Black Money Act - Litigation Landscape...

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The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (hereinafter referred to as BMA) has been implemented in India from 1 July 2015. The Act aims to curb black money, or undisclosed foreign assets and income, and imposes tax and penalty on such income. It penalizes the concealment of foreign income, non-reporting of foreign assets by residents and provides for criminal liability for attempting to evade tax in relation to foreign income. The Act applies to Indian residents and seeks to replace the Income Tax (IT) Act, 1961 for the taxation of foreign income. The law was enacted in 2015 and now the litigation relating to the law has been surfaced in the Judiciary with grievances of both the sides of the table, which will gradually carve out the exceptions of the law. Let us travel through some of the interesting issues which are addressed by judiciary on the law:

1) **Personal Liberty – High Court Allows foreign travel provided assesse to share Google Location & deposit wife's passport in case of Ratul Puri** [TS-187-HC-2023(DEL)]: The gravity of the BMA has been so much dense that even foreign travel of the assessee is been restricted if there is outstanding demand or pending proceedings under BMA. In the captioned case of Ratul Puri, several personal restrictions were imposed like issuance of Look Out Circular, direction of non-alienation company's assets, not to travel abroad etc due to which the Tax Payer filed the writ petition seeking relief before High Court. High Court considered the petition of the Tax Payer on several aspects like direction of Supreme Court not to take coercive action against the Assessee, Tax payer continuously appeared before the authorities, recorded his statement and extended the co-operation from time to time. Considering the same, High Court allowed Tax Payer to travel overseas subject to certain conditions like (i) not interfere with in any of the proceedings relating to Foreign Tax and Tax Research (FT&TR) references, pending with the authorities in the US, (ii) not alienate any moveable or immovable assets belonging to him or related to him or his businesses in any foreign country, (iii) provide the telephone number which is active and used by him for the said period of travel, and is operational at all times, with the Registrar General, (iv) drop a pin on Google Maps to indicate his location to the concerned Investigating Officer and (v) deposit his wife's Passport with HC's Registrar General (vi) furnish an undertaking before the Registrar General stating that - (a) No third-party rights would be created in respect of the said property during the period of Assessee's travel abroad, (b) travel itinerary handed over to the Court shall be adhered to and (c) the Assessee shall return to India, not later than specified period etc.

The readers may also refer honourable Delhi High Court's order in case in case of Manoj Vasudev Pardasany [TS-150-HC-2023(DEL)], wherein Delhi HC quashes the Look out Circular (LOC) issued against the Assessee as: (i) the Assessee deposited 20% of the demand raised under the IT Act and total demand raised under the Black Money Act, (ii) Assessee participated in the investigations initiated under both the Acts, (iii) Income Tax assessment and proceedings under Black Money Act got concluded, (iv) No prosecution was launched by the authorities, and (v) The LOC continued since 2019 without being reviewed by the originating agency.

2) **No Tax under BMA if Tax Payer paid Income Tax - Srinjoy Bose** [TS-105-ITAT-2023(Kol)] - : The concept of No double taxation of the single income in the same hands of the Tax Payer is very much prevalent under the Income tax Act. The Black Money Law being ancillary and sibling to the Income Tax

Act relating to Undisclosed Income (may be a foreign income), the basic principles of Taxation of Income under both the Acts would be congenial. In the cited case, the Tax Payer had taken insurance in UAE from foreign income while he was Non-Resident and offered income from maturity of Insurance Proceeds in India since money was received in India due to which the proceedings under Black Money Act were initiated on him. ITAT held "*this fact also remains uncontroverted that the value of the alleged investments received by the assessee in India has already been subjected to Income tax and taxing the same amount under the Black Money Act, 2015 will tantamount to double taxation*." Considering the same, it can easily be ostensibly concluded that if the income is disclosed under Income Tax Act, then such income cannot be taxed or proceeded for penalty prosecution under Black Money Act.

3) **Foreign Assets can be disclosed even in revised return under Section 139(4) or belated return under Section 139(5) or even after Search Proceedings - K. Mohammed Haris** [TS-990-HC-2021(KAR)]**:** The Tax Payers while filing return of Income, are required to disclose foreign assets including foreign bank accounts. The BMA prescribes penalty for non-disclosure of foreign assets in Income Tax Return. The question of litigation arose as to whether the undisclosed foreign asset of original return can be repaired by way of revised return? Whether revised return can be filed after department has noticed that the tax payer has not disclosed foreign asset in original return? Can return be revised after search proceedings on the Tax Payer? The answer to all the questions were given in affirmation by the honourable Karnataka High Court in the cited case. High Court held that Revenue's allegation that Tax Payer has disclosed foreign asset only in revised return, is unsustainable since the Assessee had filed the return as per stipulated time limits and offence under Section 50 can be said to have been committed if no disclosure was made in the revised return. High Court relies on Madras HC ruling in Srinidhi Karti Chidambaram's case where it was held, "*It is trite law that a Section which has a penal consequence has to be read strictly and therefore, the words, "or sub-Section (4) or sub-Section (5) of Section 139" has to be given some meaning and an offence, under Section 50 of the BM Act, would be attracted, only after the period to file the revised return, under Section 139(5) is over and if there is a wilful failure to furnish the information of a foreign asset/financial interest in the return. Except in cases, of course, where there is a complete fraud played by the assessee, by filing a false return*." Karnataka HC quashed criminal complaint for offence under Section 50 of the Black Money Act since the Assessee had made the disclosure of foreign assets and interest in the revised return although after search proceedings.

Similarly, in case of **Leena Gandhi Tiwari** [TS-227-ITAT-2022(Mum)], the honorable ITAT accepted disclosure of foreign bank account in return filed in response to notice issued during search assessments. Relying on jurisdictional High Court ruling in JSW Steel Ltd wherein it was held that where a return is filed consequent to search and seizure, the return filed under Section 153A takes place of the original return, thus ITAT opines that non-disclosure of the foreign asset in the original return filed under section 139, even if that be so, cannot be put against the Assessee, particularly when the said disclosure was admittedly made in the return filed under Section 153A;

4) **Penalty for Non-Disclosure (of Foreign Asset) not automatic, reasonable cause can rescue - Leena Gandhi Tiwari** [TS-227-ITAT-2022(Mum)]: Under the Income Tax Act, there are considerable judgements on the human probability which are surrounded by litigation from both sides of the table. The department while making fictitious additions is countered by Tax Payers that no addition can be made on the basis of presumptions and surmises whereas majority of the additions under search and survey proceedings are contested on the grounds of practical possibility that certain category of Tax Payers would not ordinarily involve in given set of circumstances. Under Income Tax act, if reasonable cause is given for violation of the provision, then the penal consequences can be avoided considering absence of Mens Rea. Black Money Law being sibling of the Income Tax Act, is being carved out by judiciary on the same principle. In the cited case, the Tax Payer who is a High Net Worth Individual, with aggregate payment of taxes around Rs.2,350.66 Cr. in the last seven years by her, her husband and the private limited company she chairs was questioned under Black Money Law for foreign bank balance of merely UK £ 2,34,710. The ITAT held "when seen in the light of this financial position, the amount held in the alleged undisclosed foreign bank account is a small, if not trivial, amount of UK £ 2,34,710, and that it is not, by any stretch of logic or imagination, a case of siphoning unaccounted wealth in India to the undisclosed bank accounts abroad.". ITAT opines "*When we objectively see all these factors in totality, the inescapable impression is that the assessee is certainly not from the category of persons who were sought to be checked by this piece of legislation. To use it in a case in which a person has not reported a bank account, which is a lawful inheritance from her father and which contains a small amount that is*

eventually donated by her to a medical charity of global repute, will surely be inappropriate...". Relying on SC ruling in Hindustan Steel, ITAT expound that the overall conduct of the Assessee, materiality of the lapse, nature of lapse i.e., technical or venial breach of law, is the most critical factor so far as taking a call on the question of whether or not a penalty should be imposed for the Assessee's failure to discharge a statutory obligation. Hence, in the above case, the honourable ITAT relied on personal factors and human probability basis which the penal consequences under BMA were knocked out.

5) **Simultaneous proceedings under Income Tax and Black Money on same foreign asset jurisdictionally defective - Yashovardhan Birla** [TS-837-ITAT-2021(Mum)]: Mumbai ITAT allowed Assessee - Yashovardhan Birla's appeal in the black money case, held notice under Section 10(1) of Black Money Act to be jurisdictionally defective, violative of principles of natural justice. ITAT held that there cannot be simultaneous proceedings under Black Money Act and Income-tax Act. ITAT held that the Black Money Act has an inbuilt bar "*inasmuch as it has been provided that assets out of income assessed to income tax shall be excluded from the purview of undisclosed asset in Black Money Act. Hence, it is abundantly clear that as per the scheme of the act, there cannot be a simultaneously proceedings on the same asset/income under Income Tax Act, 1961 as well as Black Money Act*".

Conclusion: It is imperative for every professional to ensure that the Tax Payer should disclose foreign asset appropriately in the return. There are other consequences on personal liberty to travel abroad and giving surety and security which also needs to be considered while assessing vigour of Black Money Law. Being a recent law, it is implemented in the manner best suited to the revenue and it becomes challenging to fight for tax payers since the litigations to throw light on subject have not been available on variety of its aspects.