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PROSECUTION SANCTION UNDER THE BLACK MONEY ACT UPHELD FOR NON-DISCLOSURE OF OFFSHORE BANK ACCOUNTS IN INCOME TAX RETURNS | RETROACTIVITY CONSIDERED

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Facts

In the case of *Shrivardhan Mohta v Union of India [W.P. No. 568 of 2018, decided on 14 February 2019]*, the income tax authorities searched the premises of Mr Shrivardhan Mohta (Taxpayer) and found that the Taxpayer held four offshore bank accounts (held with HSBC Bank, Singapore) (Foreign Assets) which were not reported by the Taxpayer in his income tax returns. The Taxpayer explained such Foreign Assets as belonging to his deceased mother received as a part of his inheritance.

Pursuant to the search operation, a notice was issued to the Taxpayer to assess or re-assess his income for the six financial years as required under the Income Tax Act, 1961 (IT Act). The Taxpayer was also called upon to furnish his returns for these Assessment Years (AY) (2009-10 to 2015-16). The Taxpayer filed income tax returns for these years and accordingly assessment proceedings were initiated.

Under the IT Act, a taxpayer can approach the settlement commission in search proceedings (during the pendency of assessment proceedings), and the Taxpayer accordingly approached the settlement commission, for settlement of tax dues to be paid on undisclosed income. The proceedings did not result in a settlement and the Taxpayer's application was rejected on account of incomplete disclosures. It is pertinent to note that in the returns of income furnished by the Taxpayer pursuant to search proceedings as well as in its filings before the settlement commission, the Taxpayer did not disclose these Foreign Assets.

The assessing officer proceeded to complete the assessment for the AYs 2009-10 to 2015-16 and took into consideration the Foreign Assets and raised demands and initiated penalty proceedings under Sections 271(1)(b) (concerning penalty for non-compliance of notices issued, etc) and 271(1)(c) (concerning penalty for concealment of income or filing inaccurate particulars thereof) of the IT Act.

During the pendency of the assessment proceedings, the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (BMA) came into effect (with effect from 1 July 2015). Under Chapter VI of the BMA, an 'Income Declaration Scheme' was introduced to provide tax payers with a one-time voluntary disclosure opportunity to disclose undisclosed foreign income and assets and pay the prescribed tax and penalty thereon. However, certain taxpayers were barred from making such a declaration under the scheme; one such category of taxpayers were those in whose case a search had been initiated and assessments were pending during the period of

this one time disclosure window. Accordingly, the Taxpayer was barred from making such a voluntary declaration as his assessments were pending.

The Taxpayer thereafter received prosecution show cause notices under the BMA for failing to make disclosures under the BMA and ultimately a sanction was granted to prosecute the Taxpayer under the BMA. The Taxpayer approached the Calcutta High Court (HC) with the present writ to get the prosecution proceedings annulled.

Broadly, the Taxpayer's contentions before the HC were:

- the BMA being a fiscal statute should be applied prospectively. The Taxpayer contended that prosecution had been sanctioned against him for income-tax returns pertaining to years 2009-10 to 2015-16 which is prior to the introduction of BMA leading to retrospective application of the BMA;

- since the Taxpayer was debarred by the BMA of availing the declaration window, the penal provisions of the BMA should not be applied against the taxpayer;

- there was no *mens rea* on the part of the Taxpayer to attract prosecution under the BMA; and

- the Taxpayer would suffer double jeopardy as penal proceedings had been initiated under the IT Act and prosecution had been initiated under the BMA.

Decision of the HC

The HC dismissed the writ petition on all grounds.

With respect to the retrospective application of the BMA, the HC held that, notwithstanding the declaration window under the BMA Act, the Taxpayer had opportunities to make a true and proper disclosure of the Foreign Assets i.e. after the search and seizure operations and thereafter in the settlement proceedings. Both the opportunities were subsequent to the introduction of the BMA and the Taxpayer had failed to avail either of the opportunities. Thus, the HC held that there had been no retrospective application of the BMA.

Further, Section 71 of the BMA only bars the application of a certain part of the BMA to a taxpayer in case of pending proceedings under the IT Act (i.e. with respect to Chapter VI voluntary declarations). Prosecution against the Taxpayer had been initiated under Section 50 read with Section 55 of the BMA which provides for punishment for failure to furnish any return of income, any information about an asset located outside India, and was not barred. Since the Taxpayer had failed to furnish in his return of income information about an asset located outside India (i.e. Foreign Assets), the provisions of Section 50 of the BMA were attracted. The HC also noted that the Taxpayer had admitted to being in possession of the Foreign Assets and ought to have disclosed them in his income tax returns. Merely citing inheritance of the Foreign Assets from his deceased mother did not absolve the Taxpayer from the obligation of disclosing such Foreign Assets in his income-tax returns.

With respect to double jeopardy, relying on the Supreme Court's decision in *State of Maharashtra v Sayyed Hassan* the HC held that, "*where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence.*" In the Taxpayer's case, the IT Act does not impose a punishment of imprisonment while the BMA does. The HC thus held that, in such circumstances, it cannot be said that, the Taxpayer has been sought to be punished twice for the same offence.

The HC did not decide the issue regarding the requirement of *mens rea* holding that this need not be decided by a writ court and could be decided in the criminal proceedings.

Comments

While the HC's decision is an interesting take on the applicability of the BMA, it opens a can of worms for a few pertinent questions.

The HC decision indicates that the BMA came into force from 1 April 2016 (i.e., financial year 2015-16 commencing on 1 April 2015). This seems incorrect and has an important bearing on the final outcome. The BMA in fact came into force from 1 July 2015 and this change in the effective date was brought about by the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act (Removal of Difficulties) Order, 2015 dated 1 July 2015. *Vide* this circular it was clarified that "*…the Act passed by the Parliament received the assent of the President on the 26th day of May, 2015 and therefore the provisions of this Act cannot be given effect prior to the 26th day of May, 2015 irrespective of the fact that the assessment year beginning on the 1st day of April, 2016 relates to the previous year commencing on the 1st day of April, 2015*" and the applicability of the Act was changed to 1 July 2015.

One important piece of information missing in the fact pattern listed is the date of filing of returns of income by the Taxpayer pursuant to search proceedings. As per the facts mentioned, the search was conducted on 17 March 2015 and there is a possibility that the returns for AY 2009-10 to 2015-16, filed pursuant to notices issued after search, could have been filed before 1 July 2015. If that is the case, the Taxpayer would have had an additional argument that the BMA was not even in force when he filed his return of income and hence, he cannot be prosecuted under the BMA.

Further, from the HC's decision, one cannot ascertain with absolute clarity whether the prosecution against the Taxpayer was initiated under Section 50 or Section 51 of the BMA.

Assuming that prosecution was initiated only under Section 50 of the BMA, the HC's observation on double jeopardy is not free from doubt. The HC has stated that the IT Act does not impose a punishment of imprisonment while the BMA does and hence it cannot be said that, the Taxpayer has been sought to be punished twice for the same offence. Pertinently, under Section 277 of the IT Act, a taxpayer can be imprisoned for any verification under made under the IT Act or its rules which is false, and which he either knows or believes to be false or does not believe to be true. This can be equated with a taxpayer wilfully failing to furnish in his income tax returns any information relating to an asset located outside India, held by him, as a beneficial owner or of which he is a beneficiary (i.e., the offence under Section 50 of the BMA).

If the prosecution is initiated under Section 51 of the BMA (dealing with punishment for a wilful attempt to evade any taxes under the BMA) as well, the decision of the HC does not provide clarity on whether an initial analysis on the applicability of charging section of the BMA (i.e. Section 3) was carried out. This is on account of the requirement that one needs to first assess whether any tax payable under the BMA has been evaded in order to be liable for prosecution under Section 51. As per the facts of the case, the Taxpayer inherited the bank accounts from his deceased mother and has thus fulfilled the initial onus of explaining the source of the asset. An argument can be made that since the source is explained, the Foreign Assets cannot be treated as 'undisclosed assets located outside India' as defined under Section 2(11) of BMA. Hence, it is unclear whether the non-disclosure of the assets in such a case is encompassed under Section 3 of the BMA and whether prosecution can be initiated against a taxpayer in the event the charging section itself fails and there is no tax payable at all under BMA.

In light of the HC decision, it is advisable that the taxpayers should be very cautious in filing their income tax returns (especially if there are offshore assets and incomes involved since such reporting appears to be the focus point of the income tax department and may have huge ramifications if found deficient).

Recently, a writ petition has been filed before Delhi HC by Mr Gautam Khaitan challenging various provisions of the BMA. The taxpayer has challenged, *inter alia,* the retrospective operation of Section 10(1) and Section 51 of the BMA, and an offence being created retrospectively. This petition is listed for hearing in April.

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