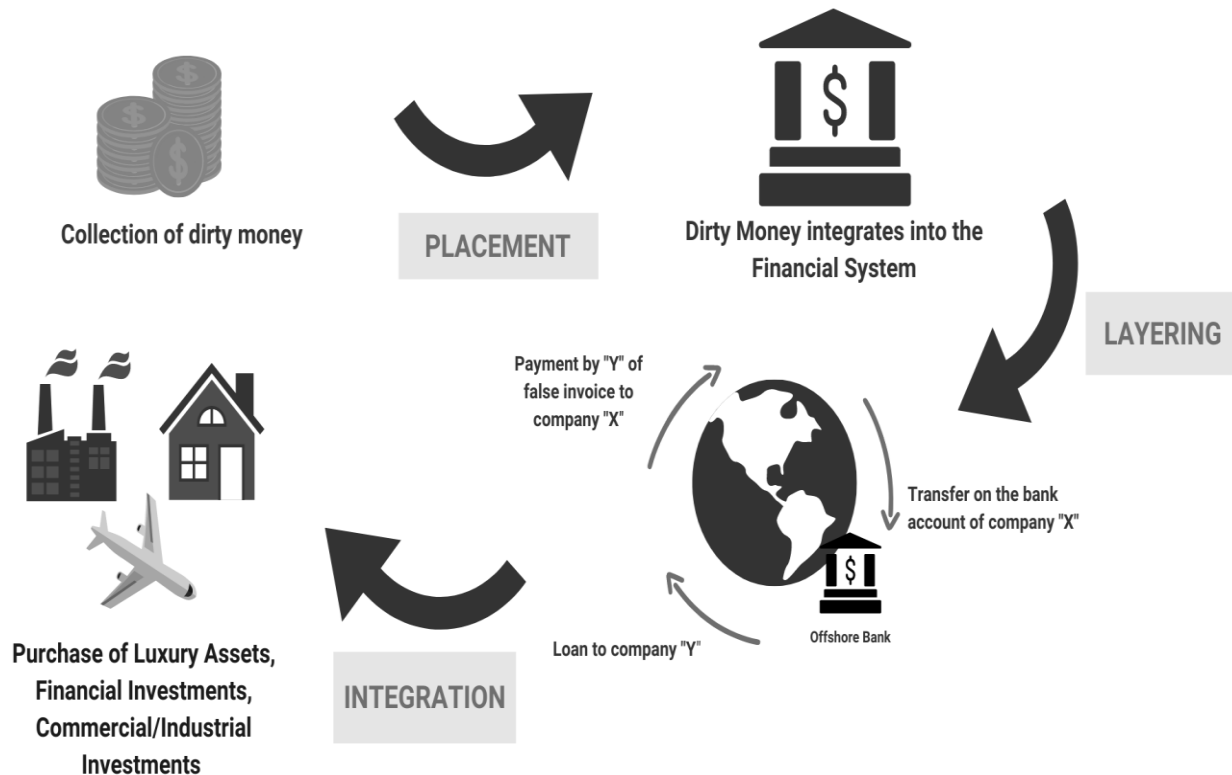
After the funds enter into the financial system, the layering takes place. In this stage, the launderer engages in a series of conversions or movements of the funds to distance them from their source. The funds might be channeled through the purchase and sale of investment instruments, or the launderer might simply wire the funds through a series of accounts at various banks across the globe.

After successful processing of criminal profits through the first two phases of the money laundering process, the launderer moves them to integration. In this stage the funds re-enter the legitimate economy. The launderer might choose to invest the funds into real estate, luxury assets, or business ventures.

Money laundering is a process which typically follows three stages to finally release laundered funds into the legal financial system. Three Stages of Money Laundering are:

- Placement (i.e. moving the funds from direct association with the crime)
- Layering (i.e. disguising the trail to foil pursuit)
- Integration (i.e. making the money available to the criminal from what seem to be legitimate sources)

# Money Laundering Cycle



Source: <https://www.unodc.org/unodc/en/money-laundering/overview.html>

## Impact of Money Laundering on Development

Economies with growing or developing financial centers, but inadequate controls are particularly vulnerable to money laundering, as against the established financial center countries, which implement comprehensive anti-money laundering regimes. The gaps in a national anti-money laundering protecting system are exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective counter measures. As with the damaged integrity of an individual financial institution, there is a damping effect on foreign direct investment when a country's commercial and financial sectors are perceived to be subject to the control and influence of organised crime.

In times of decelerating growth, an infusion of hard currency can bolster a country's foreign reserves; ease the hardship associated with budget tightening policies and moderate foreign indebtedness. While these are short-term benefits associated with an inflow of criminal monies, the long-term effects are mostly negative. One difference between official borrowing and laundered funds is that the former can be controlled by Government, whereas the funds owned by criminals escape the government's ability to control and regulate the economy.

The possible social, economic and political effects of money laundering, if left unchecked or dealt with ineffectively, are serious. Through the process of money laundering, organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments. Thus, the economic and political influence of criminal organisations can weaken the social fabric, ethical standards and ultimately the democratic institutions of society.

***What is the connection of money laundering with society at large?***

***The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. Organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments.***

***The economic and political influence of criminal organisations can weaken the social fabric, collective ethical standards, and ultimately the democratic institutions of society.***

***In countries transitioning to democratic systems, this criminal influence can undermine the transition. Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generated it. Laundering enables criminal activity to continue.***

***In the case of Vijay Madanlal Choudhary vs. Union of India, Special Leave Petition (Criminal) No. 4634 of 2014 judgement dated 27 July, 2022, Supreme Court of India inter alia observed that the rudimentary understanding of ‘money-laundering’ is that there are three generally accepted stages to money-laundering, they are:***

- (a) Placement: which is to move the funds from direct association of the crime.***
- (b) Layering: which is disguising the trail to foil pursuit.***
- (c) Integration: which is making the money available to the criminal from what seem to be legitimate sources.***

***It is common experience world over that money-laundering can be a threat to the good functioning of a financial system. However, it is also the most suitable mode for the criminals to deal in such money. It is the means of livelihood of drug dealers, terrorist, white collar criminals and so on. Tainted money breeds discontent in any society and in turn leads to more crime and civil unrest. Thus, the onus on the Government and the people to identify and seize such money is heavy. If there are any proactive steps towards such a cause, we cannot but facilitate the good steps. However, passions aside we must first balance the law to be able to save the basic tenets of the fundamental rights and laws of this country. After all, condemning an innocent man is a bigger misfortune than letting a criminal go.***

## **PREVENTION OF MONEY LAUNDERING – GLOBAL INITIATIVES**

The process of money laundering involves cleansing of money earned through illegal activities like extortion, drug trafficking and gun running etc. The tainted money is projected as clean money through intricate processes of placement, layering and laundering. The serious threat posed by money laundering to the financial systems and sovereignty was being progressively realized by various countries of the world. As a consequence of this realization, the international community took the following initiatives to curb the menace of money laundering: -

- (i) The 1998 United Nations Convention against illicit traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention of 1998), provided a comprehensive legal definition of money laundering. This definition has formed the basis of subsequent legislations on Money Laundering Laws of various countries;
- (ii) The Basle statement of principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money laundering; and

- (iii) The Financial Action Task Force on money laundering (FATF), 1989 made 40 recommendations, which provide the foundation for comprehensive legislation to combat the problem of money laundering. The recommendations were classified under various heads. Some of the important heads are:-
- (a) Declaration of laundering of moneys earned through serious crimes should be treated a criminal offence;
  - (b) to work out modalities of disclosure by financial institutions regarding suspicious transactions;
  - (c) Confiscation of the proceeds of crime;
  - (d) declaring money laundering to be an extraditable offence; and
  - (e) promoting international cooperation in investigation of money laundering.

### The Vienna Convention

The first major initiative in the prevention of money laundering was the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in December 1988 (popularly known as Vienna Convention). This convention laid the groundwork for efforts to combat money laundering by obliging the member states to criminalize the laundering of money from drug trafficking and confiscation of proceeds derived from such offence. It promotes international cooperation in investigations and makes extradition between member states applicable to money laundering. The convention also establishes the principle that domestic bank secrecy provisions should not interfere with international criminal investigations. UN Vienna 1988 Convention Article 3.1 describing Money Laundering as: ***“the conversion or transfer of property, knowing that such property is derived from any offense(s), for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such offense(s) to evade the legal consequences of his actions”.***

### Council of Europe Convention

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime, 1990 establishes a common policy on money laundering. It sets out a common definition of money laundering and common measures for dealing with it. The Convention lays down the principles for international cooperation among the member states, which may also include states outside the Council of Europe. This convention came into force in September 1993. One of the purposes of the convention is to facilitate international cooperation as regards investigative assistance, search, seizure and confiscation of the proceeds of all types of criminality, particularly serious crimes, such as, drug offences, arms dealing, terrorist offences etc. and other offences which generate large profits.

### European Union Money Laundering Directive

In response to the new opportunities for money laundering opened up by the liberalization of capital movements and cross-border financial services in the European Union, the Council of the European Communities in June, 1991 issued a directive on the Prevention of Use of the Financial System for the Purpose of Money Laundering. The directive requires member states to outlaw money laundering. The member states have been put under obligation to require financial institutions to establish and maintain internal systems to prevent laundering, to obtain the identification of customers with whom they enter into transaction of more than a particular amount and to keep proper records for at least five years. The financial institutions are also required to report suspicious transactions and ensure that such reporting does not result in liability for the institution or its employees.

### Basle Committee's Statement of Principles

In December 1988 the Basle Committee on Banking Regulation Supervisory Practices issued a statement of principles to be complied by the international banks of member states. These principles include identifying customers, avoiding suspicious transactions, and cooperating with law enforcement agencies. The statement aims at encouraging the banking sector to adopt common position in order to ensure that banks are not used to hide or launder funds acquired through criminal activities.

The International Organization of Securities Commissions (IOSCO) adopted, in October 1992, a resolution encouraging its members to take necessary steps to combat money laundering in securities and futures markets.

### Global Programme against Money Laundering (GPML)

The Global Programme against Money Laundering (GPML) was established in 1997 in response to the mandate given by the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The broad objective of GPML, as a unit within the United Nations Office on Drugs and Crime (UNODC), is to strengthen the ability of UN Member States to implement measures in anti-money laundering and countering the financing of terrorism (AML/CFT) and to assist them in detecting, seizing and confiscating illicit proceeds.

GPML fulfils its mandate principally through technical cooperation and assistance. It commits itself to providing a repository of best practices and information on AML/CFT and to promoting dissemination through its various initiatives. It focuses on assisting legal, financial, law enforcement and judicial authorities, as well as the private sector, to develop the necessary AML/CFT infrastructure. Over the years, GPML has developed and maintained strategic relationships and conducted many joint activities with partner international organizations working in this field.

In response to countries or group of countries requesting more specialized and in –depth assistance, GPML continues to deploy professional expertise in the form of mentors in the field to train people and build institutions, delivering direct technical assistance in states and regions to improve AML/CFT capacity. The reaction to mentoring, from assisted states and donors alike, has been extremely positive. Mentors don't directly exercise sovereign national powers but they can advise, pass on the know-how and train those officials who are empowered to do so.

GPML has specifically been tasked by the United Nations General Assembly, most recently in resolutions 74/177 (2019), 73/186 (2018), 72/196 (2017), and 71/209 (2016) to:

*"...continue providing technical assistance to Member States to combat money laundering and the financing of terrorism in accordance with United Nations related instruments and internationally accepted standards, including, where applicable, recommendations of relevant intergovernmental bodies, inter alia, the Financial Action Task Force on Money Laundering, and relevant initiatives of regional, interregional and multilateral organizations against money laundering."*

### The Financial Action Task Force (FATF)

The Financial Action Task Force (FATF) was established in July 1989 by a Group of Seven (G-7) Summit in Paris, initially to examine and develop measures to combat money laundering.

The Financial Action Task Force (FATF) is the global money laundering and terrorist financing watchdog. The inter-governmental body sets international standards that aim to prevent these illegal activities and the harm they cause to society. As a policy-making body, the FATF works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

In October 2001, the FATF expanded its mandate to incorporate efforts to combat terrorist financing, in addition to money laundering. In April 2012, it added efforts to counter the financing of proliferation of weapons of mass

destruction. Since its inception, the FATF has operated under a fixed life-span, requiring a specific decision by its Ministers to continue. Three decades after its creation, in April 2019, FATF Ministers adopted a new, open-ended mandate for the FATF.

The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. Starting with its own members, the FATF monitors countries' progress in implementing the FATF Recommendations; reviews money laundering and terrorist financing techniques and counter-measures; and, promotes the adoption and implementation of the FATF Recommendations globally.

The FATF's decision making body, the FATF Plenary, meets three times per year. With more than 200 countries and jurisdictions committed to implementing them, the FATF has developed the FATF Recommendations, or FATF Standards, which ensure a co-ordinated global response to prevent organised crime, corruption and terrorism. They help authorities go after the money of criminals dealing in illegal drugs, human trafficking and other crimes. The FATF also works to stop funding for weapons of mass destruction.

The FATF reviews money laundering and terrorist financing techniques and continuously strengthens its standards to address new risks, such as the regulation of virtual assets, which have spread as cryptocurrencies gain popularity. The FATF monitors countries to ensure they implement the FATF Standards fully and effectively, and holds countries to account that do not comply.

### **Egmont Group**

The Egmont Group serves as an international network fostering improved communication and interaction among Financial Intelligence Units (FIUs). Egmont Group is named after the venue in Brussels where the first such meeting of FIUs was held in June of 1995. The goal of the Egmont Group is to provide a forum for FIUs around the world to improve support to their respective governments in the fight against money laundering, terrorist financing and other financial crimes. This support includes:

- expanding and systematizing international cooperation in the reciprocal exchange of financial intelligence information;
- increasing the effectiveness of FIUs by offering training and personnel exchanges to improve the expertise and capabilities of personnel employed by FIUs;
- fostering better and secure communication among FIUs through the application of technology, presently via the Egmont Secure Web (ESW); and
- promoting the establishment of FIUs in those jurisdictions without a national anti-money laundering/terrorist financing program in place, or in areas with a program in the beginning stages of development.

### **The Asia/Pacific Group on Money Laundering (APG)**

The Asia/Pacific Group on Money Laundering (APG) was officially established as an autonomous regional anti-money laundering body in February 1997 at the Fourth (and last) Asia/Pacific Money Laundering Symposium in Bangkok, Thailand. The purpose of the APG is to facilitate the adoption, implementation and enforcement of internationally accepted anti-money laundering and anti-terrorist financing standards set out in the recommendations of the Financial Action Task Force (FATF).

The APG's role includes assisting jurisdictions in the region to enact laws dealing with the proceeds of crime, mutual legal assistance, confiscation, forfeiture and extradition. It also includes the provision of guidance in setting up systems for reporting and investigating suspicious transactions and helping in the establishment of financial intelligence units. The APG undertakes studies of methods and trends of money laundering and the financing of terrorism in the Asia/Pacific region. The APG allows for regional factors to be taken into account

in the implementation of anti-money laundering and anti-terrorist financing measures and provides for peer review by means of a mutual evaluation process.

The APG is a voluntary and co-operative international body established by agreement among its members and is autonomous. It does not derive from an international treaty nor is it part of any international organisation. However, it keeps itself informed of action taken or formal agreements made by relevant international and regional organisations or bodies in order to promote a consistent global response to money laundering and terrorist financing. The work to be done by the APG and its procedures is decided by consensus agreement among its members.

### **Eurasian Group on Combating Money Laundering and Financing of Terrorism (EAG)**

The Eurasian Group on Combating Money Laundering and financing of terrorism is an FATF-style regional body. The EAG was established in 2004 and is currently an associate member of the FATF.

The EAG was created for the countries of the Eurasian region not included in the existing FATF-style regional groups and is intended to play an important role in reducing the threat of international terrorism and ensure the transparency, reliability and security of the financial systems of states and their further integration into the international infrastructure for combating money laundering and terrorism financing (AML/CFT).

The primary goal of the EAG is to ensure effective interaction and cooperation at the regional level and integration of EAG member-states into the international system of anti-money laundering and combating financing of terrorism in accordance with the Recommendations of the FATF and the anti-money laundering and combating financing of terrorism standards of other international organizations, to which EAG member-states are party.

#### ***What influence does money laundering have on economic development?***

***Launderers are continuously looking for new routes for laundering their funds. Economies with growing or developing financial centres, but inadequate controls are particularly vulnerable as established financial centre countries implement comprehensive anti-money laundering regimes.***

***Differences between national anti-money laundering systems will be exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective countermeasures.***

***Some might argue that developing economies cannot afford to be too selective about the sources of capital they attract. But postponing action is dangerous. The more it is deferred, the more entrenched organised crime can become.***

***As with the damaged integrity of an individual financial institution, there is a damping effect on foreign direct investment when a country's commercial and financial sectors are perceived to be subject to the control and influence of organised crime. Fighting money laundering and terrorist financing is therefore a part of creating a business friendly environment which is a precondition for lasting economic development.***

### **PREVENTION OF MONEY LAUNDERING – INDIAN INITIATIVES**

Money laundering is posing threat to the financial systems and social order and integrity of the country and the same needs to be tackled by way of a separate legislation in view of the very fact that no comprehensive legislation is in force at present which can effectively deal with the problem. There is an urgent need for the enactment of a comprehensive legislation providing, inter alia, for preventing and punishing offences relating to money-laundering and connected activities, confiscation of proceeds of crime, disclosure of such transactions by financial institutions, setting up of agencies and mechanisms for co-ordinating measures necessary for combating money laundering, etc.

In view of an urgent need for the enactment of a comprehensive legislation for preventing money-laundering and connected activities, confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money laundering etc., the Prevention of Money Laundering Bill, 1998 was introduced in the Parliament on the 4th August, 1998. The Bill was referred to the Standing Committee on Finance, which presented its report on the 4th March, 1999 to Lok Sabha. After incorporating the recommendations of the Standing Committee, the Government introduced the Prevention of Money Laundering Bill 1999 in the Parliament on October 29, 1999. The Bill received the assent of the President and became Prevention of Money Laundering Act, 2002 on 17th January 2003. The Act has come in force with effect from July 1, 2005.

## PREVENTION OF MONEY LAUNDERING ACT, 2002

### Regulatory Framework

<b>Chapter I</b>	<b>Preliminary</b>
<b>Chapter II</b>	<b>Offence of Money Laundering</b>
<b>Chapter III</b>	<b>Attachment, Adjudication and Confiscation</b>
<b>Chapter IV</b>	<b>Obligations of Banking Companies, Financial Institutions and Intermediaries</b>
<b>Chapter V</b>	<b>Appellate Tribunal</b>
<b>Chapter VII</b>	<b>Special Courts</b>
<b>Chapter VIII</b>	<b>Authorities</b>
<b>Chapter IX</b>	<b>Attachment and Confiscation of Property in Contracting State</b>
<b>Chapter X</b>	<b>Miscellaneous</b>

The Prevention of Money Laundering Act, 2002 consists of ten chapters containing 75 sections and one Schedule. Chapter I containing section 1 and 2 deals with short title, extent and commencement and definitions. Chapter II containing sections 3 and 4 provides for offences and punishment for money laundering. Chapter III (Section 5-11) provides for attachment, adjudication and confiscation and Chapter IV (Sections 12-15) deals with obligations of banking companies, financial institutions and intermediaries. Chapter V (Sections 16-24) relates to Summons, Searches and Seizures etc.

The Act provides for establishment of Appellate Tribunal and thus sections 25-42 under Chapter VI provides for composition, procedure, power, jurisdiction etc. of the Appellate Tribunal. Chapter VII (Sections 43-47) deals with Special Courts, and Chapter VIII (Sections 48-54) provides for establishment of various authorities under the Act, their appointment, powers, jurisdiction etc. Chapter IX (Sections 55-61) deals with reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property. Chapter X containing Sections 62-75 deals with miscellaneous provisions including punishment for, vexatious search, false information etc., cognizance of offences, and offences by companies, among others.

In the case of *Nikesh Tarachand Shah (Petitioner) vs. Union of India & Anr (Respondents)*, Writ Petition (Criminal) No. 67 of 2017, Judgement dated November 23, 2017, Supreme Court of India observed that the Prevention of Money Laundering Act, 2002 was introduced, as its Statement of Objects and Reasons mentions, to make money laundering an offence, and to attach property involved in money laundering, so that this serious threat to the financial system of India is adequately dealt with. It is worth setting out the Statement of Objects and Reasons of the Act in full.

*“STATEMENT OF OBJECTS AND REASONS*

*It is being realised, world over, that money laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty. Some of the initiatives taken by the international community to obviate such threats are outlined below:—*

- (a) *the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party, calls for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence.*
- (b) *the Basle Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money-laundering.*
- (c) *the Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from 14th to 16th July, 1989, to examine the problem of money-laundering has made forty recommendations, which provide the foundation material for comprehensive legislation to combat the problem of money-laundering. The recommendations were classified under various heads. Some of the important heads are—*
  - (i) *declaration of laundering of monies carried through serious crimes a criminal offence;*
  - (ii) *to work out modalities of disclosure by financial institutions regarding reportable transactions;*
  - (iii) *confiscation of the proceeds of crime;*
  - (iv) *declaring money-laundering to be an extraditable offence; and*
  - (v) *promoting international co-operation in investigation of money-laundering.*
- (d) *the Political Declaration and Global Programme of Action adopted by United Nations General Assembly by its Resolution No. S-17/2 of 23<sup>rd</sup> February, 1990, inter alia, calls upon the member States to develop mechanism to prevent financial institutions from being used for laundering of drug related money and enactment of legislation to prevent such laundering.*
- (e) *the United Nations in the Special Session on Countering World Drug Problem Together concluded on the 8th to the 10th June, 1998 has made another declaration regarding the need to combat money-laundering. India is a signatory to this declaration.*

2. In view of an urgent need for the enactment or a comprehensive legislation inter alia for preventing money-laundering and connected activities confiscation of proceeds of crime, setting up of agencies and mechanisms for coordinating measures for combating money-laundering, etc., the Prevention of Money-Laundering Bill, 1998 was introduced in the Lok Sabha on the 4th August, 1998. The Bill was referred to the Standing Committee on Finance, which presented its report on the 4th March, 1999 to the Lok Sabha. The recommendations of the Standing Committee accepted by the Central Government are that

- (a) *the expressions “banking company” and “person” may be defined;*
- (b) *in Part I of the Schedule under Indian Penal Code the word offence under section 477A relating to falsification of accounts should be omitted;*
- (c) *‘knowingly’ be inserted in clause 3(b) relating to the definition of money-laundering;*
- (d) *the banking companies, financial institutions and intermediaries should be required to furnish information of transactions to the Director instead of Commissioner of Income-tax (e) the banking companies should also be brought within the ambit of clause II relating to obligations of financial institutions and intermediaries;*

- (f) a definite timelimit of 24 hours should be provided for producing a person about to be searched or arrested person before the Gazetted Officer or Magistrate;
  - (g) the words “unless otherwise proved to the satisfaction of the authority concerned” may be inserted in clause 22 relating to presumption on interconnected transactions;
  - (h) vacancy in the office of the Chairperson of an Appellate Tribunal, by reason of his death, resignation or otherwise, the seniormost member shall act as the Chairperson till the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill the vacancy, enters upon his office;
  - (i) the appellant before the Appellate Tribunal may be authorised to engage any authorised representative as defined under section 288 of the Income-tax Act, 1961,
  - (j) the punishment for vexatious search and for false information may be enhanced from three months imprisonment to two years imprisonment, or fine of rupees ten thousand to fine of rupees fifty thousand or both;
  - (k) the word ‘good faith’ may be incorporated in the clause relating to Bar of legal proceedings. The Central Government have broadly accepted the above recommendations and made provisions of the said recommendations in the Bill.
3. In addition to above recommendations of the standing committee the Central Government proposes to
- (a) relax the conditions prescribed for grant of bail so that the Court may grant bail to a person who is below sixteen years of age, or woman, or sick or infirm,
  - (b) levy of fine for default of non-compliance of the issue of summons, etc.
  - (c) make provisions for having reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property so as to facilitate the transfer of funds involved in money laundering kept outside the country and extradition of the accused persons from abroad.
4. The Bill seeks to achieve the above objects.”

***In the case of Vijay Madanlal Choudhary vs. Union of India, Special Leave Petition (Criminal) No. 4634 of 2014 judgement dated 27 July, 2022, Supreme Court of India inter alia observed that:***

***The Preamble of the 2002 Act reads thus:***

***“An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.***

***WHEREAS the Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its seventeenth special session on the twenty-third day of February, 1990;***

***AND WHEREAS the Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 calls upon the Member States to adopt national money-laundering legislation and programme;***

***AND WHEREAS it is considered necessary to implement the aforesaid resolution and the Declaration.”***

***Even the Preamble of the Act reinforces the background in which the Act has been enacted by the Parliament being commitment of the country to the international community. It is crystal clear from the Preamble that the Act has been enacted to prevent money-laundering and to provide for confiscation of property derived from or involved in money-laundering and for matters connected therewith or incidental thereto. It is neither a pure regulatory legislation nor a pure penal legislation. It is amalgam***

*of several facets essential to address the scourge of money-laundering as such. In one sense, it is a sui generis legislation.*

*As aforesaid, it is a comprehensive legislation dealing with all the related issues concerning prevention of money-laundering, attachment of proceeds of crime, adjudication and confiscation thereof including vesting of it in the Central Government, setting up of agencies and mechanisms for coordinating measures for combating money-laundering and also to prosecute the persons indulging in the process or activity connected with the proceeds of crime. While considering the challenge to the relevant provision(s) of the 2002 Act, we cannot be oblivious to the objects and reasons for enacting such a special legislation and the seriousness of the issues to be dealt with thereunder including having transnational implications. Every provision in the 2002 Act will have to be given its due significance while keeping in mind the legislative intent for providing a special mechanism to deal with the scourge of money-laundering recognised world over and with the need to deal with it sternly.*

## MAJOR PROVISIONS OF THE ACT

### Important Definitions

Section 2 of the Act defines various terms used in the Act. Some of the important definitions are given below:

#### Attachment

Sub-section 1(d) defines attachment as to mean prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III.

#### Proceeds of Crime

Section 2(1)(u) defines the term 'proceeds of crime' as to mean 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.

#### Property

The term 'property used in sub-section 1(v) of Section 2 means any property or assets of every description, whether, corporeal or incorporeal, movable or immovable, tangible or intangible and includes, deeds and instruments evidencing title to, or interest in such property or assets wherever located.

#### Beneficial Owner

The term Beneficial Owner under Section 2 (1) (fa) means an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person.

#### Intermediary

The term intermediary under sub-section 1(n) of Section 2 has been defined as to mean a stock broker, sub-broker, share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment advisor, and any other intermediary associated with securities market and registered under Section 12 of the SEBI Act, 1992 or an association recognised or registered under the Forward Contracts (Regulation) Act, 1952 or any member of such association; intermediary registered by the

Pension Fund Regulatory and Development Authority; a recognised stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956.

### Investigation

Sub-section 2(1)(na) defines investigation to include all the proceedings under the Act conducted by the Director or by an authority authorized by the Central Government under this Act for the collection of evidence.

### “Reporting entity”

As per Section 2(1)(wa) “Reporting entity” means a banking company, financial institution, intermediary or a person carrying on a designated business or profession.

### Scheduled offence

Section 2(1) (y) defines Scheduled Offence to include the offences specified under Part A of the Schedule, the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; the offences specified under Part C of the Schedule.

### Special Court

Section 2(1) (z) defines Special Court to means a Court of Session designated as Special Court under sub-section (1) of section 43.

### Transfer

Section 2(1) (za) defines transfer to includes sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

### Value

Section 2(1) (zb) defines value to mean the fair market value of any property on the date of its acquisition by any person, or if such date cannot be determined, the date on which such property is possessed by such person.

#### ***What are Proceeds of Crime?***

***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.***

***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 relating to the scheduled offence.***

### Money Laundering

Section 3 of the Act states that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it is an untainted property shall be guilty of offence of money laundering.

Section 4 provides that any person who commits the offence of money laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years

and also liable to fine. However, where the proceeds of crime involved in money laundering relates to any offence specified under the Narcotic Drugs and Psychotropic Substances Act, the punishment may extend to rigorous imprisonment for ten years.

#### ***What is a Money Laundering Offence?***

***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 untainted property; or (f) claiming as untainted property, in any manner whatsoever.***

***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.***

***In the case of Vijay Madanlal Choudhary vs. Union of India( Special Leave Petition (Criminal) No. 4634 of 2014 judgement dated 27 July, 2022) Supreme Court of India inter alia observed that 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. 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. For, the expression “derived or obtained” is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, 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. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause “proceeds of crime”, as it obtains as of now.***

***Directorate of Enforcement (Appellant(s)) vs. Padmanabhan Kishore (Respondent(s)) (Arising out of SLP (CrL.) No. 2668 of 2022) Judgement dated October 31, 2022, Supreme Court of India inter-alia observed that the definition of “proceeds of crime” in PML Act, inter alia, means any property derived or obtained by any person as a result of criminal activity relating to a scheduled offence. The offences punishable under Sections 7, 12 and 13 are scheduled offences, as is evident from paragraph 8 of Part-A of the Schedule to the PML Act. Any property thus derived as a result of criminal activity relating to offence mentioned in said paragraph 8 of Part-A of the Schedule would certainly be “proceeds of crime”. Section 3 states, inter alia, that whoever 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 shall be guilty of offence of money-laundering.***

***It is true that so long as the amount is in the hands of a bribe giver, and till it does not get impressed with the requisite intent and is actually handed over as a bribe, it would definitely be untainted money. If the money is handed over without such intent, it would be a mere entrustment. If it is thereafter appropriated by the public servant, the offence would be of misappropriation or species thereof but certainly not of bribe. The crucial part therefore is the requisite intent to hand over the amount as bribe and normally such intent must necessarily be antecedent or prior to the moment the amount is handed over. Thus, the requisite intent would always be at the core before the amount is handed over. Such***

*intent having been entertained well before the amount is actually handed over, the person concerned would certainly be involved in the process or activity connected with “proceeds of crime” including inter alia, the aspects of possession or acquisition thereof. By handing over money with the intent of giving bribe, such person will be assisting or will knowingly be a party to an activity connected with the proceeds of crime. Without such active participation on part of the person concerned, the money would not assume the character of being proceeds of crime. The relevant expressions from Section 3 of the PML Act are thus wide enough to cover the role played by such person.*

*Further, Supreme Court of India held that on a bare perusal of the complaint made by the Enforcement Directorate, it is quite clear that the respondent was prima facie involved in the activity connected with the proceeds of crime.*

### Attachment of property involved in money laundering

Section 5 of the Act authorises the Director or any officer not below the rank of Deputy Director authorised by him and who has reason to believe on the basis of material in his possession that any person is in possession of any proceeds of money laundering; such person has been charged of having committed a scheduled offence and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime to, provisionally attach by order in writing such property for a period not exceeding 180 days from the date of the order.

The said provisional attachment does not debar the person who has the possession of the property from enjoying the same but the said person is prohibited from creating any third party interest in the said property.

The Director or any other officer who provisionally attaches any property is required to forward a copy of the order along with material in his possession to the Adjudicating Authority immediately and thereafter required to file, within a period of thirty days from such attachment file a complaint, stating the facts of such attachment before the Adjudicating Authority.

### Adjudicating Authority

Section 6 empowers the Central Government to appoint, by notification, one or more persons not below the prescribed rank or designation or having prescribed experience, as the Adjudicating Authority to exercise the jurisdiction, powers and authority conferred on or under the Act.

### Adjudication

Section 8 dealing with the adjudication. Section 8(1) states that on receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, it may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized or frozen under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government.

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person.

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

According to Section 8(2) the Adjudicating Authority shall, after— (a) considering the reply, if any, to the notice issued under sub-section (1); (b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and (c) taking into account all relevant materials placed on record before him, by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering: Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

Section 8(3) provides that where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall –

- (a) continue during investigation for a period not exceeding three hundred and sixty-five days or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and
- (b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Special Court.

*Explanation.*—For the purposes of computing the period of three hundred and sixty-five days under clause (a), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.

Section 8(4) states that where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed.

Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.

As per Section 8(5) where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

Section 8(6) states that where on conclusion of a trial under this Act, the Special Court finds that the offence of money laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.

According to Section 8(7) where the trial under this Act 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 Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it.

Section 8(8) provides that where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be prescribed, may also direct the Central

Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering: Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering. Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.

### **Vesting of Property in Central Government**

Section 9 provides that Where an order of confiscation has been made under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 in respect of any property of a person, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances: Where the Special Court or the Adjudicating Authority, as the case may be, after giving an opportunity of being heard to any other person interested in the property attached under this Chapter, or seized or frozen under Chapter V, is of the opinion that any encumbrance on the property or lease-hold interest has been created with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or lease-hold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrances or lease-hold interest.

It may be noted that nothing in this section shall operate to discharge any person from any liability in respect of such encumbrances which may be enforced against such person by a suit for damages.

### **Obligation of Banking Companies, Financial Institutions and Intermediaries**

Chapter IV of the Act deals with obligations of Banking companies, financial institutions and intermediaries. According to Section 12(1) requires every reporting entity shall—

- (a) maintain a record of all transactions, including information relating to transactions covered under clause (b), in such manner as to enable it to reconstruct individual transactions;
- (b) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;
- (c) maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

Section 12(2) provides that every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force, shall be kept confidential.

Section 12(3) states that the records referred to in clause (a) of sub-section (1) shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

The records referred to in clause (e) of sub-section (1) shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this Chapter.

Section 13 states that the Director may, either on his own motion, or on an application made by any authority, officer, or person, call for records of all transactions and make such inquiry or cause such inquiry to be made, as he thinks fit. In the course of any inquiry, if the Director finds that a banking company, financial institution or

an intermediary or any of its officers has failed to maintain or retain records in accordance with the provisions of the Act, he may, by an order, levy a fine on such banking company, financial institution or intermediary.

Section 15 empowers the Central Government to prescribe, in consultation with the Reserve Bank of India, the procedure and the manner of maintaining and furnishing information for the purpose of implementation of the provisions of the Act.

### **Summon, Searches and Seizures, etc.**

Section 16 empowers an authority to enter, on having reason to believe that an offence under Section 3 has been committed, any place within the limits of the area assigned to him or in respect of which he is authorised. Section 16(3) requires such authority to place marks of identification on the records inspected by him and make or cause to be made extracts or copies therefrom, make an inventory of any property checked or verified by him and record the statement of any person present in the place which may be useful for, or relevant to, any proceedings under the Act. Section 17 empowers authority to search and seizure.

Section 18 of the Act deals with search of persons and provides that if an authority authorised in this behalf by the Central Government by general or special order has reason to believe that any person has secreted about his person or in anything under his possession, ownership or control any record or proceeds of crime which may be useful for or relevant to any proceedings under this Act, he may search that person and seize such record or property which may be useful for or relevant to any proceedings under this Act.

### **Power to Arrest**

Section 19(1) of the Act states that 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.

The Director, Deputy Director, Assistant Director or any other officer shall, immediately after arrest of such person under sub-section (1), forward a copy of the order along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such order and material for such period, as may be prescribed.

Every person arrested under sub-section (1) shall, within twenty-four hours, be taken to a Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction: Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the [Special Court or] Magistrate's Court.

In the case of *Pankaj Bansal v. Union of India & Ors. Criminal Appeal Nos. 3053-3054 of 2023* [Special Leave Petition (Crl.) Nos. 9275-76 of 2023] judgement dated 03.10.2023, Hon'ble Supreme Court of India noted that the language of Section 19 of the Act of 2002 puts it beyond doubt that the authorized officer has to record in writing the reasons for forming the belief that the person proposed to be arrested is guilty of an offence punishable under the Act of 2002. Section 19(2) requires the authorized officer to forward a copy of the arrest order along with the material in his possession, referred to in Section 19(1), to the Adjudicating Authority in a sealed envelope. Though it is not necessary for the arrested person to be supplied with all the material that is forwarded to the Adjudicating Authority under Section 19(2), he/she has a constitutional and statutory right to be 'informed' of the grounds of arrest, which are compulsorily recorded in writing by the authorized officer in keeping with the mandate of Section 19(1) of the Act of 2002. As already noted hereinbefore, It seems that the mode of informing this to the persons arrested is left to the option of the ED's authorized officers in different parts of the country, i.e., to either furnish such grounds of arrest in writing or to allow such grounds to be read by the arrested person or be read over and explained to such person.

Further the Apex Court noted that the grounds of arrest recorded by the authorized officer, in terms of Section 19(1) of the Act of 2002, would be personal to the person who is arrested and there should, ordinarily, be no risk of sensitive material being divulged therefrom, compromising the sanctity and integrity of the investigation. In the event any such sensitive material finds mention in such grounds of arrest recorded by the authorized officer, it would always be open to him to redact such sensitive portions in the document and furnish the edited copy of the grounds of arrest to the arrested person, so as to safeguard the sanctity of the investigation.

On the above analysis, to give true meaning and purpose to the constitutional and the statutory mandate of Section 19(1) of the Act of 2002 of informing the arrested person of the grounds of arrest, Supreme Court of India hold that it would be necessary, henceforth, that a copy of such written grounds of arrest is furnished to the arrested person as a matter of course and without exception. The decisions of the *Delhi High Court in Moin Akhtar Qureshi (supra)* and the *Bombay High Court in Chhagan Chandrakant Bhujbal (supra)*, which hold to the contrary, do not lay down the correct law. In the case on hand, the admitted position is that the ED's Investigating Officer merely read out or permitted reading of the grounds of arrest of the appellants and left it at that, which is also disputed by the appellants. As this form of communication is not found to be adequate to fulfil compliance with the mandate of Article 22(1) of the Constitution and Section 19(1) of the Act of 2002, we have no hesitation in holding that their arrest was not in keeping with the provisions of Section 19(1) of the Act of 2002. Further, as already noted supra, the clandestine conduct of the ED in proceeding against the appellants, by recording the second ECIR immediately after they secured interim protection in relation to the first ECIR does not commend acceptance as it reeks of arbitrary exercise of power. In effect, the arrest of the appellants and, in consequence, their remand to the custody of the ED and, thereafter, to judicial custody, cannot be sustained.

### Retention of Property

Section 20 of the Act deals with retention of property.

1. Where any property has been seized under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the officer authorised by the Director in this behalf has, on the basis of material in his possession, reason to believe (the reason for such belief to be recorded by him in writing) that such property is required to be retained for the purposes of adjudication under section 8, such property may, if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such property was seized or frozen, as the case may be.
2. The officer authorised by the Director shall, immediately after he has passed an order for retention or continuation of freezing of the property for purposes of adjudication under section 8, forward a copy of the order along with the material in his possession, referred to in sub-section (1), to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.
3. On the expiry of the period specified in sub-section (1), the property shall be returned to the person from whom such property was seized or whose property was ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such property beyond the said period.
4. The Adjudicating Authority, before authorising the retention or continuation of freezing of such property beyond the period specified in sub-section (1), shall satisfy himself that the property is prima facie involved in money-laundering and the property is required for the purposes of adjudication under section 8.
5. After passing the order of confiscation under sub-section (5) or sub-section (7) of section 8, the Special Court shall direct the release of all property other than the property involved in money-laundering to the person from whom such property was seized or the persons entitled to receive it.

6. Where an order releasing the property has been made by the Special Court under sub-section (6) of section 8 or by the Adjudicating Authority under section 58B or sub-section (2A) of section 60, the Director or any officer authorised by him in this behalf may withhold the release of any such property for a period of ninety days from the date of such order, if he is of the opinion that such property is relevant for the appeal proceedings under the Act.

### Retention of records

Section 21 deals with retention of records.

- (1) Where any records have been seized, under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the Investigating Officer or any other officer authorised by the Director in this behalf has reason to believe that any of such records are required to be retained for any inquiry under this Act, such records may if seized, be retained or if frozen, may continue to remain frozen, for a period not exceeding one hundred and eighty days from the day on which such records were seized or frozen, as the case may be.
- (2) The person, from whom records seized or frozen, shall be entitled to obtain copies of records.
- (3) On the expiry of the period specified under sub-section (1), the records shall be returned to the person from whom such records were seized or whose records were ordered to be frozen unless the Adjudicating Authority permits retention or continuation of freezing of such records beyond the said period.
- (4) The Adjudicating Authority, before authorising the retention or continuation of freezing of such records beyond the period specified in sub-section (1), shall satisfy himself that the records are required for the purposes of adjudication under section 8.
- (5) After passing of an order of confiscation or release under sub-section (5) or subsection (7) of section 8 or Section 58B, the Adjudicating Authority shall direct the release of the records to the person from whom such records were seized.
- (6) Where an order releasing the records has been made by the Court, Adjudicating Authority under section 21(5), the Director or any officer authorised by him in this behalf may withhold the release of any such record for a period of ninety days from the date of such order, if he is of the opinion that such record is relevant for the appeal proceedings under the Act.

### Presumption in Inter-connected Transactions

Section 23 of the Act deals with presumption in inter-connected transactions and provides that where money laundering involves two or more transactions and one or more such transactions is or are proved to be involved in money laundering, then for the purposes of adjudication or confiscation under Section 8, it shall be presumed that the remaining transactions form part of such interconnected transactions, unless otherwise proved to the satisfaction of the Adjudicating Authority.

### Appellate Tribunal

Chapter VI of the Act deals with Appellate Tribunal. Section 25 empowers the Central Government, to establish an Appellate Tribunal to hear appeals against the orders of Adjudicating Authority and other authorities under the Act.

The Appellate Tribunal constituted under sub-section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against the orders of the Adjudicating Authority and the other authorities under this Act. Section 26 lays down the matters where appeal lies to the Appellate Tribunal and which include orders made by Adjudicating Authority, reporting

authority aggrieved by the order of the Director, etc. Further appeal from the orders of the Appellate Tribunal would lie to the High Court under Section 42 of the Act.

### Special Courts

Sections 43 to 47 of the Act deal with provisions relating to Special Courts. Section 43(1) empowers the Central Government to designate, in consultation with the Chief Justice of the High Court, one or more Courts of Session as Special Courts or Court for such area or areas or for such case or class or group of cases as may be specified in the notification, for trial of offence punishable under Section 4.

### Offences Triable by Special Courts

Section 44(1) provides that the offence punishable under Section 4, shall be triable only by the Special Court constituted for the area in which the offence has been committed or a special court may, upon a complaint made by an authority authorised in this behalf take cognizance of the offence for which the accused is committed to it for trial.

### Offences to be cognizable and Non-bailable

Section 45 declares every offence punishable under the Act to be cognizable. It provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence under this Act shall be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity to oppose the application for such release; and where the Public Prosecutor opposes the application, unless 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 in bail.

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees may be released on bail, if the Special Court so directs.

However the special court shall not take cognizance of any offence punishable under Section 4, except upon a complaint in writing made by (i) the Director or (ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or special order made by that Government.

Section 45(1A) provides that notwithstanding anything contained in 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 authorized, by the Central Government by a general or special order, and subject to such conditions as may be prescribed.

It may be noted that “Offences to be cognizable and non-bailable” shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfillment of conditions under section 19 and subject to the conditions enshrined under this section.

### Power of Central Government to Issue Directions

Section 52 empowers the Central Government to issue, from time to time, such orders, instructions and directions to the authorities as it may deem fit for the proper administration of this Act. The authorities and all other persons employed in execution of the Act have been put under obligation to observe and follow such orders, instructions and directions of the Central Government. However, no such orders, instructions or directions shall

be issued so as to require any authority to decide a particular case in a particular manner or interfere with the discretion of the Adjudicating Authority in exercise of his functions.

### **Agreement with Foreign Countries**

Section 56 empowers the Central Government to enter into an agreement with the Government of any country for enforcing the provisions of the Act and also for exchange of information for the prevention of any offence under the this Act or under the corresponding law in force in that country or investigation of cases relating to any offence under the Act.

### **Assistance to a Contracting State in Certain Cases**

Section 58 provides that, where 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 forwarding to such court or authority any evidence connected therewith, the Central Government may forward such letter of request to the Special Court or to any authority as it thinks fit for execution of such request in accordance with the provisions of the Act or as the case may be, any other law for the time being in force. Section 58A empowering Special Court to release the property.

### **Reciprocal Arrangements for Processes and Assistance for Transfer of Accused Persons**

Section 59(1) prescribes that where Special Court, in relation to an offence punishable under Section 4 desires that a summon to an accused person; or a warrant for the arrest of an accused person; or a summon to any person requiring him to attend and produce a document or other thing, or to produce a document or other things or to produce it; or 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 through such authorities as the Central Government may by notification, specify in that behalf and that court, Judge or Magistrate, as the case may be, shall cause the same to be executed.

Sub-Section (2) stipulates that where a Special Court, in relation to an offence punishable under Section 4 has received for service or execution, summon to an accused person; or a warrant for the arrest of an accused person; or a summon to any person requiring him to attend and produce a document or other things or to produce it; or a search warrant; issued by a court, Judge or Magistrate in a contracting State, it shall cause the same to be served or executed as if it were a summon or warrant received by it from another court in the said territories for service or execution within its jurisdiction. Where a warrant of arrest has been executed, the person arrested shall, so far as possible be dealt with in accordance with the procedure specified under Section 19 and where a search warrant has been executed, the things found in the search shall so far as possible be dealt with in accordance with the procedure specified under Section 17 or 18.

However, 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 summon or search warrant through such authority as the Central Government may by notification specify in this behalf.

### **Authorities under PMLA**

There shall be the following classes of authorities namely:

- (a) Director or Additional Director or Joint Director,
- (b) Deputy Director,

- (c) Assistant Director, and
- (d) such other class of officers as may be appointed for the purposes of this Act.

### **Jurisdiction of Authorities**

The authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, as the case may be, to such authorities by or under this Act or the rules framed thereunder in accordance with such directions as the Central Government may issue for the exercise of powers and performance of the functions by all or any of the authorities.

In issuing the directions or orders by the Central Government may have regard to any one or more of the following criteria:

- (a) territorial area;
- (b) classes of persons;
- (c) classes of cases; and
- (d) any other criterion specified by the Central Government in this behalf.

### **Attachment, Seizure and Confiscation of Property, etc.**

Section 60(1) provides that where the Director has made an order for attachment of any property under Section 5 or for freezing under sub-section (1A) of section 17 or where an Adjudicating Authority has made an order relating to a property under section 8 or where a Special Court has made an order of confiscation relating to a property under sub-section (5) or sub section (6) of section 8 and such property is suspected to be in a contracting state, the Special Court on an application by the Director or the Administrator appointed under Section 10(1) as the case may be, may issue a letter of request to a court or an authority in the contracting state for execution of such order.

Section 60(2) prescribes that where a letter of request is received by the Central Government from a court or an authority in a contracting State requesting attachment, seizure, freezing or confiscation of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence under a corresponding law committed in that contracting State, the Central Government may forward such letter of request to the Director, as it thinks fit, for execution in accordance with the provisions of this Act.

Section 60(2A) states that where on closure of the criminal case or conclusion of trial in a criminal court outside India under the corresponding law of any other country, such court finds that the offence of money-laundering under the corresponding law of that country has been committed, the Special Court shall, on receipt of an application from the Director for execution of confiscation under sub-section (2), order, after giving notice to the affected persons, that such property involved in money-laundering or which has been used for commission of the offence of money-laundering stand confiscated to the Central Government.

Sub-Section (3) stipulates that the Director shall on receipt of a letter of request under Section 58 or Section 59 direct any authority under the Act to take all steps necessary for tracing and identifying such property.

### **RBI Master Direction - Know Your Customer (KYC) Direction**

#### **The objective of KYC Norms/ AML Measures/ CFT Guidelines**

The objective of Know Your Customer (KYC) Norms/Anti-Money Laundering (AML) Measures/Combating of Financing of Terrorism (CFT) guidelines is to prevent banks from being used, intentionally or unintentionally, by criminal elements for money laundering or terrorist financing activities. KYC procedures also enable banks to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently.

In terms of the provisions of Prevention of Money-Laundering Act, 2002 and the Prevention of Money-Laundering (Maintenance of Records) Rules, 2005, as amended from time to time by the Government of India as notified by the Government of India, Regulated Entities (REs) are required to follow certain customer identification procedures while undertaking a transaction either by establishing an account-based relationship or otherwise and monitor their transactions. REs shall take steps to implement the provisions of the aforementioned Act and Rules, including operational instructions issued in pursuance of such amendment(s).

It may be noted that “**Regulated Entities**” (REs) means:

- a. all Scheduled Commercial Banks (SCBs)/ Regional Rural Banks (RRBs)/ Local Area Banks (LABs)/ All Primary (Urban) Co-operative Banks (UCBs) /State and Central Co-operative Banks (StCBs / CCBs) and any other entity which has been licenced under Section 22 of Banking Regulation Act, 1949, which as a group shall be referred as ‘banks’.
- b. All India Financial Institutions (AIFIs).
- c. All Non-Banking Finance Companies (NBFCs), Miscellaneous Non-Banking Companies (MNBCs) and Residuary Non-Banking Companies (RNBCs).
- d. All Payment System Providers (PSPs)/ System Participants (SPs) and Prepaid Payment Instrument Issuers (PPI Issuers).
- e. All authorised persons (APs) including those who are agents of Money Transfer Service Scheme (MTSS), regulated by the Regulator.

#### **Know Your Customer (KYC) Policy of Regulated Entities (REs)**

According to the RBI Master Direction - Know Your Customer (KYC) Direction, there shall be a Know Your Customer (KYC) policy duly approved by the Board of Directors of Regulated Entities (Res) or any committee of the Board to which power has been delegated. The KYC policy shall include following four key elements:



#### **Money Laundering and Terrorist Financing Risk Assessment by Regulated Entities (REs)**

- (a) REs shall carry out ‘Money Laundering (ML) and Terrorist Financing (TF) Risk Assessment’ exercise periodically to identify, assess and take effective measures to mitigate its money laundering and terrorist financing risk for clients, countries or geographic areas, products, services, transactions or delivery channels, etc.

The assessment process should consider all the relevant risk factors before determining the level of overall risk and the appropriate level and type of mitigation to be applied. While preparing the internal risk assessment, REs shall take cognizance of the overall sector-specific vulnerabilities, if any, that the regulator/supervisor may share with REs from time to time.

- (b) The risk assessment by the RE shall be properly documented and be proportionate to the nature, size, geographical presence, complexity of activities/structure, etc. of the RE. Further, the periodicity of risk assessment exercise shall be determined by the Board of the RE, in alignment with the outcome of the risk assessment exercise. However, it should be reviewed at least annually.
- (c) The outcome of the exercise shall be put up to the Board or any committee of the Board to which power in this regard has been delegated, and should be available to competent authorities and self-regulating bodies.
- (d) REs shall apply a Risk Based Approach (RBA) for mitigation and management of the identified risk and should have Board approved policies, controls and procedures in this regard. Further, REs shall monitor the implementation of the controls and enhance them if necessary.

### Financial Intelligence Unit – India (FIU-IND)

Financial Intelligence Unit - India (FIU-IND) is the central, national agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions to enforcement agencies and foreign FIUs. Financial Intelligence Unit – India (FIU-IND) was set by the Government of India vide O.M. dated 18th November 2004 as the central national agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions. FIU-IND is also responsible for coordinating and strengthening efforts of national and international intelligence, investigation and enforcement agencies in pursuing the global efforts against money laundering and financing of terrorism. FIU-IND is an independent body reporting directly to the Economic Intelligence Council (EIC) headed by the Finance Minister.

The main function of FIU-IND is to receive cash/suspicious transaction reports, analyse them and, as appropriate, disseminate valuable financial information to intelligence/enforcement agencies and regulatory authorities. The functions of FIU-IND are:

- *Collection of Information:* Act as the central reception point for receiving Cash Transaction reports (CTRs), Non-Profit Organisation Transaction Report (NTRs), Cross Border Wire Transfer Reports (CBWTRs), Reports on Purchase or Sale of Immovable Property (IPRs) and Suspicious Transaction Reports (STRs) from various reporting entities.
- *Analysis of Information:* Analyse received information in order to uncover patterns of transactions suggesting suspicion of money laundering and related crimes.
- *Sharing of Information:* Share information with national intelligence/law enforcement agencies, national regulatory authorities and foreign Financial Intelligence Units.
- *Act as Central Repository:* Establish and maintain national data base on the basis of reports received from reporting entities.
- *Coordination:* Coordinate and strengthen collection and sharing of financial intelligence through an effective national, regional and global network to combat money laundering and related crimes.
- *Research and Analysis:* Monitor and identify strategic key areas on money laundering trends, typologies and developments.

### The Directorate of Enforcement (ED)

The Directorate of Enforcement or the ED is a multi-disciplinary organization mandated with investigation of economic crimes and violations of foreign exchange laws. The origin of this Directorate goes back to 1st May, 1956, when an 'Enforcement Unit' was formed in the Department of Economic Affairs for handling Exchange

Control Laws violations under Foreign Exchange Regulation Act, 1947 (FERA '47). This Unit with Delhi as Headquarters was headed by a Legal Service Officer, as Director of Enforcement, assisted by an Officer drawn on deputation from Reserve Bank of India (RBI) and 03 Inspectors of Special Police Establishment. There were 02 branches – at Bombay and Calcutta.

In the year 1957, this Unit was renamed as 'Enforcement Directorate', and another branch was opened at Madras. In 1960, the administrative control of the Directorate was transferred from the Department of Economic Affairs to the Department of Revenue. With the passage of time, FERA' 47 was repealed and replaced by FERA, 1973. For a short period of 04 years (1973 – 1977), the Directorate remained under the administrative jurisdiction of the Department of Personnel & Administrative Reforms. Presently, the Directorate is under the administrative control of Department of Revenue, Ministry of Finance, and Government of India.

With the onset of the process of economic liberalization, FERA, 1973, which was a regulatory law, was repealed and in its place, a new law viz. the Foreign Exchange Management Act, 1999 (FEMA) came into operation w.e.f. 1st June 2000. Further, in tune with the International Anti Money Laundering regime, the Prevention of Money Laundering Act, 2002 (PMLA) was enacted and ED was entrusted with its enforcement w.e.f. 1st July 2005. Recently, with the increase in number of cases relating to economic offenders taking shelter in foreign countries, the Government has passed the Fugitive Economic Offenders Act, 2018 (FEOA) and ED is entrusted with its enforcement with effect from 21st April, 2018. The Directorate of Enforcement is a multi-disciplinary organization mandated with investigation of offence of money laundering and violations of foreign exchange laws. The statutory functions of the Directorate include enforcement of following Acts:

- The Prevention of Money Laundering Act, 2002 (PMLA)
- The Foreign Exchange Management Act, 1999 (FEMA)
- The Fugitive Economic Offenders Act, 2018 (FEOA)

### **Freezing of Assets under Section 51A of Unlawful Activities (Prevention) Act, 1967**

The Unlawful Activities (Prevention) Act, 1967 (UAPA) enacted by the Parliament for the more effective prevention of certain unlawful activities of individual and association and for dealing with terrorist activities. According to the UAPA, unlawful activity in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise), – (i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or (iii) which causes or is intended to cause disaffection against India.

In terms of Section 51A, the Central Government is empowered to freeze, seize or attach funds and other financial assets or economic resources held by, on behalf of or at the direction of the individuals or entities Listed in the Schedule to the Order, or any other person engaged in or suspected to be engaged in terrorism and prohibit any individual or entity from making any funds, financial assets or economic resources or related services available for the benefit of the individuals or entities Listed in the Schedule to the Order or any other person engaged in or suspected to be engaged in terrorism.

### **Law Relating to Fugitive Economic Offenders**

Fugitive Economic Offenders Act, 2018 provides for measures to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India.

*Salient Features of the Fugitive Economic Offenders Act, 2018 are as under:*

- Act defines the term such as “Fugitive Economic Offender”, “Key Managerial Personnel”, “Proceeds of Crime”.
- Provisions for attachment of the property of a fugitive economic offender and proceeds of crime.
- Empowers Director relating to survey, search and seizure and search of persons.
- Confiscation of the property of a fugitive economic offender and proceeds of crime.
- Disentitlement of the fugitive economic offender from putting forward or defending any civil claim.
- Appointment of an Administrator.
- Appeal to the High Court against the orders issued by the Special Court.

### **Law relating to Benami Transactions Prohibition**

Benami Transactions (Prohibition) Act, 1988 prohibit benami transactions and the right to recover properly held benami and for matters corrected therewith or incidental thereto.

*Salient Features of the Benami Transactions (Prohibition) Act, 1988 are as under:*

- It defines a benami transaction and benami property and also provides for exclusions and transactions which shall not be construed benami.
- It provides the consequences of entering into a prohibited benami transactions.
- It lays down the procedure for determination and related penal consequences in the case of a prohibited benami transaction.
- It also provides that the powers of civil court shall be available to authorities under the said Act.
- Miscellaneous Provisions have been provided for service of notice, protection of action taken in good faith, etc.
- Central Government empowers to make rules for the implementation of the provisions of the Act.
- It enables the Central Government in consultation with the Chief Justice of the High Court to designate one or more Courts of Session as Special Court or Special Courts for the purpose of the Act.
- It provides penalty for entering into benami transactions and for furnishing any false documents in any proceeding under the Act.
- It provides for transfer of any suit or proceeding in respect of a benami transaction pending in any court (other than High Court) or Tribunal or before any authority to the Appellate Tribunal.

### **LESSON ROUND-UP**

- Money laundering is the processing of criminal proceeds to disguise its illegal origin.
- The process of money laundering can be classified into three stages, namely, placement, layering and integration.
- The Prevention of Money-laundering Act, 2002 was enacted to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto.
- The Act also addresses the international obligations under the Political Declaration and Global Programme of Action adopted by the General Assembly of the United Nations to prevent money laundering.

- The Act contains provisions pertaining to offences and punishment for money laundering, attachment, adjudication and confiscation, obligations of banking companies, financial institutions and intermediaries, Summons, Searches and Seizures etc.
- The Act states that whoever, acquires, owns, possesses, or transfers any proceeds of crime or knowingly enters into any transaction which is related to proceeds of crime directly or indirectly or conceals or aids in the concealment of the proceeds of crime, shall be guilty of offence of money laundering.
- Every banking company, financial institution and intermediary is required to maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions legally connected to each other, and when such series of transactions take place within a month.
- The objective of Know Your Customer (KYC) Norms/Anti-Money Laundering (AML) Measures/ Combating of Financing of Terrorism (CFT) guidelines is to prevent banks from being used, intentionally or unintentionally, by criminal elements for money laundering or terrorist financing activities. KYC procedures also enable banks to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently.

#### TEST YOURSELF

*(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)*

1. Define the term money laundering and explain the process of money laundering.
2. Briefly discuss the international efforts in preventing the money laundering.
3. Offences under the Prevention of Money Laundering Act, 2002 are cognizable and non –bailable. Comment.
4. Write short note on the following:
  - (a) Financial Asset Task Force.
  - (b) Maintenance and preservation of records of clients by banking companies, financial institutions and intermediaries.
  - (c) Recourse available to a person aggrieved by any decision or order of the Appellate Tribunal under the Act.
5. Discuss the power of Enforcement Directorate regarding arrest of person under the PMLA, 2002.

#### LIST OF FURTHER READINGS

- Bare Act - Prevention of Money- laundering Act, 2002
- Law on Prevention of Money Laundering in India – M C Mehanathan

#### OTHER REFERENCES (INCLUDING WEBSITES / VIDEO LINKS)

- <https://dor.gov.in/prevention-of-money-laundering-list>
- <https://dea.gov.in/sites/default/files/moneylaunderingact.pdf>