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India

WHITE COLLAR CRIME

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This country-specific Q&A provides an overview of white collar crime laws and regulations applicable in India.

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INDIA

WHITE COLLAR CRIME



1. What are the key financial crime offences applicable to companies and their directors and officers? (E.g. Fraud, money laundering, false accounting, tax evasion, market abuse, corruption, sanctions.) Please explain the governing laws or regulations.

Under Indian Law, a company, its director(s), including the key managerial person(s) or the authorized representatives can be tried for criminal offences. An offence means any act or omission made punishable by law and includes any act for which a complaint may be made. Simply put, an offence is an act committed by not adhering to the provisions of the law under the purview of which the said action was done or was about to be done. Any act done by an officer of a company which is not in accordance with the law would constitute an offence. Such offences can include cheating, misappropriation, fraud, embezzlement, tax evasion, money laundering and bribery etc.

Offences such as cheating, misappropriation, fraud, embezzlement, criminal breach of trust, are largely codified under the Indian Penal Code, 1860 ('**IPC**'), being the primary criminal code of the Country, while those relating to illegal gains/money laundering by a company are governed under the Prevention of Money Laundering Act, 2002 ('**PMLA**') and the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

The Prevention of Corruption Act, 1988 ('**POCA**') is a special legislation enacted to combat bribery and corruption amongst public servants. POCA penalizes offences committed by public servants in relation to acceptance or attempted acceptance of any form of illegal gratification while any person or a commercial organization engaged in obtaining any undue advantage through such illegal gratification can also be held criminally liable under the legislation. Tax evasions, financial irregularities and statutory violations are governed by the Income Tax Act, 1961 ('**ITA**') and the

Companies Act, 2013 ('**Companies Act**').

2. Can corporates be held criminally liable? If yes, how is this determined/attribution?

Indian law recognizes a company as a separate legal entity, being liable for civil and criminal acts. A company is also liable for the acts done by its employees committed within the scope of their employment.

Corporate criminal liability is governed by the norms of the vicarious liability, while there are scenarios in which a company can be held liable for statutory offences specifically making the company liable for that particular offence.

Various provisions of the Companies Act, not only make the director criminally liable but also include officers in default under the concept of corporate criminal liability. The term officer in a default is a broad term and can include whole-time director, key managerial personnel ('**KMP**') and such other directors in the absence of KMP who have been specified by the Board of Directors.

To determine commission of a criminal act and to array a company as an accused, it must be established that the company through its employee or officer in default either (i) participated in commission of the offence or (ii) did not raise any objection even after having knowledge of the offence or (iii) where the offence was committed with his consent or connivance.

As stated above a company is also liable for the acts of its employee(s) when the act is done by the employee while performing his official duties. When such an act is performed under the scope of employment, the company becomes the principal while the person committing the act become the agent. By virtue of agent-principal relationship, corporate criminal liability can be invoked against a company. However, while invoking vicarious liability, it must be established that the criminal act of the employee gave some benefit to the company.

In *Iridium India Telecom Ltd. v. Motorola Inc.*¹, the Supreme Court held that a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. *Mens rea* is attributed to corporations on the principle of 'alter ego' of the company. Through this judgment, the doctrines of attribution and imputation (as prevalent in other jurisdictions) was accepted in India.

Footnotes:

¹ (2011) 1 SCC 74

3. What are the commonly prosecuted offences personally applicable to company directors and officers?

Fraud, cheating, bribery or illegal gratification, money laundering and tax evasion are the commonly prosecuted offences personally applicable to a company's director(s), key managerial person(s), officers or authorized representatives.

4. Who are the lead prosecuting authorities which investigate and prosecute financial crime and what are their responsibilities?

Considering the multiple legislations inter-alia dealing with aspects of financial crimes and corruption, there are different authorities who have jurisdiction to investigate and prosecute cases of bribery and corruption in India. The said authorities (as stipulated under each of the Acts) are summarized herein below:

- Under IPC, the jurisdictional local police register and investigate cases relating to offences such as criminal conspiracy, criminal misappropriation, criminal breach of trust, cheating and fraud. The Court of the jurisdictional Magistrate has power to try the cases registered for the said offences.
- Under the POCA, it is usually the Central Bureau of Investigation (established under the Delhi Special Police Establishment Act) and the Anti-Corruption Bureau (established under notifications issued separately by every State

Government) which investigate cases of corruption. The cases are then tried by jurisdictional Special Courts presided over by Special Judges appointed by the Central Government.

- Under the Prohibition of Benami Property Transactions Act, there are four authorities exercising power over cases involving Benami transactions. The said authorities are (a) Initiating Officer, (b) Approving Authority, (c) Administrator and (d) Adjudicating Authority. Under the Act, the Central Government is also empowered to establish an Appellate Tribunal to hear appeals against the orders passed by the Adjudicating Authority. Presently the Income Tax Authorities exercise powers and functions of the 'authorities' under the Act².
- An Adjudicating Authority consisting of a chairman and two members is appointed by the Central Government under the Prevention of Money Laundering Act. The Adjudicating Authority is empowered to receive complaints and try cases under this Act. Presently the Enforcement Directorate, established under the Ministry of Finance investigates and prosecutes cases under the Prevention of Money Laundering Act, 2002 as well as the Foreign Exchange Management Act, 1999.
- The Central Vigilance Commission (consisting of a chairperson and two members) is appointed under the Central Vigilance Commission Act, 2003, for supervising investigation of corruption cases (under PCA) in central government departments, government companies and local government bodies.
- Investigation into cases under the Foreign Contribution (Regulation) Act, 2010 may be conducted by such authority as the Central Government may specify and the authority so appointed has all powers which an officer-in-charge of a police station has while investigating a cognizable offence³.
- Under the Lokpal and Lokayuktas Act, 2013, Lokpal comprises of a chairperson and up to eight members. Lokpal has jurisdiction to investigate and prosecute cases of corruption involving, the prime minister, ministers, members of Parliament, public servants and other central government employees, other than members of armed forces. Lokayuktas function at the state-level and perform similar duties, like the Lokpal.
- The Serious Fraud Investigation Office ('SFIO') is a multi-disciplinary organization set up under the Ministry of Corporate Affairs, for

detecting and prosecuting or recommending for prosecution white-collar crimes/frauds. SFIO is empowered to investigate the affairs of companies based on an order from the Central Government which may be issued under certain circumstances specified under the Companies Act.

Footnotes:

² Notification No. 40/2017/F. No.173/429/2016-ITA-I dated May 18, 2017 issued by the Ministry of Finance

³ As per Section 2(c) of the Code of Criminal Procedure, 1973, a 'cognizable offence' means an offence for which a police officer may arrest without a warrant.

5. Which courts hear cases of financial crime? Are trials held by jury?

Depending upon the nature of the crime classified under a specific Act, different courts have jurisdiction to try a case. For instance, offences under IPC are tried by the jurisdictional Magistrate. Under PMLA, the Adjudicating Authority (appointed under the Act), hears the case. Under POCA, Special Courts notified by the respective State Government are competent to hear cases, while the jurisdictional bench of the National Company Law Tribunal hears cases under CA. Jury trials were abolished in India in 1973 and there are no trials held by jury.

6. How do the authorities initiate an investigation? (E.g. Are raids common, are there compulsory document production or evidence taking powers?)

Different legislations provide for the manner in which an investigation may be initiated. Typically, upon receipt of a complaint or information regarding an offence, the investigating authority ('officer') verifies whether the complaint/information involves commission of an offence(s) under provisions of law. The officer must form a prima facie view as to commission of an offence.

Thereafter, the officer concerned, conducts an enquiry. Depending upon the result of the enquiry, the officer, proceeds with the investigation, collects documents / electronic records, conducts raids, records statements of accused and witnesses.

During the course of investigation, if the officer has sufficient reasons to believe that the accused are in possession of some documents and the same have not

been provided after being sought for, the officer takes necessary permissions (as stipulated under the Act concerned) to conduct a raid for searching and seizing the documents/electronic records.

7. What powers do the authorities have to conduct interviews?

The procedural code, as provided under the Code of Criminal Procedure, 1973 ('CrPC'), which is applicable to all criminal prosecutions, subject to certain exceptions, gives power to an investigating officer to examine a witness and record the statements of witness(es) and documents produced by them can be taken on record.

The officer also has the power to summon the accused persons asking them to join the investigation for recording their statements. If this is resisted / refused, the officer can approach the competent court to seek custody of the accused.

In addition, special legislations such as the PMLA, FEMA etc also grants power to investigative agencies to summon any person whose attendance the agency considers necessary and conduct investigative interviews or to produce any records as may be considered necessary.

8. What rights do interviewees have regarding the interview process? (E.g. Is there a right to be represented by a lawyer at an interview? Is there an absolute or qualified right to silence? Is there a right to pre-interview disclosure? Are interviews recorded or transcribed?)

All investigations and interrogations conducted by the investigative agencies should comply and adhere to provisions enacted under the Indian Constitution, 1950, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872.

The Constitution of India under Article 20(3) safeguards any person summoned by the police against self-incrimination. Further, Article 22 of the Constitution states that a person cannot be denied the right to consult and to be defended by a legal practitioner of his choice. This right enshrined in the Constitution finds its way in Section 41D of the Criminal Procedure Code which provides that any person arrested and interrogated by the police, shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation,

Accordingly, India does not allow lawyers to accompany an accused individual throughout the course of the investigation. An interviewee or an accused or a witness will be granted an opportunity to meet with a counsel during the interrogation, but this cannot be continuous.

Statements made by the interviewee / witness can be reduced in writing, however the interviewee is not required to sign the statement so recorded. The examination of the witness or the accused can be recorded through electronic means.

Traditionally, the law prohibits treating any statement made before the investigating officer as admissible evidence before any Court. This is expressly provided under Section 24-26 of the Indian evidence Act. Further, section 161 and 162 CrPC supplement the provisions of the Evidence Act and provides that any statement made to a police officer shall not be treated as admissible and can only be used for the purposes for investigation.

However, certain special legislations such as the PMLA, NDPS Act, Customs Act authorize the investigative agencies to records statements on oath. This means that any false statements made to such special agencies would open the interviewee to risk of perjury. Confessional statements especially those made in investigations under the PMLA are controversial and the legal jurisprudence on the same is still developing.

9. Do some or all the laws or regulations governing financial crime have extraterritorial effect so as to catch conduct of nationals or companies operating overseas?

IPC, being the primary criminal code of the country, permits exercise of extra territorial jurisdiction in cases when (i) a crime committed outside India which if committed in India would be punishable under IPC and (ii) the accused is liable under Indian Law to be tried in India for that offence.

When both these conditions are satisfied the accused person is required to be dealt with according to the provisions of the IPC in the same manner as if the particular crime had been committed in India.

Based on the same principle other legislations also have extra territorial effect. For example, the PMLA confers extraterritorial jurisdiction upon investigating authorities where the offence has cross-border implications in a case where proceeds of crime arising out of a scheduled offence⁴ committed in India have been remitted or attempted to be remitted outside India.

The authorities can also exercise extra territorial jurisdiction in a case when an act committed outside India qualifies as a scheduled offence had it been committed in India and where the proceedings from the commission of the offence have been remitted to India. Further the PMLA also provides for attachment and confiscation of property (being proceeds of a crime) taken or held outside the country.

Footnotes: ⁴ As per section 2(1)(y) of the PMLA "scheduled offence" means— (i) the offences specified under Part A of the Schedule; or [(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is [one crore rupees] or more; or (iii) the offences specified under Part C of the Schedule.]

10. Do the authorities commonly cooperate with foreign authorities? If so, under what arrangements?

India provides mutual legal assistance in criminal matters through Bilateral Treaties/Agreements, Multilateral Treaties/Agreements, or International Conventions or on the basis of assurance of reciprocity. The Mutual Legal Assistance Treaties ('MLATs') in criminal matters are the bilateral treaties, entered between the countries for providing international cooperation and assistance. India has entered into MLATs with 42 countries.

11. What are the rules regarding legal professional privilege? Does it protect communications from being produced/seized by financial crime authorities?

The Indian Evidence Act 1872 ('Evidence Act') is the principal legislation governing admissibility of evidence in Indian courts. The Evidence Act codifies the common law principles of privileged professional communication between an attorney and the client.

All communications made between clients and their attorneys confidentially with a view to obtaining professional advice are privileged, and privilege is applicable even to a copy held by a client. While the provisions of the Evidence Act apply during the course of both civil and criminal judicial proceedings, they are not strictly applied during the course of investigation. The investigative agencies are not expressly barred from seizing material solely on the ground that it is marked as privileged. However, in case of such search or seizure, the holder of the information must clearly state that the

information was marked privilege was being provided to the investigator under due protest.

Privilege is subject to certain limitations, and it does not apply where disclosures are made with the express consent of the client. Even in cases where the communication is made in furtherance of any illegal purpose or where, post the engagement, the attorney discovers a fact that a crime was committed, the privilege does not apply.

12. What rights do companies and individuals have in relation to privacy or data protection in the context of a financial crime investigation?

While the right to privacy has been declared to be a fundamental right by the Indian Supreme Court, at present, there are no statutory/codified rights of a company and an individual which remain intact during the course of investigation.

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 were introduced by the Government of India under Section 43A and Section 79 of the Information Technology Act, 2000. These rules aim to protect the privacy of individuals with regard to their personal data and information. Under these rules, sensitive personal data or information (SPDI) is defined as information that relates to a person's password, financial information, medical records, biometric information, sexual orientation, or any other information that may affect an individual's privacy. The rules require companies to obtain consent from individuals before collecting their SPDI and to clearly state the purpose for which it will be used.

Access to stored data is potentially addressed under Section 91 of the CrPC which states that a court in India or any officer in charge of a police station may summon a person to produce any document or any other thing that is necessary for the purposes of any investigation, inquiry, trial or other proceeding. Thus, theoretically, under section 91, law enforcement agencies in India can access stored data. However, when such data is sought, the company can either deny access claiming the same to be personal data or provide the same after recording due protest.

A Digital Personal Data Protection Bill is currently pending approval with the Parliament wherein data privacy, cybersecurity, consolidation of information technology laws, and intermediary guidelines are expected to be a key focus.

13. Is there a doctrine of successor criminal liability? For instance in mergers and acquisitions?

Under Indian law there is no doctrine of successor criminal liability as such. Scheme of mergers provide for transfer of rights and liabilities however they do not entail transfer of all rights and liabilities, but those that are capable of being legally transferred. Criminal liability is incapable of being transferred under law or contract and consequently there is no automatic fastening of the criminal liability on the successor in case of a merger, unless it is seen that the merger was used as a tool to overthrow the criminal prosecution.

The scheme of the merger will play a deciding factor in establishing criminal liability of a successor post, merger. The true effect and character of the amalgamation largely depends on the terms of the scheme of merger, including the respective rights and liabilities.

14. What factors must prosecuting authorities consider when deciding whether to charge?

Prosecuting authorities are required to weigh the evidence for the limited purpose of examining whether a prima facie case against the accused has been made out or not.

While there are no set yardsticks, the material to determine a prima facie case would depend upon the facts of each case. At that stage, the prosecuting authorities are not expected to decide the credibility and truthfulness of the material available. The disputed defence of an accused is not taken into consideration at this stage.

The prosecuting authorities usually do not weigh the sufficiency of evidence collected at that stage, unless they find that the material collected is completely insufficient for the purpose of trial.

Other factors such as reasonable prospect of conviction and larger public interest are also considered while deciding whether to charge the accused or not.

15. What is the evidential standard required to secure conviction?

In the criminal justice system, the burden of proof lies on the prosecution, which implies that the prosecution is required to prove every charge that is made against the

accused. The burden of proof is defined by standards of proof, which are dependent on the assertions made.

To secure a conviction, the prosecution must prove its case beyond reasonable doubt. Proof beyond a reasonable doubt is a basic provision in criminal prosecutions. The clause is interpreted as requiring a high level of satisfaction that a prosecution must achieve in the court's mind through the facts and evidence that it offers.

Evidence collected is put under two major heads, namely primary or direct evidence and indirect or circumstantial evidence. As the name suggests, direct evidence is such piece of evidence that can link the accused with the charges without an iota of doubt. Circumstantial evidence is usually a theory, supported by a significant quantity of corroborative evidence. The distinction between direct and circumstantial evidence is important because, with the obvious exceptions nearly all criminals are careful to not generate direct evidence and try to avoid material which establishes criminal intent.

16. Is there a statute of limitations for criminal matters? If so, are there any exceptions?

The Code of Criminal Procedure provides for the period of limitation for a Court to take cognizance of any offence. The limitation periods for taking cognizance of various offences, depends on the gravity of those offences interlinked with the respective punishments. These are divided into three categories. For offences that are punishable by only fine, the period of limitation is 6 months. For offences which are punishable with imprisonment for a maximum period of 1 year, the limitation is 1 year and for offences that are punishable with imprisonment exceeding 1-year upto 3 years, the period of limitation is 3 years.

There is no limitation period for offences which are punishable with imprisonment of more than 3 years. Several economic offences are punishable with imprisonment of more than 3 years so the limitation aspect as such does not apply to most economic offences.

The Court however has been given the power to extend the period of limitation in certain cases where there is a proper explanation given for the delay.

17. Are there any mechanisms commonly used to resolve financial crime issues

falling short of a prosecution? (E.g. Deferred prosecution agreements, non-prosecution agreements, civil recovery orders, etc.) If yes, what factors are relevant and what approvals are required by the court?

Opposed to the US and UK, there are no provisions for deferred prosecution agreements, non-prosecution agreements, etc. in India. There are no specific provisions under which an accused could reach any settlement with the prosecution to avoid the trial.

However, to avoid a full-fledged trial, depending upon the severity of the offence alleged, the court may permit an accused to turn an approver supporting the case of the prosecution.

18. Is there a mechanism for plea bargaining?

Chapter XXI A of the CrPC deals with plea bargaining in criminal trials in India. Plea Bargaining is applicable in respect of those offences for which punishment is up to a period of 7 years. Moreover, it does not apply to cases where the offence committed is a socio-economic offence or where the offence is committed against a woman or a child below the age of 14 years. Also, once the court passes an order in the case of plea bargaining no appeal lies to any court against that order.

19. Is there any requirement or benefit to a corporate for voluntary disclosure to a prosecuting authority? Is there any guidance?

Voluntary disclosure is a set of information revealed over and above the mandatory, statutory and regulatory requirements.

In certain cases, it is beneficial for a corporate to voluntarily report criminal conduct. The POCA envisages a situation where a person has been compelled to give an 'undue advantage' or an illegal gratification to a public servant. The person/corporate so compelled can be excluded from the purview of criminal action if the person/corporate reports the matter to law enforcement agency within a period of 7 days. This qualifies as a voluntary disclosure which is beneficial to the corporates.

That apart, section 39 of CrPC makes it obligatory for the public to give information of certain offences, which also includes financial crimes to the local police.

20. What rules or guidelines determine sentencing? Are there any leniency or discount policies? If so, how are these applied?

India follows the reformatory theory while administering punishments. There is no legislation in India laying down formal sentencing guidelines for criminal offences. While every offence, (be it under the IPC or POCA or PMLA) there is a corresponding section which lays down the punishment to be awarded after a trial, there are no legislative guidelines governing the same. Every crime, for instance, is accompanied with circumstances, but the court has the discretion to determine which circumstances are mitigating and which serve as aggravating, resulting in punishment.

While awarding punishment, courts determine which acts or omissions are punishable, who should receive what punishment, and how severe it should be. This determination is based on factors such as, nature of the offence, applicable law, motive to commit the crime, the offender's role in the commission of the crime, its nature or severity, the availability of evidence against the accused, the offenders' criminal antecedents, and witness testimony, if any.

There is no straitjacket formula for sentencing an accused on conclusion of a trial proving commission of the offence. Likewise, there are also no legislative rules on leniency or discount policies. However, factors such, facts and circumstances of a case, gravity of the offence, motive or benefit received by the accused and his antecedents, can be considered by the court while awarding punishment and while considering a request for leniency.

21. In relation to corporate liability, how are compliance procedures evaluated by the financial crime authorities and how can businesses best protect themselves?

The Companies Act, 2013 mandate the Board of Directors to develop a risk management policy and identify risks that threaten a company. There is an explicit requirement for directors of a company to state that there is in place a proper system to ensure compliance with the applicable laws and that such systems are operating effectively.

Various laws and regulations however, stipulate penalties for non-compliance of provisions. Legislations such as the Companies Act 2013, FEMA and almost all labour legislations in India, provide for penalties for non-compliance of various provisions under the respective

legislations. Only strict compliance of such procedures is typically the only way to avoid penalties. For example, section 35(1) of the Companies Act 2013 imposes civil liability on every director, promoter or other senior management personnel for any misstatements in the company's prospectus. There are also criminal liabilities attached to non-compliance. Legislations, including foreign exchange regulations, tax, labour and environment laws that attract the doctrine of vicarious liability and provide for criminal liabilities of a person in-charge and/or directors or for 'Key Managerial Personnel' in the case of an offence being committed by a company.

Therefore, compliance programs and effective corporate governance are the best way for businesses to protect themselves. Non-compliance despite having an effective program can lead to penalties and liabilities. Simply put, ranging from corporate to tax compliances, to internal and statutory audits, the compliances under domestic economic laws are put in place to prevent a person / entity from committing an overt act. However, compliance measures per se do not mitigate the risk of prosecution but may be helpful in demonstrating a lack of mens rea.

Under certain special legislations such as the POCA, there is a provision relating to defence for a commercial organisation which has been charged with the offence of bribery and/or corruption. If the commercial organization is able to prove that it had in place 'adequate procedures' and guidelines to prevent a person associated with it from undertaking such conduct.

However, the government is yet to provide guidelines as to what constitutes adequate procedures. Thus, commercial organizations in India are presently advised to adhere to the established international accepted standards for compliance, such as those of FCPA and UK Bribery Act. The following factors are certain examples that prosecuting agencies may look at during investigations to ascertain whether the corporation had measures in place to deal with corruption within and outside their organisation(s):

- workshops and training sessions conducted by the organization to create awareness amongst their employees and personnel on the rights, obligations and duties under anti-corruption laws,
- bribery and ethics internal policies,
- policies in respect of business dealings with third parties,
- whistle-blower protection mechanisms through internal policies and
- procedures to encourage reporting of acts of

corruption or bribery by their counterparts in the organisation,

In the current regime, in order to protect themselves, corporate houses should follow a proactive approach while dealing with anti-corruption and bribery policies.

22. What penalties do the courts typically impose on individuals and corporates in relation to the key offences listed at Q1?

Penalties for key offences are as follows:

Under IPC:

- Criminal breach of trust – Imprisonment for a term which may extend to 3 years or with fine or with both.
- Cheating – Imprisonment for a term which may extend to 7 years and fine.

Under CA:

- Fraud – any person who is found guilty of fraud, involving an amount of at least 10 lakh rupees or 1% of the turnover of the company, whichever is lower shall be punishable with:
 - Imprisonment for a term which shall not be less than 6 months, but which may extend to 10 years, and
 - Fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

In case the fraud in question involves public interest, then the term of imprisonment shall not be less than 3 years.

In a case where, fraud involves an amount less than 10 lakh rupees or 1% of the company's turnover, whichever is lower, and does not involve public interest, then the maximum punishment that can be awarded to the person found guilty of such fraud shall be 5 years imprisonment or a fine which may extend to 50 lakh rupees or both.

Under PMLA:

- Money laundering – rigorous imprisonment which shall not be less than 3 years, but which may extend to 7 years. In some instances where the crime involves specified offenses, imprisonment can extend up to 10 years. A penalty of INR 5 lakhs can be

imposed on the offender. This penalty may vary depending on the nature and severity of the offense.

Under POCA:

- Bribing a public servant (section 8) – Imprisonment expandable up to seven years and fine.
- Bribing a public servant by a commercial organization (section 9 & 10) – fine on organization and person in charge of the commercial organization to be punished with imprisonment for a term which shall not less than 3 years but may extend to 7 years and fine.
- Abetment of an offence under POCA (section 12) – Imprisonment for a term not less than 3 years which may extend to 7 years and fine.

For a long time, Indian courts grappled with the question of whether a company can be prosecuted and convicted for committing an offence under the IPC/other special purpose legislations which is punishable with compulsory imprisonment and fine. Responding to this issue in the affirmative, the Supreme Court of India has, in *Standard Chartered v. Directorate of Enforcement*⁵, reasoned that a corporation or a company could be prosecuted for any offence punishable under law. The company cannot be imprisoned but can be fined with the conviction standing against its name, where the offences prescribe both imprisonment and fine.

By using the law of attribution, Indian courts developed a jurisprudence that for the criminal intent of the company's directors or officials, the corporation can be held liable for offences committed by those in control of the company's affairs. Thereafter, the Supreme Court in *Sunil Bharti Mittal v. Central Bureau of Investigation*, further ruled that an individual who commits an offence on behalf of a company can also be charged alongside the company if there exists adequate evidence active engagement as well as criminal intent of such an individual.

Footnotes:

⁵ AIR 2005 SC 2622.

23. What rights of appeal are there?

Every conviction order can be challenged before the concerned appellate court in India, being the District and Sessions Court, the concerned High Court and the Supreme Court of India.

As per section 372 of the CrPC, even a victim has a right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. Such appeals also lie before the superior court, where an appeal against a conviction can be preferred.

24. How active are the authorities in tackling financial crime?

In the recent past, the enforcement agencies have been extremely proactive in monitoring compliance and tracking financial crimes. Even the courts in India (especially the Supreme Court of India) have been adopting a rather stringent approach so far as the quantum of penalties for companies / corporations is concerned. Regulators have become more aggressive and stringent in enforcing the existing regulations. Driven by the need for stricter regulatory compliance, the authorities are striving to constantly track offences and conduct investigations. The regulatory framework in India is constantly evolving given the dynamic nature of financial crimes.

India and Organisation for Economic Cooperation and Development recently launched a pilot program on tax and financial crime investigations in southeast Asia. The idea of this program is to trace sophisticated measures adopted for transfer of illegal proceeds across borders through multi-layered transactions, involving various forms of assets including financial assets, crypto assets and real estate.

25. In the last 5 years, have you seen any trends or focus on particular types of offences, sectors and/or industries?

In the last 5 years, the focus has been on financial institutions such as private banks, asset management companies, NBFC's, start-ups involving foreign investors, stockbrokers, etc. Mostly all investigations on financial crimes have been associated with the banking or associates sectors which include offences ranging from credit card fraud, phishing, KYC fraud to corporate frauds and money laundering.

26. Have there been any landmark or notable cases, investigations or developments in the past year?

Listed hereinbelow are a few notable cases / judicial pronouncements in the past year:

In *Rana Ayyub v. Directorate of Enforcement*⁶, the Supreme Court dismissed the writ petition filed by journalist Rana Ayyub in a money laundering case, after observing that the issue of territorial jurisdiction cannot be decided in a writ petition, especially when there is a serious factual dispute about the place(s) of commission of the offence. The court gave the petitioner the liberty to raise the said question before the concerned court as the answer to the same would depend upon evidence as to the places where any one or more of the processes or activities under the PMLA were carried out. The court held that the offense of money laundering takes place at a place (i) where the funds were acquired, (ii) where they are held, (iii) where they are concealed, or (iv) where they are utilized. This judgment broadens the scope of possible jurisdictions for prosecuting money laundering offenses beyond just the location of the illicit funds' deposit.

In the case of *Vijay Madanlal v Union of India*⁷, the Supreme Court upheld the constitutionality of the provisions of the PMLA which were challenged. The Court highlighted that the PMLA was neither a pure regulatory legislation nor a pure penal legislation, but rather a unique legislation essential to combat money laundering. The decision has a significant impact on the rights of individuals and corporations subject to investigation or prosecution by the Enforcement Directorate ('ED'), since it provides the ED with ample powers to conduct an investigation under the PMLA, including the authority to arrest, dehors the due process safeguards available under criminal procedure.

In *Directorate of Enforcement v. Padmanabhan Kishore*⁸, the allegation against the accused was that he conspired with other co-accused and offered bribes to a public servant. The accused in his defence contended that as long as the amount in question, was in the hands of the accused himself, it could not be said to be tainted money. It assumed such character only after it was received by the public servant for commission of the alleged offence. The accused contended that he was not connected with proceeds of crime and could not be proceeded against under the provisions of the PMLA.

On the question of possession of money, the Supreme Court held 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.

Basis the above reasoning, the court prima facie found the accused to be a bribe giver, being involved in the activity connected with the proceeds of crime. The court accordingly held that the proceedings under PMLA were maintainable.

In the case of *Nik Nish Retail Ltd. v. Union of India*⁹, the High Court addressed whether the quashing of a case involving a scheduled offense automatically leads to the dismissal of subsequent cases registered under PMLA. A case was initiated against the petitioner under various sections of IPC and POCA. Subsequently, charges of money laundering were brought against the petitioner related to alleged irregularities in loan approval from a bank. ED provisionally attached properties, but the Appellate Tribunal set aside the attachment orders, concluding that the properties had been acquired by their respective owners before availing of the loans, hence not connected to the alleged proceeds of crime. In the meantime, a settlement was reached between the petitioner and the bank, resulting in the quashing of the scheduled offense. Accordingly, the High Court ruled that if a person is absolved by a court of criminal jurisdiction due to discharge, acquittal, or quashing of a scheduled offense, no money laundering action can proceed in relation to the property linked to that offense. Considering the attachment order's setting aside and the quashing of the FIR for the predicate offense, the High Court concluded that the PMLA offenses were also unsustainable, leading to the quashing of the prosecution under the PMLA.

In the case of *Neeraj Dutta v. State (NCT of Delhi)*¹⁰, the Supreme Court was considering the issue as to whether a conviction under the POCA can be sustained in the absence of any direct evidence for demand of bribe and whether circumstantial evidence can alone be relied upon. While acquitting the accused, the court held that in absence of direct evidence, the demand and/or acceptance can always be proved by other evidence such as circumstantial evidence. The allegation of

demand of gratification and acceptance made by a public servant has to be established beyond a reasonable doubt. When reliance is placed on circumstantial evidence to prove the demand for gratification, the prosecution must establish each and every circumstance from which the prosecution wants the Court to draw a conclusion of guilt.

In this case, a question was raised as to whether in the absence of evidence of the complainant/direct or primary evidence of demand of illegal gratification, is it not permissible to draw inferential deduction of culpability/guilt of a public servant based on other evidence adduced by the prosecution. A five judges' bench of the Supreme Court answered this issue and held that in absence of the complaint's testimony in a prosecution for offences punishable POCA, the prosecution can rely upon circumstantial evidence to prove the demand of gratification.

In the case of *Sri Kailash S. Raj and others Vs. the State of Karnataka*¹¹, the High Court dismissed a petition filed by owners and two employees of a company who sought quashing of a case that was registered in relation to corruption charges in a tender scam. The High Court noted that two accused, office bearers of company, were caught at the time when the search was conducted at the office of the public servant. The court held that where an offence under section 9 [of POCA] is committed by a commercial organization, the person(s) who are in charge of the organization would also be guilty of the offence.

Footnotes:

⁶ 2023 SCC OnLine SC 109

⁷ 2022 SCC OnLine SC 929

⁸ 2022 SCC OnLine SC 1490

⁹ 2022 SCC OnLine Cal 4044

¹⁰ 2023 SCC OnLine SC 280

¹¹ 2023 SCC OnLine Kar 42

27. Are there any planned developments to the legal, regulatory and/or enforcement framework?

Currently, India does not have a standalone law on data protection. Use of personal data is regulated under the Information Technology (IT) Act, 2000. In 2017, the central government constituted a Committee of Experts

on Data Protection, to examine issues relating to data protection in the country. The Committee submitted its report and based on the recommendations of the Committee, the Personal Data Protection Bill, 2019 was introduced in Lok Sabha in December 2019. The Bill was referred to a Joint Parliamentary Committee which submitted its report in December 2021. In August 2022, the Bill was withdrawn from Parliament. In November 2022, a Draft Bill was released for public consultation. In August 2023, the Digital Personal Data Protection Bill, 2023 was introduced in Parliament. It is yet to get the assent of the parliament.

The bill, when formulated into an act, will apply to the processing of digital personal data within India where such data is collected online, or collected offline and is digitised. It will also apply to such processing outside India, if it is for offering goods or services in India.

Under the PMLA, the Prevention of Money-Laundering (Maintenance of Records Rules), 2005 ('**2005 Rules**') were framed. These Rules were recently amended requiring financial institutions to disclose information about beneficial owners, and the ownership threshold for such disclosures has been lowered from 25% to 10% of a company's shares. The amendments also define terms like 'group,' 'non-profit organization,' and 'politically exposed persons.'

The Ministry of Finance, through a recent notification, has expanded the definition of 'person carrying on designated business or profession' to include activities related to virtual digital assets ('**VDAs**'). This means that VDAs are now under the scope of PMLA and are considered reporting entities. As a result, Reporting

Entities dealing with VDAs must comply with additional requirements, including continuous diligence, verification of customer identity, and maintaining thorough records.

Through Notification No. S.O. 2036(E), dated May 3, 2023, practicing professionals in the field of Chartered Accountancy, Company Secretaries and Cost and Works Accountants are brought under the ambit of the PMLA as a Reporting Entity if they execute some specific listed financial transactions on behalf of their clients.

28. Are there any gaps or areas for improvement in the financial crime legal framework?

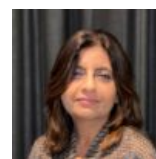
Issues such as inordinate delay in concluding investigations, lack of cooperation between various statutory departments has resulted in slow conviction rate in financial crimes in the country. While the investigating agencies as well as the judiciary has made significant strides in understanding complex technological aspects of financial crimes, there is room for improvement in certain areas.

To combat, tax evasion, fraud, corruption, money laundering, and other financial crimes which threaten the strategic, political, and economic interests of the country, financial transparency, robust legal and institutional frameworks, and effective co-operation between tax administrations and other law enforcement authorities is necessary. With the ever-evolving technology there is a need to introduce frequent changes in the legislative regime governing such crimes.

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