

Black Money Act - All You Need to Know - Part 1

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Recently there has been a lot of administrative action in the field of offshore assets and related action initiated under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (**BMA**). This is so especially in view of the constant flow of information concerning offshore assets coming to the notice of the authorities on account of various data leaks as well as from various jurisdictions under information sharing arrangements as well as automatic sharing of information. BMA was introduced in the year 2015 specifically with a view to deal with undisclosed offshore incomes and assets as it was felt that the prevalent laws were inadequate to deal with various aspects of offshore assets.

As per news reports, as on 31 December 2019, more than 400 notices have been issued under the BMA and there have been recoveries of crores of rupees as well as 100s of prosecution cases have been filed (under the BMA as well as Income Tax Act, 1961 (**IT Act**)) in offshore assets matters. With more and more seamless information flow that is going to happen in near future, this law is going to be one of the key focus areas for the administrative authorities for augmenting tax collections.

Key features of BMA:

- Administration of BMA by same authorities as those under the IT Act
- BMA is applicable from 1 July 2015 (was 1 April 2016 - Being AY 2016-17, was later modified by notification dated 1 July 2015)
- BMA applied only to resident taxpayers when it was introduced in 2015 (however, in 2019, applicability of the law has been retrospectively (since its introduction) changed to cover certain non-residents as well within its purview)
- Under BMA, tax is leviable not only on undisclosed offshore income, but also on undisclosed offshore assets
- Tax rate is 30% and penalty is flat 90% (therefore applicable taxes and penalties will exceed the value of income and assets sought to be taxed)
- No foreign tax credits, offsets, etc. are available against taxes due under BMA
- A combined reading of Section 3 (Charging section), Section 10 (Assessment) and 72 (Removal of doubts) would mean tax will be levied in the year in which the assessing officer issues a notice to the assessee (irrespective of the year in which such income was earned or offshore asset was acquired)
- Prosecution provisions have prescribed for jail term of upto a period of 10 years in case of certain

offences

- Offences under the BMA are not compoundable, Settlement Commission route is also not available for proceedings under the BMA

A limited period one-time disclosure window was also introduced wherein one could make a disclosure and come clean by paying 30% tax and 30% penalty (effectively 60% of the value of undisclosed income and offshore assets). Immunities from action under five acts (IT Act, Wealth Tax Act, 1957, Foreign Exchange Management Act, 1999, Companies Act, 2013 and Customs Act, 1962) were given to taxpayers who availed this opportunity.

The authors have analyzed the provisions of this law (BMA) with a view to address the following questions and given practical insights therein:

- What triggers action under BMA?
- Whom does BMA apply to?
- What incomes / assets would be covered under this law and related mechanics?
- What are the implications of invocation of BMA?
- Defenses available to taxpayers and Court rulings in the context.

A. What triggers action under BMA?

The administrative machinery of BMA sets in motion when an assessing officer issues an assessment / reassessment notice under Section 10 (1) of the BMA (an equivalent of Section 143(2) or 148 of IT Act). An assessing officer can issue this notice on account of receipt of information (concerning undisclosed offshore assets and incomes) from another income tax officer, any other authority under any law or on receipt of any information. As per Section 11(1) (equivalent of Section 153 of IT Act), an order under BMA needs to be passed within two years from the end of the financial year in which Section 10(1) notice was issued. As can be seen, the scope for issuance of assessment notice for the assessing officer is quite wide.

Avenues for receipt of information

A lot of recent notices issued emanate from information available on account of multiple data leaks (Panama Papers, Paradise Papers, HSBC Geneva leaks, Potrcullis, etc. to name a few). These leaks also generally provide leads which trigger requests for information to various jurisdictions through diplomatic channels. In most Double Tax Avoidance Agreements (**DTAAs**) that India has entered into with offshore jurisdictions there is an article dealing with 'exchange of information' and related assistance for gathering of information. With a lot of jurisdictions with whom a full fledged tax treaty is not required (as they have no taxes) / not entered into, there are specific Tax Information Exchange Agreements (**TIEAs**) which provide for sharing of information on a request basis. In addition to this, there are Automatic Exchange of Information (**AEOI**) agreements signed between almost 100 countries now wherein information is shared on an ongoing basis as against on a request basis in the DTAAs / TIEAs. This puts the regulatory authorities in possession of a lot of information which they are mining and issuing notices under the BMA to tackle the cases of potential tax evasion.

B. Whom does BMA apply to?

When introduced, BMA applied only to an 'assessee' (defined under Section 2(2) of BMA) which meant Residents of India as per Section 6 of IT Act. 'Non-residents' and 'Residents but not-ordinarily residents' were outside the purview of this law.

The definition of an 'assessee' under BMA has recently (in July 2019) been amended retrospectively to apply from the date of applicability of BMA i.e., 1 July 2015. This position has been retrospectively amended to include individuals / entities that were residents when undisclosed offshore incomes were earned / undisclosed offshore assets were acquired but later such individuals / entities became non-

residents of India. This amendment clearly shows the focus and intention of the Government and hints that there is going to be a lot of administrative action in this field. Since, this a very recent amendment the validity of the same (considering the fact that it retrospectively seeks to apply a law that has criminal implications to a class of tax payers that was specifically excluded earlier) will need to be tested in Courts of law. One important factor that would also be relevant in deciding this would be the intention and scheme of this law and the ailment that it seeks to address (menace of black money).

Unless there is a constitutional challenge to such an amendment (extending the application of this law retrospectively to a new class of tax payers) and the amendment is struck down, authorities are likely to take a view that BMA will apply to individuals / entities that are covered under the revised definition of the term 'assessee' retrospectively from 1 July 2015 (being the date from which BMA came in force).

C. What incomes / assets would be covered under this law and related mechanics?

Section 2(12) (definition of the term 'undisclosed foreign income and asset') provides that BMA applies to offshore incomes and assets which are either in an assessee's (as defined under Section 2(2) of BMA) name or of which such assessee is a beneficial owner and such assessee has no explanation (to the satisfaction of the assessing officer) about the source of investment in such asset. Section 3 (charging section) provides that such 'undisclosed foreign income and asset' will be chargeable under BMA on its value (as prescribed) at the rate of 30% in the year in which it comes to the notice of the assessing officer.

Section 72(c) of BMA is very important in analyzing the charge of tax under BMA and it reads as under:

where any asset has been acquired or made prior to commencement of this Act, and no declaration in respect of such asset is made under this Chapter, such asset shall be deemed to have been acquired or made in the year in which a notice under section 10 is issued by the Assessing Officer and the provisions of this Act shall apply accordingly.

Thus, it can be stated that Section 10(1) of BM Act (discussed above) provides that an Assessing Officer can issue a notice in the year in which he discovers an undisclosed offshore asset / receives information about an undisclosed offshore asset / income. Accordingly, a combined reading of Section 10 and 72(c) would suggest that the presumption will be that the undisclosed offshore asset has been acquired in the year in which it came to the notice of the Assessing Officer and a requisite notice is issued. Where an undisclosed offshore asset was acquired or offshore income earned say prior to the date of BMA coming into effect (say somewhere in 1990, which would mean that the same would be time barred even under the IT Act) and it could not have been taxed under the IT Act, still under the BM Act, tax and penalty to the extent of 120% (30% tax and 90% penalty) of the value of the asset can be recovered from such taxpayer. In addition, the taxpayer may also be liable for prosecution which can result in imprisonment ranging from three years to ten years (discussed below).

Illustration provided in BM Act under Section 5 (Computation provision) clearly indicates that the BM Act will apply in relation to an income that was earned in AY 2009-10 (Financial Year 2008-09) and the Black Money Act comes into effect only from 1 July 2015.

Illustration

A house property located outside India was acquired by an assessee in the previous year 2009-10 for fifty lakh rupees. Out of the investment of fifty lakh rupees, twenty lakh rupees was assessed to tax in the total income of the previous year 2009-10 and earlier years. Such undisclosed asset comes to the notice of the Assessing Officer in the year 2017-18. If the value of the asset in the year 2017-18 is one crore rupees, the amount chargeable to tax shall be $A-B=C$

where,

$A = \text{Rs.1 crore}$, $B = \text{Rs. } (100 \times 20/50) \text{ lakh} = \text{Rs.40 lakh}$, $C = \text{Rs. } (100-40) \text{ lakh} = \text{Rs.60 lakh}$.

This shows that BM Act is a retrospective legislation as the year in which an income was earned / asset acquired is irrelevant and importance is placed only on its detection and the presumption is that tax will

be levied in the year of detection and notice by the authorities as if it is the income earned in the year of issuance of notice. This presumption could result in taxation of time barred incomes. This aspect has been reiterated vide FAQ's 14 and 20 of Circular Number 13 of 2015 dated 6 July 2015 issued when the one-time disclosure window under BMA was available.

It has further been clarified that incomes / assets that are taxed under the BMA would not be subject to levy of tax under the provisions of IT Act (Section 4(3) of BMA). Conversely, certain incomes assessed under the IT Act (as mentioned in Section 4(2) of BMA) would not be subject to charge under the BMA.

In a lot of cases especially in case of leaks wherein information concerning certain offshore interests was leaked on websites, etc. (say ICIJ website), the authorities issued notices requiring the individuals / entities referred in the information to explain whether the offshore assets mentioned were reported in various filings, etc. Based on the responses received, there were further investigations, questioning or dropping of proceedings on receipt of sufficient clarifications.

D. What are the implications of invocation of BMA?

Once an adverse assessment order is passed under BMA (requiring the taxpayer to pay tax, penalty), the taxpayer will have an option to agitate the same before Commissioner of Income Tax (Appeals) (within 30 days of receipt of order) which is the first appellate authority. Such an appeal will need to be decided within one year from the end of the financial year of its filing.

Either party can agitate an order of the first appellate authority before the Appellate Tribunal (within 60 days). An appeal (only on a substantial question of law) against the order of the Appellate Tribunal will lie before the High Court (time limit for filing such an appeal would be 120 days). An appeal will then lie to the Supreme Court in case the High Court deems it be to be fit case for appeal to the Supreme Court. It may be pertinent to note here that a Special Leave Petition may be filed against such orders as is generally the case in majority Income Tax proceedings as well.

It may be pertinent to note that Section 25 of BMA requires that even if an appeal is pending before the High Court or Supreme Court, taxes will need to be paid in accordance with the assessments made under BMA. This is a provision to prepone collection of taxes (and not allow too much deferral) pending appeals before the High Court / Supreme Court.

In addition to the financial penalties (which may also include a penalty of INR 10 Lacs under Section 43 of BMA for failure to furnish details of offshore assets and incomes in the return of income required to be filed under the IT Act), the following implications may also follow for proceedings initiated under the BMA:

Sr No	Section	Offence	Punishment
1	49	Failure to file tax returns in India by an Indian resident assessee who has interests in reportable offshore assets.	Rigorous Imprisonment (RI) of minimum six months to maximum seven years plus fine.
2	50	Willful failure to disclose interest in offshore assets in tax filings in India	RI of minimum six months to maximum seven years plus fine.
3	51	Wilful attempt to evade any tax due under BMA	RI of minimum to three years to maximum ten years plus fine.
		Wilful attempt to evade payment of any tax due under BMA	RI of minimum to three months to maximum three years plus fine.
4	52	False statement made in verification	RI of minimum six months to maximum seven years plus fine.
5	53	Punishment for abatement of an offence	RI of minimum six months to maximum seven years plus fine.

It is also pertinent to note that under Section 54 of the BMA (corresponding to Section 278E of IT Act) there is a presumption of culpable mental state on the part of the taxpayer wherever required. It will be

for the taxpayer to prove beyond reasonable doubt that there was no such intention / culpable mental state.

In addition to the above implications, one more possible implication is invocation of Prevention of Money Laundering Act, 2002 (PMLA). A willful attempt to evade payment of taxes under BMA has been made a predicate offence under the PMLA. Schedule of offences under PMLA have been amended to include in the definition of offences an act to willfully evade tax, penalty or interest referred to in Section 51 of BMA. Thus, even adverse implications under PMLA would follow if the prescribed conditions for its invocation are fulfilled.

In Part-2, the authors shall discuss a few defences available to taxpayers and also deliberate on court rulings in this regard.

[Click here](#) to read Part 2.