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

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## *A Conceptual Overview*

Aseem Chawla  
ASC Legal, Solicitors and Advocates  
[aseem@aseemchawla.com](mailto:aseem@aseemchawla.com)

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# Overview

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# Background

- **March 18, 2009** : On **March 18, 2009**, the Government of Germany had passed on the names and bank account details of Indians who had allegedly stashed their unaccounted monies in the LGT Bank of Liechtenstein.
- Thereafter, a writ petition was filed by eminent lawyer, Mr. Ram Jethmalani before the Hon'ble Supreme Court of India involving two broad theme(s):
  - Appointment of ***Special Investigation Team*** ('SIT') which is entrusted with the responsibilities and duties of investigation, initiation of proceedings and prosecution in all matters related to unaccounted money stashed in foreign bank accounts.
  - Disclosure of the names and bank account details of Indians who had stashed their black money in the LGT Bank of Liechtenstein.
- **July 4, 2011** : The Hon'ble Supreme Court in its order dated **July 4, 2011 (Refer Ram Jethmalani vs Union of India, 339 ITR 107)** noted that '*the worries of this Court relate not merely to the quantum of monies said to have been secreted away in foreign banks, but also the manner in which they may have been taken away from the country, and with the nature of activities that may have engendered the accumulation of such monies*'.

# Background (Contd..)

- The Apex Court noted that the large amount of unaccounted money held by nationals and entities in banks abroad, especially in tax havens, shows that firstly, large volume of activities in the social and economic spheres within the country are unlawful and secondly, substantial weakness in the capacity of the State in collection of taxes on income generated by individuals and entities within the Country.
- The Apex Court, noting its concerns about the black money, ordered the constitution of a SIT and entrusted it with the responsibilities and duties of investigation, initiation of proceedings and prosecution in all matters related to unaccounted money stashed in foreign bank accounts.
- The Apex Court also directed that the SIT shall also be charged with the responsibility of preparing a comprehensive action plan, including the creation of necessary institutional structures that can enable and strengthen the country's battle against generation of unaccounted monies, and their stashing away in foreign banks or in various forms domestically.

# Background (Contd..)

- It was further directed by the Apex Court that SIT shall also be empowered to further investigate even where charge-sheets have been previously filed; and that the Special Investigation Team may register further cases, and conduct appropriate investigations and initiate proceedings, for the purpose of bringing back unaccounted monies unlawfully kept in bank accounts abroad.
- With respect to concern in relation to disclosure of the names and bank account details of Indians who had stashed their black money in the LGT Bank of Liechtenstein, the Apex Court noted that while there is a requirement for confidentiality, the Indo-German Tax Treaty, vide Article 26(1), permitted disclosure of information in Court proceedings and accordingly, the Apex Court had directed the Indian Government to reveal details of individuals having bank accounts with LGT Bank of Liechtenstein, which were shared by the German Government.

# Background (Contd..)

- **December 27, 2011** : Vide Notification No. SO 2903(E) dated **December 27, 2011**, the Article 26 of the India-Swiss Tax Treaty was amended to protect the 'Secrecy' of information received by one Contracting State to another. Article 26(2) states that '*any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions'*
- Sometimes in the year 2011, it is widely believed that the Indian Government had also received the names of 782 Indians who had accounts in HSBC, Geneva.
- Though, the Indian Government never disclosed the names of the accountholders but ended up publishing a '**White Paper on Black Money**'

# Background (Contd..)

- **May 26, 2012** : The '**White Paper on Black Money**' presented by the Hon'ble Finance Minister before the Lok Sabha on **May 26, 2012** stated that there is no uniform definition of black money in the literature or economic theory. In fact, several terms with similar connotations have been in vogue, including 'unaccounted income', 'black income', 'dirty money', 'black wealth', 'underground wealth', 'black economy', 'parallel economy', 'shadow economy', and 'underground' or 'unofficial' economy.
- All these terms usually refer to any income on which the taxes imposed by government or public authorities have not been paid. Such wealth may consist of income generated from legitimate activities or activities which are illegitimate per se, like smuggling, illicit trade in banned substances, counterfeit currency, arms trafficking, terrorism, and corruption.
- '**Black money**' can be defined as *assets or resources that have neither been reported to the public authorities at the time of their generation nor disclosed at any point of time during their possession.*

# Background (Contd..)

- The '**White Paper on Black Money**' described the framework which the Government of India had employed to tackle black money. It stated that it is a five-way strategy which involves:
  - joining the global crusade against black money;
  - creating an appropriate legislative framework;
  - setting up institutions for dealing with illicit money;
  - developing systems for implementation; and
  - imparting skills to personnel for effective action.
- **May 29, 2014** : The Indian Government, vide Notification No. 11/2/2009, dated **May 29, 2014** and in pursuance to the Hon'ble Supreme Court order dated July 4, 2011 in the case of Mr. Ram Jethmalani vs Union of India, had constituted the SIT.

# Background (Contd..)

- **October 31, 2014** : In **Mohan Manoj Dhupelia vs DCIT, 52 taxmann.com 146**, the Hon'ble Income Tax Appellate Tribunal, Mumbai Benches had dealt with the issue of Black Money wherein information was received as a part of tax information exchange treaty, which revealed that the Assessee was a beneficiary of a trust in a foreign country, having an account in Liechtenstein Bank. The Hon'ble Tribunal vide its order dated **October 31, 2014** had held that '*the sum deposited in account of a trust in foreign country by the Assessee, beneficiary of said trust, without disclosing it in his return of income in India, represented his black money to be assessable under section 69 of the Income Tax Act*'.
- **July 9, 2015** : On **July 9, 2015**, India and the United States (U.S.) had signed an Inter Governmental Agreement for the implementation of the U.S. Foreign Account Tax Compliance Act ('FATCA').
- **August 7, 2015** : On **August 7, 2015**, the Central Board of Direct Taxes ('CBDT') framed rules for the Indian financial Institutions to ensure systematic implementation of requirements under FATCA. In this regard, Income Tax Rules, 1962 were amended by inserting Rules 114F, 114G and 114H.

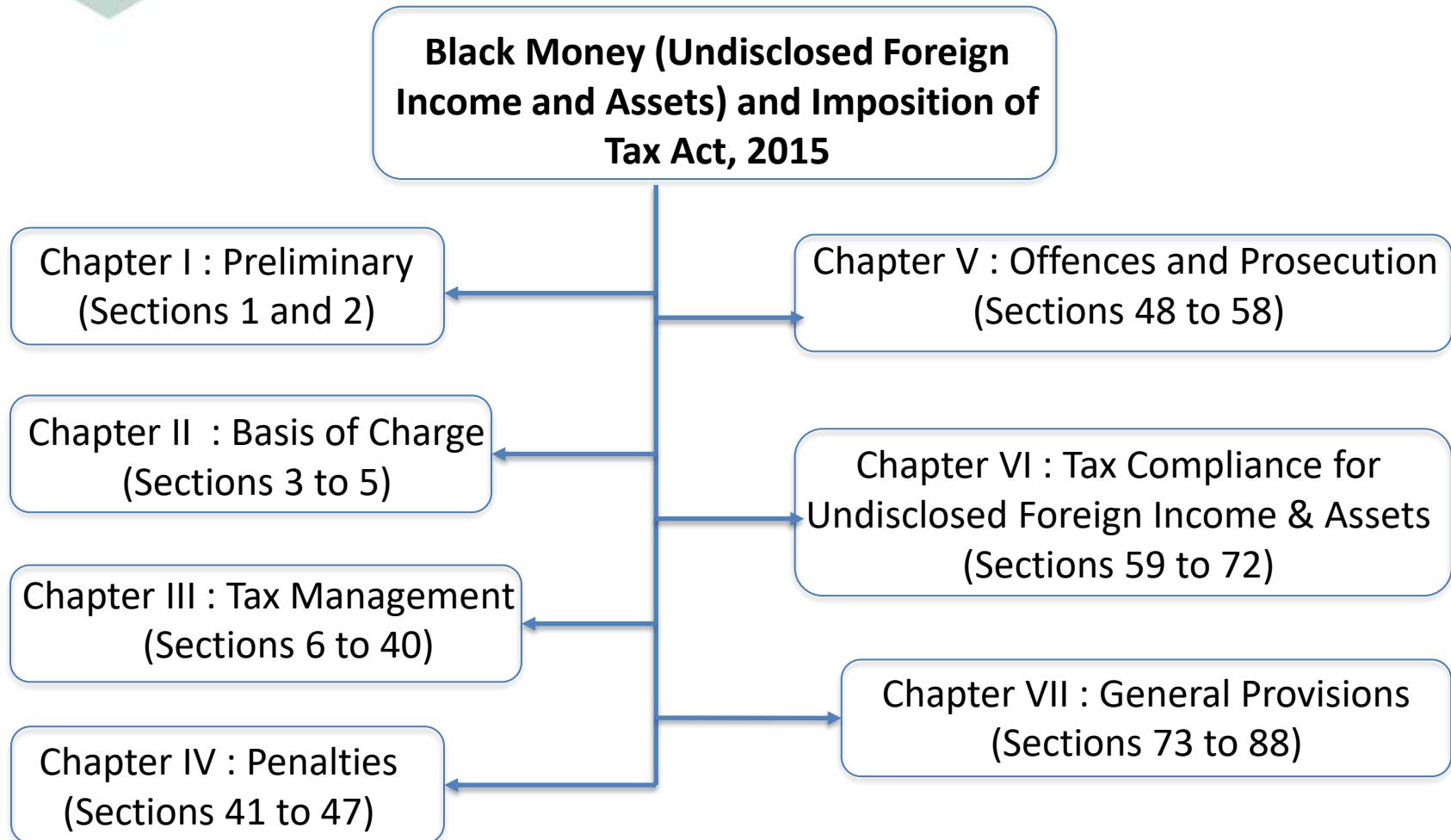
# Background (Contd..)

- The Hon'ble Finance Minister while presenting the Union Budget for the year 2015 recognised the limitations under the existing legislation and thus, proposed introduction of a new comprehensive law on black money.
- Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 was enacted on May 26, 2015 and has been made effective from July 1, 2015.
- The CBDT issued the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015 ('**BM Rules**') under the provisions of BM Act vide Notification No. 58 dated July 2, 2015.
- The Rules prescribed the manner of determination of 'fair market value' ('**FMV**') and illustrations on the same. The Rules do further prescribe the procedure for declaration of an undisclosed asset outside India & for appellate mechanism to Commissioner of Income-tax Appeals ['**CIT(A)**'] and Appellate Tribunal.

# Background (Contd..)

- Further, CBDT provided a one-time compliance opportunity for a limited period to persons who had any **foreign assets which have not been disclosed for the purposes of income-tax**. Under this facility, once the taxpayer pays tax at 30 per cent on the value of undisclosed foreign assets and amount equal to 100% of tax as penalty, he is immune from any other consequence under the BM Act & other notified enactments
- The one-time compliance procedure were explained vide Circular No. 12 of 2015 dated July 2, 2015. Further, clarifications also provided vide Circular No. 13 of 2015 dated July 6, 2015 and Circular No. 15 of 2015 dated September 3, 2015.
- Although, the FAQs relate to one-time compliance window as specified in Chapter VI of the BM Act, **one may suggest that such FAQs would have a persuasive value in interpreting the intent of the legislature.**

# Anatomy of the Black Money Act



# Important Definitions

## Section 2(2) : Assessee

### Definition prior to Amendment vide Finance Act, 2019

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

# Important Definitions (Contd..)

## Section 2(2) : Assessee (Contd..)

### Retrospective Amendment vide Finance Act, 2019

"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 or 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 resident in India either in the previous year to which the income referred to in section 4 relates; or in the previous year in which the undisclosed asset located outside India was acquired:

**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.

# Important Definitions (Contd..)

## Section 2(2) : Assessee (Contd..)

### Memorandum to Finance (No. 2) Bill, 2019

#### *Rationalisation of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015*

The existing provisions of section 2 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 ('**BM Act**') provide inter alia that the "assessee" means a person who is resident in India within the meaning of section 6 of the Income-tax Act.

*In order to clarify the legislative intent behind enacting the BM Act, which was to tax such foreign income and assets, which were not charged to tax under the Income-tax Act, it is proposed to amend the said section so as to provide that the "assessee" shall mean a person being a resident in India within the meaning of section 6 of the Income-tax Act, in the previous year, or a person being a non-resident or not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, in the previous year, who was resident in India either in the previous year to which the income referred to in section 4 relates, or in the previous year in which the undisclosed asset located outside India was acquired.*

# Important Definitions (Contd..)

## Section 2(2) : Assessee (Contd..)

### Memorandum to Finance (No. 2) Bill, 2019

### *Rationalisation of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (Contd..)*

It is also proposed to provide that the previous year of acquisition of the undisclosed asset located outside India shall be determined without giving effect to the provisions of section 72(c) of the BM Act.

Further, clarificatory amendment is also proposed to be made to section 10 of the BM Act so as to include the expressions “re-assess” and “reassessment” in sub-section (3) and (4) of the said section.

These amendments will take effect retrospectively from July 1, 2015.

# Important Definitions (Contd..)

## Section 2(9) : Previous Year

“Previous year” means –

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

and which immediately precedes the assessment year.

# Important Definitions (Contd..)

## **Section 2(11) : Undisclosed Asset located Outside India**

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

## **Section 2(12) : Undisclosed Foreign Income and Asset**

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

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# **Basis of Charge**

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# Section 3 : Charge of Tax

(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.

# 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.

# Section 4 : Scope of Total Undisclosed Foreign Income and Asset (Contd..)

(2) 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 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.

# Section 5 : Computation of Total Undisclosed Foreign Income and Asset (Contd..)

## *Illustration*

A house property located outside India was acquired by an assessee in the previous year 2009-10 for fifty lakh rupees.

Out of the investment of fifty lakh rupees, twenty lakh rupees was assessed to tax in the total income of the previous year 2009-10 and earlier years.

Such undisclosed asset comes to the notice of the Assessing Officer in the year 2017-18.

If the value of the asset in the year 2017-18 is one crore rupees, the amount chargeable to tax shall be  $A - B = C$

where,

$A = \text{Rs. 1 crore}$

$B = \text{Rs. } (100 \times 20/50) \text{ lakh} = \text{Rs. 40 lakh}$

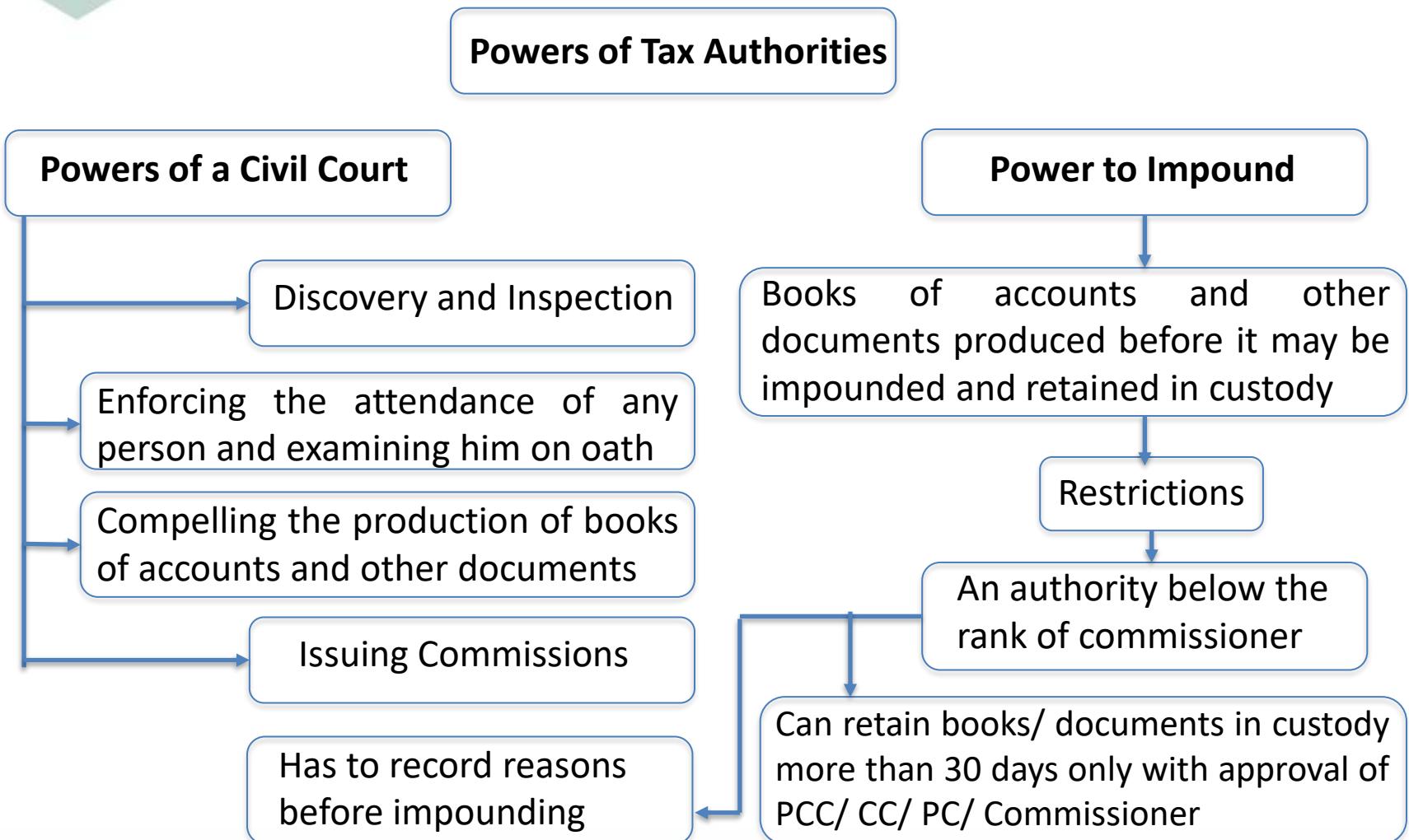
$C = \text{Rs. } (100 - 40) \text{ lakh} = \text{Rs. 60 lakh.}$

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# **Tax Management**

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# Section 8 : Powers regarding Discovery and Production of Evidence



# 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.

# Section 10 : Assessment (Contd..)

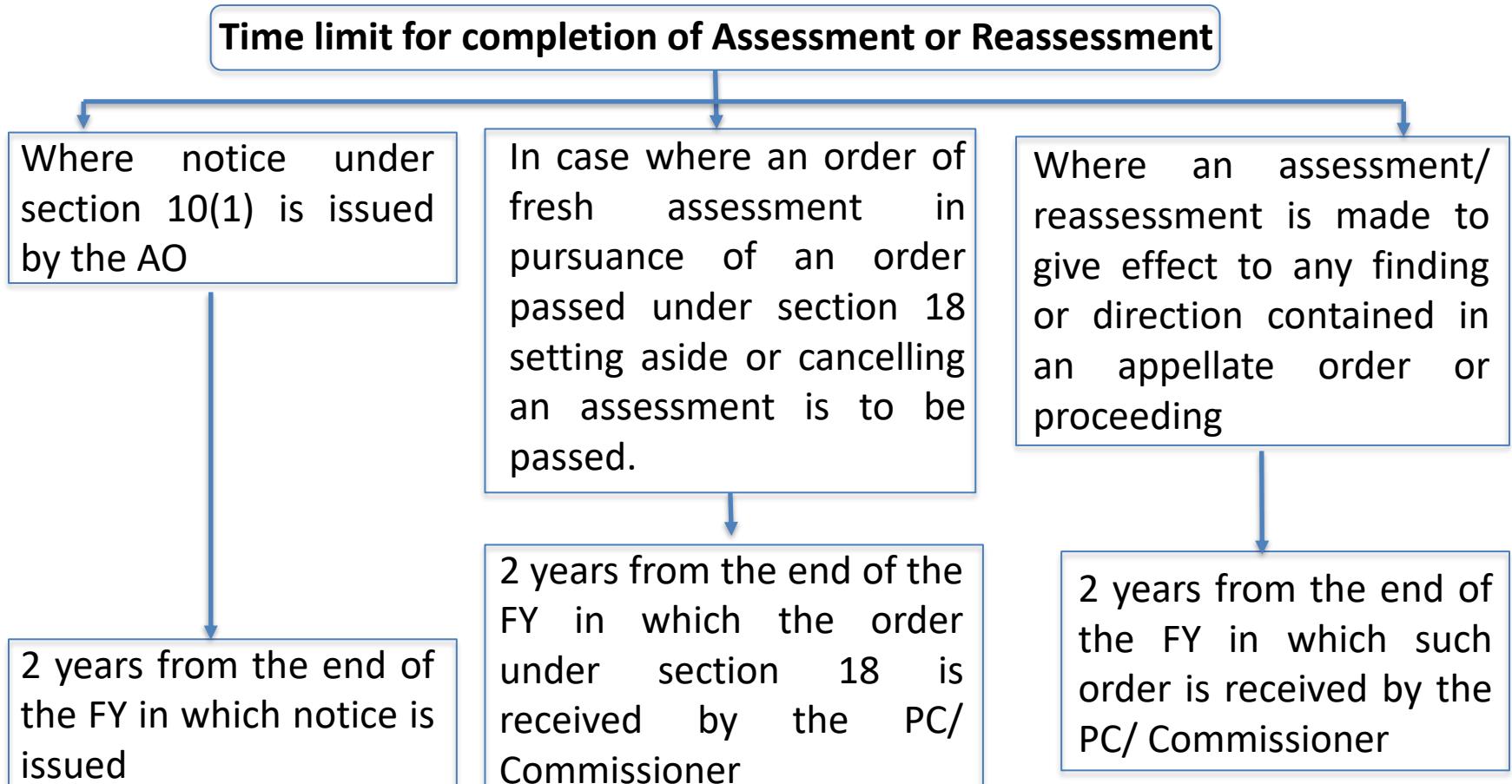
(3) The Assessing Officer, after considering such accounts, documents or evidence, as he has obtained under sub-section (1), and after taking into account any relevant material which he has gathered under sub-section (2) and any other evidence produced by the assessee, shall by an order in writing, assess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

# Section 10 : Assessment (Contd..)

- Under the BM Act, the Assessing Officer can require the Assessee to reproduce accounts/ books/ documents or evidence on the basis of information from Income Tax Authority, any other Authority under any law and other information which comes to his or notice.
- Unlike the assessment proceedings initiated under section 147 of the Act, the Assessing Officer before initiating proceedings under the BM Act, does not need a '*reason to believe*' that undisclosed foreign income and asset has escaped assessment.
- Since, under the BM Act, there is no requirement to have *reasons to believe*, therefore, there is no obligation on the part of the Assessing Officer to provide the information basis which Notice under section 10(1) of the BM Act is served on the Assessee. Hence, there is a possibility that Notice under section 10(1) of the BM Act may get served on the Assessee in order to conduct a '*fishig and roving*' enquiry.

# Section 11 : Time Limit for completion of Assessment and Reassessment



# Section 11 : Time Limit for completion of Assessment and Reassessment (Contd..)

## Exclusion of Specified Time Period

The time taken in reopening the whole or any part of the proceeding, the period during which the assessment proceeding is stayed by an order or injunction of any court or the period commencing from the date on which a reference or the first of the references for exchange of information is made by the competent authority (with reference to section 90/90A of the Income-tax Act, 1961 or under section 73 of this Act) and ending with the date on which the information requested is last received or a period of one year, whichever is less, shall be excluded in computing the period of limitation.

If, after exclusion of such time period, the period of limitation available to the Assessing Officer for making an assessment order is less than 60 days, the period of limitation shall be deemed to be extended to 60 days.

# Section 12 : Rectification of Mistake

- (1) A tax authority may amend any order passed by it under this Act so as to rectify any mistake apparent from the record.
- (2) No amendment under this section shall be made after a period of four years from the end of the financial year in which the order sought to be amended was passed.
- (3) The tax authority shall not make any amendment, which has the effect of enhancing the undisclosed foreign income and asset or reducing a refund or otherwise increasing the liability of the assessee, unless the authority concerned has given to the assessee an opportunity of being heard.
- (4) The tax authority concerned may make an amendment under this section
  - (a) on its own motion; or
  - (b) on an application made to it by the assessee or, as the case may be, by the Assessing officer.

# Section 12 : Rectification of Mistake (Contd..)

- (5) Any application received by the tax authority for amendment of an order shall be decided within a period of six months from the end of the month in which such application is received by it.
  
- (6) In a case where the order has been made in an appeal or revision, the power of the tax authority to amend the order shall be restricted to matters other than those decided in appeal or revision.

# Section 13 : Notice of Demand

Any sum payable in consequence of any order made under this Act shall be demanded by a tax authority by serving upon the assessee a notice of demand in such form and manner as may be prescribed.

# Appeals

<b>Particulars</b>	<b>Appellate Authority</b>		
	<b>Commissioner (Appeals)</b>	<b>Appellate Tribunal</b>	<b>High Court</b>
Form of Appeal	Form 2	Form 3	Memorandum of appeal stating the substantial question of law
Fees	INR 10,000/-	INR 25,000/- (where appeal is filed by the Assessee)	As per the High Court Rules of the respective State/Court Fees Act, 1870.
Time period for filing the Appeal	30 days from the date of service of notice of demand relating to an assessment or penalty or in any other case, 30 days from the date on which the intimation of the order sought to be appealed against is served.	60 days from the date on which the order sought to be appealed against is communicated to the Assessee or the Principal Commissioner or the Commissioner	120 days from the date on which the order appealed against is received by the Assessee or the Principal Commissioner/ Chief Commissioner/ Principal Commissioner/ Commissioner

# Appeals (Contd..)

<b>Particulars</b>	<b>Appellate Authority</b>		
	<b>Commissioner (Appeals)</b>	<b>Appellate Tribunal</b>	<b>High Court</b>
Extension of time period for filing appeal	Permitted	Permitted	Permitted
Permissible Reasons for extension	The Commissioner (Appeals) should be satisfied that the Appellant had sufficient cause for not presenting it within that period; and the delay in preferring the appeal does not exceed one year.	The Appellate Tribunal should be satisfied that there was sufficient cause for not presenting it within that period; and the delay in filing the appeal does not exceed a period of one year.	The High Court should be satisfied that there was sufficient cause for not filing an appeal within that period.

# Section 30 : Recovery of Tax Dues by Assessing Officer

- (1) 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.
- (2) Where the Assessing Officer has any reason to believe that it will be detrimental to the interests of revenue, if the period of thirty days referred to in sub-section (1) is allowed, he may, with the previous approval of the Joint Commissioner, reduce such period as he deems fit.
- (3) The Assessing Officer may, on an application made by the assessee, before the expiry of a period of thirty days or the period reduced under sub-section (2) or during the pendency of appeal with the Commissioner (Appeals), extend the time for payment, or allow payment by instalments, subject to such conditions as he may think fit to impose in the circumstances of the case.

# Section 30 : Recovery of Tax Dues by Assessing Officer (Contd..)

(4) An assessee shall be deemed to be an assessee in default, if the tax arrear is not paid within the time allowed under sub-section (1) or the period reduced under sub-section (2) or extended under sub-section (3), as the case may be.

(5) Where an assessee defaults in paying any one of the instalments within the time fixed under sub-section (3), he shall be deemed to be an assessee in default in respect of the whole of the then outstanding amount.

(6) The Assessing Officer may, in a case where no certificate has been drawn up under section 31 by the Tax Recovery Officer, recover the amount in respect of which the assessee is in default, or is deemed to be in default, by any one or more of the modes provided in section 32.

(7) The Tax Recovery Officer shall be vested with the powers to recover the tax arrear on drawing up of a statement of tax arrear under section 31.

# Section 31 : Recovery of Tax Dues by Tax Recovery Officer

- (1) The Tax Recovery Officer may draw up under his signature a statement of tax arrears of an assessee referred to in sub-section (4) or sub-section (5) of section 30, in such form, as may be prescribed (such statement hereafter in this Chapter referred to as "certificate").
- (2) The certificate under sub-section (1) shall stand amended from time to time consequent to any proceeding under this Act and the Tax Recovery Officer shall recover the amount so modified.
- (3) The Tax Recovery Officer may rectify any mistake apparent from the record.
- (4) The Tax Recovery Officer shall have the power to extend the time for payment, or allow payment by instalments, subject to such conditions as he may think fit to impose in the circumstances of the case.
- (5) The Tax Recovery Officer shall proceed to recover from the assessee the amount specified in the certificate by one or more of the modes referred to in section 32 or in the Second Schedule to the Income-tax Act.
- (6) It shall not be open to the assessee to dispute the correctness of any certificate drawn up by the Tax Recovery Officer on any ground whatsoever, but it shall be lawful for the Tax Recovery Officer to cancel the certificate if, for any reason, he thinks it necessary so to do.

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# Penalties & Procedure

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# Penal Provisions

Section	Failure/ Default	Quantum of Penalty
41	Where tax has been computed in relation to undisclosed foreign income and asset	In addition to tax, a sum equal to three times the tax so computed.
42	Failure to furnish return in relation to foreign income and asset	INR 10 Lakhs
43	Failure to furnish information in the return of income or for furnishing inaccurate particulars about an asset located outside India	INR 10 Lakhs
44	Default in payment of tax arrear	Amount equal to the amount of tax arrears
45	Failure, without reasonable cause, to answer any question put to him by a tax authority or to sign any statement made by him in the course of any proceedings under the Act or to attend or produce books of account or documents at the place or time in response to summons issued under section 8	INR 50,000/- to INR 2 Lakhs

# Section 46 : Procedure

- (1) The tax authority shall, for the purposes of imposing any penalty under this Chapter, issue a notice to an assessee requiring him to show cause why the penalty should not be imposed on him.
- (2) The notice referred to in sub-section (1) shall be issued –
  - (a) during the pendency of any proceedings under this Act for the relevant previous year, in respect of penalty referred to in section 41;
  - (b) within a period of three years from the end of the financial year in which the default is committed, in respect of penalties referred to in section 45.
- (3) No order imposing a penalty under this Chapter shall be made unless the assessee has been given an opportunity of being heard.

# Section 46 : Procedure (Contd..)

(4) An order imposing a penalty under this Chapter shall be made with the approval of the Joint Commissioner [*or the Joint Director*], if –

- (a) the penalty exceeds one lakh rupees and the tax authority levying the penalty is in the rank of Income-tax Officer; or
- (b) the penalty exceeds five lakh rupees and the tax authority levying the penalty is in the rank of Assistant Commissioner or Deputy Commissioner [*or Assistant Director or Deputy Director*]

(5) Every order of penalty issued under this Chapter shall be accompanied by a notice of demand in respect of the amount of penalty imposed and such notice of demand shall be deemed to be a notice under section 13.

# Section 47 : Bar on Limitation for Imposing Penalty

- (1) No order imposing a penalty under this Chapter shall be passed after the expiry of a period of one year from the end of the financial year in which the notice for imposition of penalty is issued under section 46.
- (2) An order imposing, or dropping the proceedings for imposition of, penalty under this Chapter may be revised, or revived, as the case may be, on the basis of assessment of the undisclosed foreign income and asset as revised after giving effect to the order of the Commissioner (Appeals), the Appellate Tribunal, the High Court or the Supreme Court or order of revision under section 23 or section 24.
- (3) An order revising or reviving the penalty under sub-section (2) shall not be passed after the expiry of a period of six months from the end of the month in which order of the Commissioner (Appeals), the Appellate Tribunal, the High Court or the Supreme Court is received by the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner or the order of revision under section 23 or section 24 is passed.
- (4) In computing the period of limitation for the purposes of this section, the following time or period shall not be included –
  - (a) the time taken in giving an opportunity to the assessee to be reheard under section 7; and
  - (b) any period during which a proceeding under this Chapter for the levy of penalty is stayed by an order, or injunction, of any court.

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# Offences and Prosecution

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# Prosecution Provisions

Section	Offence	Punishment
49	Willful failure to furnish return in relation to foreign income and asset (including financial interest in any entity) before the expiry of the assessment year by a person, being a resident other than not ordinarily resident in India	Rigorous Imprisonment: 6 months to 7 years (+) Fine
50	Willful failure to furnish in the return of income, any information about an asset (including financial interest in any entity) located outside India by a person, being a resident other than not ordinarily resident in India	Rigorous Imprisonment: 6 months to 7 years (+) Fine
51(1)	Willful attempt to evade any tax, penalty or interest chargeable or imposable under the Act by a person, being a resident other than not ordinarily resident in India	Rigorous Imprisonment: 3 to 10 years (+) Fine

# Prosecution Provisions (Contd..)

Section	Offence	Punishment
51(2)	Willful attempt to evade payment of any tax, penalty or interest under the Act by any person	Rigorous Imprisonment: 3 months to 3 years (+) Fine, at the discretion of the court.
52	Making false statement in verification or delivering an account of statement which is false knowingly	Rigorous Imprisonment: 6 months to 7 years (+) Fine
53	Abetting or inducing a person to make or deliver a false statement, account or declaration knowingly or to commit an offence under Section 51(1)	Rigorous Imprisonment: 6 months to 7 years (+) Fine
58	Second and subsequent offence	Rigorous Imprisonment: 3 to 10 years (+) Fine: INR 5 lakh to INR 1 crore.

# Section 54 : Presumption as to Culpable Mental State

(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 pre-ponderance of probability.

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# **Tax Compliance for Undisclosed Foreign Income and Assets**

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# One Time Compliance

- **Scope of Compliance Window**

A declaration could be made by a person who is a resident (other than not ordinarily resident in India) in respect of undisclosed foreign assets located outside India and acquired from income chargeable to tax under the Income-tax Act, 1961 ('Act') for any Assessment Year ('AY') prior to AY 2016-17 where:

- He either failed to furnish a return under Section 139 of the Act, or
- Failed to disclose such income in a return furnished before the date of commencement of the Black Money Act, or
- Such income had escaped assessment by reason of omission or failure on the part of such person to make a return under the Act or to disclose fully and truly all material facts necessary for the assessment or otherwise.

However, FAQ No. 23 of Circular No. 13 and FAQ No. 19 of Circular No. 15 stated that the declaration may be made by any person including Non-residents, who were residents at the time of earning such income. Non-residents have now been brought within the scope of BM Act by virtue of an amendment in the definition of Assessee vide Finance Act, 2019.

# One Time Compliance (Contd..)

- **Rate of Tax and Penalty**
  - The person making the declaration was liable to pay tax at the rate of 30 per cent of the value of such undisclosed assets. Also, he was liable to pay a penalty at the rate of 100 per cent of such tax.
- **Time limits for declaration and making payment**
  - The one-time compliance window was effective from July 1, 2015 as specified vide Circular No. 12 dated July 2, 2015. The declaration could be made at any time before September 30, 2015. The last date for payment of tax & penalty was December 31, 2015.

# One Time Compliance (Contd..)

- **Declaration not eligible in certain cases**

The benefit of one-time compliance window was not available in the following cases:

- A notice in respect of any undisclosed asset acquired from income chargeable to tax under the Act was issued in respect of such AY and the proceeding was pending before the Assessing Officer and the notice in reference to above was served on or before **June 30, 2015**.
- A search was conducted/requisition was made/survey was carried out, time for issuance of a notice of initiation of assessment had not expired.
- Any information received by the competent authority under the tax treaty in respect of undisclosed asset before **June 30, 2015**.
- Prosecution proceedings were initiated against the taxpayer under Indian Penal Code or Unlawful Activities (Prevention) Act or the Prevention of Corruption Act.

# One Time Compliance (Contd..)

- **Circumstances where declaration shall be void**

The declaration was held to be void if:

- The declarant failed to pay the entire amount of tax and penalty before December 31, 2015.
- The declaration was made by misrepresentation or suppression of facts or information.

Any tax or penalty paid in pursuance of the declaration was not refundable under any circumstances.

# One Time Compliance (Contd..)

- **Effect of valid declaration**

- The amount of undisclosed investment in the asset declared shall not be included in the total income of the declarant under the Act for any AY. (**Refer Section 64**)
- Declaration of an undisclosed foreign asset will not affect the finality of completed assessments. Therefore, the declarant will not be entitled to claim re-assessment of any earlier year or revision of any order or any benefit or set off or relief in any appeal or proceedings under the Black Money Act or under the Act in respect of declared undisclosed asset located outside India or any tax paid thereon. (**Refer Section 65**)
- Declaration shall not be admissible as evidence against the declarant in any penalty or prosecution proceedings under the Act, the Wealth Tax Act, the Foreign Exchange Management Act ('FEMA'), the Companies Act or the Customs Act. (**Refer Section 67**)
- The value of the asset stated in the declaration shall not be chargeable to wealth tax for any AYs. (**Refer Section 69**)

# One Time Compliance (Contd..)

- **Section 71 : Person is ineligible for one-time declaration even if there is Undisclosed Foreign Income and Asset**

(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 (52 of 1974):

Provided that -

(i) such order of detention, being an order to which the provisions of section 9 or section 12A of the said Act do not apply, has not been revoked on the report of the Advisory Board under section 8 of the said Act or before the receipt of the report of the Advisory Board; or

(ii) such order of detention, being an order to which the provisions of section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under sub-section (3) of section 9, or on the report of the Advisory Board under section 8, read with sub-section (2) of section 9, of the said Act; or

(iii) such order of detention, being an order to which the provisions of section 12A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under sub-section (3) of that section, or on the basis of the report of the Advisory Board under section 8, read with sub-section (6) of section 12A, of the said Act; or

(iv) such order of detention has not been set aside by a court of competent jurisdiction;

# One Time Compliance (Contd..)

- **Section 71 : Person is ineligible for one-time declaration even if there is Undisclosed Foreign Income and Asset (Contd..)**

(b) in relation to prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code, (45 of 1860) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), the Prevention of Corruption Act, 1988 (49 of 1988);

(c) to any person notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (27 of 1992).

# One Time Compliance (Contd..)

- **Section 71 : Person is ineligible for one-time declaration even if there is Undisclosed Foreign Income and Asset (Contd..)**

(d) in relation to any undisclosed asset located outside India which has been acquired from income chargeable to tax under the Income-tax Act for any previous year relevant to an assessment year prior to the assessment year beginning on the 1st day of April, 2016 –

(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 issued in respect of such assessment year and the proceeding is pending before the Assessing Officer; or

(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

(iii) where any information has been received by the competent authority under an agreement entered into by the Central Government under section 90 or section 90A of the Income-tax Act in respect of such undisclosed asset.

*Explanation.*—For the purpose of this sub-clause asset shall include a bank account whether having any balance or not.

# One Time Compliance (Contd..)

## Persuasive Value of the Circulars (Contd..)

### Definition of undefined terms

- The BM Act does not define the term '**Beneficial Owner**' and '**Beneficiary**' nor it provides any meaning to the said terms. However, clarification in this regard was included in the FAQ No. 31 of Circular No. 13 which suggested that for assimilating the definition of the terms '**Beneficial Owner**' and '**Beneficiary**' one can seek recourse to Explanation 4 and Explanation 5, respectively, to Section 139(1) of the Act.
- Also, Section 2(15) of the BM act states that *all other words and expressions used herein but not defined and defined in the Income-tax Act shall have the meanings respectively assigned to them in that Act.*

# Section 72 : Removal of Doubts

For the removal of doubts, it is hereby declared that

- (a) save as otherwise expressly provided in the *Explanation* to sub-section (1) of section 69, nothing contained in this Chapter shall be construed as conferring any benefit, concession or immunity on any person other than the person making the declaration under this Chapter;
- (b) where any declaration has been made under section 59 but no tax and penalty has been paid within the time specified under section 60 and section 61, the value of such asset shall be chargeable to tax under this Act in the previous year in which such declaration is made;
- (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.

# Section 72 : Removal of Doubts (Contd..)

## Retrospectivity of BM Act

- Section 72(c) of the BM Act also states that '*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*'.
- The applicability of the provisions of Section 72(c) of the BM Act was also clarified vide FAQ No. 14 and 15 of Circular No. 13.

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# General Provisions

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# General Provisions

## **Section 83 : Income Tax Papers to be available for purposes of BM Act**

Notwithstanding anything contained in the Income-tax Act, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes of the said Act may be used for the purposes of this Act.

## **Section 84 : Application of Provisions of Income Tax Act**

The provisions of clauses (c) and (d) of sub-section (1) of section 90, clauses (c) and (d) of sub-section (1) of section 90A, sections 119, 133, 134, 135, [138, 144A], Chapter XV and sections 237, 240, 245, 280, 280A, 280B, 280D, 281, 281B and 284 of the Income-tax Act shall apply with necessary modifications as if the said provisions refer to undisclosed foreign income and asset instead of to income-tax.

# General Provisions (Contd..)

## Section 86 : Power to remove difficulties

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

Provided that no such order shall be made after the expiry of a period of two years from the date on which the provisions of this Act come into force.

(2) Every order made under this section shall be laid before each House of Parliament.

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# Key Judicial Pronouncements

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# Key Judicial Pronouncements

- In **Arun Mammen vs Union of India, (2017) 391 ITR 23 (Madras)**, the Hon'ble High Court of Madras held that where the Petitioner had filed its return of income before the enactment of the BM Act , which came into effect from July 1, 2015, and the Notice under section 148 of the Income Tax Act, 1961 was also issued before July 1, 2015, the application submitted by the Petitioner before the Income Tax Settlement Commission was maintainable.
- The Hon'ble Court in the aforesaid case had set aside the order of the Settlement Commission vide which the Settlement Commission had rejected the application of the Petitioners by stating that it did not have jurisdiction to entertain applications offering undisclosed foreign income and assets and the issue pertaining to undisclosed foreign income and assets will be dealt by the BM Act and the same does not provide any mechanism of Settlement Commission unlike the Income Tax Act.
- The Hon'ble Court directed the Petitioners to file the application before the Settlement Commission which shall consider it in accordance with the provisions of the Income Tax Act.

# Key Judicial Pronouncements (Contd..)

- In **Srinidhi Karti Chidambaram vs Principal Chief Commissioner of Income Tax, (2019) 411 ITR 1 (Madras)**, the Hon'ble High Court of Madras held that the foreign assets in the instant case were acquired with the money that was disclosed in the books of account of the Assessee and that was remitted through banking channels. There was no allegation of black money or unaccounted money or money that had escaped tax or money that was remitted through illegal channels. It was not disputed by the Income-tax department that the source of investment was tax paid money remitted through banking channels in accordance with schemes approved by the RBI. Further, foreign assets were disclosed in Schedule FA in Original/ Revised return of income. Therefore, the offence under section 50 of the BM Act was not tenable.
- The Hon'ble Court in the aforesaid case observed that an assessee can file a revised return of income or even more than one revised return of income under Section 139(5) of the Income Tax Act, 1961, as long as, it is filed within time.

# Key Judicial Pronouncements (Contd..)

- The Hon'ble Court in the case of **Srinidhi Karti Chidambaram** also noted that a revised return of income is the only relevant return of income that can be relied upon or referred to. Revised return of income obliterates or effaces any earlier return of income.
- Further, the Hon'ble Court noted that a return of income has many schedules and all the schedules are part of the 'return of income' referred to in Section 139 of the Income tax Act.
- In view of the above observations, the Hon'ble Court held that an offence under Section 50 is made out only if, in the return of income under sub-section (1) or sub-Section (4) or Sub- Section (5) of Section 139 of the Income-tax Act, there has been a willful failure to disclose any information relating to foreign asset.

*(\* the matter is sub judice before the Hon'ble Supreme Court)*

# Key Judicial Pronouncements (Contd..)

- In **Shrivardhan Mohta vs Union of India, (2019) 102 taxmann.com 273 (Calcutta)**, the Hon'ble High Court of Calcutta had upheld the initiation of prosecution proceedings under the BM Act for non-disclosure of foreign bank accounts by the Assessee in his return of income. The Hon'ble Court rejected the Assessee's contention that the said accounts belonged to his deceased mother and the same was inherited.
- The Hon'ble Court observed that the Assessee 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 proceedings before the settlement commission, which were subsequent to the BM Act coming into effect, and therefore, in the present case, the provisions of the BM Act are getting applied prospectively only and not retrospectively as claimed by the Assessee.
- The Hon'ble Court in the aforesaid case rejected the Assessee's contention of double jeopardy to hold that there is no bar to a trial or conviction of an offence under two different enactments. In the facts of the present case, the Income Tax Act does not impose a punishment of imprisonment, while the BM Act does, and therefore, it cannot be said that the Assessee had been sought to be punished twice for the same offence.

# Key Judicial Pronouncements (Contd..)

- In **Union of India vs Gautam Khaitan, (2020) 420 ITR 140 (SC)**, the Hon'ble Supreme Court had observed that the statute provided a one-time opportunity to make a declaration in respect of any undisclosed asset located outside India and acquired from income chargeable to tax under Income-tax Act. The declaration was to be made on or after the date of commencement of the Act i.e. April 1, 2016, but before a date notified by the Central Government in the Official Gazette. The date so notified for making a declaration was September 30, 2015 and that for payment of tax and penalty was December 31, 2015. Both these dates are prior to the date from which the BM Act would come into force.
- The Hon'ble Court further observed that in order to give the benefit to the Assessee(s) and to remove the anomalies, July 1, 2015 has been substituted in the Act in place of April 1, 2016. By doing so, taxpayers could have made declaration prior to September 30, 2015 and also paid the applicable tax and penalty prior to December 31, 2015.

# Key Judicial Pronouncements (Contd..)

- The Hon'ble Court in the case of **Gautam Khaitan** also observed that a conjoint reading of the various provisions would suggest, that the Assessing Officer can charge the taxes only from the AY 2016-17. However, the value of the said asset has to be as per its valuation in the previous year.
- That the date was changed only for purpose of enabling taxpayers to take benefit of the one-time opportunity provided under the Act for self-declaration and to remove difficulties with respect to penal provisions under the Act. These provisions would come into play only when a taxpayer has failed to take benefit of the self-declaration scheme and neither disclosed nor paid the tax and penalty thereon.
- Therefore, according to the Apex Court, the Hon'ble High Court of Delhi was not right in holding that by impugned notification, penal provisions were made retrospectively applicable.



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