

“PMLA Notification –
Not the Armageddon
you think!”.

By CA Nitin Bhuta, Mumbai

06.05.2023

Dear Readers,

Sub: “PMLA Notification – Not the Armageddon you think!”.

“This Presentation Deck seeks to explain the key provisions of PMLA and also to allay the fears of Professionals who have been expressing their deep concerns, if not hue and cry, over the recent notification dated 03.05.2023 whereby Professionals such as CAs, CS’, CMAs have been specifically included in the scope. Apart from the provisions of the law, you will find the FAQs with their answers to be of interest to you.

Any suggestions to improve the content are welcomed with the folded hands.

Cordially yours

CA Nitin Bhuta Mumbai.

Disclaimer

All views stated are my personal views, they are not binding on ICAI/Study Circle. My personal views may be correct/incorrect as they are expressed based on my understanding of the subject.

All members/listeners are requested to go through tax law provisions on their own and advise their clients accordingly as each situation is peculiar in itself.

All Illustrations provided are imaginary and any resemblance to any situation/s is purely co-incidental and without any intentions to disclose private and confidential information.

PMLA – Armageddon!- History & Purpose



PMLA - Background

Applicability - Section 3

Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is 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 as untainted property shall be guilty of offence of money laundering.

Applicability - Section 3

- **directly** or **indirectly** attempts to
- **indulge** or **knowingly** assists or knowingly a party
- is **actually involved** in any **process** or **activity connected**
- **proceeds of crime**
- including its **concealment, possession, acquisition or use**
- **projecting** or **claiming** it as **untainted property**
- shall be **guilty** of **offence** of **money laundering**.

PMLA - Background

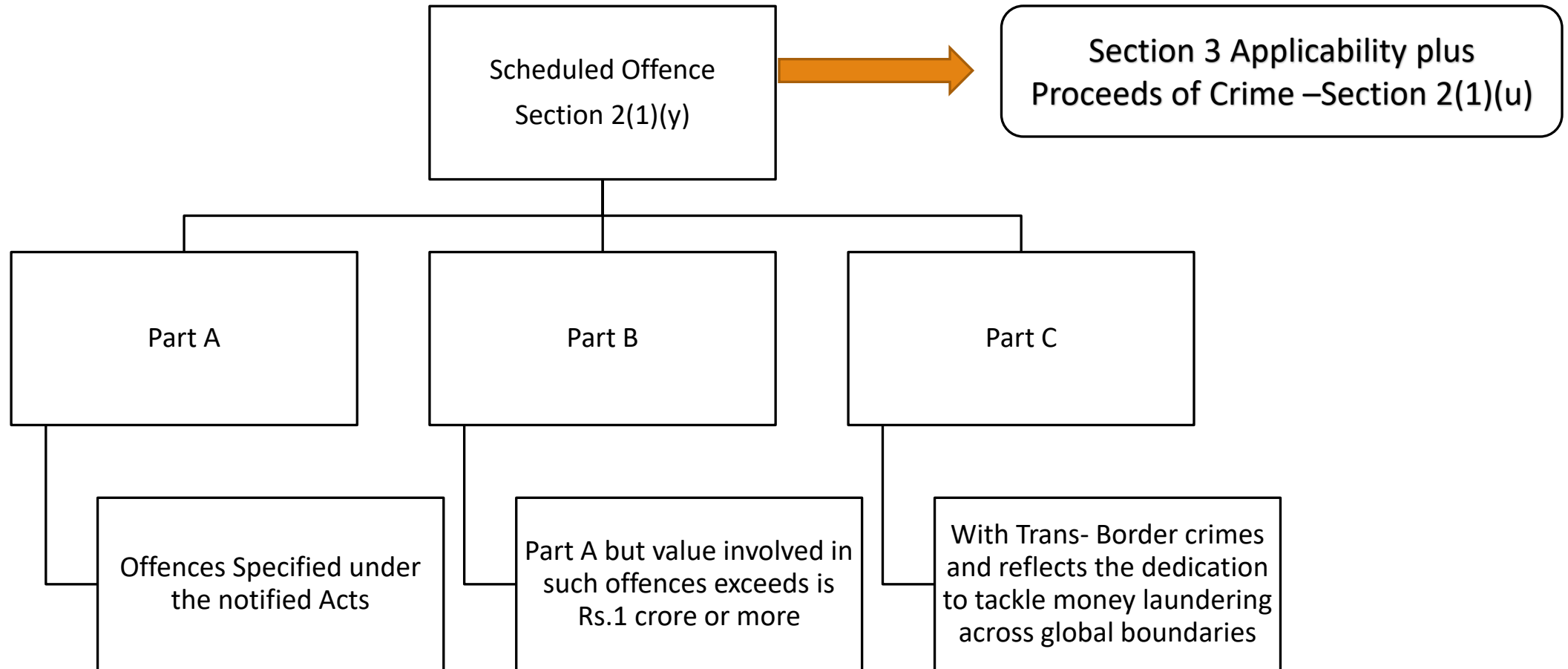
Proceeds of Crime - Section 2 (1) (u)

It 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 - Section 2 (1) (u)

- **property derived or obtained,**
- **directly or indirectly**
- **by any person**
- **result of criminal activity**
- **relating to a scheduled offence**
- **property is taken or held outside the country**
- **then the property equivalent in value held within the country or abroad**

PMLA - Background



PMLA - Background

Property - Section 2 (1) (v)

"Property" 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.

Explanation.—For the removal of doubts, it is hereby clarified that the term “property” includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences

Property - Section 2 (1) (v)

- **any property or assets of every description,**
- **whether corporeal or incorporeal**
- **movable or immovable,**
- **tangible or intangible**
- **includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.**
- **Property includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences**

PMLA - Background

Person - Section 2 (1) (s)

- (i) an individual,-
- (ii) a Hindu undivided family,-
- (iii) a company,-
- (iv) a firm,-
- (v) an association of persons or a body of individuals, whether incorporated or not,-
- (vi) every artificial judicial person not falling within any of the preceding sub clauses, and
- (vii) any agency, office or branch owned or controlled by any of the above persons mentioned in the preceding sub-clauses

SEC 2(1)(SA) – Person Carrying On Designated Business Or Profession

- “Person carrying on designated business or profession” means,—
- (i) a person carrying on activities for playing games of chance for cash or kind, and includes such activities associated with casino;
- (ii) a Registrar or Sub-Registrar appointed under section 6 of the Registration Act, 1908 (16 of 1908) as may be notified by the Central Government;
- (iii) real estate agent, as may be notified by the Central Government;

PMLA - Background

Person - Section 2 (1) (s)

- (i) an individual,-
- (ii) a Hindu undivided family,-
- (iii) a company,-
- (iv) a firm,-
- (v) an association of persons or a body of individuals, whether incorporated or not,-
- (vi) every artificial judicial person not falling within any of the preceding sub clauses, and
- (vii) any agency, office or branch owned or controlled by any of the above persons mentioned in the preceding sub-clauses

SEC 2(1)(SA) – Person Carrying On Designated Business Or Profession

➤ “Person carrying on designated business or profession” means,—

(iv) dealer in precious metals, precious stones and other high value goods, as may be notified by the Central Government;

(v) person engaged in safekeeping and administration of cash and liquid securities on behalf of other persons, as may be notified by the Central Government; or

PMLA - Background

Person - Section 2 (1) (s)

- (i) an individual,-
- (ii) a Hindu undivided family,-
- (iii) a company,-
- (iv) a firm,-
- (v) an association of persons or a body of individuals, whether incorporated or not,-
- (vi) every artificial judicial person not falling within any of the preceding sub clauses, and
- (vii) any agency, office or branch owned or controlled by any of the above persons mentioned in the preceding sub-clauses

(Definition similar to definition of person under Income Tax Act, 1961, Companies Act,2013 and GST Act, 2017 etc.)

SEC 2(1)(SA) – Person Carrying On Designated Business Or Profession

➤“Person carrying on designated business or profession” means,—

(vi) person carrying on such other activities as the Central Government may, by notification, so designate, from time-to-time;**vide notification issued on 03.05.2023 , now CA, CS and CWA are included as person carrying on designated business or profession (next slide) are included as Reporting Entity. In future even Advocates may be included through Notification.**

➤Sec 2(1)(wa) – Reporting Entity - means a banking company, financial institution, intermediary or **a person carrying on a designated business or profession**

PMLA - Background – Punishment for Offence

Seizure/Freezing of Property and records

If tainted with proceeds of crime, only then

Any person who commits the offence under PMLA

3 years < Rigorous Imprisonment < 7 Years
with Fine without any limits

Part A Offences under Narcotic Drugs and Psychotropic
Substances Act, 1985

3 years < Rigorous Imprisonment < 10
Years with Fine without any limits

PMLA - Background – Adjudication

Adjudication Powers Section 48/49 – Directorate of Enforcements

Initiation & attachment of the Property plus records & launching of prosecution in the designated special courts

Property and records freezed or seized to be retained upto 180 days

Property and records freezed or seized may be retained beyond 180 days (Section 20 & 21)

If Special Court finds offence committed on trial conclusion, then order could be passed that such property shall stand confiscated

If Special Courts finds no offence committed on trial conclusion, then order could be passed to release such property to the persons entitled to it.

PMLA - Background – Adjudication

If Adjudication Proceedings can't be concluded under PMLA ...

If trial cannot be conducted by reason of death of the accused or the accused having been declared a proclaimed offender or for any other reason or having commenced but not concluded, the Court on application filed by the Director or a person claiming to be entitled to the possession of the property – Provisional attachment – may pass confiscation and/or release orders- after considering material on records. (Section 8)

Implications of Confiscation in PMLA Proceedings

Once the Property is confiscated then all rights and title in such property vests with Central Govt. free from all the Encumbrances (Section 9)

PMLA - Background – Adjudication

Whether order passed by Adjudicating Authority under PMLA is appealable?

Any aggrieved person can file order before the Appellate Tribunal.

Appeal before Appellate Tribunal needs to be filed within 45 days
from the date of receipt of copy or order issued by AA

Appellate Tribunal may accept appeal if filed beyond 45 days based on the merits and facts of the matter.

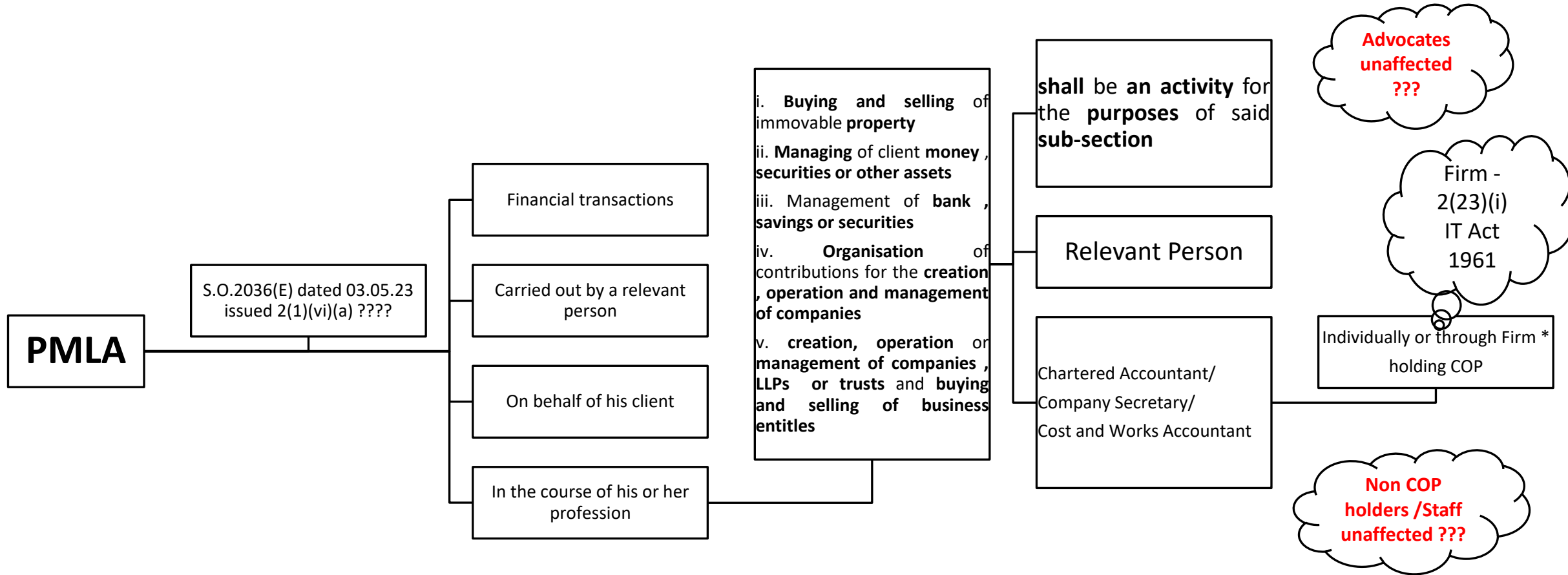
Whether order passed by Appellate Tribunal under PMLA is appealable?

Any aggrieved person can file order before the Jurisdictional High Court within 60 days from the date of communication of the decision or order of the Appellate Tribunal to him/her on question of law or facts arising out of order. High Court may accept the appeal beyond 60 days if satisfied on the merits and facts of the matter.

Whether order passed by High Court under PMLA is appealable ? Yes, Appeal to be filed before SC.

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities which are done could be tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Armageddon



PMLA - Moot Questions

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities which are done could be tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question

Q. Who are covered under the PMLA Provisions ?

Answer

➤ **Any person/party** - Whosoever Directly Or Indirectly Attempts To Indulge Or Knowingly Assists Or Knowingly Is A Party Or Is 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 As Untainted Property Shall Be Guilty Of Offence Of Money Laundering. (Section 3)

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question

Q. What do you mean by person?

Answer

Person means

- (i) an individual,-
- (ii) a Hindu undivided family,-
- (iii) a company,-
- (iv) a firm,-
- (v) an association of persons or a body of individuals, whether incorporated or not,-
- (vi) every artificial judicial person not falling within any of the preceding sub clauses, and
- (vii) any agency, office or branch owned or controlled by any of the above persons mentioned in the preceding sub-clauses

(Definition similar to definition of person under Income Tax Act, 1961, Companies Act,2013 and GST Act, 2017 etc.)

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question

Q. Considering the definition of person, whether it means every person is covered under the definition of PMLA irrespective of business or profession or vocation carried on by such persons?

Answer

➤ **All the persons are covered irrespective of their business or profession or vocation carried out directly or indirectly or incidentally viz. CA, CS, CWA, Advocates & Solicitors, Legal Counsels, Doctors, Management Consultants, Motivational Gurus, Actors/Actresses, Priests, or any other kinds of persons etc. if they are involved and only if they are involved in the proceeds of crime as defined u/s 2(1)(u) & scheduled offence as defined u/s 2(1)(y) of the PMLA, 2002.**

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question

Q. What could be the reason for issuing notification for including CA/CS/CWA as reporting entities under section 2(1)(wa) read with section 2(1)(sa) under clause (vi) from 03.05.2023.

Answer

➤ **As I understand from the information available in public domain, there were several shell companies which were incorporated by taking professional help from CA/CS/CWA and such companies were involved in mass scale activities involving money laundering as envisaged u/s 3 of PMLA. Such professionals were found in possession of properties accumulated allegedly by indulging in money laundering activities so as to enjoy the proceeds of crime as defined u/s 2(1)(u). Consequently, such activities came under the ambit of schedule offence as defined u/s 2(1)(y) of the PMLA, 2002. Thus, because of few professionals, many genuine professionals are also covered under PMLA now.**

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question

Q. Do Professionals need to worry post coverage as per notification issued on 03.05.2023 ?

Answer

➤ **In my personal view, if professionals are discharging their obligations in a transparent and legal manner by maintaining all the documentation properly in their working papers, which can be provided as support if any litigation is caused by the Authorities, then they need not unduly worry. It can then be explained that whatever they are doing is in the ordinary course of their profession or vocation, and they are not involved in money laundering as envisaged under Section 3 of PMLA and they are not in a possession of proceeds of crime as defined u/s 2(1) (u). They may face some litigation due to non-availability of information with them but with proper evidential matter they will emerge unscathed. Documentation is of the essence.**

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question

Q. What is your suggestion to Professionals post coverage as per notification issued on 03.05.2023 ?

Answer

➤ **In my personal view, all Professionals should be diligent to maintain detailed documentation of any services provided by them as well as relevant records of their clients at least for 7 to 8 years in general. Proper and Apt documentation is a key to defend any issues that may be faced under various laws.**

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question - Routine Regulatory Compliances

Q. Whether provisions of PMLA would apply to the following types of services provided by CA/CS/CWA or other professionals :

- Accounts and Books Writing Services
- Auditing, Attestation and Certification Services
- Special Purpose Audit Reports
- Due Diligence Reports
- Routine Compliances under ITR, TDS, Tax Audit, GST, Review Services, FEMA, MCA, RERA etc.
- Litigation Services under various Laws.
- Filing of Returns and payment of taxes/fees under ITR, TDS, Tax Audit, GST, Review Services, FEMA, MCA, RERA etc.
- Any other Services

Answer

➤ **In my view, such routine services provided by any person in the ordinary course of his business, profession or vocation, may not be exposed as tantamount to proceeds of crime as per defined u/s 2(1)(u), under section 3 and Scheduled Offence [Section 2(1)(y)] of PMLA Act, 2002.**

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question - Banking Transactions

Q. Whether provisions of PMLA would apply to the following types of services provided by CA/CS/CWA or other professionals :

- Paying Taxes on behalf of the Clients viz. IT, TDS, GST, MCA Fees or any types of Govt. Fees etc.
- Paying Taxes electronically by OTP provided by the Client
- Downloading Bank statements electronically on behalf of the clients
- Handling Bank account as person authorised to operate the bank account under Limited POA due to genuine reasons duly recorded in writing
- Signing the clients documents using his/her DSC under authorisation
- Any other general transactions.

Answer

- **Banking transactions done to help the clients as part of their SOS by any person in the ordinary course of his business, profession or vocation, then in my considered view, such banking transactions may not be exposed as tantamount to proceeds of crime as defined u/s 2(1)(u), money laundering under section 3 and Scheduled Offence [Section 2(1)(y)] of PMLA Act, 2002.**

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question - Incorporation/Documentation Services

Q. Whether provisions of PMLA would apply to the following types of services provided by CA/CS/CWA or other professionals :

- Application of PAN, TAN, GST, PF , ESIC , PT , Trade Mark Number etc.
- Incorporation of HUF, Firm, LLP , AOP, Society and Trust etc.
- Incorporation of Pvt Ltd, OPC, Closely held Pvt Ltd/Ltd companies and/or Public Listed Companies etc.
- Incorporation of SPV companies and Overseas Companies
- Providing Services as CFO Services (Physical/Virtual)
- Technology and Information Technology Services- Design, Development and Formulation etc.
- Project Report Services
- Listing Services under SEBI
- FEMA approval services for FDI/ODI etc.

Answer

- **Incorporation/documentation services provided to the clients as part of their SOS by any person in the ordinary course of his business, profession or vocation, then in my considered view, such incorporation and documentation services may not be exposed as tantamount to proceeds of crime as defined u/s 2(1)(u), money laundering under section 3 and Scheduled Offence [Section 2(1)(y)] of PMLA Act, 2002.**

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question - Employer/Employee Services

Q. Whether provisions of PMLA would apply to the following types of services provided by CA/CS/CWA or other professionals as an employee of the company :

- i. **Buying and selling** of immovable property
- ii. **Managing** of client money , securities or other assets
- iii. Management of **bank , savings** or securities
- iv. **Organisation** of contributions for the creation , operation and management of companies
- v. **creation, operation** or management of companies , LLPs or trusts and buying and selling of business entitles

Answer

➤ **In my opinion, if such services are provided as employee of the company and such services are exposed to proceeds of crime as defined u/s 2(1)(u), money laundering under section 3 and scheduled offence [Section 2(1)(y)] of PMLA Act, 2002, then PMLA provisions would be attracted. It can then be construed that the intention behind such activities is inherently that of money laundering to legitimise the tainted monies which are without substance as well as form, which can be unravelled by lifting the veil.**

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question - Illustrations

Q. Can you kindly provide some illustrative examples of transactions that may be termed as Money Laundering under PMLA ?

Illustrative Examples

Within India/Outside India

- Paperless transactions without underlying Sales/Purchase
- Fake. Bogus & Fraudulent Invoicing
- Incorporation of Shell Companies without operability of Business
- Frauds, Misappropriation, Diversion and Illegal use of funds by Chit Funding or Debt Funding
- Falsification of Financial Statements – Standalone/Consolidated

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question - Illustrations

Q. Can you kindly provide some illustrative examples of transactions that may be termed as Money Laundering under PMLA ?

Illustrative Examples

Within India/Outside India

- Entities/Persons – undergoing GAAR and SFIO proceedings
- Fake Identities of Promoters , Shareholders & Beneficial Owners.
- Operation of Banking accounts without proper legal documentation.
- Hacking and Unauthorised use of Technology with intention of Thefts.
- Nefarious and Illegal Business activities with the intention to disrupt the economic activities of any economy.

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question - Illustrations

Q. Can you kindly provide some illustrative examples of transactions that may be termed as Money Laundering under PMLA ?

Illustrative Examples

Within India/Outside India

- Credit Card, Banking and Insurance Frauds
- Illegal Money or Fake Currency Rackets.
- Business Operations with Fake Addresses or using theft identities
- Tax and Revenue Leakages and Frauds etc.
- Other activities.

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Moot Question

Question

Q. If any professional wants to build a career in the PMLA Laws, how it can be achieved as new arena of business opportunity?

Answer

If One wishes to build a career in the PMLA Laws, it can be done by building up a Team of Chartered Accountants, Company Secretaries, Cost & Works Accountants, Advocates and Solicitors, Technology Domain Experts, Management and Business Professionals, Business Domain Experts and Conveyancing and Documentation Experts etc. as every litigation initiated under PMLA may require combined and concerted applications of minds to argue, advance and defend from several aspects.

Unless Section 3 of PMLA applies, it is covered under scheduled offence u/s 2(1)(y) and such activities are done which tantamount to Proceeds of Crime –Section 2(1)(u) as per PMLA

PMLA - Conclusion

“ Do you still think that PMLA Notification – is the Armageddon !”.

Cas, CS’ and CWA & Advocates were already culpable to the provisions of PMLA even prior to the issuance of the Notification dated 03.05.2023 if they were involved in money laundering activities as envisaged under Section 3 of PMLA involving scheduled offence u/s 2(1)(y) and they are in the possession of proceeds of crime as defined u/s 2(1)(u) of the PMLA.

“By virtue of the recent issuance, the increased onus on fellow professionals would be to ensure that a proper KYC of their clients, a more detailed and documented Pre-Acceptance protocol be followed so that it serves as good evidence should the provisions of the Act be invoked on the Professional”

“ In fact it is an opportunity for many professionals to build career in new arena for professional skill upgrade and skill development if explored strategically.”

SURROUND YOURSELF WITH PEOPLE WHO TALK ABOUT VISION AND IDEAS NOT PEOPLE

Appreciated all of You.



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