

# TAX FLASH NEWS

22 February 2019

## Prosecution proceedings under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, regarding undisclosed inherited foreign bank accounts upheld

### Background

Taxpayers qualifying to be Resident and Ordinarily Resident (ROR) in India as per Income Tax Act, 1961 (the Act) and having assets located outside India are required to furnish the details of such assets located outside India and income earned outside India in their individual income tax return.

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (BMA) has been introduced to deal with the undisclosed foreign income and assets held outside India.

In this regard, the Calcutta High Court has recently dismissed a taxpayer's (petitioner) writ petition<sup>1</sup> for quashing of notices issued under BMA for sanction of prosecution.

### Facts of the case

- Search and seizure proceedings were carried out by the Income Tax Authorities at the residence of the petitioner and details of HSBC bank accounts held by the petitioner outside India were found. The petitioner admitted that such accounts belonged to his deceased mother and were received by him as a part of his inheritance.
- Subsequently, a notice<sup>2</sup> under the Act was issued by the Assessing Officer (AO) calling for the petitioner to furnish the return of income (ROI) for the Assessment Years (AY) 2009-10 to 2015-16, to which the petitioner complied without disclosing the overseas bank accounts.

- The AO concluded the assessment proceedings by raising demands on the amounts lying in the foreign bank accounts after giving credit to the payments made during the settlement proceedings and initiated penalty proceedings<sup>3</sup>.
- Separately, during the pendency of the aforesaid assessment proceedings:
  - Petitioner approached the Settlement Commission wherein the application of the petitioner was declared as invalid. Even at this stage the petitioner did not make the disclosure of overseas bank accounts. The application filed for rectification<sup>4</sup> of order of the Settlement Commission was also rejected
  - BMA came into effect from 1 April 2015
  - The Central Board of Direct Taxes (CBDT) had provided a one-time compliance opportunity for a limited period, to persons who have any foreign assets which have not been disclosed for the purposes of income tax. However, the petitioner did not avail the opportunity to make a voluntary disclosure under the BMA, given his understanding that any disclosure could not be availed under the BMA if the proceedings under the Act were pending.

<sup>1</sup> W.P. No. 568 of 2018 in the High Court at Calcutta Shrivardhan Mohta vs Union of India & Ors. Dated 14 February 2019

<sup>2</sup> Section 153(A) of the Act

<sup>3</sup> Section 271(1)(b) and 271(1)(c) of the Act

<sup>4</sup> Section 154 of the Act

- Later, relevant authorities under BMA, granted sanction to prosecute the petitioner under BMA<sup>5</sup>.

### Petitioner's contentions

- Based on certain judicial precedents<sup>6</sup>, the petitioner argued that BMA is only prospective, and cannot be applied retrospectively.
- The petitioner was debarred from availing the one-time compliance opportunity to make a declaration (regarding any delinquency) within the timelines prescribed under the BMA<sup>7</sup> as another proceeding was pending under the Act<sup>8</sup>. Accordingly, there was no failure to make any disclosure and consequently, proceedings under BMA cannot be invoked.
- Furthermore, the petitioner argued there was no 'mens rea' (deliberate intention to commit a crime) and hence prosecution under BMA could not be initiated. Based on a judicial precedent<sup>9</sup> the petitioner contended that he cannot be penalised under two different legislations for the same offence given that the income tax authorities have also initiated proceedings for the same period.

### Revenue's contentions

- The revenue argued that the petitioner, who failed to disclose foreign assets in his ROI, did not make such disclosure either in the settlement proceedings or even in the return of income filed after the search and seizure was conducted.
- Based on a judicial precedent<sup>10</sup>, the revenue contended that 'mens rea' is not required to be proved for penalty proceedings under BMA.
- The revenue also contended that the petitioner was not penalised under two legislations as the Act penalised him financially while under BMA, imprisonment is triggered.

<sup>5</sup> Sections 50 and 51 of the BMA

<sup>6</sup> Rao Shiv Bahadur Singh & Anr. vs State of Vindhya Pradesh AIR 1954 SC 322

<sup>7</sup> Section 71 of the BMA

<sup>8</sup> Section 153A of the Act

<sup>9</sup> CIT vs Anwar Ali [1967] 65 ITR 95 (Cal)

<sup>10</sup> Gujarat Travancore Agency, Cochin vs CIT [1989] 44 Taxman 278 (SC)

### High Court's observation

- The petitioner did not avail any of the two opportunities with respect to disclosure of foreign assets - neither during the search and seizure proceedings nor during the settlement commission proceedings, which were subsequent to the BMA coming into effect, and accordingly there was no retrospective applicability of BMA in the petitioner's case.
- Separately, the High Court observed that only one portion<sup>11</sup> of BMA will not apply to a person to whom a proceeding under the Act<sup>12</sup> is pending; however the prosecution<sup>13</sup> proceedings under BMA could still apply.
- In light of the above, the High Court observed that the judicial precedents<sup>5,8</sup> as quoted by the petitioner would not be relevant in the present case.
- It could not be said that the petitioner was being penalised under two legislations as he is charged under the provisions<sup>14</sup> of BMA which is different from the provisions of the Act, as the Act does not impose imprisonment.
- High Court also acknowledged Revenue's view of quoting a judicial precedent<sup>9</sup> by noting that the Act<sup>15</sup> does not have a clause for proving 'mens rea'.
- Given the above, the High Court rejected the writ petition application of the petitioner.

### Our comments

This decision provides clarity on the applicability of BMA. Given the stringent nature of the provisions of BMA, it becomes critical and important for all individuals qualifying as ROR in India to continue to mandatorily disclose the details of all assets held outside India and offer the income earned outside India in their individual income tax returns. Further, where income/ assets remain undisclosed under various machinery available under the Act, the provisions of BMA may become applicable.

<sup>11</sup> Section 71 of the BMA (Chapter VI)

<sup>12</sup> Section 153A of the Act

<sup>13</sup> Section 50 and 55 of the BMA

<sup>14</sup> Section 51 of the BMA

<sup>15</sup> Section 271 of the Act

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