Black Money Act - All You Need to Know - Part 2

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In Part 1 of their 2-Part article series, the authors lucidly analysed the provisions of the Black Money Act. In Part 2 today, the authors briefly discuss a few defences available to the taxpayers and also deliberate on a few court rulings on the same.

Some Defenses available to taxpayers and Court rulings in the context

While one will need to look at the nuances and specific facts / circumstances of each case (as the implications under these laws can be enormous), one of the basic defense that could be explored in these proceedings (facts permitting) is to provide a complete explanation of the source of the asset / income in question and whether that has any link / connection with Indian taxation.

Unlike the general opinion on such leaks, not all names and entities appearing in these leaks are tainted. It is very much possible that the structures as appearing in the so called leaked tainted / confidential information would be completely legal structures compliant with all regulatory framework, reporting requirements, etc. It may be interesting to note that even on the websites on which leaked information is uploaded which is available for public access, generally there is a disclaimer that the offshore structures could well be within regulatory and legal framework. Having offshore structures and trusts and the mere fact that data is listed on these websites does not mean, suggest, or imply that there is any impropriety, evasion, etc. on the part of the individuals / entities mentioned therein. The initial onus will be on the taxpayer to prove the source of acquisition as well as satisfy the authorities that all compliances as applicable were indeed undertaken. Another factual defense could be that the structures / entities were set up when the individual was a non-resident of India (for taxation and / or exchange control purpose but continued to hold an Indian passport and mention an Indian address, etc.) and therefore there was no reporting requirement / taxability in India.

Based on some media reports as well as some reported tax cases, it has been observed that the individual / entities named in the leaks were merely discretionary class beneficiaries of offshore trusts (that could have been settled by their non-resident relative). The defense that can possibly be set up by such taxpayers is that it is a settled legal principle that taxation (if any) would arise either on account of contribution of assets / funds or on receipt of any distributions / benefits from such trusts / structures. In the absence of either contribution or receipt / income, there could be no implication for merely being named as a beneficiary in an offshore discretionary trust as all that a beneficiary of such trusts has is a

hope that a distribution will be made in his favor (as has been held in the SC ruling in case of Commissioner of Wealth Tax v Estate of HMM Vikramsinghji of Gondal reported in [TS-258-SC-2014] (refer para 18).

Another legal defence (again facts permitting) could be around the retrospective application of BMA in view of the deeming provisions of Section 72(c) of BMA as discussed above as well as possible criminal sanctions against taxpayers for acts that may have been done prior to 2015 when this law was not introduced. This aspect as well as related provisions of the Constitution of India (including Article 20) have been analysed along with the requisite case laws later in this article.

It may also be pertinent to note here that a similar provision was later introduced in IT Act as well to do away with limitation under the IT Act. Section 197(C) of the Finance Act, 2016 introduced similar language for assesssee's who did not make a disclosure under the disclosure window made available under the Income Declaration Scheme, 2016.

Section 197(c) of the Finance Act 2016 is reproduced below:

Section 197 For the removal of doubts, it is hereby declared that

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(c) where any income has accrued, arisen or received or any asset has been acquired out of such income prior to commencement of this Scheme, and no declaration in respect of such income is made under this Scheme,

(i) such income shall be deemed to have accrued, arisen or received, as the case may be; or

(ii) the value of the asset acquired out of such income shall be deemed to have been acquired or made,

in the year in which a notice under section 142, sub-section (2) of section 143 or section 148 or section 153A or section 153C of the Income-tax Act is issued by the Assessing Officer, and the provisions of the Income-tax Act shall apply accordingly.

There were a lot of representation from the taxpayer community against such provision taking away an accrued right of time barring. Accordingly, the same was retrospectively (from effect from its introduction) withdrawn in the immediately next Finance Act (that of 2017).

Reason quoted for said withdrawal:

In view of the various representations received from stakeholders citing genuine hardships if the said provision is made applicable, it is proposed to omit clause (c) of section 197 of the Finance Act, 2016.

It would be interesting to see how courts interpret the provisions of Section 72(c) and test the same against the principles enshrined in the Constitution of India (especially under Article 20).

BMA is a relatively new legislation. Some writs have been filed challenging the constitutional validity of provisions of the BMA (especially the ones which have a retrospective application). While the outcome of these challenges is awaited, certain grounds taken in these writs concern the retrospective applicability of provisions which may ultimately lead to criminal prosecution which is not under Article 20(3) of the Constitution of India (which protects against retrospective application of criminal laws).

Rulings in this context

Writ petitions challenging the provisions of BMA (especially the ones that have a retrospective application have been challenged before various High Courts - Delhi High Court, Calcutta High Court, Bombay High Court to name a few). One of the main arguments raised in these petitions is that provisions of BMA are violative of Article 20 of the Constitution of India, which is reproduced below:

Article 20 - Protection in respect of conviction for offences:

(1) *No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence*

(2) *No person shall be prosecuted and punished for the same offence more than once*

(3) *No person accused of any offence shall be compelled to be a witness against himself*

Article 20(1) protects against retrospective application of laws which may lead to prosecution / jail term. However, if the provisions of BMA as they are presently worded are given effect to, it leads to a situation where a taxpayer may have to face prosecution proceedings for undeclared offshore assets that were acquired and transferred even prior to the BMA being introduced (in view of the presumption under Section 72(c) which deems that such asset would have been acquired in the year in which a notice under Section 10(1) is issued by the officer) which seems violative of Article 20(1).

Article 20(2) protects against double jeopardy and prescribes that a person cannot be prosecuted twice for the same offence. In the present context, there is a possibility of double jeopardy in a situation where an assessee misses reporting certain offshore assets in his tax filings. This could result in criminal action under Section 50 of BMA (as discussed above) and the same act is treated as an offence under Section 277 of the IT Act (False statement in verification, etc.).

The Calcutta High Court in the case of Shrivardhan Mohta v. Union of India [TS-64-HC-2019(CAL)] dismissed a writ petition by the petitioner seeking a declaration that provisions of BMA must be applied prospectively and inter alia, the quashing of the sanction for his prosecution under the BMA. The HC noted that the petitioner had been accorded opportunities to make a true and proper disclosure about his foreign bank accounts on two occasions after the introduction of the BMA and his failure to do so would attract prosecution under the BMA.

That apart, the Hon'ble Supreme Court in Union of India v. Gautam Khaitan, [TS-616-SC-2019] interfered with a restraint order passed by the Delhi High Court (asking the authorities to stay proceedings under the BMA). Supreme Court held that such an interim order passed by the Delhi High Court was not sustainable and accordingly vacated the same. These questions concerning retrospectivity and consequent constitutional challenge are yet to be decided in this case (as well as some other cases pending before various courts) and proceedings are underway.

Overall, considering the intent of BMA as well as related ramifications that rulings could have on the ongoing proceedings, it may be stated that Courts have also been treading cautiously and have been reluctant to completely quash notices issued under BMA.

Practical suggestions for taxpayers

If you think training is expensive, try ignorance - Peter Drucker. This quote has often been tweaked and quoted as If you think compliance is expensive, try non-compliance . Taxpayers will need to be very careful in making statutory filings like Schedule FA (Foreign Assets) of Income Tax Forms as well as foreign exchange laws related disclosures, as well as submissions / responses concerning notices under the BMA to avoid the rigours of regulatory action in this area of focus for the authorities. There has been a lot of regulatory action especially in cases wherein taxpayers have reported offshore assets in their tax returns and such cases are being picked up for scrutiny assessments mainly to verify the offshore assets related aspects.

All in all, robust documentation (especially explaining source of funds), proper representation and filing responses / submissions coupled with accurate compliances (like filling up Schedule FA accurately, making all disclosures required under exchange control laws, etc.) will act as the best possible defence for the taxpayers against any regulatory action that may be initiated under BMA.

Conclusion

Offshore assets and related aspects have been the focus area of the tax administration and regulatory authorities for some time now and there is going to be a lot of traction this filed for some years to come

as there has been a tremendous uptrend in the receipt of information and seamless dissemination and sharing of information amongst nations. This is a hot topic of discussion globally as well as a matter of great political interest in India and is going to be in the limelight for some time. One will need to be cautious and vigilant to avoid being on the wrong side of the law as there are very harsh ramifications that could ensue even for small technical defaults.

Click here to read Part 1.