The Black Money Act, 2015

(Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

Act No. 22 of 2015 · Assented 26 May 2015 · In force from 1 July 2015

By Ved Jain
(Past President of Institute of Chartered Accountants of India)

History · Rationale · Statutory Roadmap · Rules & Forms · Case Law · Contemporary Issues

Roadmap of the Session

01 **The Problem & The Genesis**

Black money abroad, judicial push (SIT) and global data leaks that forced legislation.

02 **Legislative Journey & Rationale**

From the 2012 White Paper to Act No. 22 of 2015 — why Parliament acted.

03 **Architecture of the Act**

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06 **Contemporary Issues (2024–26)**

Rs. 20 lakh relief, FAST-DS 2026 and the live retrospectivity debate.

Global Data Leaks That Forced the Law

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2008–11

HSBC & Liechtenstein lists

Leaked foreign-bank data named Indian account-holders, triggering treaty references and investigations.

2015

Swiss & HSBC Geneva

Exchange of information on Indian accounts intensified pressure for a stringent dedicated statute.

2016

Panama Papers

ICIJ revelations named ~426 Indians; a Multi-Agency Group was set up to probe offshore entities.

2017–21

Paradise & Pandora Papers

Successive leaks expanded the universe of undisclosed offshore structures under investigation.

Investigative journalism and treaty-based exchange supplied the evidence; the State needed a law harsh enough to act on it.

Why Parliament Enacted the Law

Plug the offshore gap

Create a dedicated charge on undisclosed foreign income and assets that the Income-tax Act, 1961 could not effectively reach.

Deter concealment

Impose a punitive 30% tax plus penalty and criminal prosecution to make offshore hiding economically irrational.

Honour global commitments

Operationalise treaty exchange, FATCA and the OECD Common Reporting Standard within domestic law.

Offer a one-time exit

Provide a limited compliance window for past defaulters to declare and regularise before enforcement began.

Protect fiscal sovereignty

Reclaim revenue lost to tax havens and reinforce the rule of law over illicit capital flight.

Build an audit trail

Mandate disclosure of foreign assets (Schedule FA) so non-reporting itself becomes an actionable offence.

Measures to Curb Black Money

- Bill for a comprehensive new law to deal with black money parked abroad
- Evasion of tax in relation to foreign assets to have a punishment of rigorous imprisonment upto 10 years, be non-compoundable, have a penalty rate of 300% and the offender will not be permitted to approach the Settlement Commission
- Non-filing of return/filing of return with inadequate disclosures to have a punishment of rigorous imprisonment upto 7 years

Undisclosed income from any foreign assets to be taxable at the maximum marginal rate)

Mandatory filing of return in respect of foreign asset

Entities, banks, financial institutions including individuals all liable for prosecution and penalty

Concealment of income/evasion of income in relation to a foreign asset to be made a predicate offence under Prevention of Money Laundering Act, 2002

Prevention of Money Laundering Act, 2002 and Foreign Exchange Management Act 1999 to be amended to enable administration of new Act on black money

Laws to Curb Black Money

- Income Tax Act, 1961
- Prohibition of Benami Property Transactions Act, 1998
- Foreign Exchange Management Act, 1999
- Black Money (Undisclosed Income and Foreign Assets) and Imposition of Tax Act, 2015
- Prevention of Money Laundering Act, 2002
- Fugitive Economic Offenders Act, 2018

Black Money Act at a Glance

CITATION
Act No. 22 of 2015

LONG TITLE
An Act to deal with undisclosed foreign income and assets and to impose tax thereon

ENACTED BY
Parliament of India — moved by FM Arun Jaitley

ASSENTED
26 May 2015 (President of India)

COMMENCEMENT
1 July 2015*; charge from AY 2016–17

SHORT STRUCTURE
7 Chapters · 88 Sections · Schedule

HEADLINE LEVY
30% flat tax + up to 90% penalty

PROSECUTION
Rigorous imprisonment up to 10 years

*The Black Money Act's effective date was moved backward from April 1, 2016, to July 1, 2015 (per **CBDT Notification No. 56/2015**).- Clarifications also given by **Circular No. 13/2015 dated 06.07.2015**

Summary of the consequences under BMA

30%	90%	120%	10 yrs
FLAT TAX	**PENALTY**	**COMBINED**	**IMPRISONMENT**
On the value of undisclosed foreign income or asset — no slabs, deductions or exemptions.	Up to three times the tax (≈ 90% of value) under S. 41, over and above the tax.	Tax plus penalty can effectively exceed the value of the asset itself.	Rigorous imprisonment of 3 to 10 years for wilful attempt to evade (S. 51).

Contrast with the Income-tax Act, 1961: no graduated slabs, no exemptions, and prosecution carries no automatic right to compounding.

Preamble

- The Preamble of the BM Act, 2015 is as under:

  An Act to make provisions to deal with the problem of the Black money that is undisclosed foreign income and assets, the procedure for dealing with such income and assets and to provide for imposition of tax on any undisclosed foreign income and asset held outside India and for matters connected therewith or incidental thereto.

- The Act has been brought to:

  - To tax **foreign sourced** undisclosed income and **undisclosed assets located outside India** which was otherwise taxable under the Income Tax Act
  - To overcome the limitation period under the IT Act
  - To overcome the challenge of taxability in the correct year under the IT Act

Statement of object and reasons

- **Stashing away of black money abroad by some people with intent to evade taxes has been a matter of deep concern to the nation. 'Black Money' is a common expression used in reference to tax-evaded income**. Evasion of tax robs the nation of critical resources necessary to undertake programs for social inclusion and economic development. It also puts a disproportionate burden on the honest taxpayers as they have to bear the brunt of higher taxes to make up for the revenue leakage caused by evasion. The money stashed away abroad by evading tax could also be used in ways which could threaten the national security.

- The Central Government is strongly committed to the task of tracking down and bringing back undisclosed foreign assets and income which legitimately belong to the nation. <u>Recognizing the limitations of the existing legislation, it is proposed to introduce a new legislation to deal with undisclosed assets and income stashed away abroad</u>.

- The Supreme Court of India has also expressed concern over this issue. The Special Investigation Team constituted by the Central Government to implement the decision of the Supreme Court, has also expressed the views that measures may be taken to curb the menace of black money. Internationally, a new regime for automatic exchange of financial information is fast taking shape and India is a leading force in this effort.

- The new legislation will apply to all persons resident in India and holding undisclosed foreign income and assets. A limited window is proposed to persons who have any undisclosed foreign assets. Such persons may file a declaration before the specified tax authority within a specified period, followed by payment of tax at the rate of 30 per cent and an equal amount by way of penalty. Exemptions, deductions, set off and carried forward losses etc. shall also be not allowed under the new legislation. Upon fulfilling these conditions, a person shall not be prosecuted under the Bill and the declaration made by him will not be used as evidence against him under the Wealth-tax Act, the Foreign Exchange Management Act (FEMA), the Companies Act or the Customs Act. Wealth-tax shall not be payable on any asset so disclosed. It is merely an opportunity for persons to become tax compliant before the stringent provisions of the new legislation come into force

Salient Features of the BM Act, 2015

- Applicable from 01.07.2015 (earlier was applicable from 01.04.2016 – AY 2016-17 onwards]
- **Initially** – Act was made **applicable to residents**
- Vide Finance (No.2) Act, 2019, **extended** to certain **NR or RONOR** – retrospectively extended
- Charge under the BM Act, 2015 is on "**undisclosed foreign income and assets**"
- Tax @ 30% u/s 3 plus penalty @ 90% u/s 41 – **Aggregate levy 120% - *No surcharge or cess***
- **No tax credit, offset,** deduction, etc. available while computing income/tax under BM Act, 2015
- The **income included** in the total undisclosed foreign income and asset **under BM Act, 2015** is to be **excluded** while computing the total income **under the Income-tax Act**
- Section 3, 72(c), etc provides that **charge of tax** is in the year in which **undisclosed asset comes to the notice of the AO** and the AO issues notice irrespective of the year when such asset was acquired
- **Prosecution** –upto 10 years – **offence not compoundable** – no settlement route available under BM Act, 2015
- One time disclosure window till 30.09.2015 was available upon introduction of the BM Act, 2015 – 30% tax and 30% penalty (immunity under 5 Act – IT Act, Wealth Tax FEMA, Companies Act and Customs) – no voluntary compliance option anymore

Architecture of the Act

STATUTORY ROADMAP

CHAPTER I — Preliminary

Ss. 1–2

Short title, extent, commencement and definitions.

CHAPTER II — Basis of Charge

Ss. 3–5

Charge of tax, scope and computation of undisclosed foreign income & asset.

CHAPTER III — Tax Management

Ss. 6–40

Authorities, assessment, appeals, recovery and refunds.

CHAPTER IV — Penalties

Ss. 41–47

Penalties for undisclosed income, non-filing and non-disclosure.

CHAPTER V — Offences & Prosecution

Ss. 48–58

Criminal liability, including wilful evasion and false statements.

CHAPTER VI — Tax Compliance (one-time)

Ss. 59–72

The 2015 voluntary disclosure window and connected provisions.

CHAPTER VII — General

Ss. 73-88

General Provisions

Basis of charge and scope of assessee under BM Act

Chapter I: Preliminary

Section 2: Definitions

In this Act, unless the context otherwise requires,—

(1) "Appellate Tribunal" means the Appellate Tribunal constituted under section 252 of the Income-tax Act;

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

*(11) "**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;*

*(12) "**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*

(14) "value of an undisclosed asset" shall have the meaning assigned to it in sub-section (2) of section 3

Meaning of "assessee"

- *As per section 2(2), "assessee" means a* ***person,—***

  (a)being ***a resident in India*** *within the meaning of section 6 of the Income-tax Act, 1961 (43 of 1961.)* ***in the previous year****; or*

  (b)being a ***non-resident*** ***<u>or</u>*** ***not ordinarily resident in India*** *within the meaning of clause (6) of section 6 of the Income-tax Act 1961 (43 of 1961.)* ***in the previous year****, who was* ***<u>resident in India</u>*** *either* ***in the previous year*** *to which the* ***<u>income</u>*** *referred to in section 4* ***<u>relates:</u>*** ***or*** *in the previous year in which the* ***<u>undisclosed asset located outside India was acquired:</u>***

  *Provided that the previous year, in case of acquisition of undisclosed asset outside India, shall be determined without giving effect to the provisions of clause (c) of section 72;**]***

- Thus, BM Act, 2015 applies to every **person** who is a:
  - '**ROR**' or
  - "**NR**" or a "**RNOR**" who were **"ROR" in the year to which undisclosed foreign income relates** to or during which year **undisclosed asset outside India was acquired**

- **'Person'** shall include an individual, a HUF, a company, a firm, AOP, BOI, local authority and every artificial judicial person [section 2(15) of BM Act r.w.s 2(31) of the IT Act]

Manner of determination of status of residence of Individual in India [S. 6 of IT Act]

- An individual is considered to be **resident in India** during a year if:

  i. He has been in India for an aggregate period of **182 days or more** during the year; or

  ii. He has been in India for an aggregate period of **60 days* or more during the year** and he has been in India for an aggregate period of **365 days or more during the preceding 4 years**; or

  He is a **citizen of India having income from Indian Sources exceeding Rs. 15 lakhs** and **he is not liable to tax in any other country by reason of his domicile or residence** of any other criteria of similar nature

- *In case of an individual being **citizen of India** or a person of Indian Origin **('PIO') who leaves India during the year for the purpose of employment outside India**, the condition of **60 days is replaced with 182 days**

- *In case of an individual being **citizen of India or a PIO**, who being outside India comes to visit India during the year, the condition of **60 days is replaced with**

  - **120 days** if income from **Indian Sources exceeds Rs. 15 lakhs**;

  - **182 days** if income from Indian Sources **does not exceed Rs. 15 lakhs**

Manner of determination of status of residence of Individual in India [S. 6 of IT Act]

An individual is considered to "not ordinarily resident" in India in any previous year if such person—

i. has been a **non-resident** in India in **9 out of the 10 previous years** preceding that year; or

ii. has been during the **7 previous years preceding that year** been in India for a period of **729 days or less**; or

iii. A citizen of India, or a PIO who being outside India comes to visit India if such person has total income from Indian sources exceeding INR 15 lakh rupees during the previous year and has been in India for a period or 120 days or more but less than 182 days; or

iv. iv. A citizen of India who is **deemed to be resident in India under Section 6(1A)**

Manner of determination of status of residence of HUF in India [Section 6 of IT Act]

- A HUF is said to be resident in India in any previous year in every case **except where during that year the control and management of its affairs is situated wholly** outside India.

- Even if part affairs are situated in India, the HUF is considered to be a resident in India

- HUF is considered to be a **RNOR** if:

  - The manager has been a **non-resident in India** in **9 out of the 10 previous years** preceding that year, or

  - The manager has during the **7 previous years preceding that year** been in India for an aggregate period of **729 days or less**

Manner of determination of status of residence of Company, Firm, LLP in India [S. 6 of IT Act]

1. Company

- A **Company** is treated as a resident of India in any previous year if it is an **Indian company**, or its **Place of Effective Management (PoEM) in that year is in India**

- A foreign company will be regarded as a resident in India if its PoEM is in India during the year. The term **PoEM means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance, made**. CBDT has laid down guidelines for determination of PoeM. PoEM provisions will not apply to a foreign company having turnover or gross receipts of INR 50 crore or less in a year.

2. A **Partnership firm, LLP, and other non-individual entities** are treated as resident in India **if any portion of their control and management is in India**. They are non-resident if their control and management is situated wholly outside India.

A company, partnership firm, LLP and other non-individual entities are either ROR or NR. There can never be categorized as a RNOR

Meaning of “assessee”

Status in previous year	Status in previous year when undisclosed foreign income was earned or undisclosed foreign asset was acquired	Whether considered to be an “assessee” under the BM Act, 2015
ROR	ROR	Yes
ROR	RNOR	Yes
ROR	NR	Yes
RNOR	ROR	Yes
RNOR	RNOR	No
RNOR	NR	No
NR	ROR	Yes
NR	RNOR	No
NR	NR	No

Meaning of "assessee" under BMA 2015

Issues:-

- **Dual Residence Cases** – Whether a dual resident who qualifies as resident of other Country as per tie breaker rule to be considered as resident and covered under BM Act, 2015?
- **POEM - Whether Companies** considered to be resident on account of **POEM provisions covered under BM Act, 2015?**
- **Expats -** Whether foreign expats who were in India during AY 2000- AY 2005-06 and were resident during such period and who did not pay tax on global income say in AY 2004-05 in respect of some allowances also covered ?

Chapter II · Basis Of Charge

Section 3: Basis of Charge

(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.

(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.*

Undisclosed income & assets located outside India

Section 4: Scope of total undisclosed foreign income and asset.

(1) Subject to the provisions of this Act, the total undisclosed foreign income and asset of any previous year of an assessee shall be, —

(a) the income from a source located outside India, which has not been disclosed in the return of income furnished within the time specified in Explanation 2 to sub-section (1) or under sub-section (4) or sub-section (5) of section 139 of the Income-tax Act;

(b) the income, from a source located outside India, in respect of which a return is required to be furnished under section 139 of the Income-tax Act but no return of income has been furnished within the time specified in Explanation 2 to sub-section (1) or under sub-section (4) or sub-section (5) of section 139 of the said Act; and

(c) the value of an undisclosed asset located outside India.

Notwithstanding anything contained in sub-section (1), any variation made in the income from a source outside India in the assessment or reassessment of the total income of any previous year, of the assessee under the Income-tax Act in accordance with the provisions of section 29 to section 43C or section 57 to section 59 or section 92C of the said Act, shall not be included in the total undisclosed foreign income.

(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****.*

Section 4(1) – Scope of total undisclosed foreign income and asset

- The **total undisclosed foreign income and asset** of any previous year of an assessee shall be,—

1. **Income from a source located outside India:**

   - **which has not been disclosed in the return of income furnished within the time specified** in Explanation 2 to sub-section (1) or under sub-section (4) or sub-section (5) of section 139 of the Income-tax Act;

   - **in respect of which** a return is required to be furnished under section 139 of the Income-tax Act but **no return of income has been furnished within the time specified** in Explanation 2 to sub-section (1) or under sub-section (4) or sub-section (5) of section 139 of the said Act; and

2. **Value of an undisclosed asset located outside India**

- Whether if undisclosed income is subsequently disclosed in return u/s 153A or 148, can one argue that since such return is deemed to be a return filed u/s 139, accordingly, the income will not be covered under BM Act, 2015

Section 4(2) – Addition or disallowance made not to result in undisclosed income or asset

- **Any variation made** in the **income from a source outside** India under the Income-tax Act **in accordance with the provisions of section 29 to section 43C or section 57 to section 59 or section 92C of the said Act**, shall not be included in the total undisclosed foreign income u/s 4.

- If variation made due to some other provision under IT Act, whether it will be covered under BM Act, 2015?

  - **Eg.** Capital gain from property situated outside India disclosed as 40 lakh – AO tinkers with computation u/s 48 and revised capital gain is 80 lakh;

  - **Eg.** House property held outside India in respect of which rental income is earned – upward adjustment made by the AO u/s 23 by substituting actual rent charged with market rent or disallowance of interest claimed as deduction u/s 24

Section 4(3) – Income taxable under BM Act, 2015 not taxable under Income Tax Act

- The **income included in the total undisclosed foreign income and asset** under the BM Act, 2015 **shall not form part of the total income under the Income-tax Act.**

- The **provision of BM Act, 2015** being a **specific legislation to deal with undisclosed foreign income and asset, the same will be applicable in respect of such undisclosed income and asset** as against the provision of IT Act

- Thus, post 01.07.2015, **undisclosed foreign income/assets** to be **taxable** under **BM Act, 2015** and **not IT Act**

- If undisclosed income gets assessed under IT Act (for AY 2016-17 onwards) and subsequently proceedings under BM Act, 2015 are initiated – rectification application may be filed under section 154 of IT Act r.w.s 4(3) of the BM Act, 2015
- Income already assessed prior to AY 2016-17 will not be taxable again under BM Act, 2015 [Section 5 - BM Act, 2015]

Deductions and set off while computing income/tax under BM Act, 2015

Section 5: Computation of total undisclosed foreign income and asset.

(1) In computing the total undisclosed foreign income and asset of any previous year of an assessee,—

(i) no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee, whether or not it is allowable in accordance with the provisions of the Income-tax Act;

(ii) any income,—

(a) which has been assessed to tax for any assessment year under the Income-tax Act prior to the assessment year to which this Act applies; or

(b) which is assessable or has been assessed to tax for any assessment year under this Act,

shall be reduced from the value of the undisclosed asset located outside India, if, the assessee furnishes evidence to the satisfaction of the Assessing Officer that the asset has been acquired from the income which has been assessed or is assessable, as the case may be, to tax

(2) The amount of deduction referred to in clause (ii) of sub-section (1) in case of an immovable property shall be the amount which bears to the value of the asset as on the ***first day of the financial year in which it comes to the notice of the Assessing Officer****, the same proportion as the assessable or assessed foreign income bears to the total cost of the asset*

- **No deduction** for expenditure/ **no allowance**/ **no set off** for loss **allowed while computing total undisclosed foreign income**
  and asset under the BM Act, 2015 (whether or not it is allowable in accordance with the provisions of the Income-tax Act)

- Expression 'undisclosed foreign **income**' **implies net income** i.e revenue less expenses – **is denial of deduction contradictory** ?

- **Deduction** shall be **allowed in respect** of **following** while computing value of asset located outside India (subject to furnishing of evidence before AO and AO being satisfied)
  - **Income which has been assessed to tax** for any assessment under the Income-tax Act prior to the AY 2016-17; or
  - Income which is **assessable** **or has been assessed to tax** for any assessment year **under the BM Act, 2015**

- The term **assessable** apparently signifies that income from AY 2016-17 onwards invested in an asset should be taxed as undisclosed income of the relevant assessment year as against undisclosed asset

- In case of **immovable property**, the above said **deduction** shall be the amount which bears to the value of the asset as on the first day of the financial year in which it comes to the notice of the Assessing Officer, the same proportion as the assessable or assessed foreign income bears to the total cost of the asset (*discussed in further slides*) – deduction for other assets not to be computed proportionately – only for immovable property to be computed proportionately

- The Central Government may enter into an agreement with the foreign countries or specified territories [Section 73] :

  - For **exchange of information** for prevention of tax evasion or avoidance on undisclosed foreign income chargeable under this Act or law in the corresponding country
  - For **investigation cases** involving such tax evasion or avoidance
  - For **recovery of tax** under this Act

- **There is no provision granting relief against double taxation of income** under BM Act, 2015 and corresponding law in foreign jurisdiction

- **<u>No credit of foreign taxes paid shall be allowable in India</u>** against the tax payable under BM Act, 2015[FAQ No. 26 Circular No 13/15, FAQ No. 3 Circular No 15/15]

Few examples where **income or asset** **will not be** **considered to be undisclosed foreign income or asset**

1

Income that is credited to the foreign account during the period the **individual was NR** if such income is not chargeable to tax in India - such income considered to be assessed and benefit of section 5 available [FAQ No. 1 of Circular No 15/2015]

2

Income which is not chargeable to tax on account of residential **status being NR as per DTAA** on application of **tie breaker rule** [FAQ No. 6 Circular No 15/2015]

3

Income that is **exempt** on account of **DTAA** – Eg. Under few DTAA's, rental income from immovable property "shall" only be taxable in the country where it is located [FAQ No. 10 Circular No 15/2015]

Simple Illustration for computation:

Particulars	Amount	Amount
1. Undisclosed income from a source located outside India		Rs. 20,00,000
2. Value of undisclosed property/asset outside India	Rs. 40,00,000	
Less: Amt. of income declared/assessable under I. T. Act and used to acquire foreign asset	Rs. (10,00,000)	
		Rs.30,00,000
Total taxable under BM Act		Rs. 50,00,000

Simple Illustration for computation:

Particulars	Amount
Property acquired outside India P. Y. 2009-10 – cost	Rs. 50,00,000
Income taxed in India, used to buy the property upto P. Y. 2009-10 (evidence required) i.e. 40% of cost	Rs. 20,00,000
<u>Property noticed by A.O. in P. Y. 2017-18</u>	
Value of Property in P. Y. 2017-18	Rs. 1,00,00,000
Less: Reduction for income taxed (40% of income)	<u>Rs. (40,00,000)</u>
Value chargeable to tax under BM Act	<u>Rs. 60,00,000</u>

Example of Foreign Assets

Examples of foreign assets which can be subject to retrospective charge are as under:

- Bullion, jewellery or precious stone
- Shares and securities
- **An account with a bank**
- Archaeological collections, drawings, paintings, sculptures or any work of art
- Immovable property
- An interest of a person in a partnership firm or in an association of persons or a LLP

- **Foreign Bank Account** is intended to be considered as an **asset.** The following provisions reveals the same:
  - **Rule 3(1)(e) provides valuation mechanism** of foreign bank account by considering it to be a foreign asset
  - Proviso to Section 42 and proviso to section 43 - "*Provided that this section shall not apply in respect of an **asset, being one or more bank accounts** having an aggregate balance which does not exceed a value equivalent to five hundred thousand rupees at any time during the previous year.*
  - Section 69(1) – "Where the **undisclosed asset located outside India is represented by cash(including bank deposits)**"
- Thus, **any income credited to foreign bank account prior to commencement of the BM Act**, 2015 can be **taxable under the BM Act, 2015 in the year** when foreign bank **account comes to the notice of the AO**.
- Further, the BM Act, 2015 to apply even if the foreign bank account is not **held/operative in the year in which information regarding such account comes to the notice of the AO or even if the account is not held since prior to AY 2016-17 i.e. year of commencement of the Act** [FAQ No. 20 and 29 of Circular No. 13/2015]

Can one argue that BM Act, 2015 should not apply if the asset is not held on the date of commencement of the Act - section 2(11) states asset is **"held"** or in respect of which he **"is"** a beneficial owner i.e. suggests existence of asset – however, still debatable as 72(c) creates a deeming fiction

Since undisclosed bank account is considered as an undisclosed foreign asset, any income which is kept in it will take the color of the asset; if not kept in account but used to purchase an asset, then also income will take the color of asset. What could possibly be covered under the category of undisclosed income?

- Undisclosed income from source located outside India earned prior to AY 2016-17 should not is chargeable under BM Act, 2015 and shall be taxable only under IT Act (subject to limitation period available)

- However, in case income is not so taxed under IT Act and limitation also expires, since Foreign Bank Account are considered to be a undisclosed foreign asset – income earned prior to AY 2016-17 transferred to foreign bank account can still be brought to tax under BM Act, 2015

Framework of Rules

Rule	Title
2	Definitions
3	Fair Market Value
4	Tax Authorities
5	Notice of demand
6, 7	Appeals
8	Form of tax arrears
9	Form of declaration
10,11,12	Other Rules

Rule 3: Value of undisclosed foreign bank account

Value of undisclosed foreign bank account is to be computed as under:

Add

- **Sum of all the deposits** made in the account with the bank since the **date of account opening**

Less

- **Deposits** made **from the proceeds of any withdrawal** from the account [Proviso to Rule 3(1)(e)] – *Only amount withdrawn in cash and redeposited in bank covered* [FAQ No. 18 Circular No 15/2015]
- **Income that is credited to the foreign account** during the period the **individual was NR** if such income is not chargeable to tax in India – thus assessed and benefit of section 5 available [FAQ No. 1 of Circular No 15/2015]
- **Income not chargeable to tax** on account of **status being NR as per DTAA** on application of tie breaker rule [FAQ No. 6 Circular No 15/2015]
- **Income** that is **exempt** on account of **DTAA** – Eg. Under few DTAA's, rental income from immovable property "shall" only be taxable in the country where it is located [FAQ No. 10 Circular No 15/2015]
- Income **assessed to tax under IT Act prior to AY 2016-17** [Section 5]

Valuation of E-wallet/Virtual cards to be done in as made in case of bank account [FAQ No. 22 Circular No 15/2015]

Rule 3: Value of undisclosed foreign bank account

CASE STUDY

Facts

- Bank opened with USD 10,0000 in FY 2000-01 when individual was NR with legitimate sources
- From 2002-2004 – individual was resident – credit of rental income of USD 40,000 from immovable property situated outside India which was not taxable as per DTAA with the Country
- 2004 – 2010 - individual was Resident ; total dividend income credit to the bank account during this period - USD 90,000 - tax was not paid in India in respect of such income
- Bank account closed in FY 2011
- Information about bank Account comes to notice of the AO in FY 2020-21 when Individual was a ROR

COMPUTATION OF VALUE OF UNDISCLOSED FOREIGN BANK ACCOUNT

- Total credits : USD 1,40,000 [10,000 + 40,000 + 90,000]
- Total Deduction of USD 50,000 allowed in respect of:
  - ➢ Initial amount deposited as a NR - USD 10,000
  - ➢ Rental income exempt by virtue of DTAA – 40,000
- Value of undisclosed asset located outside India taxable under BM Act, 2015 – USD 90,000 (1,40,000 – 50,000)
- Even if the individual is a NR or a RNOR in FY 2020-21, he will qualify as an "assessee" and value of undisclosed asset shall be the same i.e. USD 90,000

Rule 3: Manner of determination of value of undisclosed asset located outside India

- **Value of undisclosed asset located outside India** is done as per the **Rule 3** of the BM Rules, 2015. **Broadly**, for various assets such as **immovable property, bullion, jewellery, artistic work,** the Rules provides that the **value is to the higher of the following:**
  - Cost of acquisition of the asset (‘**COA**’); or
  - **Price** that the **asset would fetch if sold in the open market** on the valuation date
- For **bank account, shares/ securities, and interest in entities**, Rules provide for a different mechanism to determine FMV
- **Valuation date -** First day of April of the previous year in which the asset comes to the notice of the AO
- **Where an asset** (other than a bank account) is **transferred before the valuation date**, the FMV of such asset shall be **higher of its COA and the sale price** (if transfer not for adequate consideration, then comparison between COA and FMV as on date of transfer to determine the value of asset located outside India)
- **Exchange rate** for determining equivalent value in INR – **reference rate of RBI**
- In above cases, rules also require that the **valuation** to be supported by **report from a registered valuer**

Rule 3: Value of undisclosed immovable property situated outside India

Rule 3(1)(d) - The fair market value of an **immovable property** shall be **higher of**

i. **Cost of acquisition**; and

ii. **the price** that the property shall ordinarily fetch if sold in the **open market**

CASE STUDY - [Refer FAQ No. 24 Circular No 15/2015]

Facts

- Property Acquired for USD 50,000 in FY 2000-01
- Investment of USD 10,000 made from undisclosed income
- Investment of USD 40,000 made from legitimate sources say loan or savings bank account balance
- Property comes to the notice of the AO in PY 2020-21
- Value of the property on the valuation date (01.04.2020) – USD 1,00,000

COMPUTATION OF VALUE OF UNDISCLOSED IMMOVABLE PROPERTY

- FMV as on 01.04.2020 as per Rule 3(1)(d) – USD 1,00,000 [Higher of 50,000 or 1,00,000]
- Deduction u/s 5(1)(ii) r.w.s. 5(2): USD 80,000 [USD 1,00,000 x 40,000/50,000]
- Value of undisclosed asset = USD 20,000 [USD1,00,000 – 80,000]

Rule 3: Value of unquoted equity shares and securities [Similar to Rule 11UA of IT Act]

FMV of unquoted equity shares and securities to be higher of:

(i) Cost of acquisition and

(ii) Value on the valuation date of such equity shares as determined in the following manner: **(A+B-L)*(PV)/(PE)**, where

A= Book value of all the assets (other than bullion, jewellery, precious stone, artistic work, shares, securities and immovable property) as reduced by,- (i) any amount of income-tax paid, if any, less the amount of income-tax refund claimed, if any, and (ii) any amount shown as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

B= Fair market value of bullion, jewellery, precious stone, artistic work, shares, securities and immovable property as determined in the manner provided in Rule 3

L= book value of liabilities, excluding paid up capital of equity shares, amount set apart for payment of dividends, reserves and surplus, provision for tax, provision for unascertained liabilities, contingent liabilities (other than arrears of cumulative preference shares dividend)

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

PV= the paid up value of such equity shares

Rule 3: Fair Market Value of quoted and non-equity unquoted shares and securities

FMV of quoted shares and securities [Rule 3(1)(c)(I)]

Higher of:

(i) Cost of acquisition and
(ii) The price as determined in the following manner:

(a) average of the lowest and highest price of such shares and securities **quoted on any established securities market** on the valuation date; or

(b) where on the valuation date there is **no trading** in such shares and securities on any established securities market, average of the lowest and highest price of such shares and securities on any established securities market **on a date immediately preceding** the valuation date when such shares and securities were traded on such securities market;

FMV of non-equity unquoted shares and securities
[Rule 3(1)(c)(III)]

Higher of:

(i) Cost of acquisition and

(ii) Price that the share or security shall ordinarily fetch if sold in the open market on the valuation date

Rule 3: Fair Market Value of interest in Partnership Firm, LLP or AOP

Value of interest in Partnership Firm, LLP, AOP shall be the total of the following:

(i) The **net asset*** of the firm, association of persons or limited liability partnership on the valuation date **to the extent represented by amount of capital** to be **apportioned** amongst the partner/member in **capital ratio**: and

(ii) **Residue net assets** to be apportioned in accordance with

(a) in the event of dissolution- as per the agreement for distribution

(b) in absence of such agreement - in the profit sharing ratio

***Net asset** = A+B-L as calculated for unquoted equity under Rule 3(1)(c)(II)*

Valuation Date

As per Rule 3, Explanation 2.-

- For assets declared under section 59 of the Act – 1st July, 2015
- In other cases 1st day of April of the <u>Previous year</u>

Assessment under BM Act, 2015

Chapter III. Tax Management

Section 10: Assessment

(1) *For the purposes of making an assessment or reassessment under this Act, the Assessing Officer may, on receipt of an information from an income-tax authority under the Income-tax Act or any other authority under any law for the time being in force or on coming of any information to his notice, serve on any person, a notice requiring him on a date to be specified to produce or cause to be produced such accounts or documents or evidence as the Assessing Officer may require for the purposes of this Act and may, from time to time, serve further notices requiring the production of such other accounts or documents or evidence as he may require.*

(2) *The Assessing Officer may make such inquiry, as he considers necessary, for the purpose of obtaining full information in respect of undisclosed foreign income and asset of any person for the relevant financial year or years.*

(3) *The Assessing Officer, after considering such accounts, documents or evidence, as he has obtained under sub-section (1), and after taking into account any relevant material which he has gathered under sub-section (2) and any other evidence produced by the assessee, shall by an order in writing, assess the undisclosed foreign income and asset and determine the sum payable by the assessee.*

(4) *If any person fails to comply with all the terms of the notice under sub-section (1), the Assessing Officer shall, after taking into account all the relevant material which he has gathered and after giving the assessee an opportunity of being heard, make the assessment of undisclosed foreign income and asset to the best of his judgment and determine the sum payable by the assessee.*

- **Tax Authority** under **Income Tax Act** will be the tax authority under **BM Act, 2015**

- Section 10(1) of the BM Act, 2015 reads as under:

  "For the purposes of making an assessment or reassessment under this Act, the ***Assessing Officer may****,* ***on receipt of an information from an income-tax authority under the Income-tax Act or any other authority under any law for the time being in force or on coming of any information to his notice****, serve on any person,* ***a notice*** *requiring him on a date to be specified to produce or cause to be produced such accounts or documents or evidence as the Assessing Officer may require for the purposes of this Act and may, from time to time, serve further notices requiring the production of such other accounts or documents or evidence as he may require."*

- **No period of limitation** for issuance of notice

- **Once notice is issued**, period of limitation to pass the order u/s 11 is **2 years from the end of the FY in which notice u/s 10(1) is issued –** If order is not passed within limitation period of 2 years, **can a new notice u/s 10 be issued?**

Source of information basis which notice can be issued by AO u/s 10

- Section 10 of the BM Act, 2015 **empowers the AO to issue notice** of assessment or reassessment **on the basis of**:

  - **Information** from an **income-tax authority** under the Income-tax Act; or

  - **Information** from **any other authority under any law** for the time being in force**;** or

  - **<u>Any other information which comes to his notice</u>**

- **What is the scope of any other information? Anonymous letters covered?**

- **Section 73** allows Central Government to enter into **Agreement with Foreign Countries or specified territories** for exchange of information or recovery of tax

- **Section 83** provides that **all information contained in any statement or return** made or furnished **under the Income Tax Act** or **obtained or collected for the purpose of Income Tax Act** can be used for the purpose of BM Act, 2015

- **Examples of source for notices issued till now -** Panama Leak Papers, SWISS Leaks – HSBC, Information from tax authorities of other Countries, International consortium of Investigative Journalists (ICIJ) , Search and seizure proceedings under the Income Tax Act

Some Issues

- Unlike the requirement to form a **“reason to believe” under 147** of the Income Tax Act, **no such requirement exists in the BM Act, 2015** for issuance of notice by the AO
- **No requirement** under BM Act, 2015 **to seek sanction/approval** of higher authority despite the provisions being draconian
- Whether there is **any obligation on the AO to disclose the source of information ?**
- Whether the assessee can **challenge the notice** basis **credibility of the information**?
- Whether there is any **time limitation within which notice should be issued upon receipt of information** by the AO?

Entry in books of accounts pursuant to assessment

- **FAQ No. 17 Circular No 15/2015 dt. 03.09.2015 reads as under:**

Question No. 17: In respect of undisclosed foreign asset declared under Chapter VI of the Act, is it mandatory to include such asset in the books of account of the person?

*Answer: **It is expected/required that the declarant will show the asset so declared in his books of accounts** and if he is required to main books of account, he shall maintain the record of such asset. Further, if he continues to hold such asset he shall be required to report such asset in schedule FA of the return of income*

- What would be the accounting entry the person will be required to pass pursuant to assessment under BM Act, 2015?
- Whether tax will be payable under the IT Act in addition to BM Act, 2015
- Whether in case of a loss making company, it will be required to pay **MAT** if it brings the asset into its books of account?

Section 14: Direct assessment or recovery not barred.

Nothing in this Chapter shall prevent either the direct assessment of the person on whose behalf or for whose benefit the undisclosed income from a source located outside India is receivable or undisclosed asset located outside India is held, or the recovery from such person of the tax or any other sum of money payable in respect of such income and asset

Section 30: Direct assessment or recovery not barred.

Any amount specified as payable in a notice of demand under section 13 shall be paid within a period of thirty days of the service of the notice, to the credit of the Central Government in such manner as may be prescribed.

Section 40: Interest for default in furnishing return and payment or deferment of advance tax.

(1) Where the assessee has any income from a source outside India which has not been disclosed in the return of income furnished under sub-section (1) of section 139 of the Income-tax Act or the return of income has not been furnished under the said sub section, interest shall be chargeable in accordance with the provisions of section 234A of the Income-tax Act.

(2) Where the assessee has any undisclosed income from a source outside India and the advance tax on such income has not been paid in accordance with Part C of Chapter XVII of the Income-tax Act, interest shall be chargeable in accordance with the provisions of sections 234B and 234C of the Income-tax Act.

- Undisclosed income from AY 2016-17 onwards will be assessed as income in the relevant previous year and not as undisclosed asset
- Since there is no limitation period of assessing the income, **interest cost may be substantial at the time of assessment**

Appellate procedure under BM Act, 2015

Appellate Process under BM Act, 2015– Similar to Income Tax

STAGE I	STAGE II	STAGE III	STAGE IV	STAGE V
Adverse order passed by AO	Commissioner (Appeals)	Income Tax Appellate Tribunal (ITAT)	High Court	Supreme Court
Section 10,11,13	Section 15-17	Section 18	Section 19-20	Section 21-22

- Appellate procedures similar to those prescribed under IT Act. CIT(A) and ITAT cannot condone delay in filing of appeal beyond 1 year
- Other remedial measures such as rectification, revision, etc also present in the BM Act, 2015

Penal & Prosecution provisions under the BM Act, 2015

Chapter IV. Penalties

Section 41: Penalty in relation to undisclosed foreign income and asset.

The Assessing Officer may direct that in a case where tax has been computed under section 10 in respect of undisclosed foreign income and asset, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum equal to three times the tax computed under that section

Section 42: Penalty for failure to furnish return in relation to foreign income and asset.

If 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, who is required to furnish a return of his income for any previous year, as required under sub-section (1) of section 139 of the Income-tax Act or by the provisos to that sub-section, and who at any time during such previous year,—

(i) held any asset (including financial interest in any entity) located outside India as a beneficial owner or otherwise; or

(ii) was a beneficiary of any asset (including financial interest in any entity) located outside India; or

(iii) had any income from a source located outside India,

and fails to furnish such return before the end of the relevant assessment year, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of ten lakh rupees:

Provided that this section shall not apply in respect of an asset or assets (other than immovable property) where the aggregate value of such asset or assets does not exceed twenty lakh rupees ~~at any time during the previous year~~.". (Substituted w.e.f. 1.10.2024)

Explanation.– For determining the value equivalent in rupees of the balance in an account maintained in foreign currency, the rate of exchange for calculation of the value in rupees shall be the telegraphic transfer buying rate of such currency as on the date for which the value is to be determined as adopted by the State Bank of India constituted under the State Bank of India Act, 1955.

Chapter IV. Penalties

Section 43: Penalty for failure to furnish in return of income, an information or furnish inaccurate particulars about an asset (including financial interest in any entity) located outside India.

If any 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, who has furnished the return of income for any previous year under sub-section (1) or sub-section (4) or sub-section (5) of section 139 of the said Act, fails to furnish any information or furnishes inaccurate particulars in such return relating to any asset (including financial interest in any entity) located outside India, held by him as a beneficial owner or otherwise, or in respect of which he was a beneficiary, or relating to any income from a source located outside India, at any time during such previous year, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of ten lakh rupees:

Provided that this section shall not apply in respect of an asset or assets (other than immovable property), where the aggregate value of such asset or assets does not exceed twenty lakh rupees ~~at any time during the previous year~~." (Substituted w.e.f. 1.10.2024)

Explanation.—*The value equivalent in rupees shall be determined in the manner provided in the Explanation to section 42.*

Chapter V. Offences & Prosecution

Section 48: Chapter not in derogation of any other law or any other provision of this Act.

(1) The provisions of this Chapter shall be in addition to, and not in derogation of, the provisions of any other law providing for prosecution for offences thereunder.

(2) The provisions of this Chapter shall be independent of any order under this Act that may be made, or has not been made, on any person and it shall be no defence that the order has not been made on account of time limitation or for any other reason.

Section 49: Punishment for failure to furnish return in relation to foreign income and asset.

If 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, who at any time during the previous year, held any asset (including financial interest in any entity) located outside India as a beneficial owner or otherwise, or was a beneficiary of such asset or had income from a source outside India and wilfully fails to furnish in due time the return of income which he is required to furnish under sub-section (1) of section 139 of that Act, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine:

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of income under sub-section (1) of section 139 of the Income tax Act if the return is furnished by him before the expiry of the assessment year.

"Provided further that this section shall not apply in respect of an asset or assets (other than immovable property), where the aggregate value of such asset or assets does not exceed twenty lakh rupees."; (inserted w.e.f. 1.10.2024)

Chapter V. Offences & Prosecution

Section 50: Punishment for failure to furnish in return of income, any information about an asset (including financial interest in any entity) located outside India.

If any 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, who has furnished the return of income for any previous year under sub-section (1) or sub-section (4) or sub-section (5) of section 139 of that Act, wilfully fails to furnish in such return any information relating to an asset (including financial interest in any entity) located outside India, held by him, as a beneficial owner or otherwise or in which he was a beneficiary, at any time during such previous year, or disclose any income from a source outside India, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.

"Provided that this section shall not apply in respect of an asset or assets (other than immovable property), where the aggregate value of such asset or assets does not exceed twenty lakh rupees." (inserted w.e.f. 1.10.2024)

Chapter V. Offences & Prosecution

Section 51: Punishment for wilful attempt to evade tax.

(1) If 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, wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and with fine.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

(3) For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person—

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.

Penalties leviable & offences subject to prosecution

Particulars	Penalty
Penalty in respect of tax computed on undisclosed foreign income and asset **{Sec 41}**	03 times the tax amount
*Penalty for non-filing of Return of Income (ROI) under Section 139(1) by an assessee (resident other than NOR) having an undisclosed foreign income or asset **(Sec 42)**	INR 10, 00, 000
*Penalty for non-disclosure or incorrect disclosure in ROI of foreign income or asset **(Sec 43)**	INR 10, 00, 000
Default in tax payment **(Sec 44)**	Equal to the tax amount
Other defaults (as per **Sec 45** of the Act: Failure to answer any questions/sign any statement made by him/attend or produce documents)	INR 50, 000 up to INR 2, 00, 000

*** No penalty shall apply in respect of an asset or assets (other than immovable property) which does not exceed INR 20 lakh.**

Penalties leviable & offences subject to prosecution

Offence	Prosecution
*Willful failure to furnish a return of income (before expiry of AY) in respect of UFIA **(Sec 49)**	Rigorous imprisonment from 6 months to 7 years with fine
*Willful failure to disclose information relating to foreign income and assets in return of income **(Sec 50)**	Rigorous imprisonment from 6 months to 7 years with fine
Willful attempt to evade tax, penalty or interest in relation to UFIA **(Sec 51)**	Rigorous imprisonment from 3 to 10 years with fine
Willful attempt to evade payment of tax, penalty or interest in relation to UFIA **(Sec 51)**	Rigorous imprisonment from 3 months to 3 years with fine
A person who makes false statement in any verification or delivers false account or statement **(Sec 52)**	Rigorous imprisonment from 6 months to 7 years with fine
A person who abets or induces another person to make and deliver false account, statement or declaration **(Sec 53)**	Rigorous imprisonment from 6 months to 7 years with fine

***No prosecution in respect of an asset or assets (other than immovable property) which does not exceed INR 20 lakh.**

Penal provisions for failure to file return/furnish information in relation to foreign assets or income

Case I – Assets legitimate but not reported in ITR

- **Facts** - Certain foreign assets which are fully explained and acquired out of tax paid income – however not reported in the return

- **Consequences:***[Refer FAQ 18, Circular No. 13/2015*]:
  - ➢ Proceedings under BM Act, 2015 will trigger
  - ➢ However, since source will be explained – proceedings should be dropped
  - ➢ Penalty u/s 43 – Rs. 10 lakh for non disclosure to be levied – no penalty if balance account balance is less than Rs. 5 lakh
  - ➢ If non-disclosure is willful – prosecution u/s 50 may also take place

[Caution – Advisable to disclose all foreign assets, otherwise, exposure to BM Act, 2015]

Case II – Assets undisclosed but reported in FA Schedule

- **Facts:** Assets are undisclosed – source not explainable, however, assets are reported in the FA Schedule

- **Consequences:***[Refer FAQ 17, Circular No. 13/2015]:*
  - ➢ Merely reporting of a foreign asset in Schedule FA of the Return does not mean that the source of investment in the asset has been explained
  - ➢ Asset will be considered to be undisclosed asset outside India
  - ➢ Proceedings under BM Act, 2015 will trigger
  - ➢ Unless the source is explained, the asset will be subject to charge under BM Act, 2015
  - ➢ Tax @ 30% plus penalty @ 90%
  - ➢ Other penalty/prosecution provision may also be applicable

Penal provisions for failure to file return/furnish information in relation to foreign assets or income

Section 51: Case law - Srinidhi Karti Chidambaram v. Pr. CCIT, [2018] 99 taxmann.com 181 (Madras), Madras HC]

Facts Assessee did not file details in Schedule FA in return for AY 2016-17. However, after the receipt of notice under section 10(1) of the Black Money Act, a revised return of Income was filed on 21.08.2017 with the foreign asset details mentioned in Schedule FA. Notice u/s 50 was issued for prosecution. Assesse contended that Schedule FA was not filed due to human error committed by CA.

Madras HC Held as under;-

- **An offence under Section 50 cannot be attracted, till the time period for filing a return, under Section 139(5) of the Income Tax Act, is not over.**
- A Section which has a penal consequence has to be read strictly and therefore, the words, "or sub-Section (4) or sub- Section (5) of Section 139" has to be given some meaning and **an offence, under Section 50 of the BM Act, would be attracted, only after the period to file the revised return, under Section 139(5) is over** and if there is a wilful failure to furnish the information of a foreign asset/financial interest in the return. Except in cases, of course, where there is a complete fraud played by the assessee, by filing a false return
- Even in view of FAQ no 18 of Circular No 13/2015, prosecution cannot be launched, but at best, there can only be penal proceedings. **It was also observed that before proceeding with any action, it is the duty of the assessing officer to arrive at a conclusion, as to whether, there is an undisclosed income under Section 2(11)**

Burden of proof on the accused [Section 54 of the BM Act, 2015]

Presumption as to culpable mental state.

54. (1) In any prosecution for any offence under this Act which requires a **culpable mental state** on the part of the accused, **the court shall presume** the existence of such mental state **but it shall be a defence for the accused to prove the fact that he had no such mental state** with respect to the act charged as an offence in that prosecution.

Explanation.-In this sub-section, **"culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.**

(2) For the purposes of this section, **a fact is said to be proved only when the court believes it to exist beyond reasonable doubt** and not merely when its existence is established by a preponderance of probability.

Onus to prove non-culpability beyond reasonable doubt is on the accused

Offences and Prosecution

Section 48

- The provisions are in addition and not in derogation of any other law
- Time barred order u/s 10 cannot be a reason to escape prosecution

Section 55

- The sanction of Pr. CIT/CIT is mandatory
- Pr. CIT/CCIT or CBDT may, suo moto, issue directions/instructions to tax authorities for institution of proceedings

Section 57

- Entries in records/documents in custody of Tax authorities shall be admissible evidence in prosecution proceedings

Note: No defense of reasonable cause for penalty or prosecution unlike Income Tax Act

Compounding of offence committed under BM Act, 2015

There is **no provision for compounding of offences** under the BM Act, 2015

"4. It is clarified that there is no provision for compounding of offences under the newly enacted Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015" *[F. NO.285/90/2013 IT(INV.V)/212 Dated 4-9-2015]*

Liability on persons other than assessee

- BM Act, 2015 imposes **joint and several liability** in respect of any amount payable under this Act on
  - ➢ **Manager** (including a managing director) of a **company** - Section 35,
  - ➢ **Participant** in an **unincorporated body** [Partners, member of AOP or BOI, etc.] – Section 36
  - ➢ **Representative assessee** of deceased person – Section 36

  for any amount due, if the amount is not recoverable from the company/ firm/ AOP BOI.

- The amount can be recovered if the **person was manager/participant at any time during the Financial Year** –

  Whether Financial Year means the year when asset was actually acquired or the year of assessment?

- **Manager of the company and partner of LLP** will **not be held liable** if he proves that **non-recovery cannot be attributed** to any neglect, misfeasance or breach of duty on his part in relation to the affairs of the company/ LLP

- **The Act is silent** on the **liability of partners of the firm other than LLP and members of AOP and BOI** if they prove non-recovery cannot be attributed to their neglect, etc

Whether voluntary disclosure of undisclosed foreign assets and income possible now?

Chapter VI. Tax Compliances – One time

Section 59: Declaration of undisclosed foreign asset.

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 assets

Section 71: Chapter not to apply to certain persons.

The provisions of this Chapter shall not apply—

(a) to any person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974:

Provided that—

(ii) 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 of the Income-tax Act in a previous year and a notice under sub section (2) of section 143 for the assessment year relevant to such previous year or a notice under section 153A or under section 153C of the said Act for an assessment year relevant to any previous year prior to such previous year has not been issued and the time for issuance of such notice has not expired; or

Section 72: Removal of Doubts.

The provisions of this Chapter shall not apply—

(a) to any person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974:

Provided that—

(ii) 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 of the Income-tax Act in a previous year and a notice under sub section (2) of section 143 for the assessment year relevant to such previous year or a notice under section 153A or under section 153C of the said Act for an assessment year relevant to any previous year prior to such previous year has not been issued and the time for issuance of such notice has not expired; or

Whether voluntary disclosure possible now?

1 No option to voluntarily made disclosure under BM Act, 2015 now

2 Further, no option to go the Income Tax Settlement Commission as well

3 Even if the assessee reports prior year undisclosed assets in return now, since source is unexplained, he will be required to pay tax and penalty under BM Act

4 Disclosure in return may however be a defence against the penal provision of section 43, 49, 50

5 Thus, BM Act, 2015 to trigger on black money parked abroad even if the assessee wishes to bring the same back to India

Chapter IV of FA, 2026:
The FAST-DS, 2026

The Foreign Assets of Small Taxpayers' Disclosure Scheme, 2026 ***(FAST-DS 2026)***, brought into force through the Finance Act, 2026, provides a **one-time compliance window** for eligible taxpayers to voluntarily disclose previously unreported foreign assets and foreign income. Designed to address genuine cases of inadvertent non-disclosure while promoting voluntary tax compliance, the Scheme prescribes a structured tax or fee-based settlement mechanism and grants immunity from further penalty and prosecution under the Black Money Act in respect of valid declarations made in accordance with its provisions.

Foundation

130–131

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Short Title and Definitions

Section 130: Short title and commencement.

*(1) This Scheme may be called the **Foreign Assets of Small Taxpayers Disclosure Scheme, 2026**.*

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Section 131: Definitions.

(1) In this Scheme, unless the context otherwise requires, —

(a) "assessee" means a person,-

(i) being a resident in India within the meaning of section 6 of the Income-tax Act, 1961 (43 of 1961) in the previous year, or

(ii) being a non-resident or not ordinarily resident in India within the meaning of clause (6) of section 6 of the said Act in the previous year, who was resident in India either—

(A) in the previous year to which the income referred to in section 4 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015) relates; or

(B) in the previous year in which the undisclosed asset located outside India was acquired;

(b) "assessment" includes reassessment;

*(c) "assessment year" shall have the same meaning as assigned to it in **clause (9) of section 2 of the Income-tax Act, 1961** (43 of 1961);*

Definitions

Section 131: Definitions.

(1) In this Scheme, unless the context otherwise requires, —

(d) "Board" means the Central Board of Direct Taxes constituted under section 3 of the Central Boards of Revenue Act, 1963 (54 of 1963);

(e) "declarant" means a person who files declaration under section [132];

(f) "declaration" means the declaration filed under section [132];

(g) "last date" means such date as may be notified by the Central Government in the Official Gazette;

(h) "prescribed" means prescribed by rules made under this Act;

(i) "previous year" shall have the same meaning as assigned to it in clause (34) of section 2 of the Income-tax Act, 1961 (43 of 1961);

(j) "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;

(k) "undisclosed foreign income" means the total amount of income of an assessee from a source located outside India which was chargeable to tax in India but has not been offered to tax under the Income-tax Act, 1961 (43 of 1961); and

(l) "value of the asset" means the fair market value of the asset determined in such manner as may be prescribed.

(2) Words and expressions used herein and not defined but defined in the Income-tax Act, 1961 (43 of 1961) or the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015) or the Income-tax Act, 2025 (30 of 2025) shall have the meanings respectively assigned to them in those Acts

Section 132-135: Declaration, Amount Payable and Procedure

Section 132: Declaration by Declarant.

Subject to the provisions of this Scheme, any person may make, on or after the date of commencement of this Scheme but on or before the last date, a declaration, for any previous year, in respect of any income or asset referred to in section 133, where —

(a) he has failed to furnish a return under section 139 of the Income-tax Act, 1961 (43 of 1961); or

(b) he has failed to disclose such asset or income, in a return of income furnished by him under the Income-tax Act, 1961 (43 of 1961) before the date of commencement of this Scheme; or

(c) such asset or income has escaped assessment within the meaning of section 147 of the Income-tax Act, 1961 (43 of 1961).

Section 133: Amount payable by Declarant.

The declaration referred to in section 132 may be filed in respect of assets or income as specified in column (2) of the Table below and in respect of such assets or income, the amount payable by the declarant under this Scheme shall be as specified in column (3), subject to the conditions in column (4), of the said Table:

Section 133: Amount payable by declarant

Sl. No.	Type of assets or income	Amount payable	Conditions
1.	(a) Undisclosed asset located outside India; or (b) Undisclosed foreign income.	Aggregate of,– (i) tax at the rate of **thirty per cent**. of the value of the undisclosed asset located outside India as on the 31st March, 2026; (ii) tax at the rate of **thirty per cent**. of the undisclosed foreign income; and (iii) an amount equal to **one hundred per cent**. of tax determined in clauses (i) and (ii).	The aggregate value of the undisclosed asset located outside India and the undisclosed foreign income does not exceed **one crore rupees.**
2.	(a) <u>Asset located outside India acquired from income accruing or arising outside India</u>, by an assessee, during the period in which such assessee was a non-resident, but such assets were not declared by him in the relevant Schedule in the return of income on becoming a resident; or (b) <u>asset located outside India acquired from income which has been offered to tax</u> under the Income-tax Act, 1961 (43 of 1961) by the assessee, but such assets were not declared by him in the relevant Schedule in the return of income.	A fee of **one lakh rupees**.	The value of the asset located outside India does not exceed **five crore rupees**.

Manner and Procedure

Section 134: Manner of making declaration.

(1) *A declaration under section [132] shall be made complete in all respects to the prescribed income-tax authority, in such form and shall be verified in such manner, as may be prescribed.*

(2) *The verification referred to in sub-section (1) shall be made electronically, so as to verify that —*

- (a) *the assessee making the declaration is an eligible assessee; and*
- (b) *the declaration of income or assets is in accordance with the provisions of this Scheme.*

(3) *The declaration made under sub-section (1) shall be deemed to be invalid, if—*

- (a) *any material particular furnished in the declaration is found to be false at any stage; or*
- (b) *the declarant violates any of the conditions referred to in this Scheme.*

Manner and Procedure

Section 135: Procedure relating to manner of payment.

(1) After electronic verification of the declaration as specified in sub-section (2) of section [134], the amount payable by the assessee shall be communicated electronically, within a period of one month from the end of the month in which the declaration is made, by way of an order in such form and manner, as may be prescribed.

(2) The assessee shall pay the amount determined under sub-section (1) within a period of two months from the end of the month in which the order referred to in the said sub-section was received by him and the payment shall be made in such manner, as may be prescribed.

(3) Where the assessee fails to pay the amount determined under sub-section (1) or any part thereof within the period specified in sub-section (2), the assessee may pay such amount within a further period not exceeding two months, along with simple interest at the rate of one per cent. for every month or part of a month on such amount.

(4) The assessee shall, upon making the payment under sub-section (2) or sub-section (3), as the case may be, intimate the details of such payment to the prescribed income-tax authority, in such form and manner, as may be prescribed, within the extended period specified in sub-section (3).

(5) Upon receipt of the intimation referred to in sub-section (4), where the intimation is in accordance with the order under sub-section (1), an order certifying the payment of the amount as per the declaration, shall be communicated electronically to the assessee, in such form and manner, as may be prescribed, within one month from the end of the month of receipt of such intimation.

(6) Every order made under sub-section (5) shall be conclusive as to the matters stated therein.

Tax treatment, Finality, Non-refundable and Immunity

Section 136: Any income or asset declared not to be included in total income.

The income or the amount of investment in an asset, which has been declared in the manner provided in section 134 shall not be included in the total income of the declarant for any assessment year under the Income-tax Act, 1961 (43 of 1961) or the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015), if the declarant makes the payment of amount referred to in section 135 within the extended period specified in sub-section (3) of the said section.

Section 137: Any income or asset declared not to affect finality of completed assessments.

In respect of income or asset declared or any amount paid thereon, the declarant shall not be entitled to claim for rectification or revision of any assessment made under the Income-tax Act, 1961 (43 of 1961) or the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015) or claim any set off or relief in any appeal, reference or other proceeding in relation to any such assessment.

Section 138: Amount paid in pursuance of declaration non-refundable.

(1) No amount paid under section [135] in pursuance of a declaration made in the manner provided in section [134] shall be refundable.

Section 139: Grant of immunity from penalty and prosecution.

(1) Notwithstanding anything contained in the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015), a declarant who makes a valid declaration under this Scheme and pays any amount, whether as tax, fee or otherwise, as the case may be, in accordance with the provisions of this Scheme, shall be granted immunity from the levy of any further tax or penalty and also from prosecution under the said Act in respect of income or asset so declared, for the previous year ending on the 31st March, 2026 or any earlier previous year.

Ineligible persons, Void declarations, Rules, Directions and Difficulties

Section 140: Non-applicability of scheme.

The provisions of this Scheme shall not apply in respect of—

(a) any income or asset which represents, directly or indirectly, proceeds of crime in respect of which proceedings have been initiated, or pending under the Prevention of Money-laundering Act, 2002 (15 of 2003); or

(b) any income or asset relating to an assessment year for which assessment proceedings have been completed under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015).

Section 141: Effect of declaration on pending assessment proceedings

Where a declaration of any income or asset is made under this Scheme and assessment proceedings under the Income-tax Act, 1961 (43 of 1961) or the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015) are pending in respect of such income or assets, the Assessing Officer shall take such declaration into account while finalising such assessment order.

Section 142: Power of Board to issue directions, etc.

(1) The Board may, from time to time, issue such directions or orders to the prescribed income-tax authorities, as it may deem fit:

(2) Without prejudice to the generality of the foregoing power, the Board may, if it considers necessary or expedient so to do, for the purposes of this Scheme, including collection of revenue, issue from time to time, general or special orders in respect of any class of cases, setting forth directions or instructions as to the guidelines, principles or procedures to be followed by the prescribed income-tax authorities in any work relating to this Act, including collection of revenue and issue such order, by way of relaxation of any provision of this Chapter or otherwise, if the Board is of the opinion that it is necessary in the public interest so to do.

Power to make Rules and Difficulties

Section 143: Power to make rules.

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Scheme.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

- (a) the form in which a declaration may be made and the manner of its verification under sub-section (1) of section 134;
- (b) the form and manner in which order shall be passed under sub-section (1) of section 135;
- (c) the manner of making payment under sub-section (2) of section 135;
- (d) the form and manner of intimation of payment under sub-section (4) of section 135;
- (e) the form and manner in which the order certifying the payment shall be communicated under sub-section (5) of section 135;
- (f) the manner of calculating the value of the asset under this Scheme;
- (g) the manner of calculating the amount payable under this Scheme;
- (h) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules for carrying out the provisions of this Scheme.

(3) Every rule made by the Central Government under this Scheme shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Difficulties

Section 144: Power to remove difficulties.

(1) *If any difficulty arises in giving effect to the provisions of this Scheme, the Central Government may, by order, not inconsistent with the provisions of this Scheme, remove the difficulty.*

(2) *No order under sub-section (1) shall be made after the expiry of period of two years from the date on which provisions of this Scheme come into force.*

(3) *Every order made under sub-section (1) shall, as soon as may be after it is made, be laid before each House of Parliament.*

Retrospective levy in respect of undisclosed assets located outside India

Retrospective charge in respect of undisclosed asset located outside India

- **Undisclosed foreign income** is **chargeable** to tax in the relevant **previous year** to which **it pertains**

- **Undisclosed foreign asset** is **chargeable** to tax in the **year in which comes to the notice of the AO and the AO issues notices.** Thus, any undisclosed asset located outside acquired prior to 01.07.2015, can be subject to charge of tax u/s 3 of the BM Act, 2015 *(even if the asset is not held in the year in which notice is issued)*:

Retrospectivity in respect of undisclosed asset located outside India can be gathered from following

- **Section 72(c)** – *"For the removal of doubts, it is hereby declared that— (c) 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."*
- **Proviso to section 3** – *"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"*
- **Section 4(c)** – "Subject to the provisions of this Act, the total undisclosed foreign income and asset of any previous year of an assessee shall be (c) the value of an undisclosed asset located outside India."
- **FAQ No. 20 and 29 of Circular No. 13/2015** - **Undisclosed asset held prior to 01.07.2015 can be taxed even if such assets are not held on or after the date of commencement of Act**
- **FAQ No. 14, 15 of Circular No. 13/2015** - Undisclosed asset held prior to 01.07.2015 can be taxed after commencement of Act
- **Rule 3(2)** provides for **valuation mechanism** where **asset** is **sold prior to valuation date**

Relevant FAQ's that provides that levy in respect of undisclosed asset is retrospective

Question No.14: What are the consequences if no declaration under Chapter VI of the Act is made in respect of undisclosed foreign assets acquired prior to the commencement of the Act?

Answer: As per section 72(c), where any asset has been acquired prior to the commencement of the Act and no declaration under Chapter VI of the Act is made then such asset shall be deemed to have been acquired in the year in which it comes to the notice of the Assessing Officer and the provisions of the Act shall apply accordingly.

India is expected to start receiving information through Automatic Exchange of Information (AEOI) route under FATCA from USA later in the year 2015. Further, under the multilateral agreement India will start receiving information from other countries under AEOI route from 2017 onwards. As at 18th March 2015, 58 jurisdictions (including India) have committed to share information under AEOI by 2017 and 36 jurisdictions have committed to share by 2018, including jurisdictions which have beneficial tax regime. The multilateral agreement is expected to cover all the countries in the near future. The information under the AEOI will include information of controlling persons (beneficial owners) of the asset. **The possibility of discovery of an undisclosed asset may arise at any time in the future; say for example, information of an immovable property can be unearthed if any utility bills/property tax or even gardener's/ caretaker's salary has been paid through an existing or closed bank account. Therefore, if any information of an undisclosed foreign asset acquired earlier, say in the year 1975, for $ 100,000 comes to the notice of an Assessing Officer later, say in the year 2020, when its value becomes, say, $ 5 Million, the liability under the Act amounting to 120 percent of the fair market value of the asset on the valuation date may arise in the year 2020, besides prosecution and other consequences. In this case if the valuation date is in the year 2020 the amount of tax and penalty under the Act will be $ 6 Million.**

Relevant FAQ's that provides that levy in respect of undisclosed asset is retrospective

Question No. 20: A person held a foreign bank account for a limited period between 1994-95 and 1997-98 which was unexplained. Since **such account was closed in 1997-98** does he need to declare the same under Chapter VI of the Act?

Answer: Section 59 of the Act provides that the declaration may be made of any undisclosed foreign asset which has been acquired from income which has not been charged to tax under the Income Tax Act. Since the investment in the bank account was unexplained and was from untaxed income the same may be declared under Chapter VI of the Act . **The consequences of non-declaration may arise under the Act at any time in the future when the information of such account comes to the notice of the Assessing Officer**

Question No. 29: Whether for the purpose of declaration, **the undisclosed foreign asset should be held by the declarant on the date of declaration?**

Answer: No, there is no such requirement. The declaration may be made if the foreign asset was acquired out of undisclosed income even if the same has been disposed off and is not held by the declarant on the date of declaration.

Retrospective application subject to challenge

Article 20 in The Constitution Of India reads as under:

"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"

BM Act, 2015 Act has penal consequences and convictions - retrospectivity of BM Act, 2015 may be challengeable under Article 20 of the Constitution of India dealing with Ex-Post Facto Laws for far it intends to cover offences committed prior to 01.07.2015

Some pressing issues coming from latest judgements

[2024] 466 ITR 1 (Kar) — 2024 (6) TMI 943

Smt. Dhanashree Ravindra Pandit v. Income Tax Dept.

KARNATAKA HIGH COURT

Order Date: June 7, 2024

Aligned Facts

- **Pre-Act Setup:** BVI company and offshore bank account (UBS, Singapore) were established back in **2008–2009**.
- **Absolute Closure:** Offshore accounts were closed, and BVI companies were fully dissolved/struck off by **November 2010**.
- **Post-Facto Law:** The Black Money Act (BMA) was enacted on **01-07-2015**—five years after all assets ceased to exist.
- **Prosecution Trigger:** Criminal prosecution under BMA Sec. 50 & 52 was launched in 2019 for the closed 2008-10 transactions.

Issues Involved

- **1. Article 20 Violation:** Does criminal prosecution under the BMA for assets closed long before the Act's enactment violate the ex post facto bar in Article 20(1)?
- **2. Section 72(c) Legality:** Can the statutory deeming fiction of Section 72(c) be legally extended to retroactively construct criminal liability for pre-Act events?
- **3. Fundamental Right Primacy:** Does statutory tax legislation override Chapter III constitutional guarantees against retrospective criminalization?

Decision

Criminal Complaints Quashed as Unconstitutional

- **Article 20 Bar Upheld:** The Court ruled criminal liability cannot be retrospectively imposed by subsequent laws for conduct that was lawful when committed.
- **Deeming Fiction Limited:** Deeming provisions under Section 72(c) cannot be stretched to manufacture ex post facto offenses.

Special Leave to Appeal (Crl) No. 11016/2024

Income Tax Dept. v. Dhanashree Ravindra Pandit

SUPREME COURT OF INDIA

Order Date: August 23, 2024

Aligned Facts

- **BMA Prosecutions:** Criminal prosecution initiated against the assessees under the Black Money Act (BMA), 2015.
- **Retrospective Trigger:** BMA **Section 72(c)** deems undisclosed foreign assets acquired pre-2015 as "acquired in the year of notice issue," triggering retroactive penal actions.
- **HC Intervention:** Karnataka HC (2024 (6) TMI 943) quashed the prosecution, holding that retroactive criminal liability is unconstitutional.

Issue Involved

- **Article 20 Clash:** Does criminal prosecution under the deeming fiction of Sec 72(c) for pre-Act offshore assets violate **Article 20** (protection against retrospective penal laws)?
- **Judicial Scope:** Did the High Court exceed its jurisdictional limits by "obliterating" a crime without a formal vires challenge to Sec 72(c)?

Supreme Court order

High Court's Article 20 Observation Strictly Stayed

- **Paragraph 15 Stayed:** The SC explicitly stayed the portion of the HC order holding that prosecution under Section 72(c) falls foul of Article 20.
- **Prosecution Restored:** This interim stay effectively revives the criminal machinery under the Black Money Act pending final disposal.
- **Merits Reserved:** SC recorded the lack of a formal constitutional challenge to Sec 72(c), granting leave.

BMA Nos.: 7, 8, 9, 10 & 11/CHNY/2024

Smt. Elangovan Malarmangai v. Addl. CIT

ITAT CHENNAI BENCH

Order Date: April 30, 2025

Relevant Facts

- **Search Action:** A search u/s 132 of the Income Tax Act was conducted on **13.07.2016** at her residential property.
- **Singapore Assets:** AO alleged undisclosed investments in 2 apartments (#06-02 and #09-02) at **93, Meyer Road, Singapore**.
- **Non-Disclosure:** Foreign assets & bank accounts were omitted from original & post-search returns.
- **Section 10 Notice:** Notice u/s 10(1) of the Black Money Act was issued on **21.03.2020**. Assessment completed on 24.03.2022 for **A.Y. 2017-18**.

Issue Involved

- **The Jurisdictional Timing:** Whether a Black Money Act assessment can be legally framed for A.Y. 2017-18 when the notice u/s 10(1) was issued on 21.03.2020 (falling in F.Y. 2019-20 / A.Y. 2020-21).
- **Search Date vs. Deeming Fiction:** Whether the CIT(A) erred in treating A.Y. 2017-18 as valid simply because search occurred on 13.07.2016, ignoring the specialized deeming rules under Section 72(c).

ITAT Pronouncement

Assessment Quashed as Bad in Law & Void Ab Initio

- **Notice Date Deeming Fiction:** Under BMA Sec. 3, 10, & 72(c), undisclosed pre-act assets are deemed acquired strictly in the financial year the Section 10(1) notice is issued.
- **Correct Assessment Year:** Since notice was issued on 21.03.2020, the correct year is A.Y. 2020-21, not A.Y. 2017-18.
- **Precedents Applied:** Followed PCIT v. ITSC (Guj) and Anandi Kaushik Laijawala (Mum ITAT)

BLACK MONEY ACT, 2015 — Assessment year u/s 3(1), virtual assets taxability, and penalty on disclosure failure

BMA Nos. 1 to 3/PUN/2024 (ITAT Pune)

ITAT PUNE "B" BENCH

Order Date: December 4, 2025

Shaista Suhel Patanwala v. ADIT (Inv.)

I. Foreign Asset (Timing)

- **Aligned Facts:** Credits of **₹86,80,289** hit the Westpac Bank account (Fiji) during F.Y. 2016-17 (A.Y. 2017-18) between 13.01.2017 to 31.01.2017. AO received information about the account on **24.10.2017** (A.Y. 2018-19).
- **The Legal Issue:** Whether an undisclosed foreign asset can be taxed in A.Y. 2017-18 when it came to the AO's notice only in A.Y. 2018-19.
- **Decision:** BMA Sec 3(1) Proviso mandates undisclosed foreign assets are charged to tax in the previous year in which they **come to the notice of the AO** i.e. AY 2018-19 and not AY 2017-18.Consequent penalty also deleted

ADDITION & PENALTY DELETED

II. Citus of Bitcoin Profit

- **Aligned Facts:** Assessee made a profit of **₹6,99,010.2** from Bitcoin trading. Transactions were routed entirely through the undisclosed Westpac bank account in Fiji.
- **The Legal Issue:** Whether profits on virtual assets (Bitcoins) are "undisclosed foreign income" under BMA, given that the e-wallet owner resides in India.
- **Decision:** Since the trading was operated through an undisclosed overseas bank account, thus the income is **foreign-sourced**. Also, no deductions u/s 5(1) are permissible. Consequent penalty upheld

INCOME & 300% PENALTY UPHELD

III. Penalty on Disclosure Failure

- **Aligned Facts:** Assessee completely omitted the Westpac (Fiji) Bank Account details and Bitcoin trading profits from **Schedule FA** of her Indian Income Tax Return (ITR).
- **The Legal Issue:** Whether the Section 43 statutory penalty of ₹10 Lakhs is triggered for omission of foreign assets/income from standard ITR filings.
- **Decision:** Under Sec 43 of BMA, failing to furnish details or providing inaccurate particulars of offshore assets/income in Indian ITR triggers a **strict statutory penalty**.

₹10.00 LAKH PENALTY CONFIRMED

Forms Prescribed

Form	Particulars
1 (Rule 5)	Notice of demand
2 (Rule 6(1))	Form of appeal to Commissioner/Designation of the Commissioner (Appeals)
3 (Rule 7(1))	Form of appeal to the Appellate Tribunal
4 (Rule 7(2))	Form of memorandum of cross-objections to the Appellate Tribunal
5 (Rule 8)	Certificate u/s 31 or 33 of the B.M. Act, 2015
6 (Rule 9(1))	Form of declaration of undisclosed asset located outside India u/s 59 of B. M. Act, 2015
7 (Rule 9(2))	Acknowledgment of declaration of undisclosed foreign asset under Chapter VI of B. M. Act, 2015

Some Posers

- Person becoming non-resident in F.Y. 15-16 or later but having foreign asset when he was resident of India
- A person is a resident now. However, he was non- resident earlier when he had acquired foreign assets (which he continues to hold now) out of the income which was not chargeable to tax in India.
- Where a person was non-resident when he acquired foreign assets from income which was accrued or received in India, and thus chargeable to tax in India, but not disclosed in the return of income, or he has not filed a return.
- A resident earned income outside India which has been deposited in his foreign bank account. The income was charged to tax in the foreign country when it was earned, but the same was not declared in the return of income in India, and consequently, was not taxed in India. ***Will he get credit for foreign taxes paid?***
- Where a person voluntarily declares 2 out of 3 undisclosed foreign assets, will he get immunity from the Black Money Taxation Act in respect of 2 assets declared?
- Bank accounts/investments of Indian students studying abroad

Some Posers

- Sec. 4(2): Income increased under Sec. 29- 43C, 57-59 & 92C of I.T. Act shall be taxed only under I.T. Act and not under B.M. Act.
- Foreign assets held in past, now not existing but noticed by Dept. in future - are they covered or required to be declared
- A person hold foreign assets which are fully explained and acquired out of tax-paid income. However, he has not reported these assets in the income-tax return in the past.
- Foreign assets held in past, now not existing but noticed by Dept. in future - are they covered
- Capital gains chargeability on declared asset which is later sold – FMV shall be treated as cost for computing CG clarified by Board

Screenshot of Form 6

Form 6

Tax compliance for undisclosed foreign asset

[See rule 9(1)]

Form of declaration of undisclosed asset located outside India under section 59 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

To,

The Principal Commissioner/Commissioner

……………………………………

Sir/ Madam,

I hereby make a declaration under section 59 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015. I give below the necessary particulars:-

1. Name of the declarant ……………………………………………………………
2. Address: Office……………………………………………………………………

   ……………………………………………………………………………………

   E-mail……………………………………Telephone No………………………

   Residence……………………………………………………………………………

   ……………………………………………………………………………………

   E-mail……………………………………Telephone No………………………

3. Permanent Account Number (PAN) ……………………………
   (In case PAN is not held, please apply for PAN and quote here)
4. Original/Revised declaration ……………………………
   (If Revised provide date of filing original declaration)
5. Status of the declarant
   (a) State whether individual, HUF, firm, company etc.

   ……………………………………

   (b) State whether Resident/Non-Resident/Not ordinarily resident ……………………………
6. Whether any Income-tax return has been filed? Yes/No. If Yes provide the following details
   (a) Asst. Year for which last return filed ……………………
   (b) Assessing Officer before whom filed, if above return filed in paper form ……………………
7. Statement of undisclosed asset located outside India (as per annexure)

Screenshot of Form 6

8. Total amount of declaration of undisclosed asset located outside India Rs.........................

9. Tax payable thereon (@ 30% of item 8) Rs.........................

10. Penalty payable thereon (@ 30% of item 8) Rs.........................

11. Tax paid, if any, on or before the date of declaration Rs.........................

(Attach proof of payment and provide details below)

Sl	BSR Code of Bank	Date of Deposit (DD/MM/YYYY)	Serial Number of Challan	Amount (Rs)
(1)	(2)	(3)	(4)	(5)
i				
ii				

12. Balance tax payable...

VERIFICATION

I...son/daughter/wife of Shri...
(Full name in block letters) (name of father/husband)
solemnly declare that-

(a) the information given in this declaration is correct and complete to the best of my knowledge and belief;

(b) my own undisclosed foreign asset and also any undisclosed foreign asset of other persons in respect of which I am chargeable to tax and income accruing or arising from assets held by me through any other person, for which I had failed to furnish a return under section 139 of the Income-tax Act, 1961/which I had failed to disclose in a return of income furnished by me before the commencement of the Act/which has otherwise escaped assessment, has been disclosed in this declaration;

(c) the provisions of section 71(a) in respect of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 are not applicable to me;

(d) the provision of section 71(b) in respect of Indian penal Code, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Unlawful Activities (Prevention) Act, 1967, the Prevention of Corruption Act, 1988 are not applicable to me;

(e) the undersigned has not been notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992;

(f) the asset declared has not been acquired from income chargeable to tax under the Income-tax Act for any previous year relevant to assessment year,-

(i) where a notice under section 142 or sub-section (2) of section 143 or section 148 or section 153A or section 153C of the Income-tax Act has been received in respect of such assessment year and the proceeding is pending before the Assessing Officer;

(ii) 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 of the Income-tax Act in a previous year and a notice under subsection (2) of section 143 of the said Act for the assessment year relevant to

Screenshot of Form 6

such previous year or a notice under section 153A or under section 153C of the said Act for an assessment year relevant to any previous year prior to such previous year has not been received and the time for issuance of such notice has not expired.

I further declare that I am making this declaration in my capacity as...
(designation)

and that I am competent to make this declaration and verify it.

....
(Signature)

Place......................

Date.......................

* Score out whichever is not applicable.

Chapter VII: General

Section 73: Agreement with foreign countries or specified territories.

- The Central Government may enter into an agreement with the foreign countries or specified territories [Section 73] :

  - For **exchange of information** for prevention of tax evasion or avoidance on undisclosed foreign income chargeable under this Act or law in the corresponding country
  - For **investigation cases** involving such tax evasion or avoidance
  - For **recovery of tax** under this Act

- **There is no provision granting relief against double taxation of income** under BM Act, 2015 and corresponding law in foreign jurisdiction
- **No credit of foreign taxes paid shall be allowable in India** against the tax payable under BM Act, 2015[FAQ No. 26 Circular No 13/15, FAQ No. 3 Circular No 15/15]

Recap and Takeaway

Recap

- BM Act, 2015 applicable from 01.07.2015 (earlier was applicable from 01.04.2016 – AY 2016-17 onwards]
- **Initially** – Act was made **applicable to residents**
- Vide Finance (No.2) Act, 2019, **extended** to certain **NR or RONOR** – retrospectively extended
- Charge under the BM Act, 2015 is on "**undisclosed foreign income and assets**"
- "Undisclosed foreign income and assets" **includes (1) undisclosed income from source outside India** and **(2) undisclosed asset located outside**
- **Undisclosed asset held even prior to AY 2016 -17 can be taxable under BM Act. 2015** in the year in which the same comes to the notice of the AO
- **Undisclosed income from source outside India prior to AY 2016-17 should not be covered** within the ambit of BM Act, 2015 but should be chargeable under IT Act
- However, if **undisclosed income** is **earned prior to AY 2016-17 and is transferred in foreign bank account** in the relevant years, the **same can then get taxable under BM Act, 2015** when the existence of bank account comes to the notice of the AO

Recap

- In case undisclosed income was already **assessed under IT Act prior to AY 2016-17**, while computing the value of foreign bank account or foreign asset, the income assessed under IT Act will be reduced and accordingly will not be again taxable under BM Act
- Undisclosed income and assets post 01.07.2015 are to be taxable under BM Act, 2015 only and not under IT Act
- The undisclosed foreign income and asset taxable **under BM Act, 2015** to be **excluded** from total income **under the Income-tax Act**
- **No tax credit, offset,** deduction, etc. available while computing income/tax under BM Act, 2015
- Tax @ 30% u/s 3 plus penalty @ 90% u/s 41 – **Aggregate levy 120% -** ***No surcharge or cess***
- **Prosecution** –upto 10 years – **offence not compoundable**
- **Prosecution for upto 7 years for not furnishing details of foreign asset in ITR along with penalty of 10 lakhs**
- **Wilful evasion of tax u/s 51 entails prosecution for upto 10 years – offence also a scheduled offence under PMLA**
- **No settlement route** available under BM Act, 2015
- One time disclosure window was available upon introduction of the BM Act, 2015 – 30% tax and 30% penalty (immunity under 5 Act – IT Act, Wealth Tax FEMA, Companies Act and Customs) – no voluntary compliance option anymore

Key Takeaways

- **Proceedings under BM Act, 2015 pursued with increasing pace** - The Income Tax department has issued notices under BM Act, 2015 in **422 cases** involving undisclosed assets and **income of over Rs 12,600 crore till December 2019** [Parliament was informed on 11.02.2020 by Anurag Singh Thakur, Minister of State for Finance - *Source* – *Economic Times*]

- The implications of the BM Act, 2015 are far reaching. To mitigate risk, **action points would be as under:**

  - **Residence status in ITR:** To file the status of residence as ROR, RNOR or NR in the ITR very carefully after ensuring the number of days one is in India from the passport [*Advisable to include both day of departure and day of arrival both*]

  - **Disclosure:** Ensure that if the status of residence is that of ROR – declare all foreign assets in the ITR and FA Schedule

  - **Time for disclosure -** The disclosure should preferably be made in ITR u/s 139(1) – in any case, the disclosure should be made before the end of the relevant AY u/s 139(4) or 139(5)

  - **Tax to be paid:** Ensure that taxes are duly paid in respect of any foreign sourced income or asset [if source of any foreign asset is unexplainable, the same will be covered under the BM Act, 2015 as against Income Tax Act]

  - **Documentation -** Ensure that proper documentation is in place to explain the source of foreign asset/income before AO

Interplay of Income Tax, Black Money, PMLA and FEMA

Interplay of Income Tax, Black Money, PMLA and FEMA

Resident acquires immovable property outside India in FY 2005-06 for USD 10 Million

Property is bought from funds which were to be received on account of some services rendered overseas – money diverted to purchase property

No tax is paid in respect of the income which was diverted to acquire property

Property was never disclosed in ITR subsequently

Rental income is earned on the property from FY 2005-06 – FY 2020-21 - not offered to tax in India as well

Information regarding such immovable property comes to the attention of the AO in AY 2021-22

Income Tax

Black Money

PMLA

FEMA

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

Prevention of Money Laundering Act, 2002 (‘PMLA, 2002’)

Preamble of PMLA, 2002

PREAMBLE

An Act **to prevent money-laundering** and **to provide for confiscation of property derived from**, or involved in, **money-laundering** and for matters connected therewith or incidental thereto.

Offence of money–laundering [Section 3]

Offence of money-laundering.

3. Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the **proceeds of crime** including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of **offence of money-laundering.**

Explanation.-For the removal of doubts, it is hereby clarified that,-

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:-

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property, in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.]

Definitions - Proceeds of crime and Scheduled offence

Section 2 - Definitions

(u) **"proceeds of crime"** means **any property derived or obtained**, directly or indirectly, by any person **as a result of criminal activity relating to a scheduled offence** or the value of any such property **or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;**

Explanation.-For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;

(y) **"scheduled offence"** means-

(i) the offences specified under **Part A of the Schedule**; or

(ii) the offences specified under **Part B of the Schedule** if the total value involved in such offences is one crore rupees or more; or

(iii) the offences specified under **Part C of the Schedule;**

Key offences under Schedule to PMLA

Part A

Section	Description of offence
	Offences under the Indian Penal Code
419	Punishment for cheating by personation.
420	Cheating and dishonestly inducing delivery of property.
421	Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors
422	Dishonestly or fraudulently preventing debt being available for creditors.
423	Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.
423	Dishonest or fraudulent removal or concealment of property.

Key offences under Schedule to PMLA (cont..)

Part A

Section	Description of offence
Offences under the Prevention of Corruption Act, 1988	
7	Public servant taking gratification other than legal remuneration in respect of an official act.
8	Taking gratification in order, by corrupt or illegal means, to influence public servant.
9	Taking gratification for exercise of personal influence with public servant.
10	Abetment by public servant of offences defined in section 8 or section 9 of the Prevention of Corruption Act, 1988.
13	Criminal misconduct by a public servant.
Offences Under The Securities And Exchange Board Of India Act, 1992	
12A read with section 24	Prohibition of manipulative and deceptive devices, insider trading and substantial.
24	Acquisition of securities or control.

Key offences under Schedule to PMLA (cont..)

Part A

Section	Description of offence
	Offences under the Customs Act, 1962
135	Evasion of duty or prohibitions
	Offences under the Copyright Act, 1957
63	Offence of infringement of copyright or other rights conferred by this Act.
63A	Enhanced penalty on second and subsequent convictions.
63B	Knowing use of infringing copy of computer programme.
68A	Penalty for contravention of section 52A.

Key offences under Schedule to PMLA (cont..)

Part A

Section	Description of offence
Offences Under the Trade Marks Act, 1999	
103	Penalty for applying false trademarks, trade descriptions, etc.
104	Penalty for selling goods or providing services to which false trademark or false trade description is applied.
105	Enhanced penalty on second or subsequent conviction.
107	Penalty for falsely representing a trademark as registered.
120	Punishment of abetment in India of acts done out of India
Offences under the Information Technology Act, 2000	
72	Penalty for breach of confidentiality and privacy
75	Act to apply for offence or contravention committed outside India

Key offences under Schedule to PMLA (cont..)

Part A

Section	Description of offence
Offences under the Environment Protection Act, 1986	
15 read with section 7	Penalty for discharging environmental pollutants, etc., in excess of prescribed standards.
15 read with section 8	Penalty for handling hazardous substances without complying with procedural safeguards.
Offences under the Water (Prevention and Control of Pollution) Act, 1974	
41(2)	Penalty for pollution of stream or well
42	Penalty for contravention of provisions of section 24.
Offence under The Companies Act, 2013	
447	Punishment for fraud

Key offences under Schedule to PMLA (cont..)

Part B

Section	Description of offence
Offences under the Customs Act, 1962	
132	False declaration, false documents, etc

Key offences under Schedule to PMLA (cont..)

Part C

An offence which is the **offence of cross border implications** and is specified in,—

- Part A; or
- the offences against property under Chapter XVII of the Indian Penal Code (45 of 1860).
- The **offence of wilful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money** (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (22 of 2015)

"**Offence of cross border implications**", means—

(i) any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person transfers in any manner the proceeds of such conduct or part thereof to India; or

(ii) any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India.

Explanation.—Nothing contained in this clause shall adversely affect any investigation, enquiry, trial or proceeding before any authority in respect of the offences specified in Part A or Part B of the Schedule to the Act before the commencement of the Prevention of Moneylaundering (Amendment) Act, 2009 (21 of 2009);

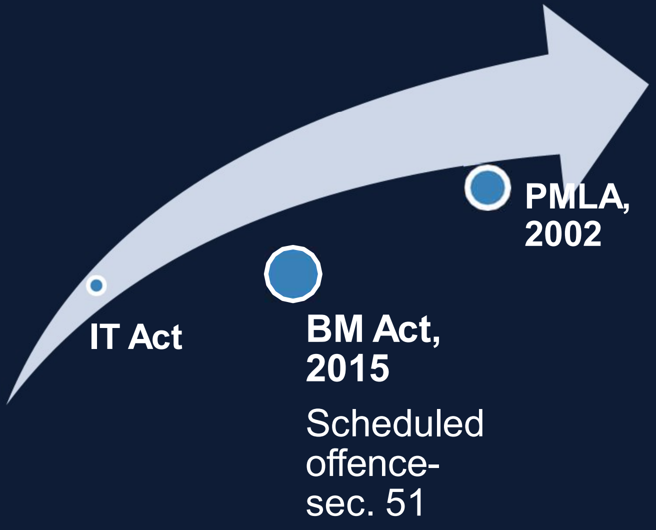
Interplay of PMLA, 2002 and BM Act, 2015

- PMLA, 2002 came into force w.e.f 1st July 2005
- **Under PMLA, 2002,** the scheduled offences are investigated and prosecuted
- Under PMLA Act, 2002, punishment is **rigorous Imprisonment for 3 years to 7 years with fine** [Section 4].
- In case of an offence under the Offences Under The Narcotic Drugs And Psychotropic Substances Act, 1985, listed in Paragraph 2 of Part A of the Schedule, the punishment is **rigorous imprisonment for 3 years to 10 years with fine** [Section 4]
- Additionally, **proceeds of crime** are liable for **confiscation**
- Offence of willful evasion of tax, penalty or interest u/s 51 of BM Act, 2015 is an **offence of money laundering under Part C of the Schedule to PMLA, 2002**
- There are no provisions under either law to preclude the punishment under one statute when it is dealt within the other statute

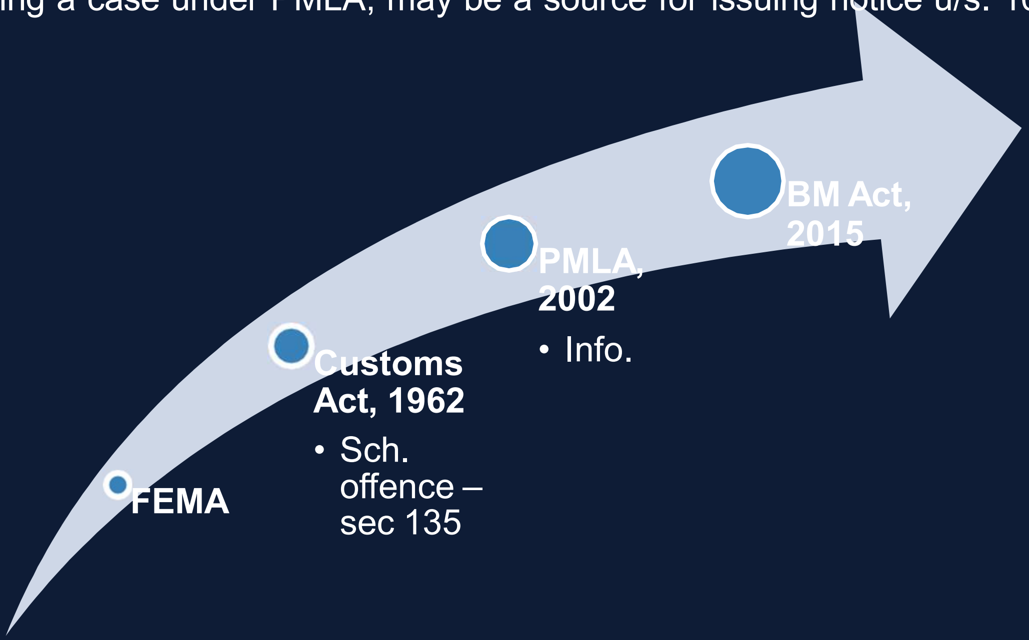
Interplay of PMLA, 2002 and BM Act, 2015

The interplay between PMLA, 2002 and BM Act, 2015 can be, inter-alia, as under:

- **Case I -** As the offence u/s. 51 of BM Act, 2015 is a Scheduled Offence under PMLA, 2002, the investigation under BM Act, 2015 may lead to an investigation under PMLA, 2002; or
- **Case II -** Information gathered by authorities while investigating a case under PMLA, may be a source for issuing notice u/s. 10 of BM Act, 2015

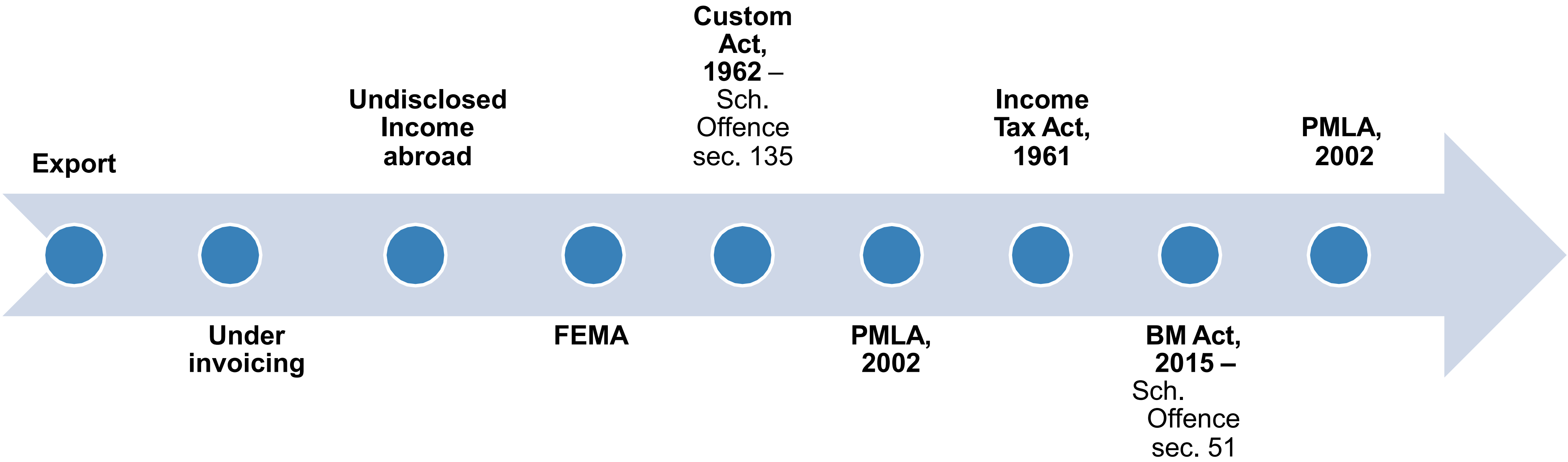


CASE-I



CASE-II

Interplay of PMLA, 2002 and BM Act, 2015



Fugitive Economic Offenders Act, 2018

Fugitive Economic Offenders Act, 2018

- An Act to provide for **measures to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts**, to preserve the sanctity of the rule of law in India and for matters connected therewith or incidental thereto.

- **"Fugitive economic offender"** means any individual **against whom a warrant for arrest in relation to a Scheduled Offence has been issued** by any Court in India, **who**— (i) **has left India** so as **to avoid criminal prosecution**; or (ii) **being abroad, refuses to return to India** to face criminal prosecution;

- **"Scheduled Offence"** means an **offence specified in the Schedule**, if the **total value** involved in such offence or offences **is one hundred crore rupees or more;**

- Clause XIII of the Schedule lists offence of **willful evasion of tax u/s 51 of BM Act, 2015 as a Scheduled offence**

- Special Court may **attach** (a) the **proceeds of crime in India or abroad**, whether or not such property is owned by the fugitive economic offender; and (b) **any other property or benami property in India or abroad**, owned by the fugitive economic offender.

- The provisions of this Act shall be in addition to and not in derogation of any other law for the time being in force

Permissible and non permissible foreign exchange transactions under FEMA

Restrictions on dealing in foreign exchange, etc. [Section 3]

3. **<u>Save as otherwise provided in this Act, rules or regulations</u>** made there under, or with the general or special permission of the Reserve Bank, **no person shall-**

(a) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person;

(b) make any payment to or for the credit of any person resident outside India in any manner;

(c) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner;

Explanation.-For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of aright to acquire, <u>any asset outside India by any person.</u>

Explanation.-For the purpose of this clause, "financial transaction" means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

Restrictions on holding foreign exchange, foreign security, immovable property [Section 4]

Holding of foreign exchange, etc.

4. Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

Examples of Foreign Assets that can be legally held by resident under FEMA

1	**Assets acquired overseas as a NR**	**Assets** (shares/securities, immovable properties and foreign currency) **which were acquired at time when a person was resident outside India can be continued to be held** even after he turns resident [Section 6(4)]
2	**Inheritance**	Residents can **inherit assets outside India from a person resident outside India** [Section 6(4)]
3	**Liberalized Remittance Scheme ('LRS')**	Resident individual may hold **assets abroad acquired from LRS**
4	**Overseas Direct Investments (ODI) Guidelines**	Resident may hold **assets abroad acquired** under Overseas Direct Investments **(ODI) Guidelines**
5	**Immovable Properties**	Resident may hold **immovable property abroad acquired** under Foreign Exchange Management (Acquisition and transfer of immovable property outside India Regulations, 2015)

Permissible modes of acquiring immovable property outside India by a resident under FEMA

- Immovable property **which were acquired at time when a person was resident outside India can be continued to be held** even after he turns resident [Section 6(4)]
- Immovable property can be **inherited** from a person resident outside India [Section 6(4)]
- Gift/inheritance - A resident can acquire immovable property outside India by way of gift or inheritance from:
  - person referred in section 6(4); or
  - a person resident in India who had acquired such property on or before July 8, 1947 and continued to be held by him with the permission of the Reserve Bank.
  - a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.
- LRS - A resident individual can send remittances under the LRS for purchasing immovable property outside India.
- RFC A/c - A resident can purchase immovable property outside India out of Foreign exchange held in his/ her Resident Foreign Currency (RFC) account.
- Foreign National - Person resident in India who is a foreign national can acquire immovable property outside India

Permissible modes of acquiring immovable property outside India by a resident under FEMA

- Jointly with relative (NR) - A resident can acquire immovable property outside India jointly with a relative* who is a person resident outside India, provided there is no outflow of funds from India
- A was acquired by a person resident in India on or before July 8, 1947 and continued to be held by him with the permission of the Reserve Bank
- 5-year lease - Person resident in India can acquire immovable property outside India on a lease not exceeding 5 years – LRS limit not applicable in respect of such lease
- An Indian Company having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, provided total remittances do not exceed the following limits:
  - Limit for initial expenses - 15 per cent of the average annual sales/ income or turnover of the Indian entity during the last two financial years or up to 25 per cent of the net worth, whichever is higher;
  - Limit for recurring expenses - 10 per cent of the average annual sales/ income or turnover during the last two financial years

* relative in relation to an individual means souse, brother, sister or any lineal ascendant or descendant

Assets that can be acquired overseas under LRS

- Under the LRS, resident individuals are freely allowed to remit up to USD 2,50,000 per Financial Year for any permitted current or capital account transaction or a combination of both.
- The Scheme is available to all resident individuals including minors (Form A2 to be signed by the minor's natural guardian). The Scheme is not available to corporates, partnership firms, HUF, Trusts, etc.
- The permissible capital account transactions by an individual under LRS are:
  - Opening of **foreign currency account abroad** with a bank;
  - Purchase of **property abroad**;
  - **Making investments abroad-** acquisition and holding shares of both listed and unlisted overseas company or debt instruments; acquisition of qualification shares of an overseas company for holding the post of Director; acquisition of shares of a foreign company towards professional services rendered or in lieu of Director's remuneration; investment in units of Mutual Funds, Venture Capital Funds, unrated debt securities, promissory notes;
  - **setting up Wholly Owned Subsidiaries and Joint Ventures** (with effect from August 05, 2013) outside India for bona fide business subject to the terms & conditions stipulated in Notification No FEMA.263/ RB-2013 dated March 5, 2013;
  - **extending loans** including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013

Assets that can be acquired overseas under LRS

- The limit of USD 2,50,000 per Financial Year under the Scheme also includes/subsumes remittances for current account transactions (viz. private visit; gift/donation; going abroad on employment; emigration; maintenance of close relatives abroad; business trip; medical treatment abroad; studies abroad) available to resident individuals under Para 1 of Schedule III to Foreign Exchange Management (Current Account Transactions) Amendment Rules, 2015 dated May 26, 2015.
- Release of foreign exchange exceeding USD 2,50,000 requires prior permission from the RBI

Penal provisions under FEMA [Section 13]

- Contravention of any provision of FEMA, Rules, Regulations, Notifications, etc would entail the following penalty:
- where such amount is quantifiable, - up to 3 times the sum involved in such contravention ;
- where the amount is not quantifiable, - up to Rs. 2 lakh;
- where the contravention is a continuing one, further penalty which may extend to Rs. 5,000 for every day after the first day during which the contravention continues.
- Where any person is found to have acquired any foreign exchange, foreign security, or any immovable property, situated outside India, of the aggregate value exceeding Rs. 1 crore in contravention of provisions of FEMA, following penal consequences will arise:
  - Penalty up to 3 times the sum involved in such contravention; and
  - confiscation of the value equivalent, situated in India, the Foreign exchange, foreign security or immovable property; and
  - punishable with imprisonment for a term which may extend to 5 years and with fine [the Adjudicating Authority may recommend initiation of prosecution ; ED, after recording the reasons of satisfaction to proceed with the prosecution,]

Compounding of offences under FEMA [Section 15]

1. **Section 15 permits compounding of offences** under the FEMA

2. RBI empowered to compound offences except for hawala transactions

3. ED empowered to compound contravention in relation to hawala transactions commited under section 3(a)

4. No compounding where the amount involved in the contravention is not quantifiable

5. No compounding where similar contravention committed by a person was compounded within a period of three years from the date of offence

Key implications under FEMA on leaving India for residing outside India

Status of assets held in India after leaving India [Section 6(5) of FEMA]

- Section 6(5) of FEMA reads as under:

  "A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India"

- Assets (share/securities, immovable properties and Indian Currency) **which were acquired at time when a person was resident in India can be continued to be held** even after the person becomes a person resident outside India

- Such assets can be transferred or invested as well

- Non-residents can inherit assets from a resident u/s 6(5) of FEMA

Existing accounts in India

Bank Accounts:

- Existing resident account should be **re-designated to NRO account** if person leaves India for uncertain period (for employment or business or vocation outside India).

De-mat Accounts:

- Sec 6(5) permits NRI to continue to own securities which were acquired while person was resident of India
- NRI needs to Intimate Depository about change in his residential status and open a new account to transfer the holdings into the new account

Types of Accounts that can be held by non-residents in India

NRE Account	Non-Resident External Account
FCNR	Foreign Currency (Non-Resident) Account
NRO Account	Non-Resident (Ordinary) Account
SNRR Account	Special Non-Resident Rupee Account
Escrow Account	Escrow Account with an AD Bank in India

Definition of key terms

Non-Resident Indian (NRI)

- A person resident outside India who is a Citizen of India

Person of Indian Origin (PIO)

- A person resident outside India who is Citizen of a Country other than Bangladesh, Pakistan or other specified countries and who satisfies the following conditions:
  a. Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or
  b. Who belonged to a territory that became part of India after the 15th day of August, 1947; or
  c. Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to above; or
  d. Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to above

- OCI cardholder is considered to be a PIO

NRE, FCNR and NRO Account

Particulars	NRE Account	FCNR Account	NRO Account
Eligibility	• NRIs/PIOs	• NRIs/PIOs	• Any person who is not resident in India
Nature of Account	• Account to **transfer foreign earnings to India**		• Accounts to **manage income earned in India**
Types of account	• Savings, Current, Recurring, and FD's	• Term deposits	• Savings, Current, Recurring, and FD's
Currency	• **Rupee denominated** account	• **Foreign currency** denominated account	• **Rupee denominated** account
Deposits and withdrawals	• Can deposit in foreign currency, and withdraw in Indian currency	• Can deposit in foreign currency, and withdraw in Indian currency • Withdrawal subject to maturity of deposit	• Can deposit in foreign as well as Indian currency, and withdraw in Indian currency
Taxability	• Interest earned on NRE/FCNR Account balance is exempt		• Interest earned on NRO Account balance is taxable

NRE, FCNR and NRO Account

Particulars	NRE Account	FCNR Account	NRO Account
Certain permissible credits	• **Inward remittances** from outside India • **Interest** accruing on funds held in the account • **Current income** subject to payment of tax in India • **Transfers** from other **NRE/ FCNR** (B) accounts • Proceeds of foreign currency/bank notes tendered during the account holders temporary visit to India; • **Maturity proceeds of investment** if the permissible investments were made in India from NRE/FCNR (B) Account or inward remittances		• **Inward remittances** from outside India • **Legitimate dues in India** of the account holder (including **current income**) • **Transfers** from **other NRO** accounts • **Rupee Gifts** or loan made by a resident to an NRI or PIO, **within the limits of LRS i.e. USD 2,50,000**
Certain permissible debits	• **Local disbursements** • **Investments** in India • Transfer to other NRE/FCNR (B) Account		• **Local payments** • **Investments** in India • Transfer to other NRO Accounts

NRE, FCNR and NRO Account

Particulars	NRE Account	FCNR Account	NRO Account
Outward remittances/ Repatriability	• Freely repatriable		• <u>Not Repatriable except for the following</u>: ➢**Current income** (rent, dividend, pension, interest, etc.) repatriable without limit; or ➢**Remittance upto USD 1 million**/ per financial year allowed by NRI's/PIO out of **balance in the NRO account/ sale proceeds of assets/ assets acquired in India by way of inheritance**/ **legacy**, other specified cases *[funds can be transferred to NRE Account within this USD 1 Million facility]* ➢With **prior approval of RBI,** remittance **in excess of USD 1 million by NRIs/ PIOs** out of the **balances held in NRO accounts/ sale proceeds of assets/ the assets acquired by way of inheritance**/ **legacy** may be made if hardship will be caused to a person if remittance from India is not made to such a person

Special Non-Resident Rupee Account (SNRR Account)

Particulars	SNRR Account
Eligible person	• Any person resident outside India having business interest in India may open the account. Business interest includes: ➢ FDI Investments made in India ➢ Import and export of goods and services ➢ Trade credit transactions and lending under ECB Framework in compliance with RBI regulations
Interest	• Non interest bearing
Repatriability	• Freely Repatriable
Permissible debits and credits	• The debits and credits in the SNRR account shall be specific/ incidental to the business proposed to be done by the account holder

NRI’s returning to India for permanently residing in India

Penal provisions under FEMA [Section 13]

Section 6(4) of FEMA reads as under:

> *"A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India."*

Assets (shares/securities, immovable properties and foreign currency) **which were acquired at time when a person was resident outside India** can be continued to be held even after he turns resident.

Such assets can be transferred or invested as well.

Residents can inherit assets outside India from a non resident u/s 6(4) of FEMA.

Status of assets held outside India after returning to India [Section 6(4) of FEMA]

Section 6(4) covers following transactions [A.P. (DIR Series) *Circular No. 90 dated 09/01/2014]:*

- **Foreign currency accounts** opened and maintained by such a person when he was resident outside India;
- **Income earned through employment or business or vocation outside India** taken up or commenced while such person was resident outside India;
- **Income earned from investments made** while such person was resident outside India,
- **Income earned from gift or inheritance received** while such a person was resident outside India;
- Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same,
- held outside India by a person resident in India acquired by way of inheritance from a person resident outside India;
- A person resident in India may **freely utilise all their eligible assets abroad as well as income on such assets or sale proceeds thereof received** after their return to India for making any payments **or to make any fresh investments abroad without approval of Reserve Bank,** provided the cost of such investments and/ or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them.

Bank/De-mat Accounts status after returning to India

Foreign Bank Accounts	• Foreign Bank Accounts can be continued to be held u/s 6(4)
NRO Account	• NRO accounts required to be re-designated to resident rupee accounts
NRE Account	• NRE accounts required to be re-designated to resident accounts • Funds in NRE accounts can even be transferred to Resident Foreign Currency Account ('RFC Account') at option of the account holder
FCNR Account	• FCNR deposits can be continued till maturity; • On maturity, FCNR Account required to be converted to rupee deposit accounts or RFC Account.
De-mat Accounts	• Requirement to intimate Depository about change in residential status and open a new account to transfer the holdings held in NRI account to the new account

Features of Resident Foreign Currency ('RFC') Account

- **Eligibility:** Account can be opened out of foreign exchange by any returning Indian.
- **Type of Accounts:** Current/ savings/ term deposits
- **Flexibility in currency:** RFC Account may be maintained in any convertible foreign currency
- **Permissible credits** to RFC Account:
  - Balances in NRE/ FCNR (B) accounts on change in residential status
  - Foreign exchange received as superannuation/ other monetary benefits from overseas employer
  - Foreign exchange realised on conversion of the assets referred to in Sec 6(4) of FEMA
  - Gift/ inheritance received from a person referred to in Sec 6(4) of FEMA
  - Foreign exchange received as earnings of LIC claims/ maturity/ surrendered value settled in forex from an Indian insurance company
  - Foreign exchange acquired before July 8, 1947 or any income arising on it held outside India with RBI permission
- Permissible Debits: No restrictions on utilization in/ outside India; funds free for investments/expenditure in/outside India
- Easy change of status: On subsequent change in status to NRI, RFC account balance may be remitted abroad or may again be transferred to NRE/ FCNR Account

Tax planning for safe landing back in India

Scope of Total Income taxable in India

Scope of total income taxable in India pursuant to returning to India:

S. No	Source of income	Nature of income	Resident (Not ordinarily resident) [Status for first 2-3 years after returning]	Resident (Ordinary resident) [Status after first 2-3 years]
1	Indian sourced income	Income received or deemed to be received in India	Taxable	Taxable
2		Income accruing or arising or deemed to be accruing or arising in India	Taxable	Taxable
3	Foreign sourced income	Income though accruing or arising outside India but derived from a business controlled in or a profession set up in India	Taxable	Taxable
4		Income accruing or arising outside India other than income of such nature mentioned in S. No 3 above	Not-taxable	Taxable
5		Income received outside India	Not-taxable	Taxable

Resident Not Ordinary Resident ('RNOR')

An individual having returned to India will be considered to be a **RNOR if**:

- He has been a **non-resident** in India in **9 out of 10 years preceding that financial year** or
- He has **been in India for less than 729 days out of 7 years** preceding that financial year

Period of stay in India	Days	Residential status
FY 2020-21	90	NR
FY 2021-22	115	NR
FY 2022-23*	120	NR
FY 2023-24	365	RNOR
FY 2024-25	365	RNOR
FY 2025-26	365	ROR
FY 2026-27	365	ROR

Tax planning for safe landing back in India

1. Transfer NRE Account balance to FCNR Deposits:

- NRE Account is required to be closed upon returning to India whereas FCNR Account can continued to be held till maturity
- Interest on FCNR deposit is exempt in the hands of RNOR as well
- Advisable to transfer NRE Account balance to FCNR Account before coming to India to continue to enjoy interest exemption during the period individual qualifies as RNOR

Tax planning for safe landing back in India

2. Transfer NRE/FCNR Account balance to RFC Account:

- There is no restriction on RFC amount balance and the same can be used in India as well as remitted outside India
- Further, RFC Account Balance can again be transferred to NRE/FCNR Account in case the individual again moves back overseas and one will not be required to create such account from income earned outside India.
- Advisable to transfer NRE/FCNR Account balance to RFC Account to claim the above said benefits after FCNR deposit matures

Tax planning for safe landing back in India

3. Use of transitional window during RNOR status to liquidate foreign investments:

- On return to India, an Individual normally qualifies as RNOR for 2-3 years during which period only income from Indian Sources will be taxable in India - Advisable to use this window to liquidate foreign investments so as to not pay tax in India during such window

- Illustrative list of **income that will not be liable to tax** during the period of when individual qualifies as **“RNOR”** :

  - **Capital gain** arising from the sale of fixed and financial assets held overseas (like properties and shares)
  - **Withdrawals or pension from the retirement account** or pension scheme held overseas
  - **Interest or dividends** earned in deposit or securities held overseas
  - **Rent** received from properties held overseas
  - **Interest** received from FCNR and RFC deposits

Points to remember on change of status to ROR

- Upon becoming ROR, the individual needs to be mindful of the following:

  ✓ **Worldwide income** will become taxable

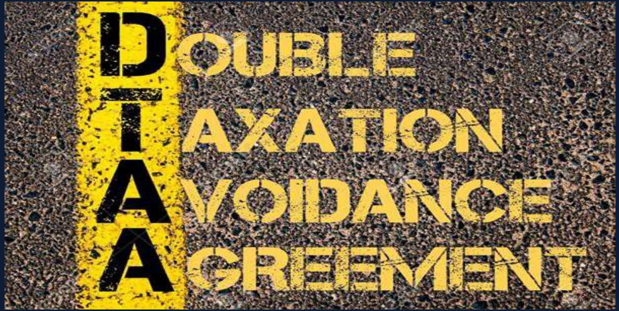
  ✓ **Income and assets must be appropriately reported** to avoid any penalty and prosecution under BM Act, 2015

  ✓ All **foreign assets/foreign income** must be disclosed/reported in the Income Tax Return to avoid applicability of Black Money Act

- **Advisable for ROR** to take note of:

  ✓ Beneficial provisions of Act that may still be applicable

  ✓ Any Treaty benefits to avoid double taxation of income



Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

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CONTACT INFORMATION

VED JAIN & ASSOCIATES

CHARTERED ACCOUNTANTS

Landline - 011-23354546, 23354547, 23354548

Head Office - 100 Babar Road, Opposite The Lalit, New Delhi, India-110001

Branch Offices- In Chandigarh and Mumbai

For more details visit our website **www.vedjainassociates.com**

Feedback/queries can be sent to **mail@vedjainassociates.com**

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