

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

## **A BRIEF ANALYSIS**

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### **INTRODUCTION –**

With the objective to deal with the menace of black money stashed away abroad, the Government of India has come up with some measures and an institutional move in this direction is enacting '*The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015*'. This law has come into force from 1 July, 2015 and will be applicable to individuals qualifying as Resident and Ordinarily Residents (ROR) of India. Therefore, non-resident Indians are out of the purview of this Act.

As per *The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015*, a person would be required to pay tax @ 30% on its undisclosed foreign income or assets along with penalty amounting to three times the tax. Apart from this, prosecution proceedings shall also be initiated which may result for imprisonment of three years which may be extended up to ten years. The act also specifies that no exemption, deduction, set off or carry forward of losses, shall be allowed against any such income.

### **HIGHLIGHTS OF THE ACT –**

The Assessing Officer may on receipt of any information related to undisclosed foreign income and assets may serve on any person a notice for the purpose of making an assessment or reassessment under this Act.

The Assessing Officer is empowered to ask the assessee to produce accounts, documents or evidence and may also conduct enquiries for the purpose of obtaining full information in respect of undisclosed foreign income and assets for the relevant financial year or year(s). The Assessing Officer on the basis of material gathered from assessee or through his own inquiry shall assess the undisclosed foreign income and assets and determine the tax payable by the assessee and shall pass an order in writing. Such order may also be amended to rectify any mistake apparent from record. The tax will be charged on the assessee in the year the Assessing Officer comes to know about the undisclosed foreign assets and income.

The person on whom the order has been passed in respect of undisclosed income and assets may appeal to the Commissioners (Appeal) and any assessee aggrieved by an order passed by the Commissioners (Appeal) may appeal to the Appellate Tribunal. He may also make an application to the Principal Commissioner or the Commissioner for revising the order passed by the Assessing Officer. The Principal Commissioner or the Commissioner may revise any order passed in any proceedings under this Act by any lower authority after giving an opportunity of hearing to the assessee.

The assessee will have to make payment of the demand within 30 days of the service of notice of demand. However, he can make an application before the Assessing

Officer for granting of instalment and the Assessing Officer may grant such instalments subject to certain conditions which he may deem fit. However, the Assessing Officer has not been empowered to grant stay of demand. Notwithstanding any appeal preferred to the High Court or the Supreme Court, the tax shall be paid in accordance with the assessment made under this Act.

A Manager as per clause 53 and 54 of section 2 of the Companies Act, 2013 shall be jointly and severally liable for any amount due under this act in respect of the company if the amount cannot be recovered from the company. The "Manager" shall include the Managing director and also the directors.

It is clearly set out in The Act that the undisclosed assets shall be taxed at fair market value. The rules have been prescribed for the valuation of undisclosed assets. For example, value of immovable property/bullion/jewellery has been defined as higher of cost, market value and value given by a Registered Valuer. Similarly, the undisclosed foreign bank account would be considered as undisclosed asset. In case of a bank account the fair market value is the sum of all the deposits made in the account computed in accordance with Rule 3(1)(e). Therefore, tax and penalty needs to be paid on such fair market value and not on the balance as on date. The fair market value shall be first determined in the currencies as permitted by the Reserve Bank of India (RBI) and the same shall be converted into local currency as per reference rate, provided by RBI as on the valuation date. The CBDT has also provided clarifications in respect to the issues that are open to different interpretations in its recent circular dated 6 July, 2015.

Taxing the entire deposits being made in the bank account without giving effect of withdrawals is not justified. Sometimes it happens that the amount is deposited into the bank account out of the amount withdrawn earlier from the bank account. Such amount is not the income and should not be taxed. The peak theory has not been considered.

As per section 5 of the Act, in computing the value of an undisclosed foreign asset any income which has been assessed to tax under the Income-tax Act from which that asset is acquired shall be reduced from the value of the undisclosed foreign asset. Only part of the investment which is undisclosed may be declared under Chapter VI of the Act. The amount of declaration shall be the fair market value of such asset.

The Assessing Officer may direct the assessee to pay penalties as under –

- ✓ In respect of undisclosed foreign income and asset, at three times the tax computed under that section.
- ✓ For failure to furnish information in the return of income under section 139(1) or (4) or 139(5) of the Income Tax Act, 1961 in relation to income and assets outside India, at Rs.10,00,000/-.
- ✓ For failure to make payment of tax, amount equal to the amount of tax arrears.

- ✓ For failure to answer any question or sign any or attend or produce any books of accounts or documents during course of proceedings, between Rs.50,000/- to Rs.2,00,000/-.

The assessee is also liable to be prosecuted for various offences made under this Act such as wilful attempt to evade any tax, penalty or interest, for non-furnishing of information relating to assets located outside India in the return of Income, for not paying tax arrears within due date, for containing false entry, statement in books of accounts or documents etc.

### **COMPLIANCE WINDOW –**

However, a declaration under Chapter VI of the Act may be made in respect of any undisclosed asset located outside India and acquired from income chargeable to tax under the Income Tax Act, 1961 for any assessment year prior to the assessment year 2016-17 for which he had, either failed to furnish a return under section 139 of the Income Tax Act, or failed to disclose such income in a return furnished before the date of commencement of the Act, or such income had 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.

An opportunity to the taxpayers have been provided by the Government by offering the one-time compliance window. As per this window, the taxpayer will pay tax at 30% in addition to a penalty of 100% of such tax instead of 300%. The taxpayers availing benefit of the one-time compliance window will be granted immunity from prosecution under this law and under the Income Tax Act, 1961 as well as Wealth Tax Act, 1957, The Foreign Exchange Management Act, 1999, Companies Act, 2013 and Customs Act, 1962.

As the compliance window is now notified, the taxpayer will need to furnish a declaration of undisclosed overseas assets to the designated Pr. Commissioner of Income Tax or Commissioner of Income Tax by 30 September, 2015. Subsequently, taxes and penalty have to be paid by 31 December, 2015 and acknowledgement of acceptance is to be provided within 15 days of taxpayer's intimation of payment of tax and penalty.

In the case of assets held abroad the declarant will be liable for capital gains under the Income-tax Act on sale of such asset in future. As per the current provisions of the Income-tax Act, the capital gains is computed by deducting cost of acquisition from the sale price. However, since the asset will be taxed at its fair market value the cost of acquisition for the purpose of Capital Gains shall be the said fair market value and the period of holding shall start from the date of declaration of such asset under Chapter VI of the Act.

After such declaration has been furnished, the designated Principal CIT/ CIT will issue an intimation to the declarant by 31.10.2015 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 under section 90 or 90A of the Income Tax Act. Where any such information had been received, the declarant shall file a revised declaration excluding such asset. The

declarant shall not be liable for any consequences under the Act in respect of, any asset which has been duly declared but has been found ineligible for declaration as the Central Government had prior information on such asset. However, such information may be used under the provisions of the Income Tax Act. The revised declaration shall be filed within 15 days of receipt of intimation from the designated Principal Commissioner /Commissioner.

Section 67 provides immunity from prosecution under the five Acts namely the Income Tax Act, Wealth Tax Act, FEMA, Companies Act and the Customs Act. It does not provide immunity from prosecution under any other Act. For example- if the undisclosed asset has been acquired out of the proceeds of sale of protected animals the person will not be eligible for immunity under the Wildlife (Protection) Act, 1972. But the said Act does not give any immunity from the Prevention of Money Laundering Act, 2002. The CBDT vide circular no 13 on 06.07.2015 has made replies to certain queries in which it has clarified that the offence under the Prevention of Money Laundering Act, 2002 arises while laundering money generated from the process or activity connected with the offences specified in the schedule to the Prevention of Money Laundering Act, 2002. Therefore, the primary requirement under Prevention of Money Laundering Act, 2002 is commission of a scheduled offence. With the enactment of the Act, the offence of wilful attempt to evade tax under section 51 of the Act has become a scheduled offence under Prevention of Money Laundering Act, 2002. However, where a declaration of an asset has been duly made under section 59 of the Act the provisions of section 51 will not be applicable in respect of that asset. Therefore, Prevention of Money Laundering Act, 2002 will not be applicable in respect of the scheduled offence of wilful attempt to evade tax under section 51 of the Act in respect of assets for which declaration is made under section 59 of the Act. This is a welcome clarification.

The person is not eligible to make a declaration under Chapter VI if a search has been initiated and the time for issuance of notice under section 153A has not expired, even if such notice for the relevant assessment year has not been issued. In this case, however, the person is eligible to file a declaration in respect of an undisclosed foreign asset acquired in any previous year which is prior to the previous years relevant for the purpose of notice under section 153A. However, if the post search assessments have been completed, the declaration under compliance window can be made.

In case of survey operation also the person is barred from making a declaration under Chapter VI in respect of an undisclosed asset acquired in the previous year in which the survey was conducted. The person is, however, eligible to make a declaration in respect of an undisclosed asset acquired in any other previous year.

### **IMPACT OF A VALID DECLARATION –**

Where a valid declaration as detailed above has been made, the following consequences will follow:

- (a) The amount of undisclosed investment in the asset declared shall not be included in the total income of the declarant under the Income-tax Act for any assessment year;

- (b) The contents of the declaration shall not be admissible in evidence against the declarant in any penalty or prosecution proceedings under the Income-tax Act, the Wealth Tax Act, the Foreign Exchange Management Act, the Companies Act or the Customs Act;
- (c) The value of asset declared in the declaration shall not be chargeable to Wealth Tax for any assessment year or years.
- (d) Declaration of undisclosed foreign asset will not affect the finality of completed assessments. The declarant will not be entitled to claim re-assessment of any earlier year or revision of any order or any benefit or set off or relief in any appeal or proceedings under the Act or under Income-tax Act in respect of declared undisclosed asset located outside India or any tax paid thereon.

It should be noted that misrepresentation or suppression of facts or information will make the declaration void and will expose taxpayers to stringent consequences of penalty and prosecution under the Act. Further, tax and penalty paid will also be forfeited in such cases.

### **CONCLUSION –**

The Hon'ble Finance Minister has introduced this Act for the purpose of taxing Black Money related to undisclosed foreign income and assets. But he appears to be very conservative in enacting this Act and also some of the provisions are very harsh. It seems very illogical that a person has to pay 120% of the value of the assets as well as face prosecution under this Act. Apart from this, he may also suffer litigation under other allied laws and again face penalty and prosecution.

Although the compliance window scheme is also not very lucrative, but in view of fear of prosecution, higher amount of penalty and also future litigation under other laws which may also lead to penalty and prosecution, the compliance window may get some momentum.