

Black Money Act –Disclosure Window & Practical Difficulties

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INTRODUCTION

- India has, over the past few decades, witnessed phenomenal increase in the amount of undisclosed income and assets stashed by Indian residents abroad. While there have been various reports estimating the quantum of Indian black money, in February 2012, Mr. A.P. Singh, the director of the Central Bureau of Investigation, speaking at the inauguration of first Interpol global program on anti-corruption and asset recovery, stated that Indians have around USD 500 million in black money stashed in tax haven countries.

LEGISLATIVE INTENT

- The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (Black Money Act) has been enacted to address the concern of money being accumulated abroad by evading tax. The legislative intent is to plug the revenue leakage which leads to disproportionate burden on the honest tax payers. The Black Money Act seeks to make the Indian residents accountable for their undisclosed income and assets outside India by paying tax and penalty as set out in the Black Money Act.

APPLICABILITY – INDIAN RESIDENTS WITH UNDISCLOSED FOREIGN INCOME & ASSETS

- The Black Money Act will apply to all Indian residents and shall replace the relevant provisions of the Income Tax Act, 1961 (IT Act) for the purposes of taxation of undisclosed foreign income. The Black Money Act deals specifically with undisclosed funds (assets, income, financial interest) held by an Indian resident in his own name or as a beneficiary outside India while black money held by the Indian residents in India shall continue to come under the purview of the IT Act and other applicable laws.

TERM 'BLACK MONEY' IS NOT DEFINED

- An important aspect to note is that, the Black Money Act does not define the term 'black money'. It simply states that the income tax authorities may levy tax (along with applicable penal provisions) on the undisclosed income and assets held by an Indian resident in any foreign country, so long as the said income and assets have not been disclosed to the income tax authorities in the relevant assessment year.

DISCLOSURE WINDOW

- The Black Money Act provides a one-time compliance window, commencing from July 1, 2015 till September 30, 2015, for the residents to voluntarily declare their undisclosed foreign income and assets prior to financial year 2015-16. Any person who makes declaration of the undisclosed income and asset within the Disclosure Window will be liable to pay tax at the rate of 30 percent of the value of such undisclosed income and/ or asset. In addition, the person will also be liable to pay a penalty at the rate of 100 percent on the amount of tax payable on the undisclosed asset or income. Pursuant to the disclosure made within the Disclosure Window, the person shall be required to pay the requisite amount of tax (along with penalty) on or before December 31, 2015. The Disclosure Window thus provides an opportunity to declare undisclosed foreign income and assets and thereby avoid the possibility of paying higher regular tax and penalty.
 - However the declaration within the Disclosure Window is not available to a person where:
 - an order of detention has been made against the person under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974;
 - the person is under prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Unlawful Activities (Prevention) Act, 1967, the Prevention of Corruption Act, 1988;
 - the person is notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992;
 - in relation to any undisclosed foreign income or asset, acquired from income chargeable to tax under the IT Act for any previous year relevant to an assessment year prior to the assessment year beginning on the 1st day of April, 2016 the person has received an assessment notice or a search requisition or survey has been carried out or a notice has been received in relation thereto or where any such notice has not been received the time period for receiving notice has not expired.
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NON-DECLARATION OF FOREIGN INCOME AND ASSETS WITHIN THE DISCLOSURE WINDOW

- In the event a person does not declare his foreign income and assets during the prescribed Disclosure Window then all such undisclosed income or assets shall be deemed to have been acquired in the year in which they come to the notice of the Assessing Officer and the provisions of the Black Money Act shall apply accordingly.
- This simply means that the value of the undisclosed foreign income or assets shall be as per its market value at the time of issue of notice by the Assessing Officer in relation to such income and asset and the value at which the undisclosed foreign income or assets was acquired will not be considered.

BENEFITS OF DECLARATION

- The fact that the undisclosed foreign income and asset will be valued (and therefore taxed and penalised) based on its market value at the time of issue of notice by the Assessing Officer entails a substantial increase in the amount of tax and penalty payable by the Indian resident in case of non-disclosure of income and asset during the Disclosure Window. This provision intends to encourage the residents in India to come clean during the disclosure period rather than to pay substantially high amount in taxes and penalty and undertake the risk of imprisonment. Further, the Black Money Act provides that the value of undisclosed foreign income and asset that has been disclosed in the declaration shall not be included in the total income of the declarant under the IT Act for any assessment year and shall not be chargeable to Wealth Tax for any assessment year or years. Also the content of the declaration shall not be admissible in evidence in any proceedings under the IT Act, the Wealth Tax Act, the Foreign Exchange Management Act, the Companies Act, or the Customs Act.

PRACTICAL DIFFICULTIES

- Here, it is pertinent to note that the exemption is only limited to income tax, wealth tax, custom duties, exchange controls laws and corporate law. The Black Money Act does not deal with income illegally obtained from other nefarious activities. This distinction drawn under the Black Money Act leads to the apprehension that the information gathered by the income tax authorities, although exempt under the five Acts, may be utilised for the purpose of initiating proceedings under other applicable laws, like the stringent provisions of the Prevention of Money Laundering Act, 2002 (PMLA).
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- For PMLA to be invoked, a scheduled offence also called a predicate offence has to be committed first. A scheduled offence can be forgery, smuggling, fixing, arms racketeering, terror funding, breach of confidentiality, polluting the environment, and such other offences as set out in the Schedule of PMLA.
 - The Black Money Act amends PMLA and the offence of wilful attempt to evade tax, penalty or interest as referred in Section 51 of the Black Money Act has been added in the Schedule, in Part C as Entry 3. It has been clarified by the Department of Revenue Central Board of Taxes, Ministry of Finance that the exemption during the Disclosure Window will also be applicable in relation to the Section 51, which is now a scheduled offence under PMLA. The exemption under PMLA is only in relation to Section 51 of Black Money Act and not undisclosed foreign income and assets amassed through other scheduled offences.
 - The other major concerns are more from the practical limitations like the absence of period for which the disclosure is to be made, the unclear valuation methodology coupled with the disclosure window being too short for completing the entire process of valuing the income and assets and then making the disclosure. Further, the declaration can be rejected for errors, in which case there is no provision for refilling the same. In the event the declaration is rejected for any reason whatsoever, there is no assurance that the information provided in such disclosure will not be used for initiating proceedings under other Acts. This may prove to be a deterrent for those who want to come clean.

OUR VIEW

On July 9, 2015 the Indian Government has signed inter government agreement with USA under Foreign Account Tax Compliance Act (FATCA). As a result of FATCA and other similar treaties entered by the Indian Government with other foreign governments, by the year 2017, India is expected to start receiving more and more information about undisclosed foreign wealth of Indian residents.

With the increasing public awareness, ever increasing international pressures and the enactment of the Black Money Act, the Indian regulatory machinery may now be more inclined to take concrete steps in the right direction. What remains to be seen is whether the Black Money Act will be able to balance the practical constraints and achieve the intended result.

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