Black Money Law in India

Background & Introduction

Income Tax Act, 1961 (hereinafter called 'ITA') seeks inter alia to tax global income of a resident-taxpayer and also provides for the levy of penalty in case of concealment, under reporting or misreporting of such income. If foreign sourced income chargeable to tax including any income in relation to any foreign asset has gone untaxed, such income can be brought to tax under ITA within 16 years from the end of the relevant assessment year in which such income was assessable, as provided in section 147 to 151 of ITA.

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (hereinafter called 'BMA') enacted by the parliament to come into effect from 1.7.2015 seeks, vide charging section 3(1), to tax 'undisclosed foreign income and asset' 'of the previous year' at the rate of 30% of such undisclosed foreign income and asset. Apart from the tax, there is penalty prescribed under section 41 of BMA at the rate of three times of tax i.e. 90% of undisclosed foreign income and asset. There are other consequences also with which we may not be concerned presently for the purpose of this article.

Person on whom BMA applies

Initially, BMA was made applicable on 'assessee'/person who were 'resident' in India other than 'not ordinarily resident' under section 6 of ITA. 'Non-resident' & 'not ordinarily resident' persons under ITA were kept out of the net of BMA. But, such definition of 'assessee' under BMA created problem and did not cover any such person who was though 'resident' under ITA in the year to which undisclosed foreign income related or in which undisclosed foreign asset was acquired or made, but who later on became 'non-resident' or 'not ordinarily resident' under ITA when proceeding under BMA was sought to be initiated.

Later on by the Finance (No.2) Act, 2019, definition of 'assessee' was accordingly amended under BMA with retrospective effect from 1.7.2015 to include such 'non- resident' and 'not ordinarily resident' under ITA also, who were 'resident' under ITA in the year to which undisclosed foreign income related and/or in which undisclosed asset located outside India was acquired.

Charge to tax on 'undisclosed foreign income and asset'

For every assessment year commencing on or after the 1st day of April, 2016, total 'undisclosed foreign income and asset' 'of the previous year' as per section 3(1) & 3(2) of BMA would be charged to tax at the rate of thirty per cent of such undisclosed income and asset.

Proviso to section 3(1) of BMA provides further that the value of foreign undisclosed asset shall be charged to tax on its value in the previous year in which such asset comes to the notice of the assessing officer.

Sub section (2) of section 3 of BMA provides that the value of such undisclosed foreign asset would be fair market value determined in the manner as may be prescribed. Rules have been prescribed for this purpose titled as 'Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015.

'Undisclosed foreign income and asset' is defined under clause (12) of section 2 of BMA which, in simple terms, is the sum total of (i) the amount of undisclosed income of an assessee from a source located outside India and (ii) the value of an undisclosed asset located outside India. These may loosely be called 'undisclosed foreign income' and 'undisclosed foreign asset' for better appreciation in this article.

i. Undisclosed foreign income would mean an income of any previous year, as referred in section 4 of BMA, from a source located outside India in respect of which return of income has not been filed within the time specified under Explanation 2 to section 139(1), 139(4) or 139(5) of ITA or even if filed, such income has not been disclosed/declared in the income tax return so filed under ITA. Thus, if such foreign sourced income has not been offered to tax in the income tax return filed, as above, under ITA, such foreign sourced income would be treated as 'undisclosed foreign income' under BMA. If part of such income is disclosed & declared in the return of income filed in India under section 139 of ITA, balance income not so disclosed/declared in the return of income so filed would constitute undisclosed foreign income.
ii. 'Undisclosed asset located outside India' has been defined under clause (11) of section 2 of BMA to mean an 'asset located outside India' & held by the assessee in his name or in respect of which such assessee is a beneficial owner and such assessee has no explanation about the source of investment in such asset or the explanation given by him in the opinion of the assessing officer is unsatisfactory. Also, financial interest in any entity has been treated as asset under BMA.

Thus, if the source of investment in such foreign asset is not explained, such foreign asset would be treated as undisclosed foreign asset or 'undisclosed asset located outside India' under BMA.

Therefore, total 'undisclosed foreign income and asset' as per section 3(1) & 3(2) read with section 2(11) & 2(12) of BMA would be equal to the foreign-sourced untaxed income of a previous year, & the fair market value of an undisclosed foreign asset of the previous year in which such foreign asset comes to the notice of the assessing officer, located outside India whose source has not been explained or explained satisfactorily.

Interplay with the Income Tax Act, 1961

In fact, BMA &ITA are intrinsically related as discussed hereinafter. Broadly speaking, black money under BMA is untaxed foreign-sourced income or such investment in foreign asset the source of which is not explained or explainable.

Following would show the intense interplay of BMA with ITA:

(a) **Section 2(1) of BMA** defines 'Appellate Tribunal' to mean Appellate Tribunal constituted under section **252 of ITA**.

(b) **Section 2(15) of BM**A provides that all other words and expressions used in BMA and not defined in BMA but **defined in ITA** shall have meaning assigned to them **in ITA**. Rule 2(2) of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015 too provides that words and expressions used and not defined in these rules but defined in the Act, the Income tax Act or the rules made thereunder shall have the meanings respectively assigned to them in those Acts and rules. Expressions not defined under BMA but defined under ITA such as 'Assessing Officer' 'Legal representative' 'person' 'total income' are few to be noted.

(c) **Section 6 of BMA** prescribes the tax authorities to be the income tax Authorities specified in **section 116 of the Income Tax Act.**

(d) **Section 84 of BMA** provides for the applicability of **several sections of ITA** in the following terms:

"The provisions of clauses (c) and (d) of sub-section (1) of section 90, clauses (c) and (d) of sub-section (1) of section 90A, sections 119, 133, 134, 135, 138, Chapter XV and sections 237, 240, 245, 280, 280A, 280B, 281, 281B and 284 of the Income Tax Act shall apply with necessary modifications as if the said provisions refer to undisclosed foreign income and asset instead of to income tax."

(e) Foreign sourced income of the previous year, not offered to tax in the income tax return filed within the time prescribed under **section 139(1), (4), (5) of ITA** is the undisclosed foreign income, as provided under **section 4(1)(a)&(b) of BMA**.

If there is an asset located outside India and assessee has no explanation about the source of investment in such asset or explanation given is not satisfactory, such asset is also part of total undisclosed foreign income and asset under section 4(1)(c) read with section 2(11) of BMA. Disclosure in the income tax return does not mean mere disclosure in **FA schedule of income tax return.** If the source of asset located outside India is not explained, it would constitute undisclosed foreign asset and would be charged to tax under **section 3 of BMA.**

(f) When foreign-sourced income and/or India sourced income used in acquiring foreign asset stood declared in the income tax return filed **and income tax assessment is made under ITA,** any addition or disallowance made to such foreign sourced income in income tax assessment under **section 29 to 43C, section 57 to 59 or section 92C of ITA** would not be treated as undisclosed foreign income as per **section 4(2) of BMA.**

Once foreign sourced income, and/or income in the form of foreign asset were declared in the income tax return filed and during the course of income tax assessment, any variation results due to additions or disallowances made under the sections 29 to 43C of ITA under the head 'income from business' &/or under section 57 to 59 of ITA under the head 'income from other sources' or on account of transfer pricing adjustment under section 92C of ITA, such

additions and disallowance or adjustments would not partake the colour of undisclosed foreign income and undisclosed foreign asset under BMA as provided in section 4(2) of BMA.

(g) Undisclosed foreign income & undisclosed foreign asset assessed under BMA would not form part of **total income under ITA** as provided in section 4(3) of BMA. But, no such provision has correspondingly been made under ITA.

(h) If such undisclosed foreign income or asset has been **assessed under ITA after commencement of BMA,** then also, such foreign undisclosed income or undisclosed foreign asset, it appears, can be brought to tax under BMA as is clear from section 5(1)(ii)(a)(b) of BMA. Appropriate proceeding in the form of section 154 of ITA read with section 4(3) of BMA would have to be resorted to by the assessee for exclusion of such amount of income and asset from the amount of total income computed under ITA.

(i) If undisclosed foreign income or undisclosed foreign asset has been assessed **under the Income Tax Act, 1961 prior to the assessment year to which BMA applies** i.e. A.Y. 2015-16 or earlier years, such undisclosed foreign income and asset would not be taxed under BMA as prescribed under section 5(1)(ii) (a) of BMA.

(j) No deduction of any expenditure or any allowance or set off of any loss shall be allowed under BMA while computing the total undisclosed foreign income and asset even though such expenditure or allowance or set off may be allowable under the provisions of Income Tax Act as provided under section 5(1)(i) of BMA. Similar, disability, you may kindly recall, has been enshrined under section 115BBE of ITA. In so far as the disability of the loss to be set off is concerned, it is understandable. Therefore, if there is any loss under any other head which but for such disability could be set off under section 70 or 71 of ITA, would not be available for the set off. But what is the disability by way of disallowance of any expenditure or allowance section 5(1)(i) of BMA is talking, is not clear. As a matter of cardinal principle of computation of income, all that can be brought to tax is only income which would in fact be computed after allowing the expenditure or allowance admissible as deduction under the respective head of income. There cannot be any concept of taxing the income on gross basis. That being so the disability by way of disallowance of expenditure or allowance as prescribed by section 5(1)(i) of BMA is not clear. Plausible interpretation to this phrase perhaps would cover a situation where foreign sourced income when being assessed in India under ITA would not qualify for any additional deduction of any expenditure or allowance which is otherwise admissible under ITA and which was not available under the foreign laws.

(k) Value of an undisclosed foreign immovable property as on the first day of the financial year in which it comes to the notice of the assessing officer, assessed or assessable under BMA needs to be reduced by such amount which bears the same proportion as the assessed or assessable foreign income bears to the total cost of the asset as prescribed under section **5(2) of BMA.**

(l) BMA has been brought into effect on and from 1.7.2015 i.e. from AY 2016-17 as provided in section 1(3) of BMA. Section 3(1) of BMA brings to charge undisclosed foreign income of the previous year which means previous year commencing on or after 1.7.2015. Therefore, undisclosed foreign income earned up to assessment year 2015-16 is not chargeable to tax under BMA. Certainly, such undisclosed foreign income can brought to tax under ITA subject to the conditions and limitations contained in this regard in section 147 to 151 under ITA.

(m) Section 2(11) of BMA which seeks to define 'undisclosed asset located outside India' read with section 59, 42, 43, 49, 50 of BMA and further read with section 3(1) of BMA would strongly indicate that such asset must be held by the assessee in his name or in respect of which he is a beneficial owner at the commencement of this Act (BMA) i.e. on 1.7.2015. It would mean that if there was any undisclosed foreign asset acquired or made prior to the commencement of BMA which did not exist at the commencement of BMA may not be brought to tax under BMA but can be brought in the tax net under ITA. Such undisclosed foreign asset representing the undisclosed income can be brought to tax under the ITA in the year of origin of such income/ asset provided the conditions of section 147 to 151 of ITA are complied with.

(n) Declaration to be made under **section 59 of BMA** for availing immunity was also to be made in respect of undisclosed foreign asset acquired from income chargeable to tax under ITA for an assessment year prior to assessment year 2016-17 and in respect of which return of income was not filed under section 139 of ITA or if such return stood filed, such foreign asset was not disclosed in that return or which had escaped assessment under section **147 of ITA,** due to the failure to file income tax return or due to non-disclosure of all material facts fully & truly necessary for assessment.

(o) 'Assessee' covered under **section 2(2) of BMA has to be 'resident' as per ITA**. Also, if in the year of assessment under BMA, he is 'non-resident' or 'not ordinarily resident' as per ITA but was 'resident' under ITA in relation to the year to which undisclosed foreign income related or undisclosed foreign asset was acquired or made, he would be 'assessee' under BMA.

(p) Penalty under **section 42 of BMA** for a sum of Rs. 10 lacs can be imposed on a person who is 'resident' as per ITA or is a person as referred in clause (o) above, if such person has failed to furnish his return of income under section 139(1) or its proviso, of ITA for such previous year in which he at any time held foreign asset or foreign income.

(q) Penalty under **section 43 of BMA** for a sum of Rs. 10 lacs can be imposed on a person who is 'resident' as per ITA or is a person as referred in clause (o) above, if such person has failed to furnish any information or furnishes inaccurate particulars of foreign income or foreign asset in the return filed by him under section 139(1),(4),(5) of ITA of any previous year in which such person held such foreign asset at any time during the previous year.

(r) Prosecution provision under **section 49, 50 of BMA** also is applicable on a person who is 'resident' as per ITA or is a person as referred in clause (o) above & who has committed the

defaults of not furnishing income tax return or not furnishing the information or furnishing inaccurate information in case such income tax return stood filed, as mentioned in penalty provisions of section 42 & 43 of BMA.

(s) Prosecution provision under **section 51 of BMA** is also applicable to a person who is 'resident' as per ITA or is a person as referred in clause (o) above and who wilfully attempts to evade any tax, interest or penalty under BMA.

(t) Amount of undisclosed investment in an 'asset located outside India' declared under **section 59 of BMA** would not be included in the total income of the declarant-assessee for any assessment year under ITA if tax and penalty due under BMA stood paid before the notified date under BMA.

(u) **Section 40 of BMA** provides that if income from a source outside India has not been disclosed in the return of income furnished under **section 139(1) of ITA** or return of income has not been filed under the said section of ITA, interest shall be chargeable in accordance with the provisions of **section 234A of ITA**. Similarly, if advance tax has not been paid on such undisclosed foreign income in accordance with the provisions of ITA, interest shall be chargeable in accordance with the provisions of **section 234B & 234C of ITA**.

In fact, above points have shown with sufficient precision as to the degree and extent BMA & ITA are intrinsically related. Associated question is that when both the Acts are so intrinsically related, why was BMA enacted? Answer perhaps is not far to seek and that seems to be - to overcome the hurdles of the law of limitation under ITA.