


CA Priti Shah & CA Rohit Katariya

Relevance of Black Money Act

1. Introduction

The saying – "The nation should have a tax system that looks like someone designed it on purpose" by William Simon fits perfectly in today's era of globalisation. The Gordian Knot of tax evasion and generation of black money, which results into huge tax revenue losses to governments, have awakened all countries to design a legislation for such menace.

In India as well, the problem of tax evasion and generation of black money is not new-fangled and it primarily ensues through two sources. The first source being activities which are not permitted by law, such as crime, drug trade terrorism, and corruption. The second includes legally permissible activities, not accounted for and / or reported to revenue authorities, which may result in tax evasion. To impede the first source, the Government of India has introduced various laws like the Benami Transactions (Prohibition) Act, 1988, the Prevention of Corruption Act, 1988, the Prevention of Money Laundering Act, 2002 ("PMLA"), etc., over the years. However, for the latter source, no detailed and distinct regime was framed by the Government for the long run except steps in the form of demonetisation in the year 1946 and 2016; Voluntary Disclosure Scheme in the year 1951 and in the year 1997-98 and other measures in the form of amendments to the Income-tax Act, 1961 ("ITA") etc. Also, the disclosure of foreign assets in the return of income was introduced in 2012. Further, an extended period of 16 years (in place of 6 years) for issuance of reassessment notice in cases involving foreign assets was also prescribed w.e.f. 1st July 2012. Even such measures were not as effective as envisaged to achieve the objective of unearthing undisclosed money. Therefore, there was a need to recognise serious and habitual tax evasion as a crime and implement a harsh distinct tax regime of fiscal and penal consequences to provide effective deterrence against tax evasion.

With this backdrop, the Government enacted a new law in 2015, called the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ("BMA"). This has put India right ahead on the world map as it becomes one of the most aggressively legislating country and maybe the first ever country to frame a statute specifically on the subject of black money. The BMA aims at implementing a separate regime for taxation of any undisclosed foreign income and assets with severe penal consequences against the tax evaders in respect of their undisclosed money stashed abroad.

2. Purpose of BMA

Before dealing with the provisions of BMA, it would be necessary to know what triggered its origination. Given below are some illegal sources leading to generation of red money and legal sources generating black money. For tax laws purposes, the treatment of red money and black money is alike.

(a) Corruption

Corruption is by and large, a major source of black money. For petty consideration, large tax evasion is ignored, which is never detected. Even stringent measures, such as search and seizures or surveys, adopted by the department have proven to be least effective in detecting any *mala fide* cases of tax evasion due to rent seeking tendencies.

(b) Hawala Transactions

Another major source of black money is 'hawala' transactions. The 'hawala' system of illegal money transfer is also directly linked to terrorist financing.

(c) Drug Trafficking

Drug trafficking is a global black market dedicated to the cultivation, manufacture, distribution and sale of drugs, the funding for which primarily comes from black money.

(d) Tax Havens

The tendency of countries to levy high taxes has led to the birth of tax havens, offshore jurisdictions or mid-shore jurisdictions. This has pumped up the amounts of black money in such tax havens.

(e) Banking Secrecy Norms

The banking secrecy norms in tax havens have further supported tax evasion as they refuse to share any information of bank accounts held by any person to anyone which means lack of transparency.

With this insight, let us now delve into the provisions of BMA.

3. Whom does BMA apply to?

The provisions of BMA do not apply to all persons. Hence, before applying BMA, it is fundamental to analyse whether one is covered under BMA. Section 2(2) of BMA defines the term "assessee" to mean a person –

a) Being a resident other than not ordinarily resident in India in terms of section 6(6) of the ITA;

b) By whom tax or any other sum of money is payable under BMA; and

c) Every person who is deemed to be an assessee in default under BMA.

The term person includes individual, HUF, company, firm, AOP, BOI, local authority and every artificial juridical person not covered above. Therefore, the term "assessee" hereunder is wide enough to cover every resident person barring individuals, HUFs and Trusts who are not ordinarily resident in terms of section 6(6) of the ITA. The provisions of BMA are not applicable to non-residents as they are taxed only in respect of their Indian sourced income. In the recent ruling of the Hon'ble Mumbai Tribunal[1], it was held that the provisions of BMA are applicable only to residents and are not applicable to non-resident assessees.

It would be interesting to determine whether a person who is a dual resident would be considered as an "assessee" under BMA. The BMA and the ITA are in *pari materia* and must be read together. Thus, where the residential status of a person under the ITA is determined pursuant to the application of tie breaker rule under a duly negotiated Double Taxation Avoidance

1 Hemant Mansukhlal Pandya TS-670-ITAT-2018(Mum) dated 16th November 2018

Agreement ("DTAA"), the provisions of DTAA should also be taken into consideration while determining his residential status under BMA. Therefore, if a person is considered as a non-resident in India under the ITA, by virtue of the tie breaker rule, then such person shall also be considered as a non-resident under BMA. Hence, BMA shall not apply to such person. This is clarified by the CBDT in Question No. 6 of FAQs issued *vide* Circular No. 15 of 2015 dated 3rd September 2015.

Further, the liability to pay tax alone is not a *sine qua non* for a person to be regarded as an assessee under BMA. Even if a person is liable to pay any other sum under BMA (such as penalty) he shall be considered to be an assessee for the purpose of BMA.

The term "assessee in default" is also not defined under BMA but the persons covered under this term have been referred to in section 30(4), 30(5) and 32(14). While section 30(4) and section 30(5) deal with an assessee who fails to pay tax arrears or installments respectively, section 32(14) deals with the failure of a debtor of the assessee to pay the sum due to him towards recovery of his arrears under BMA.

4. Which income or assets does BMA cover?

This comprehensive new law is to specifically deal with income and assets which are parked outside India by residents and which have escaped tax in India. Section 3(1) provides that every assessee shall be taxed in respect of his total undisclosed foreign income and assets. Section 2(12) defines the term "undisclosed foreign income and asset" to comprise of two elements –

a) the total amount of undisclosed income of an assessee from a source located outside India, referred to in section 4 and computed in the manner laid down in section 5 and

b) the value of an undisclosed asset located outside India, referred to in section 4 and computed in manner laid down in section 5.

The expression "undisclosed foreign income" has not been defined under BMA and hence, recourse is taken from the definition of "income" as provided u/s. 2(24) of the ITA. There could be issues where the foreign source countries characterize and tax the income in a different manner than the ITA. The term "undisclosed asset located outside India" is defined u/s. 2(11) to mean an asset (including financial interest in any entity) –

a) located outside India;

b) is held by assessee in his name or as a beneficial owner; and

c) assessee offers no explanation about the source of investment or the explanation given by him is in the opinion of the Assessing Officer ("AO") unsatisfactory.

To interpret the term "financial interest", reference may be drawn to instructions for filing income-tax return issued by the CBDT. Since the term is not defined under BMA and the ITA, this is the only proximate source of information for interpreting the said term, it would have persuasive value.

Further, the term "beneficial owner" is not defined under BMA but is defined under Explanation 4 to section 139 of the ITA. In many instances, the foreign assets are held by residents, underneath the mask of non-residents, by means of a nominee agreement. By virtue of such an agreement, whether the resident person shall be treated as a beneficial owner under BMA?

The crux of the aforementioned provision lies in the requirement that the assessee, being the legal or beneficial owner of an asset located outside India, has to offer a satisfactory explanation regarding the source of investment in the asset. Where the explanations offered are adequate, the provisions of BMA shall not apply even though the asset has not been disclosed in the return of

income. While the provisions of the ITA, such as Section 68, Section 69, already cover such instances relating to foreign assets acquired from income from unexplained sources, it is important to note that the consequences under BMA are much more stringent.

Further section 3(1) empowers the AO to assess undisclosed foreign asset as and when it comes to the knowledge of the AO, irrespective of the year to which it pertains. Therefore, the provisions of BMA can be triggered even if the asset was acquired by a person prior to previous year 2015-16, in the year when he was resident.

Section 4(1) of BMA provides that foreign income is considered undisclosed if the income is from a source located outside India and if -

a) the same is not disclosed in the return of income for the relevant year filed u/s. 139(1)/(4)/(5) of the ITA; or

b) in respect of which return of income was required to be furnished but not furnished within the time specified u/s. 139(1)/(4)/(5) of the ITA.

Therefore, as per section 2(11) r.w. section 4, action under BMA can be initiated only if foreign income is not disclosed in the original / revised / belated return. In the recent ruling of Hon'ble Madras High Court in the case of *Srinidhi Karti Chidambaram*[2], the proceedings under BMA were quashed as the assessee had filed a revised return u/s. 139(5) and disclosed the details of foreign assets.

5. Onus on whom?

BMA presumes that the accused has the required culpable mental state for an offence under the Act i.e., he had the intention, motive or knowledge of a fact or belief in, or reason to believe, a fact to commit an act considered an offence under BMA. The onus to prove non-culpability beyond reasonable doubt is shifted to the accused. Considering that penal consequences are being imposed, it is a cause of concern that legislators have sought to shift the burden of proof onto the accused. Even as per section 114(g) the Indian Evidence Act, 1872, Courts can presume existence of certain facts if the person liable to produce evidence which could be and is not produced, which if produced would have been unfavourable to the person who withholds it. Therefore, when a person liable to disclose his foreign assets fails to do so, the onus to prove he is non-guilty shall be on the assessee and not on the department. This is a major shift that BMA has introduced compared to the ITA; where in certain instances, onus of proof is also on the department.

6. What are the consequences under BMA?

The consequences on undisclosed income and assets under BMA and the ITA are tabulated hereunder:

	BMA	**ITA**
Tax	30%	78%[3]
Penalty	Three times of tax i.e., 90%	10% of tax i.e., 7.8%
Total liability	120%	85.8%

Note that while computing the above total amount of undisclosed foreign income and assets under BMA and ITA, no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed. Therefore, it is evident that the consequences under BMA are much harsh as compared to the ITA, since the total liability under the former exceeds the value of undisclosed income and assets.

Further, BMA contains no provision for foreign tax credit for taxes paid outside India as juxtaposed to the ITA. This will lead to double taxation of incomes and the assessee will have to pay 120% of the undisclosed income or asset even after paying taxes outside India.

2 TS-658-HC-2018 (Mad.) dated 2nd November 2018

3 Including Surcharge @ 25% and cess @4%

As per section 49 and 50 of BMA, in case of wilful failure to furnish return of income in relation to foreign income and assets before the expiry of the relevant assessment year or having filed the return of income, there is a wilful failure to furnish details relating to foreign income and assets in the same, the defaulting person shall be punishable with rigorous imprisonment for a term ranging from 6 months to 7 years in addition to penalty of ₹ 10 lakh. Even as per the ITA, the imprisonment term is the same for wilful failure to furnish return of income if the tax sought to be evaded exceeds ₹ 25 lakh and in any other case a rigorous imprisonment for a term ranging from 3 months to 2 years.

7. Impact of BMA

As explained above, the ITA lays down a wider scope to deal with worldwide unexplained income and assets of residents and Indian sourced income and assets of non-residents, whereas the provisions of BMA are largely restricted to deal with undisclosed foreign income and assets of residents. This would still make one ponder - why BMA is enacted as a separate legislation? In the following paragraphs, an attempt is made to analyse the reason behind enacting this draconian law:

Predicate offence

The White Paper on Black Money, 2012 has clarified that black money not only includes wealth earned from illegal means but also from legal sources. Owing to this, tax evaded is treated at parity with proceeds of crime under the provisions of BMA.

Section 88 of BMA amends the Schedule of PMLA to include "offence of wilful attempt to evade any tax, penalty or interest referred to in section 51 of BMA" as a scheduled offence. Under PMLA, all offences listed in the Schedule are considered as predicate offence[4] and the occurrence of the same is a pre-requisite for initiating investigations into the offence of money laundering. The term "predicate offence" has been defined under Article 2(h) of the United Nations Convention Against Corruption which means any offence as a result of which proceeds have been generated that may become the subject of an offence as laundering of proceeds from crime.

Accordingly, the income-tax evasion by the assessee apropos foreign income and assets has been brought within the scope of money laundering. The upshot of this landmark change by the Government (i.e., by introduction of BMA r. w. PMLA) would be that investigation against the assessee can be carried out by both, the income-tax authorities and Enforcement Directorate, which may lead to simultaneous prosecution under the respective laws. Now, a question arises as to how the objective of the Government to bring back the black money stashed abroad by Indian citizens can be achieved by treating an offence under BMA as a predicate offence?

Many countries treat tax evasion as a civil offence and therefore, whenever the Indian authorities sought information from foreign counterparts with respect to Indian residents, having foreign bank accounts or assets, the same was turned down on the ground of confidentiality obligations either on the account of bank secrecy laws or skewed provisions of the DTAAs. To outstrip this drawback, the amendment in the Schedule to PMLA is mooted through the route of BMA thereby making tax evasion a criminal offence and opening a new recourse for the Indian tax authorities to gather vital information from their foreign counterparts. Following options are now possibly available to the Indian tax authorities to counter black money –

(a) Financial Action Task Force ("FATF")

The FATF was founded with the objective to set standards and promote effective implementation of legal, regulatory and operational measures for combating *inter*

4 Q13 FAQs on PMLA dated 1st May 2013

alia money laundering[5]. India was granted a full-fledged membership in June 2010. This is where BMA acts as a facilitating agent. Since an offence under BMA is included as a scheduled offence under PMLA, prosecution proceedings could be triggered not only under BMA, but also under PMLA. Hence, once PMLA gets triggered, India would be in a position to co-ordinate and to seek co-operation from FATF member nations for the reason that money laundering is a criminal offence for each member of the FATF.

(b) United Nations Convention against Corruption ("UNCAC")

In 2011, India became the 152nd country to ratify the UNCAC. One of the purposes of this Convention is to promote, facilitate, and support international co-operation and technical assistance in the prevention of and fight against corruption including in asset recovery.

The Convention requires the States to criminalise laundering of proceeds of crime, obstruction of justice, and illicit enrichment. Further, it requires countries to have mechanisms for freezing, seizure, and confiscation of the proceeds of crime and cooperate in criminal matters by extradition and mutual legal assistance to the greatest possible extent. One of the fundamental objectives of the Convention is the return of assets for which member countries shall provide full cooperation and assistance.

As per the aforesaid explanation, BMA treats tax evasion as money laundering and proceedings under PMLA can be initiated. Under PMLA, property or records of the person involved in money laundering can be attached, frozen or seized. Thus, India now has a legislature which provides a mechanism for freezing, seizing and confiscation of the property outside India. Therefore, being a member of UNCAC, India can avail the cooperation of the member nations for establishing title of property or income belonging to any resident assessee.

8. Sources of Information

The above procedure can be smoothly carried out only when Indian authorities have information about the tax evaders. Section 10 of BMA provides that assessment can be initiated under BMA on receipt of information from an Income-tax authority under the ITA, from an authority under any law for the time being in force (FEMA, Customs, etc.) or any information coming to the notice of the AO.

Under the ITA, for assessment u/s. 147 or 153A, the AO should be in possession of information on basis of which he has a reason to believe that income was not taxed. Also, it is essential that the information so possessed by the AO should be duly authenticated and verified by him. The Hon'ble Mumbai Tribunal, in the recent case of *Hemant Mansukhalal Pandya*[6], held that no addition can be made on the basis of an unauthenticated and unverified document. While the powers of the AO are quite narrow in scope under the ITA, the AO has been given unfettered powers under BMA. Under the latter, there is no requirement for the AO to have a reason to believe and this makes BMA a lethal law. Further, in exercise of the powers conferred upon him, the AO can serve a notice under BMA on the basis of a report published in a newspaper or on the basis of any unauthentic and unofficial information made available through any website / blog. Further, the AO can also rely on stolen or leaked data to initiate the proceedings under BMA. Thus, information regarding offshore investments made by residents obtained by the AO through the various information leaks such as the Swiss leak, the Panama papers, the Paradise papers etc. can be used for initiation of assessment under BMA.

5 http://www.fatf-gafi.org/about/

6 TS-670-ITAT-2018(Mum) dated 16th November 2018

India has negotiated DTAAs with other countries over the years to insert Articles for Exchange of Information by way of Protocol. Further, India has been proactively engaging with foreign governments, for exchange of information under other agreements such as Tax Information Exchange Agreements ("TIEAs"), Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("MAC") and South Asian Association for Regional Co-operation ("SAARC") Multilateral Agreement. These steps have enabled India to receive information from foreign countries of financial information through Automatic Exchange of Information ("AEOI"). The information under the AEOI will include information of controlling persons (beneficial owners) of the asset. Similarly, India has also entered into information sharing agreement with the USA under the Foreign Account Tax Compliance Act. Apart from the above, there can be other sources of information such as the Schedule FA that has been incorporated as a part of the ITR Form *vide* Finance Act, 2012.

With respect to Switzerland, India has proactively amended the India-Switzerland DTAA through a Protocol in the year 2011 for exchange of information on a request basis concerning taxes covered by the Agreement. In addition to the above, India and Switzerland are also signatories to the MAC and the Multilateral Competent Authority Agreement ("MCAA"). Pursuant to the same, AEOI is activated between the two countries for sharing financial account information, effective from 1st January 2018, with first transmission in September 2019. Accordingly, India will receive information of financial accounts held by Indian residents in Switzerland for 2018 and subsequent years, on an automatic basis.

It is pertinent to note that all the information obtained regarding the foreign bank accounts or assets shall not automatically mean that they represent black money stashed abroad. There may be a case where the account belongs to an NRI or has already been disclosed and therefore, only after proper assessment any tax or / and penalties shall be levied. This is in accordance with the intent of the Government to not tax *bona fide* cases.

9. Conclusion

The baptism of new parallel legislation by the Government in the form of BMA effectuates severe consequences in the form of penalty of three times of the tax payable as juxtaposed to penalty embodied in the ITA of either 10%[7] or 50% / 200%[8] of the tax payable. Correspondingly, BMA also comprehends more stringent legislation which exposes the offender to PMLA by characterising the offence as a predicate offence.

Before we conclude, this article would be incomplete if no mention is made about the income derived by NRIs from sources in India which are undisclosed in the foreign country where they now reside. It should be noted that the shift in the legislature to deal with black money is not only prevalent in India, but even other countries are taking such initiatives. Like India, UK, in its Finance Act, 2017, introduced 'Requirement to correct' legislation which required disclosure of undeclared offshore tax liabilities in respect of foreign income and assets by 30th September 2018. In the absence of any disclosures, it shall tantamount to 'failure to correct' and will attract higher penalties. Australia also has established Black Economy Taskforce in 2016 to combat black money in Australia and their recommendations are soon going to be effective from 1st July 2019.

Therefore, with rampant change in each country's domestic laws, advancement of technology and with effective mechanism in place for exchange of information between countries all over the world, circumventing the provisions of BMA, by way of any mask, to stash money in any jurisdiction without paying taxes, may no longer be possible. Thus, BMA, being a draconian law, may help the Government to end the era of the black money economy in the future.

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7 Under section 271AAC

8 Under section 270A