# Six Years of Black Money Act - The Journey So Far & Way Ahead

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**Ashish Mehta**
Partner, Khaitan & Co.

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (**BMA**) has been on the statute for more than six years now. A press release dated 26 July 2021 issued by the Ministry of Finance gave an overview of the matters initiated under BMA as well as taxes recovered, etc. It has been stated that as on 31 May 2021, 166 assessment orders were passed raising demands in excess of INR 8,000 Crores. Undisclosed income of approx. INR 8,500 Cores has been brought to tax and penalty of approx. INR 1300 Crores levied in Swiss HSBC data leaks cases. It is further stated that in the Panama Papers Leaks cases, undisclosed credits in excess of INR 20,000 Crores have been detected. More than 100 prosecution complaints have been filed under BMA alone.

This is so especially in view of the constant flow of information concerning offshore assets on account of various data leaks as well as from various jurisdictions under bilateral information sharing arrangements as well as automatic sharing of information. BMA was introduced in the year 2015 specifically with a view to deal with undisclosed offshore incomes and assets as the prevalent laws were inadequate to deal with various aspects of offshore assets and incomes.

In the ensuing text, an attempt is made to list major events under the BMA (amendments in law as well as important rulings). This will hopefully provide the readers with a sense as to how the law has evolved over the years and where it stands today.

The author has been part of various articles in the past on this topic, Black Money Act - All You Need to Know - Part 1 listing the mechanics of this law, its triggers, applicability and implications of invocation. In a later part (Black Money Act - All You Need to Know - Part 2), the defenses available as well as rulings in the context of BMA were analysed. In Black Money Act - All You Need to Know - Part 3, the author endeavoured to provide some practical guidance on what course could be adopted once an assessment order was passed under BMA.

## Year 1: 2015 – Introduction of law and voluntary disclosure scheme

BMA was introduced through the Finance Act 2015, by late Mr. Arun Jaitley, the then Finance Minister of India. BMA was to be administered by authorities appointed under the Income Tax Act, 1961 (**IT Act**). Tax rate on undisclosed income and assets was prescribed to be 30% and over and above that a flat penalty of 90% on the amount of additions.

A limited period one-time disclosure window was introduced wherein one could make a disclosure (up to September 2015) and come clean by paying 30% tax and 30% penalty (effectively 60% of the value of undisclosed income and offshore assets as against a minimum outflow of 120% as stated above). Immunity from action under five acts (IT Act, Wealth Tax Act 1957, Foreign Exchange Management Act 1999, Companies Act 2013, and Customs Act 1962) was given to taxpayers who availed this opportunity. The administrative focus for the major part of 2015 and early 2016 was spent on convincing the taxpayers to avail of this one-time disclosure window and come clean (multiple FAQs were issued clarifying various questions that were faced by the taxpayers) and collect the taxes for disclosures so made. This scheme did not get a very favorable response from the taxpayers and the disclosure

applications as well as revenues therefrom were not commensurate with the Government's expectations.

**Years 2 to 4: 2016 to 2018 – Invocation of BMA in various cases (issuance of assessment notices)**

Once the time limit for making the voluntary disclosure, related compliances and payment of taxes was over, the focus of the tax authorities shifted to issuance of investigation and assessment notices concerning offshore assets held by Indian taxpayers. A lot of notices were issued between 2017 to 2019 requiring taxpayers to explain / show cause as to why proceedings under BMA should not be initiated in their cases. As per news-reports, more than 400 BMA notices were issued by the end of 2019.

The administrative machinery of BMA sets in motion when a notice under Section 10 (1) of BMA (an equivalent of Section 143(2) or 148 of IT Act) is issued. A combined reading of Section 3 (Charging section), Section 10 (Assessment) and 72(c) (Removal of doubts) meant that in case a taxpayer did not avail the one-time disclosure window, tax was to be levied in the year in which the assessing officer discovers irregularities and issues a notice to the assessee (irrespective of the year in which such offshore asset was acquired). As per Section 11(1), an order under BMA needs to be passed within two years from the end of the financial year in which Section 10(1) notice is issued.

**Note-worthy rulings pronounced in this period:**

**Madras High Court – Srinidhi Karti Chidambaram case** [TS-658-HC-2018(MAD)]

The taxpayers in this case had approached the High Court seeking two reliefs, the ruling of the court on these reliefs sought is summarised as under:

1) Writ of prohibition, prohibiting tax authorities from instituting and sanctioning any prosecution against the taxpayers – The HC considered the provisions of Sections 48 and 55 as well as Chapter V of BMA dealing with offences and prosecution. It was also observed that there was no material placed on record to show that there was a sanction under Section 55 or steps have been taken to initiate prosecution against the taxpayer. In view of such position, the HC decided that it cannot issue a writ of prohibition as sought by the taxpayers.

2) Direction be given to tax authorities to conclude the assessment proceedings under BMA forthwith without any delay – It was prayed that substantial details were sought and submitted by the taxpayers and that the department was delaying conclusion of proceedings and that there were multiple officers issuing notices / summons in relation to the same assets which was causing undue harassment. With a view to bring a conclusion to the same, the taxpayer sought a direction from the court that the authorities should be directed to forthwith conclude the assessment proceedings initiated under BMA. The Court considered these arguments and held that since a limit had already been prescribed under BMA for passing an assessment order, no such direction compelling the authorities to pass an order well before the stipulated time was feasible.

It is pertinent to note that prosecution proceedings were indeed launched later and quashed by the High Court after considering the facts and circumstances of the case.

**Year 5: 2019 – Sweeping changes made in BMA**

When introduced in 2015, BMA was applicable only to an 'assessee' (defined under Section 2(2) of BMA) which meant Residents of India as per Section 6 of IT Act. Taxpayers who were 'Non-residents' or 'Residents but not-ordinarily residents' were specifically kept outside the purview of BMA. Vide Finance Act, 2019, the definition of an 'assessee' under BMA was amended retrospectively from the date of applicability of BMA (i.e., 1 July 2015) to include individuals / entities that were residents when undisclosed offshore incomes were earned / undisclosed offshore assets were acquired even if later such individuals / entities became non-residents of India. While the reason cited for this retrospective amendment was that it merely clarifies the legislative intent of BMA, it will be interesting to see if this amendment withstands the test of judicial scrutiny as it has the effect of substantially changing a taxpayer's position retrospectively (especially those who could have been residents of India in the past, but left India before 2019).

**Note-worthy rulings pronounced in this period:**

**Delhi High Court to Supreme Court and back – Mr Gautam Khaitan's case**

The Delhi HC while hearing a petition filed by Mr. Gautam Khaitan, reported as [TS-278-HC-2019(DEL)] (wherein various provisions of BMA were challenged), had in an interim order held that BMA was introduced from 1 April 2016, hence the notification (dated 1 July 2015) amending the effective date of BMA from 1 April 2016 to 1 July 2015 was retrospective and hence, ultra vires the law and thus, the tax authorities were restrained from taking any action under the BMA.

This could have huge repercussions on the applicability of BMA and hence the tax authorities immediately approached the Supreme Court challenging the Delhi HC ruling. The Supreme Court considered the intention of the law as well as the fact that the amendment in dates was made to enable taxpayers to avail the One Time Disclosure Window as well as and to remove difficulties with respect to penal provisions under BMA. Supreme Court by its order, reported as [TS-616-SC-2019], held that there was no infirmity and that the Delhi HC was not right in treating the notification as ultra vires. The matter is now pending before the Delhi HC to decide on the merits of the grounds taken by the taxpayer.

**Calcutta High Court on retrospectivity as well as double jeopardy:**

In the case of Shrivardhan Mohta [TS-64-HC-2019(CAL)], the Calcutta High Court dismissed a writ petition seeking a declaration that provisions of BMA must be applied prospectively and inter alia, the quashing of the sanction for the taxpayer's prosecution under BMA. The taxpayer in this case also argued that there was a double jeopardy so far as the taxpayer could have been held liable for prosecution under BMA as well as IT Act.

The HC noted that the petitioner had opportunities to make a true and proper disclosure about his foreign bank accounts on two occasions after the introduction of the BMA and his failure to do so would attract prosecution under the BMA. 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*." The High Court held that in this 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. 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 held 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 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).

**Gujarat High Court in case of PCIT v Income Tax Settlement Commission (ITSC)** [TS-834-HC-2019(GUJ)]

BMA provisions do not contain any provision for settlement of cases. In this case, the taxpayer had sought to settle and pay taxes on certain offshore assets under their Income Tax Settlement application before the ITSC under the IT Act. As per the facts, it seems the tax department accepted such a settlement and recovered taxes on the amount settled under the ITSC order and later approached the courts seeking annulment of the ITSC order challenging it on the grounds that offshore assets could be dealt under BMA only, which is a specific law, rather than IT Act which is a general law. The Gujarat HC considered various arguments raised on both sides and ultimately held that there is no specific bar of exclusion from applicability of IT Act under the BMA. The HC also referred to some of the FAQs issued under BMA which also provide for invocation of IT Act. It was also held that the applicants under the ITSC did not qualify as 'assessee' under the then definition of 'assessee' under BMA and hence it cannot be held that ITSC lacked jurisdiction to decide the applications. The tax authorities were given various

opportunities during the ongoing settlement procedures and hence could not bring these proceedings challenging the settlement order.

**Year 6 and onwards: 2020-21 – First lot of assessment orders, Commissioner of Appeals notified, and separate Bench notified in Tribunal for hearing BMA cases**

While the first major batch of assessment orders under BMA was due in March 2020, on account of COVID – 19 and related relaxations in time limits announced, the time limit for passing such assessment orders were extended until 31 March 2021. Number of administrative steps were taken in 2021 namely designation of area-wise Commissioner of Income Tax (Appeals) for the purposes of filing and hearing BMA appeals, constitution of specific benches in the Income Tax Appellate Tribunal for hearing BMA cases as well as consolidation of ongoing investigation and assessment cases area wise in specifically designated ranges to ensure focused and consistent approach.

**Note-worthy rulings pronounced in this period:**

**Three rulings of Mumbai Bench of Tribunal**

1) **Mr Jatinder Mehra ruling** [TS-521-ITAT-2021(DEL)] – In this case, BMA proceedings were invoked in case of the taxpayer on receipt of information concerning offshore assets. The taxpayer was stated to be a settlor of an offshore trust, which when revoked had transferred funds to a company based in BVI. The credits in the bank account of this BVI company were sought to be added in the hands of the assessee. The assessee explained that he was the nominal settlor of the trust without making any financial contribution and he did the same on request of his family members. The assessee's son (who was a non-resident for more than two decades) was the owner of the entity to which the bank account being investigated belonged and that the assessee was neither a director nor shareholder of the entity. The assessee also filed an affidavit stating he never signed any documents and did not receive any funds from this company. The Commissioner of Income Tax (Appeals) found merit in the submissions of the assessee and deleted the additions made. The Tax Department agitated this before the Tribunal and even the Tribunal upheld the appellate order. In doing so, the Tribunal also examined meaning of the terms "beneficial ownership" and "beneficial interest" in the backdrop of a number of laws including Companies Act, Prevention of Money Laundering Act, The Benami Property (Prohibition) Act, etc. and held that there was no evidence placed on record to prove that the assessee was the beneficial owner of such offshore assets. The Tribunal also held that merely because a taxpayer's name appears on the account opening documents, the taxpayer does not become an owner of such a bank account and that the onus is on the department to prove that the funds sought to be taxed belonged to such a taxpayer.

2) **Mr Yashovardhan Birla ruling** [TS-837-ITAT-2021(Mum)] – Recently the Mumbai Bench of Tribunal pronounced a ruling under BMA in case of Yashovardhan Birla in the context of the offshore assets. These offshore assets were subject matter of litigation under Wealth Tax Act 1957, and there was a positive ruling in the context of Wealth Tax in case of the taxpayer. In the present case, the Tribunal held that the provisions of BMA were not applicable in the case of Yash Birla as merely on account of his being a discretionary class beneficiary of an offshore trust, he could not have been alleged to be the owner of the assets of the trust. It was observed that the taxpayer was not a contributor to the trust structure and was not liable to be construed as sole beneficiary of the trust. It was held that the Revenue cannot collapse the offshore trust structure. It was further held that the bank account in foreign jurisdictions pertaining to offshore entities could not be treated as bank accounts of the taxpayer, even though for anti-money laundering purposes the taxpayer had been declared as a 'beneficial owner'.

3) **Mr Rashesh Manhar Bhansali ruling** [TS-1015-ITAT-2021(Mum)] – In contrast to the above two rulings, this is a very different ruling in terms of facts. In this case, the taxpayer denied any relationship with the offshore assets under investigation to begin with and at the fag end of the BMA assessment proceedings, the taxpayer owned up the accounts, stating that these were set up on instructions of his late father. The Tribunal has considered the factual matrix very minutely and made many observations which have culminated in the confirmation of additions. Multiple legal arguments were raised and dealt in the following manner:

a. Bank accounts under investigation were shut before BMA was introduced and hence could not have been taxed at all as their existence at the time of introduction of BMA was sine qua non for applicability

of BMA thereon. The Tribunal considered the arguments raised including the use of the word "is" in Section 2(11) – Definition of the term 'undisclosed asset located outside India' of BMA and concluded that under the provisions of BMA, existence of an asset at the time of introduction of BMA was not a pre-condition for its applicability.

b. It was argued that revenue authorities were already aware of and investigating the concerned offshore assets even before the BMA was introduced and in such a situation BMA could not be invoked. The Tribunal after considering the language of Section 3(1) held that asset coming to the knowledge of 'assessing officer' is the trigger and the Tribunal's finding is that "***whether an undisclosed foreign income is in the knowledge of the Assessing Officer at any point of time or not is not the material factor; the material factor is that it should remain undisclosed in the income tax return or return of income in respect of the same is not filed. While the investigation wing was indeed carrying out inquiries even before the point of time when the provisions of the BMA came into effect but that factor, as the above analysis of legal position indicates, is not a material factor***."

While addressing the taxpayer's arguments, the Tribunal also considered a FAQ (regarding knowledge about offshore assets by other functionaries of Government of India and not just the assessing officer) that was released to assist taxpayers in making disclosures under the One Time Disclosure Window. The Tribunal ultimately held that the context of the FAQ was different (to assist disclosures and not in the context of assessments under BMA) and also that a circular that goes beyond the scope of the law is not binding on the assessee and hence cannot be of any assistance to taxpayers in this regard.

c. The next major argument for consideration by the Tribunal was definition of the term 'beneficial owner'. The Tribunal referred to the intention and preamble of BMA in this regard. It has been held that the context in which 'beneficial owner' is to be considered under BMA is diametrically different than that under the IT Act. If the restrictive definition of beneficial owner as assigned under IT Act was to be considered, that would amount to adopting the same shortcomings as were prevalent in existing laws and thus, such an interpretation is undesirable. The relevant finding of the Tribunal in this regard is - ***Viewed thus, if we are to hold that definition of 'beneficial owner' as assigned by Explanation 4 to Section 139(1) is to equally apply, we will end up in a situation in which the BMA itself will become unworkable. Therefore, for both of these reasons- i.e. (a) the contextual requirements being otherwise, and (b) the adoption of this meaning rendering the provisions of BMA becoming unworkable, the definition under Explanation 4 to Section 139(1) cannot be adopted in the context of the BMA***.

The trend of cases under BMA (as well as generally in the context of offshore assets related rulings even under IT Act) seems to depict that in cases where one is able to prove that an offshore asset under investigation does not belong to him as well as produce details of / evidence regarding the actual owner of the offshore assets, the appellate authorities / courts seem to be taking a lenient view.

**Conclusion:**

Some important questions in the context of provisions of BMA that will need to be decided by Courts in due course are:

1) Are provisions of BMA violative of Article[1] 20(1) (in so far as it has retrospective application and criminal sanctions) and Article 20(2) (as a taxpayer may be liable under BMA as well as IT Act for certain offences – for example – incorrect return filings as discussed earlier in this article) of the Constitution of India?

2) Whether the amendment (introduced in 2019 to apply retrospectively from 1 July 2015) in the definition of 'assessee' to include certain Non-residents and Resident but not ordinarily residents in the ambit of BMA law will withstand judicial scrutiny?

3) Whether BMA can be invoked on assets that were not in existence at the time of introduction of BMA? While the Tribunal in the Bhansali ruling (supra) has taken a view on this, it will be interesting to see if this is agitated before higher courts and how the courts would look at these provisions.

4) Can the presumption under Section 72(c), which effectively does away with limitation period on account of non-availing of the One Time Disclosure Window, be used against taxpayers who were not even eligible to avail such a disclosure widow? There was a huge list of exclusions prescribed debarring taxpayers from availing the One Time Disclosure Window. One will need to see how the Courts look at this aspect, as the ultimate view on this may have many ramifications on the overall administration of BMA law.

5) Is there or does there need to be a time limit within which an assessing officer needs to initiate proceedings under BMA after having received information from any source. A writ petition raising this issue is pending before the Delhi High Court (in case of Harvansh Chawla) wherein amongst other grounds, the taxpayer has also sought quashing of BMA proceedings on the ground that a show cause notice was issued after the time limits prescribed (under Department guidelines).

While considering cases under BMA, Courts are likely to tread cautiously and give heavy weightage to the intent and preamble of the law while deciding the cases and such a consideration may result in undermining / sidestepping of many well-settled concepts.

It may however be noted that unlike the general perception on data leaks, not all names and entities appearing in these leaks are tainted. It is very much possible that the structures as appearing in the so called leaked or tainted / confidential information would be completely legal structures compliant with all regulatory framework, reporting requirements, etc. Even the websites on which leaked information is uploaded and made available for public access, generally there is a disclaimer that the offshore structures could well be within regulatory and legal framework. Having offshore structures and trusts and the mere fact that data is listed on these websites does not mean, suggest, or imply that there is any impropriety, evasion, etc., on the part of the individuals / entities mentioned therein. However, one will need to be mindful that the perception of the authorities / courts in case of offshore matter investigations is going to be negative and undoing that is going to be an uphill task.

One hopes a pragmatic view is taken in these matters and the Government considers introducing a disclosure scheme which will be more inclusive and devoid of the many exceptions made in the 2015 scheme, which made it impossible for even willing taxpayers to comply and settle their issues. While a lot of prosecution cases have been filed in offshore investigation related cases, however these cases result in application of a lot of time, efforts and resources both on the part of the taxpayers and tax administration. Rather than going through these rigorous proceedings and protracted litigation, it would be preferable for the taxpayers to settle the cases which will also result in revenue generation for the tax administration.

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[1] **Article 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*