

MULUND CA CPE STUDY CIRCLE OF WIRC OF ICAI

THE BLACK MONEY (UNDISCLOSED FOREIGN INCOME AND ASSETS) AND IMPOSITION OF TAX ACT, 2015

Mulund
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BACKGROUND

BACKGROUND

- Senior Advocate Ram Jethmalani filed a petition along with few other citizens with the Hon'ble SC in 2009 to get the Black Money stashed abroad back.
- After 2 years, the Hon'ble SC ordered in 2011 for appointment of a Special Investigation Team (SIT) headed by two retired Supreme Court judges to supervise and control the investigation.
- In the said judgment it was pointed out that German Government had, by paying a huge bribe to an employee of the Liechtenstein Bank obtained the names of almost 1400 account holders from various countries who had their secret accounts in the Bank. The Swiss Bankers Association reported that the majority of the names were of Indians



BACKGROUND

- German Government publicly declared that it wanted gladly to share this information to any government that asks for it without cost or conditions.
- However, the said Supreme Court Judgment was frustrated for almost 3 years by the UPA government by filing a Review Petition
- Subsequently, there was change in Government.



BACKGROUND



- Narendra Modi Government's agenda included inter alia, bringing back Black Money stashed abroad.
- Therefore, SIT was set up in accordance with the directions of the Hon'ble Supreme Court.
- A List of account holders was disclosed to the Hon'ble Supreme Court in respect of which enquiries are going on.

BACKGROUND

- Meanwhile to fulfill the poll promise made by the Narendra Modi Government, it came out with Black Money Law
- Finance Minister in his Budget Speech on 28 February, 2015 had said that

“Tracking down and bringing back the wealth which legitimately belongs to the country is our abiding commitment to the country. Recognising the limitations under the existing legislation, we have taken a considered decision to enact a comprehensive new law on black money to specifically deal with such money stashed away abroad. To this end, I propose to introduce a Bill in the current Session of the Parliament.”

.....As regards curbing domestic black money, a new and more comprehensive Benami Transactions (Prohibition) Bill will be introduced in the current session of the Parliament. This law will enable confiscation of benami property and provide for prosecution, thus blocking a major avenue for generation and holding of black money in the form of benami property, especially in real estate.”



BACKGROUND

- The Black Money Act was passed by both the houses of the Parliament on 13 May 2015
- It received Hon'ble Presidents assent on 26 May 2015.
- It was published in the Official Gazette on 27 May 2015.



THE BLACK MONEY (UNDISCLOSED FOREIGN INCOME AND ASSETS) AND IMPOSITION OF TAX ACT, 2015

Preamble:

This Act has been enacted to make provisions:

1. to deal with the problem of the Black money that is undisclosed foreign income and assets
2. procedure for dealing with such income and assets
3. provide for imposition of tax on any undisclosed foreign income and asset held outside India and
4. for matters connected therewith or incidental thereto.

THE BLACK MONEY (UNDISCLOSED FOREIGN INCOME AND ASSETS) AND IMPOSITION OF TAX ACT, 2015

UNIQUE FEATURES OF THE BML:

- Tax on income as well as asset - Unique act –combination of IT Act and Wealth Tax Act - since tax is levied on both asset and income
- A receipt shall be income in the year in which it is earned – once it is income of the assessee, it shall become asset of the assessee – since the same gets converted into asset either in the nature of Bank Account or in any other manner.
- Unlike IT Act or WT act – there is no name given to the tax levied under this act. It is simply called 'Tax'
- Unlike IT Act – tax rate is not given in Finance Act, but prescribed in section 3 only as 30%.
- Since this is an Act to tax undisclosed income and asset located outside India, therefore there is no scope of filing any return of income under this Act, because one will never admit of any undisclosed asset or income.
- Further, both the IT Act and the BML continue to apply simultaneously.

THE BLACK MONEY (UNDISCLOSED FOREIGN INCOME AND ASSETS) AND IMPOSITION OF TAX ACT, 2015

Points to think upon..

- a. Was it necessary to come out with a separate law? Is the IT Act not capable of dealing with the Black money problems?
- b. Is this 30 page hastily drafted law sufficient to tackle the menace of Black Money?
- c. What about undisclosed income and asset held in India? Will the Law be enacted after all the powerful people have managed their wealth?



THE BLACK MONEY (UNDISCLOSED FOREIGN INCOME AND ASSETS) AND IMPOSITION OF TAX ACT, 2015

Basic Scheme of the Act.

- Chapter I – Preliminary (Scope and Definition)
- Chapter II – Basis of Charge (charging section)
- Chapter III – Tax management (Assessment, Appeal, Tax recovery)
- Chapter IV – Penalty
- Chapter V – Offences and Prosecution
- Chapter VI – Tax Compliance for undisclosed foreign income and asset
- Chapter VII – General Provisions.

Chapter I – Preliminary (Scope and Definition)

- It extends to whole of India (Section1)
- The Act received the Assent of President on 26.5.2015 and was published in the Gazette on 27.5.2015.
- Therefore, vide Notification No.56 dated 1.7.2015, the Government clarified that the Act shall come into effect from 1.7.2015.



Chapter I – Preliminary (Scope and Definition)

Definition – Section 2

- Section 2(2) – *"assessee" means a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, by whom tax in respect of undisclosed foreign income and assets, or any other sum of money, is payable under this Act and includes every person who is deemed to be an assessee in default under this Act*

Thus, under the Black Money Law – assessee means a person who is resident and ordinarily resident in India (ROR).

Assessee's covered	
Resident and ordinarily resident	Covered
Resident but not ordinarily resident	Not Covered
Non- resident	Not Covered.

Chapter I – Preliminary (Scope and Definition)

What do you mean by resident?

- Section 2(10) - *"resident"* means a person who is resident in India within the meaning of section 6 of the Income-tax Act;

Person	Section of IT Act	Conditions from becoming resident
Individual	6(1) and 6(6)	Stay in India for a. 182 days or more in the PY or b. 60 days in PY and 365 days in 4 preceding PY's
HUF	6(2) and 6(6)	control and management of its affairs is situated wholly or partly in India.
Firm or AOP	6(2)	control and management of its affairs is situated wholly or partly in India.
Company	6(3)	Indian company is always resident and other companies if POEM in India.
Any other person	6(4)	control and management of its affairs is situated wholly or partly in India.

Chapter I – Preliminary (Scope and Definition)

Issues to consider -

- BML is effective from 1.7.2015 – therefore one may in order to avoid getting covered under BML, shift outside India so as to become non-resident.
- A Foreign subsidiary of an Indian Company whose decisions are taken substantially from India – will become resident from AY 16-17 (as a result of POEM) – therefore it shall be treated as assessee under the BML.



Chapter I – Preliminary (Scope and Definition)

Section 2(9) – Previous Year

"previous year" means—

- (a) the period beginning with the date of setting up of a business and ending with the date of the closure of the business or the 31st day of March following the date of setting up of such business, whichever is earlier;*
- (b) the period beginning with the date on which a new source of income comes into existence and ending with the date of closure of the business or the 31st day of March following the date on which such new source comes into existence, whichever is earlier;*
- (c) the period beginning with the 1st day of the financial year and ending with the date of discontinuance of the business other than business referred to in clause (b) or dissolution of an unincorporated body or liquidation of a company, as the case may be; or*
- (d) the period of twelve months commencing on the 1st day of April of the relevant year in any other case,*
and which immediately precedes the assessment year.

Chapter I – Preliminary (Scope and Definition)

Section 2(12)- undisclosed foreign income and asset

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

It means:

a. Undisclosed income from a source located outside India

Plus.

b. Value of undisclosed asset located outside India.

We shall deal with each part separately

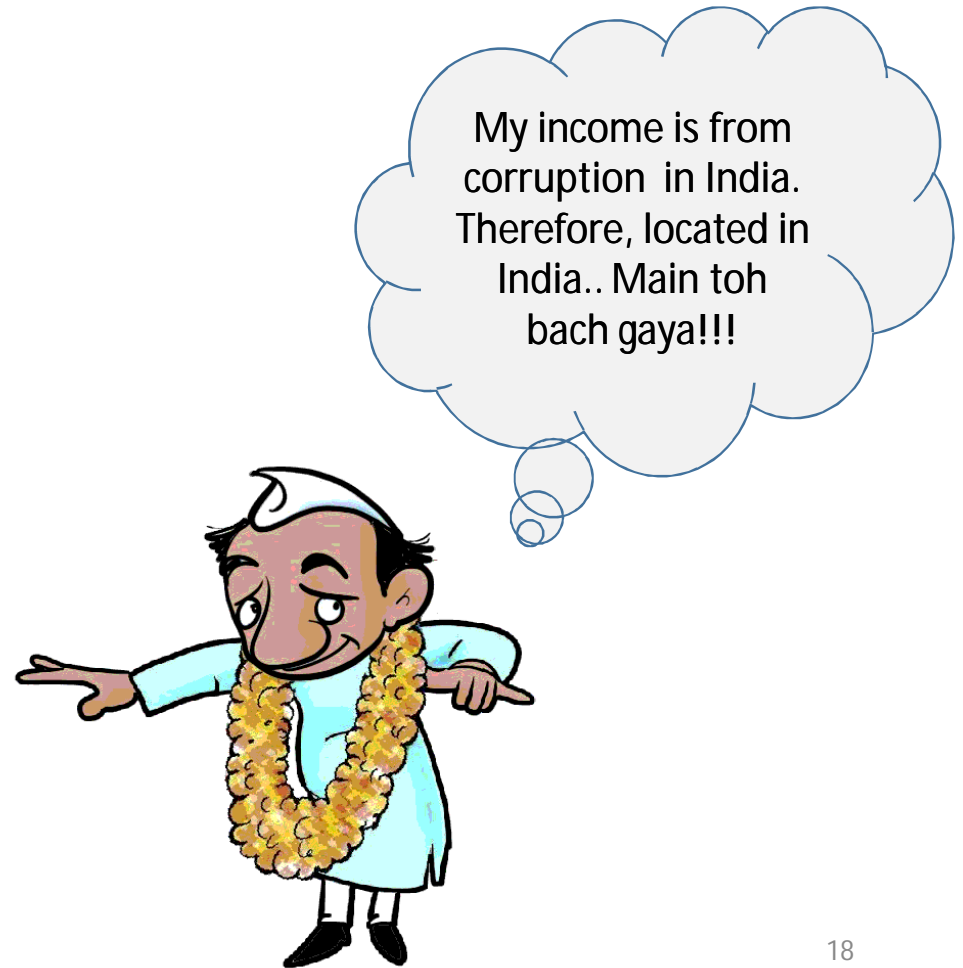
Chapter I – Preliminary (Scope and Definition)

To be undisclosed income from a source located outside India -

- It must be in the nature of income
- It must be undisclosed
- It must be from a source located outside India.

Thus following items are not covered –

- a. Items which are not income – for eg. Capital receipts
- b. Income of whose source is explained satisfactorily.**
- c. Income which are earned from a source located in India.



Chapter I – Preliminary (Scope and Definition)

Undisclosed asset located outside India.

- Section 2(11) defines - undisclosed asset located outside India.

*"undisclosed asset located outside India" means an asset (including financial interest in any entity) located outside India, **held** by the assessee in his name or in respect of which **he is a** beneficial owner, and he has no explanation about the source of investment in such asset or the explanation given by him is in the opinion of the Assessing Officer unsatisfactory*

Features:

- a. It must be an asset which also includes financial interest in any entity
- b. It must be located outside India
- c. It must be held by assessee (Presently held)
- d. Either in his own name or he must be the beneficial owner
- e. He must have no explanation about the source or his explanation is **in the opinion** of AO unsatisfactory.



Chapter I – Preliminary (Scope and Definition)

Examples:

- a. Immovable Property
- b. Bullion, jewellery
- c. Paintings
- d. Shares in foreign company
- e. Bank Account
- f. Cash in Hand
- g. Property in name of Mr. A but entirely financed by Mr. B. Then Mr. B shall be beneficial owner.

Beneficial Owner

Expln 4 to Sec 139(1).—For the purposes of this section "beneficial owner" in respect of an asset means an individual who has provided, directly or indirectly, consideration for the asset for the immediate or future benefit, direct or indirect, of himself or any other person.



Chapter I – Preliminary (Scope and Definition)

Following items are not covered with the ambit of undisclosed asset:

- If the item is not an asset
- Asset located in India (prone to litigation)
- If the asset is held by the Discretionary trust and the assessee is the beneficiary, then as far as the beneficiary is concerned it is not an undisclosed asset
- Asset in respect of which satisfactory explanation is given by the assessee i.e. the source is explained.



Chapter I – Preliminary (Scope and Definition)

Illustrations

- Mr. A has tax paid white income, some part of which is kept abroad in a Bank. Can it be considered as undisclosed asset?
- Mr. A was a resident in India. He earned rent in Canada which was as per DTAA not taxable in India. Mr. A did not disclose it in his ROI. Now that rent is in the Bank Account in Canada. Can it be considered as undisclosed asset?
- Mr. A had earned income in India on which tax was not paid. Money was stashed abroad in Swiss Account? Can it be covered under the BML?
- Mr. A, is a resident in AY 2016-17. He has a Bank account in Canada. The balance consists of income earned in AY 2010-11 when he was a Non resident. Such income was earned outside India and was kept abroad. Can the bank balance in Canada be treated as undisclosed asset?
- Mr. A was a resident in India and had earned income in India in AY 2011-12. Tax was not paid on the said income. The income is held by Mr. A as cash in India. Can Mr. A be governed by BML?

Chapter I – Preliminary (Scope and Definition)

Asset/ Income	Covered/ Not covered
Income earned in India	Not covered
Income earned outside India	Covered
Asset situated in India	Not covered
Asset situated outside India	Covered
Income earned in India but kept outside India	Covered – since foreign asset
Income earned outside India but kept in India	Not covered as an asset. If income earned post 1.7.15 – covered If income earned pre 1.7.15 – not covered

Chapter I – Preliminary (Scope and Definition)

Other definition

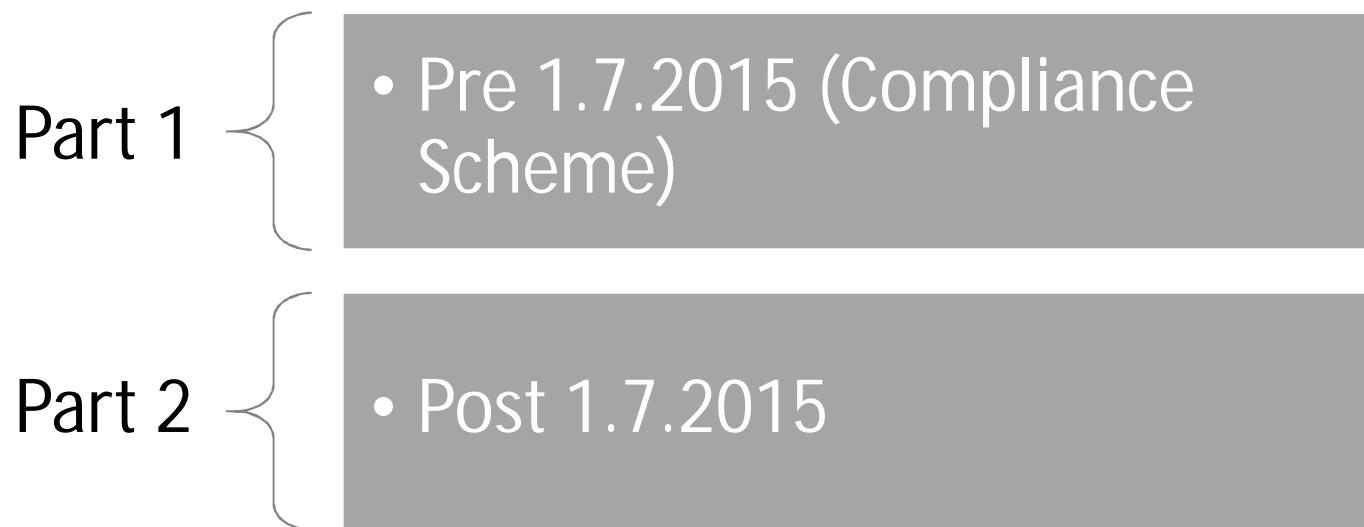
Section 2(15) - all other words and expressions used herein but not defined and defined in the Income-tax Act shall have the meanings respectively assigned to them in that Act

For eg:

- Section 2(24) – Income
- Section 2(31) – person etc.

THE BLACK MONEY (UNDISCLOSED FOREIGN INCOME AND ASSETS) AND IMPOSITION OF TAX ACT, 2015

It is divided into 2 parts:



Chapter VI – Tax Compliance for Undisclosed foreign income and asset

- The BML is applicable w.e.f 1.7.2015. Further it has no retrospective effect. Thus, it cannot tax any income earned prior to 1.7.2015. However, the same can be taxed under IT Act.
- However, the said income also becomes the asset of the Assessee- which if presently held by the assessee in any manner – he can be assessed u/s 10 of the BML. If assessed u/s 10, then penalty and prosecution follows.
- Therefore, an opportunity given to all the persons to disclose their undisclosed foreign assets under the single compliance window scheme.



Chapter VI – Tax Compliance for Undisclosed foreign income & asset



Whether the disclosure scheme is valid?

- The last VDIS scheme was in the year 1997. It had raised some controversies too. For instance, the Comptroller and Auditor General had carried out test checks and found benami disclosures, where 'minors' declared undisclosed income "prior to their birth".
- Further, it was tagged as discriminatory since it was argued that it penalised honest tax payers and at the same time encouraged tax evaders.
- The government, therefore, had given an undertaking to the Supreme Court that the VDIS was the last of its kind, and it would not bring about such schemes in future.
- Therefore, can the scheme which is prima facie against the undertaking given by the Government can be said to be valid?

Chapter VI – Tax Compliance for Undisclosed foreign income and asset

Section 59 – Declaration

Subject to the provisions of this Chapter, **any person** may make, on or after the date of commencement of this Act but on or before a date to be notified by the Central Government in the Official Gazette, a declaration in respect of **any undisclosed asset located outside India and acquired from income chargeable to tax under the Income-tax Act for any assessment year prior to the assessment year beginning on 1st day of April, 2016**—

- (a) for which he has failed to furnish a return under section 139 of the Income-tax Act;
- (b) which he has failed to disclose in a return of income furnished by him under the Income-tax Act before the date of commencement of this Act;
- (c) which has escaped assessment by reason of the omission or failure on the part of such person to make a return under the Income-tax Act or to disclose fully and truly all material facts necessary for the assessment or otherwise.

Chapter VI – Tax Compliance for Undisclosed foreign income and asset



- Any person can make a declaration, whereas the act is applicable only to ROR
- Declaration can be made only in respect of undisclosed asset located outside India [defined u/s 2(11)] and not to undisclosed foreign income
- Such asset must have been acquired from income chargeable to tax under the Income-tax Act for any assessment year prior to the assessment year beginning on 1st day of April, 2016 (prior to 1.7.2016)
- He must have failed to file a ROI, or failed to disclose or it has escaped assessment by reason of failure on the part of such person.
- Such declaration has to be made between 1.7.2015 and 30.9.2015 (Ministry of Finance Press release dated 1.7.2015.)
- Last date till which the payment can be made is 31.12.2015

Chapter VI – Tax Compliance for Undisclosed foreign income and asset

Illustrations:

- a. Mr. A received gift of USD 100000 in cash in USA in 2005. Said cash was deposited in US Bank. Mr. A's Bank a/c only had the said receipt and the interest earned thereon. Mr A is resident in India. Can Mr. A file a declaration?
- b. Mr. A inherited property from his father in Canada. The property had been acquired by his father from undisclosed sources. Can Mr. A file a declaration?
- c. Mr. A received gift of shares of US company from his spouse. He's earning dividend income which is getting deposited in the US Bank Account. Can Mr. A or Mrs. A file a declaration?



Chapter VI – Tax Compliance for Undisclosed foreign income and asset

- Section 60 – undisclosed asset located outside India and declared under section 59 - chargeable to tax at the rate of 30% of value of such undisclosed asset as on 1.7.2015.
- Section 61 – such person shall, in addition to tax charged under section 60, be liable to penalty at the rate of 100% of such tax.

Thus total 60% of the value of the undisclosed asset should be paid to the Government.

- Section 62(2) – A person can make a declaration only once.

60% Govt. ka
...toh muje
kya???



Chapter VI – Tax Compliance for Undisclosed foreign income and asset

- Section 65 - The declarant shall not be entitled, in respect of undisclosed asset located outside India declared or any amount of tax paid thereon, to reopen any assessment or reassessment made under the Income-tax Act or the Wealth-tax Act, or claim any set off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment.
- Section 66 – **amount of tax or penalty paid in pursuance of a declaration shall not be refundable.**

Chapter VI – Tax Compliance for Undisclosed foreign income and asset

- Section 64 – Amount of the undisclosed asset declared shall not be included in the total income of the declarant for any assessment year under the Income-tax Act.
- Section 69 – Where a declaration has been made u/s 59 – then the value of asset will not be taken into consideration for computing the wealth tax for any AY.

NO DOUBLE TAX !!



Chapter VI – Tax Compliance for Undisclosed foreign income and asset

- Section 67 - Notwithstanding anything contained in any other law for the time being in force, nothing contained in any declaration made under section 59 shall be admissible in evidence against the declarant for the purpose of any proceeding relating to imposition of penalty, other than the penalty leviable under section 61, or for the purposes of prosecution under the Income-tax Act or the Wealth-tax Act, 1957 (27 of 1957) or the Foreign Exchange Management Act, 1999 (42 of 1999) or the Companies Act, 2013 (18 of 2013) or the Customs Act, 1962 (52 of 1962).



Chapter VI – Tax Compliance for Undisclosed foreign income and asset

- Section 67 is the provision based on which the Government is granting immunity from penalty and prosecution to the declarant.
- However, the section merely says that the declaration won't be used as an evidence. Therefore, if they find evidence from any other source, they can prosecute.
- Immunity is available only in respect of IT Act, WT Act, FEMA, Customs Act and Companies Act.

Is it worth
Taking a
Chance



Chapter VI – Tax Compliance for Undisclosed foreign income and asset

- Section 68 –if any suppression or misrepresentation of facts, - declaration shall be treated as void
- Section 71 – A declaration cannot be made:
 - a. Where any undisclosed foreign asset which has been acquired from income chargeable for any AY prior to the AY 16-17, any assessment is pending under the IT ACT [142, 143(2), 148, 153A, 153C]
 - b. where a search has been conducted under section 132 or requisition has been made under section 132A or a survey has been carried out under section 133A and time limit for issue of notice u/s 143(2), 153A, 153C has not expired; or
 - c. where any information has been received by the competent authority under an agreement entered into u/s 90 or 90A of the IT Act in respect of such undisclosed asset.

INVALID

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Chapter VI – Tax Compliance for Undisclosed foreign income and asset

- Section 72 – (I'm gonna Kill you....)
 - Where declaration is made u/s 59, but tax and penalty is not paid, the value of the asset shall be taxable in the AY 2016-17 i.e. the 1st Assessment Year.
 - **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.**



Chapter VI – Tax Compliance for Undisclosed foreign income and asset

- Section 2(11) defined undisclosed foreign asset as an asset held by an assessee. Therefore if the asset is not held by an assessee then the same is not an asset for the purpose of this Act.
- However, as per section 72(c) – where any asset is acquired or made prior to 1.7.2015, and if no declaration is made, then such asset shall be deemed to have been acquired or made in the year in which a notice u/s 10 is issued by the AO.
- Thus, even if the assets have been transferred before to 1.7.2015, still the asset can be taxed under the Act because of the draconian deeming provision of section 72(c).
- Can this retrospective application of the Act be said to be valid?



Chapter VI – Tax Compliance for Undisclosed foreign income and assets



Steps in filing the declaration.

1. A declaration in Form 6 may be made at any time before 30.09.2015. –Such form shall be verified and signed by such person - Section 62(1)
2. Post declaration, the Principal CIT/ CIT will issue an intimation to the declarant by 31.10.15 whether any information in respect of the declared asset had been received by the Competent Authority on or before 30th June 2015, under an agreement entered into by the Central Government u/s 90 or 90A of the Income-tax Act.
3. Where such information is received, the declarant shall file a revised declaration in Form 6 after excluding such assets within 15 days of receipt of information.
4. The Declarant shall then make the payment of tax and penalty within 31.12.2015 and submit the proof to the Pr. CIT/CIT. If the declarant fails to pay the tax , declaration shall be treated as non-est – Section 63
5. Pr. CIT/CIT will issue an acknowledgement in Form 7 of the accepted declaration within 15 days of such intimation of payment by the declarant.

Valuation Rules -

Valuation rules are given under Black Money (Undisclosed Foreign Income and Asset) and Imposition of Tax Rules, 2015.

Value of

- a. bullion, jewellery, precious stone [Rule 3(1)(a)]
- b. archaeological collections, drawings, paintings, sculptures or any work of art [Rule 3(1)(b)]
- c. immovable Property [Rule 3(1)(d)]
- d. any other asset [Rule 3(1)(h)]

shall be Higher of

- Cost of acquisition or
- FMV on the valuation date, for which the assessee may obtain a valuation report



Valuation Rules

Value of Shares and Securities [Rule 3(1)(c)]

I. Quotes shares and securities shall be

Higher of

- Cost of acquisition or
- Average of the highest and the lowest price on any established securities market on the valuation date

When on the valuation date there is no trading of shares, then the average of the highest and the lowest price value on any established securities market on the immediately preceding day.

Established securities market – is defined under Expln1 to Rule 3



Valuation Rules

Value of Shares and Securities

II. Unquoted equity shares shall be

Higher of

- Cost of acquisition or
- Value on the valuation date determined in the following manner:

the fair market value of unquoted equity shares = $\frac{(A+B-L) \times (PV)}{(PE)}$

where,

A=book value of all the assets (other than bullion, jewellery, precious stone, artistic work, shares, securities and immovable property) after making certain adjustment

B= fair market value of bullion, jewellery, precious stone, artistic work, shares, securities and immovable property as determined in the manner provided in this rule;

L= book value of liabilities, after making certain adjustment

PE = total amount of paid up equity share capital as shown in the balance-sheet;

PV= the paid up value of such equity shares;

Valuation Rules

Value of Shares and Securities [Rule 3(1)(c)]

III. Unquotes shares and securities other than equity shares shall be-

Higher of

- Cost of acquisition or
- FMV on the valuation date, for which the assessee may obtain a valuation report

Valuation Rules

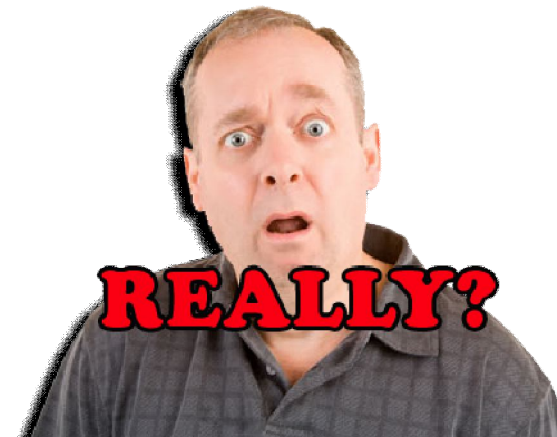
Value of Bank Account [Rule 3(1)(e)] shall be-

(I) the sum of all the deposits made in the account with the bank since the date of opening of the account; or

(II) If any declaration is made under Chapter VI (compliance scheme) and the value of the account as computed under sub-clause (I) has been charged to tax and penalty under that Chapter, then value of Bank Account shall be

the sum of all the deposits made in the account with the bank since the date of such declaration.

However, where any deposit is made from the proceeds of any withdrawal from the account, such deposit shall not be taken into consideration while computing the value of the account.



Valuation Rules



5. Value of interest of a person in a partnership firm or in an association of persons or a limited liability partnership of which he is a member [Rule 3(1)(f)/(g)] shall be determined in the following manner.
- a. First Net asset of the Firm/AOP/LLP will be determined by way of formula $(A+B-L)$ – same way as in case if unquoted equity shares
 - b. This net asset shall first be allocated among the members in proportion of their capital account balance.
 - c. Balance net asset shall be allocated in accordance with the agreement which provides of distribution of asset in case of dissolution. If there is no such agreement then in the PSR.
 - d. Sum total of amount allocated to the partner in 'b' and 'c' above shall be the value of interest of the person

Valuation Rules

Rule 3(2) – Valuation of asset already transferred –

It shall be higher of

- a. Cost of acquisition and
- b. Sale price

**ASSET ALREADY
TRANSFERRED**

If the asset was transferred without adequate consideration then the Value of the asset shall be higher of

- a. Cost of acquisition and
- b. FMV as on the date of transfer

Valuation Rules

ASSET ALREADY TRANSFERRED

Rule 3(3) – Where an old asset was transferred and the consideration was invested in a new asset or deposited in the Bank Account or when out of the undisclosed bank account a new asset was purchased then the valuation of the old asset and new asset shall be as under:

New asset – Value as per Rule 3(1)

Old asset – Value as per Rule 3(1) or 3(2) as reduced by amount invested in the new asset.

Illustration

A house property (H1) located outside India was bought in 1997 for twenty lakh rupees. It was sold in 2001 for twenty five lakh rupees which were deposited in a foreign bank account (BA). In 2002 another house property (H2) was bought for thirty lakh rupees. The investment in H2 was made through withdrawal from BA. H2 has not been transferred before the valuation date and its value on the valuation date is fifty lakh rupees. Assuming that the value of BA as computed under Rule 3(1)(e) is seventy lakh rupees, the fair market value (FMV) of the assets shall be as below:

FMV of H1: (Higher of Rs. 20 lakh and 25 lakh) – Rs. 25 lakh (invested in BA) = Nil

FMV of BA: Rs. 70 lakh – Rs. 30 lakh (invested in H2) = Rs. 40 lakh

FMV of H2: (Higher of Rs. 30 lakh and 50 lakh) = Rs. 50 lakh

Valuation Rules



Rule 3(4) and Rule 3(5)

- If the value is determined in one of the permitted currencies designated by RBI under FEMA– then it shall be converted into INR as per the reference rate of RBI as on the valuation date.
- If the Value is not determined in one of the permitted currencies, then value shall be converted into USD on the valuation date at the rates specified by the Central bank of the country in which asset is located and then it shall be converted into INR.

Explanation 2

Market value of the asset shall be determined and the rate of conversion shall be taken of :

- In respect of compliance scheme – 1.7.2015**
- In respect of other cases – 1st day April of the PY**

Chapter VI – Tax Compliance for Undisclosed foreign income &



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The CBDT has come out with 2 sets of FAQ's

- a. Circular No. 13 of 2015 dated 6.7.2015
- b. Circular No. 15 of 2015 dated 3.9.2015



Many clarifications have been given by the CBDT. However, some are ultra vires the Act. Whether the CBDT circulars are binding?

As per the SC, CBDT Circulars are not binding on the assessee however, they are binding on the Revenue. Thus, if they are beneficial to the assessee then they should be implemented even if ultra vires.

Chapter VI – Tax Compliance for Undisclosed foreign income and asset

Circular No. 13 of 2015 dated 6.7.2015 -Few Imp clarifications

- Q3- no immunity from other acts u/s 67.
- Q4 – if declaration is made, then PMLA not applicable
- Q5 – if the asset is declared and then sold, then COA will the FMV under BML and period also from 1.7.15... (How??)
- Q14, Q20 – Undisclosed asset acquired prior to commencement of the Act, as per section 72(c) is deemed to have been acquired in the year in which it comes to the notice of AO. Therefore can be taxed.
- Q17 – reporting the asset in schedule FA of the ROI does not mean that the asset has been disclosed and the source has been explained.

Chapter VI – Tax Compliance for Undisclosed foreign income and asset

- Q 23 – even a NR can file a declaration
- Q 25 – if a person declares 2 assets out of 3, he will get immunity qua 2 assets.
- Q 26 – No credit of foreign taxes available.
- Q 27 – foreign asset acquired from corruption cannot be declared.
- Q 28 – proportionate amount can be offered to tax
- Q 29 – asset disposed off, still disclosure is to be made.
- Q 30 – No enquiry apart from the fact that whether any information has been received by the CG or not.
- Q 31 – A beneficiary and beneficial owners are different and the Act only covers beneficial owners.

Chapter VI – Tax Compliance for Undisclosed foreign income and asset

Circular No. 15 of 2015 dated 3.9.2015

- Q2 – pension received after the NR employee becomes Resident is chargeable to tax
- Q5 – Foreign Bank Account since 1995, However details available since 2011 only. Then prior to that period, value should be determined on best estimate basis. However, he has to furnish a statement to the effect that details are not available with the Banks.

If it is found that the value of Bank Account is different from what has been disclosed, nothing shall be refunded and if there is a shortfall, then immunity shall be available only for the amount disclosed.

If the person had the details still filed the form on estimated basis, then the declaration shall be treated as invalid.

Chapter VI – Tax Compliance for Undisclosed foreign income and asset

Circular No. 15 of 2015 dated 3.9.2015

- Q 23 – no immunity from SEBI or IPC
- Q 24– When as a result of any income chargeable to tax in India, there is reduction of liability (like repayment of loan), then also declaration is to be made.

Chapter VI – Tax Compliance for Undisclosed foreign income and asset

Is the scheme successful?

- ✓ *“The compliance scheme to mop up black money stashed abroad before a tough law kicks in from April has got off to a slow start, netting only one declaration, estimated at Rs 70-80 crore, according to people in the know – Economic Times – 18 August 2015”*
- ✓ Sources also said the 30% penalty was proving to be a deterrent since it is easier to spirit away illicit wealth which today can be routed back, 'round tripping' in business parlance, at a cost of not more than 4-5%.
- ✓ Further, funds may be insufficient in India to make payment of 60% of the value of the Foreign Assets.
- ✓ No sufficient clarifications – many grey area- no refund if payment made erroneously- fear of giving information to the Govt.





Post 1.7.2015 – Normal provisions of the Act

Chapter II – Basis of Charge

- Section 3 – Basic Charging Section
- Section 4 – Scope of total undisclosed income and asset
- Section 5 – Computation of undisclosed income and asset.

Chapter II – Basis of Charge

- Section 3 - Basic Charging Section

3. (1) There shall be charged on every assessee for every assessment year commencing on or after the 1st day of April, 2016, subject to the provisions of this Act, a tax in respect of his total undisclosed foreign income and asset of the previous year at the rate of thirty per cent of such undisclosed income and asset:

Provided that an undisclosed asset located outside India shall be charged to tax on its value in the previous year in which such asset comes to the notice of the Assessing Officer.

3. (2) For the purposes of this section, "value of an undisclosed asset" means the fair market value of an asset (including financial interest in any entity) determined in such manner as may be prescribed.

Chapter II – Basis of Charge



When can tax be levied under this act?

- Firstly on a person who is R and OR in India.
- If he has any income or any asset from any source located outside India.
- Income and Asset are undisclosed and not offered to tax in India
- If AO finds out that the assessee has earned income or has asset which is undisclosed and situated outside India.
- Income in the year in which it is earned and asset in the year in which it comes to the notice of AO.
- Then tax can be levied.
- Further, value of undisclosed asset shall be the fair market value as computed in the manner given in the rules. (covered separately)

Chapter II – Basis of Charge

Section 4 – Scope of undisclosed foreign income and asset



Undisclosed income from a source located outside India –

- a) which has not been disclosed in the ROI filed u/s 139(1), 139(4) or 139(5)
or
- b) In respect of which a ROI is required to be furnished is not furnished u/s 139(1), 139(4) or 139(5)

Value of Undisclosed Asset located outside India

Thus, if the income from the source located outside India has been disclosed in the ROI filed for the AY, then the same is out of the ambit of section 4

Chapter II – Basis of Charge

Section 4(2) – If any variation is made to the income from a source outside India of the assessee under the head Business income or Income from other sources or under Transfer Pricing provisions, then the same cannot be taken as undisclosed income under this act.

Section 4(3) - The income included in the total undisclosed foreign income and asset under this Act shall not form part of the total income under the Income-tax Act.

Once the income is taxed under this Act, the same cannot be taxed under the IT Act.



Chapter II – Basis of Charge



Section 5 - Computation mechanism

Undisclosed income –

No deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee

Undisclosed foreign asset -

(a) Income which has been already assessed to tax in any year prior to 1.7.2015

(b) Income which has been assessed to tax for any AY under this Act,

shall be REDUCED from the value of the undisclosed asset located outside India,

(Note : Assessee must furnish evidence that the asset has been acquired from the income which has been assessed or is assessable, as the case may be, to tax.)

Chapter II – Basis of Charge

Proportionate Deduction [Section 5(3)]

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,

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

However, section applicable only to immovable property?

What about other assets like Gold, Bullion?

Allowable – as per Circular No. 13 of 2015 – Q No. 28

Chapter II – Basis of Charge

Illustrations:

1. A doctor who practices in Mumbai and is resident in India. He visits US for a surgery of a person situated in US – He earns USD 50000 for the surgery in August 2015. The amount is not disclosed in the ROI of the doctor.
2. A doctor practicing in Mumbai and Resident of India as per the IT Act earns Rs. 20,00,000/- in August 2015. The income is then through hawala route is deposited in a Swiss Bank Account. Can there be any implication under the BML?
3. An Architect practicing in New York is engaged in a project in India and earns income in India of USD 60000. He was in India for a period of 150 days. The income is not disclosed in the ROI in India. The income is then credited to his account in US. Are there any implications under the BML.



Chapter II – Basis of Charge

4. In the above scenario, if the stay of the architect in India in the PY 15-16 is more than 190 days, then what shall be the implications.
5. A business resident in India, visited US and traded in goods in August and September 2015. He bought goods for USD 20000 and sold them for USD 30000. The said receipt was deposited in the Bank of the assessee. He also incurred other expenses to the tune of USD 1000. Further he also has b/f business loss in India of Rs. 150000/-. What shall be the implications under the BML.
6. Mr. A has an account in US. The value of which is USD 50000. Out of the said Value, USD 10000 has already been taxed under the Income tax Act and USD 10000 has been taxed as undisclosed income under the BML. What can be taxed as undisclosed asset?

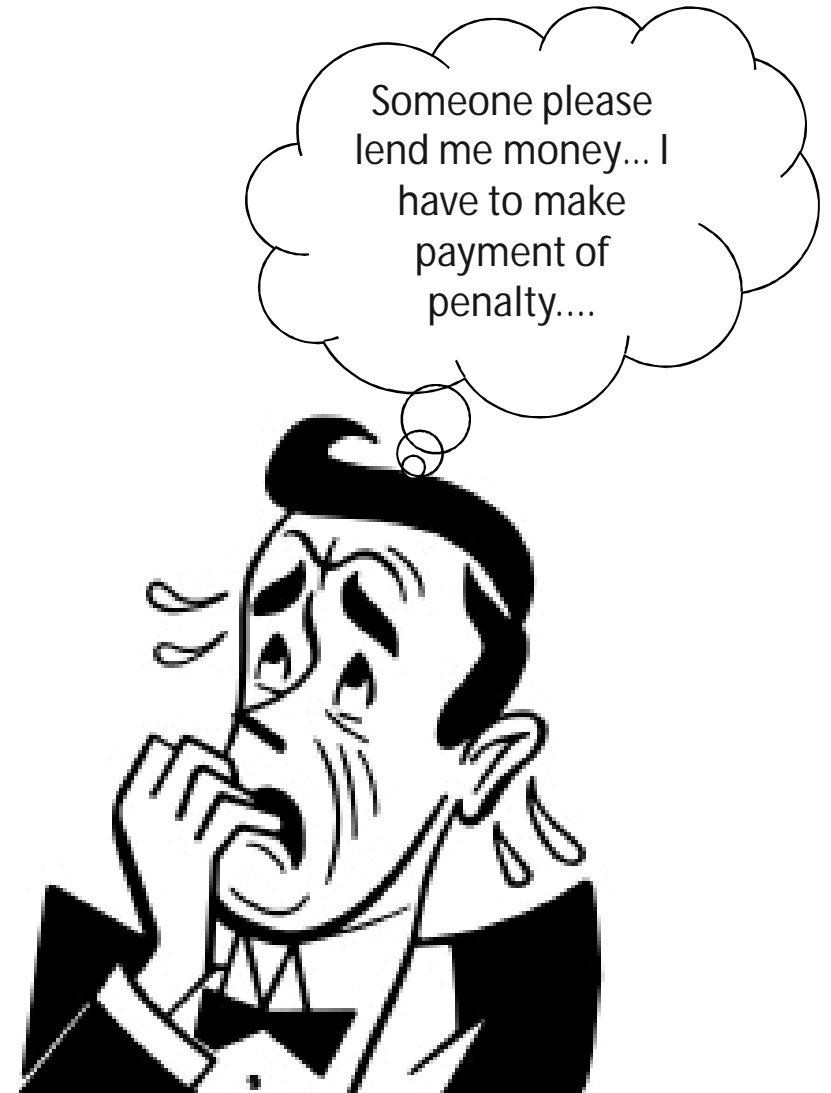


Chapter IV – Penalty

Penalty if undisclosed income or asset assessed under this act.

Section 41 – Where tax has been assessed in respect of undisclosed foreign asset and income under this Act under section 10(assessment section) – then the AO may direct **@ 3 times** the amount of tax.

Thus, unlike IT Act, penalty is fixed at 300% of the tax amount



Chapter IV – Penalty

Sec. No	Person	Offence	Remarks	Penalty
42	ROR	Fails to furnish ROI before the end of relevant AY	Must <ul style="list-style-type: none"> a. hold any asset located outside India as a beneficial owner or otherwise b. be a beneficiary of any asset located outside India c. Have any income from a source located outside India 	Rs. 10 Lakh
43	ROR	Failure to furnish information or furnishes inaccurate particulars	In relation to: <ul style="list-style-type: none"> a. any asset located outside India as a beneficial owner or otherwise or b. any asset in respect of which he was a beneficiary or c. any income from a source located outside India 	Rs. 10 Lakh

Note: if the asset held by the assessee constituted of 1 or more bank account having aggregate balance not exceeding Rs. 5 lakh at any time – no penalty under both sections

Chapter IV – Penalty

Sec. No	Person	Offence	Penalty
44	ROR	assessee is in default or deemed to be in default	Arrears of tax
45	Any person	without reasonable cause a. fails to answer, b. fails to sign or c. fails to attend or d. produce books	Rs. 50 thousand to Rs. 2 Lakh



Chapter V – Offences and Prosecutio



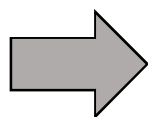
Sec. No	Person	Offence	Remarks	Punishment
49	ROR	WILLFULLY Fails to furnish ROI before the end of relevant AY	Must <ul style="list-style-type: none"> a. hold any asset located outside India as a beneficial owner or otherwise b. be a beneficiary of any asset located outside India c. Have any income from a source located outside India 	Rigorous imprisonment for a period between 6 months to 7 years with fine
50	ROR	WILLFULLY fails to furnish information in ROI	In relation to: <ul style="list-style-type: none"> a. any asset located outside India as a beneficial owner or otherwise or b. any asset in respect of which he was a beneficiary or c. any income from a source located outside India 	Rigorous imprisonment for a period between 6 months to 7 years with fine

Chapter V – Offences and Prosecution

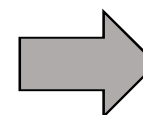
Sec. No	Person	Offence	Penalty
51(1)	ROR	WILFULLY attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act	Rigorous imprisonment for a period between 3 to 10 years and with fine.
51(2)	Any person	WILFULLY attempts to evade the payment of any tax, penalty or interest under this Act	Rigorous imprisonment for a period between 3 months to 3 years and also may be levied fine.

Chapter V – Offences and Prosecution

Sec. No	Person	Offence	Penalty
52	Any person	false statement in verification or submission of false account/ statement	Rigorous imprisonment for a period between 6 months to 7 years with fine
53	Any person	abatement of any offence	Rigorous imprisonment for a period between 6 months to 3 years and also may be levied fine.



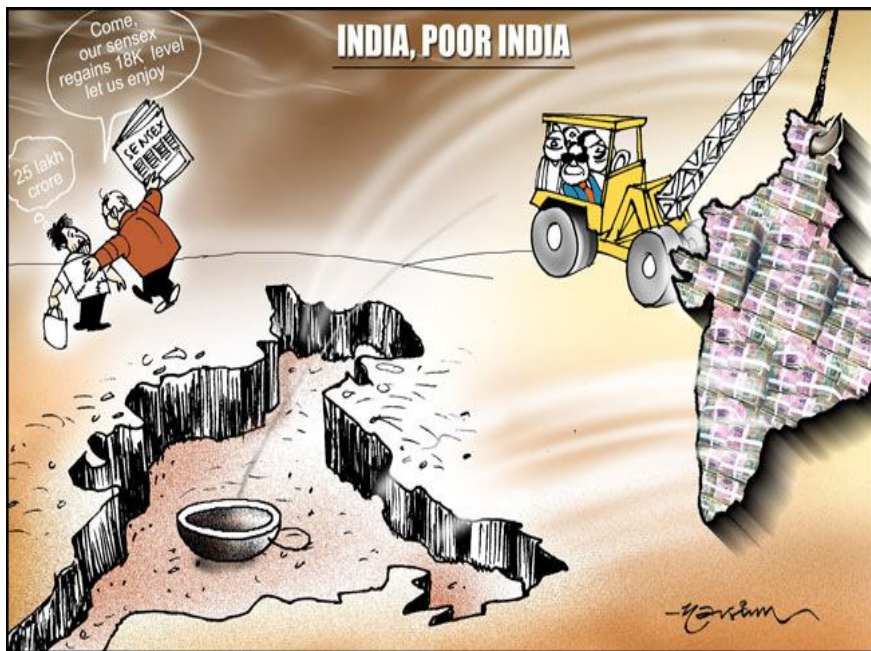
ABATEMENT



Issues in BML

- a. DTAA Benefits
- b. Tall promises of immunity
- c. High litigation – Badly drafted
- d. FEMA Implications
- e. Attack by the Government on Black money from all sides
- f. Signing of FATCA, AEOI
- g. Taxing and penalizing – but what about bringing money back?





THANK YOU



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