BLACK MONEY ACT: A MALEVOLENT LAW

T. P. OSTWAL
Chartered Accountant

Black money is a cancer in our economic system, not yet terminal or life-threatening, and unquestionably deserves closer scrutiny by the government. However, the kind of action that has been taken on this front of late is difficult to understand. The replacement of the dreaded Foreign Exchange Regulation Act (FERA) was supposed to put an end to harassment by tax sleuths and enforcement officials. But, through various recent actions, the government has opened the door to such behaviour once again.

In this article, I have tried to capture various issues which have cropped up with the enactment of the Black Money law. Even after the CBDT has tried to address few issues by rolling out circular of frequently asked questions, still there is a lack of clarity in many areas on applicability of this dreadful law.

■ CONSTITUTIONAL VALIDITY OF CHANGE IN DATE OF COMMENCEMENT OF ACT

To start with the list of issues, firstly, the move of the Finance Ministry to advance the date of operation of the black money law from April 1, 2016 to July 1, 2015 is highly questionable. Could the government have "amended" a law passed by the Parliament which had already received the assent of the President through an Executive Order? If the date from which the law would come into force was part of the Bill passed by both Houses of Parliament, then how anybody other than Parliament could have changed it. The government should have gone to the Parliament for amending it.

Section 86 (1) of the Act empowers the Central government to order to remove difficulties not inconsistent with the provisions of the main Act as a delegate of Parliament. But in the instant situation, the government has actually amended section 1(3) of the main Act by altering the date when the Act shall come into force from 1st April, 2016, to 1st July, 2015 in a notification issued by an officer of the rank of Under Secretary to remove any "difficulty" that comes in the way of giving effect to the provisions of the Act through an order. But the "difficulty" that the section refers to cannot apply to the date from which the law would come into force. Further, a delegated legislation cannot amend the parent legislation.

■ DURATION OF COMPLIANCE WINDOW

It was expected that the government would provide a compliance window of 3 to 6 months, though the author's view is that a period of 6 to 9 months would have to be provided for those, who may want to take this one time opportunity and to get the proper valuation of their assets done in terms of complicated Rules for valuation. The 3-month window will certainly be a practical difficulty faced by persons who are genuinely interested in making a disclosure of undisclosed foreign assets. Supposedly, a person having investments and assets in, let us say, 7 tax havens (Switzerland, Cayman Islands, Bermuda, Luxembourg, Jersey, Singapore and Mauritius) and wants to come clean by making declaration of undisclosed assets. Further, calculating the fair value of unlisted shares will be a pain and above that it will be a task to satisfy the tax authority that the disclosure made under the one-time compliance window is correct. An individual who holds shares in an unlisted firm will have to find out the fair value of all assets that firm holds which will be time-consuming. It will not be easy to complete the valuation exercise in three months time frame allotted *(at the time of writing this article, approximately one month of the time frame has already elapsed)* for one-time compliance window, but the downside of not declaring could be severe in view of the automatic exchange of information becoming effective soon. If this three-month compliance scheme is compared with the tax authority's 2 year time frame to complete an assessment, such short compliance scheme may cause undue hardship and be a burden to declarants to satisfy the requirements prescribed under the scheme. If the information comes to the notice of the tax department post this window, the payout would be much more and there would be the risk of imprisonment and prosecution. More so if anyone, even by mistake, makes an incorrect declaration, then the entire declaration will be treated as

null and void. The tax and penalty paid will not be refunded and the information given in the form will be used against the person for initiating proceedings by any demand raised against the declarant.

■ CONFUSION OVER NON-REFUNDABLE TAX AND PENALTY UPON REJECTION OF THE DECLARATION UNDER COM-LIANCE WINDOW SCHEME

If the declaration is regarded as void under section 68 of the Act (Chapter VI – Compliance Window Scheme), then whether the tax and penalty paid would be refunded? This question requires clarification from the CBDT. However, having regard to the provisions of section 66 and section 68, such tax and penalty may not be refunded to the declarant and the declaration shall be deemed never to have been filed under Chapter VI of the Act. Now, since the declaration is deemed never to have been filed, the Assessing Officer may issue a notice under the normal provisions of this Act. Consequently, the declaration may be required to pay tax and penalty, as per the provisions of the Act. However, the declarant should be allowed to claim set-off of the amount of tax and penalty already paid under this chapter for the assets declared *vide* the declaration (which was regarded as void under section 68) and therefore only the remaining amount of tax and/or penalty should be required to be paid.

■ PROBLEM ON OBTAINING INFORMATION ON BANKS ACCOUNTS BY THE DECLARANT

Under Indian Income Tax Act, the tax department can go back up to 16 years whereas under the Black Money Act (which prescribes no time limit) the resident is expected to disclose, as per the circular issued, income or assets even for a period beyond 16 years also. This could be 20, 30 or even 40 years depending on when an account was opened or even sums inherited by a person or person from whom assets were inherited did not pay taxes on such assets. Some of the accountholders in the Liechtenstein bank LGT had opened accounts in the late 1960s and 1970s. Foreign banks do not have account details beyond 10 years. If a person cannot furnish all details, then he would not be able to comply and the tax department will reject the application which is made under the one-time compliance window. However, in a case where there are undisclosed assets other than bank accounts in the declaration, it is uncertain whether the entire declaration would be rejected or only the bank account declaration would stand reject on account of non-compliance of the details so prescribed by the Government.

In some countries like the UAE, there is no income tax and also no legal requirement to maintain books of accounts for tax purpose. In such cases, it will be difficult for individuals to get details of all transactions in the bank account.

■ PRIOR INFORMATION RECEIVED BY GOVT UNDER DTAA

Declarant under the compliance window has no means to know whether the Government has received any prior information under DTAA on or before 30 June 2015 about his undisclosed assets. Supposedly, where a declarant has disclosed the information under the compliance window scheme and is later on informed by the Government that they had information about these undisclosed assets, then that declarant would have to exclude such undisclosed assets from the declaration and will also lose immunity from prosecution under Income-tax Act, Wealth Tax Act, Customs Act, FEMA and Companies Act. But the question here arises, on what grounds that declarant should rely on Government's statement of having prior information. So, declarants may contest the Government's assertion by filing RTI application to disclose documentary evidence substantiating Government's claim that information under DTAA was received on or before 30th June 2015.

■ VALUATION OF IMMOVABLE PROPERTIES ACQUIRED ABROAD

Properties acquired abroad will be taxed on the basis of a valuation report of a valuer recognised by the foreign government. Clarification is required regarding the evidence the declarant will have to produce to prove that the valuer is recognised by that particular foreign government and to get valuation done. In most of the foreign countries, there is no system of a registered valuers notified by the Government and valuation is generally carried out by private asset valuation companies. This becomes more difficult and time-consuming for a person to first conduct a search for finding a registered valuer otherwise the declaration made would be rejected and deemed to have never been made leading to more severe and harsh consequences like higher penalty and fear of prosecution.

■ VALUATION OF ANY OTHER ASSETS

The rules prescribed by the Government provide for valuation of any other asset. Clarification is required regarding its definition. Whether that will include intangible assets as well. Further regarding its valuation the rules

provide that FMV shall be higher of cost and the price that the asset would fetch if sold in the open market on the valuation date in an arm's-length transaction. Whether a valuation report is required for this?

■ INDIAN NATIONALS RETURNING TO INDIA AFTER FEW YEARS

Professionals who return to India after having worked abroad may have opened retirement pension accounts like 401K account in US. CBDT has clarified that assets acquired when the person was a non-resident do not fall under the definition of undisclosed assets and will not be taxed under the Black Money Act or Income-tax Act. However, a question arises whether the balance in the 401k accounts will have to be disclosed by a resident in the Income Tax Return under the Schedule for Foreign Assets? Since CBDT's circular has stated that non-reporting of foreign assets in Income-tax return and makes the person liable for penalty of Rs 10 lakh under the Act. Further, the threshold limit of Rs. 5 lakh prescribed by the Government for which the penalty is not applicable is in respect of bank account only. So, such 401k balances does not represent as bank account and the threshold limit would also not be applicable in this regard. Clarification needs to be sought from CBDT on this issue since the penalty will be harsh for a mere non-disclosure even if there is no detriment to the Government as the asset was created out of income earned when the individual was a non-resident and which is not taxable in India.

Further, there is a practical difficulty of retrieving details of such balance for those who returned to India from abroad long back. It makes no sense in putting such people to hardship without any commensurate benefit to the Government. It would be better if CBDT instructs Assessing Officers not to impose penalty in cases where non-disclosure causes no loss to the Revenue.

■ INHERITANCE OF PROPERTY

The CBDT in the circular containing a list of frequently asked questions has stated that in case of inheritance of property from the father and which has been sold by the son in an earlier year, son can make the declaration in respect of such property as legal representative where source of investment in the property by the father was unexplained. What happens if son is not aware of the source? Can he be liable under this Act, in case he fails to make such disclosures? Similarly, there is conflict between the Act and the Circular issued by the CBDT, where in the Circular it appears as if the non-residents are also being covered by the Act, while section 3 of the Act provides the applicability of this act to ordinarily residents only.

Further, would it be correct to argue that non-disclosure would only attract penalty of Rs. 10 lakh u/s. 42? Tax and penalty of 120% would be attracted only on income accrued on such inherited property that is not disclosed post inheritance?

■ THREAT OF ABETMENT

The Act imposes liability for abetting or inducing another to wilfully attempt to evade tax or to make false statements/ declarations in relation to foreign income and assets. The objective of this provision is to target professional advisors such as private banks, accountants, lawyers and other consultants whose actions may potentially be covered under 'abetment or inducement'. This move is intended to make the Act comprehensive in its scope. That said, it is bound to cause concern among practitioners as there is no clear guidance on what precautions or due diligence will be sufficient to indicate practitioners acted within their rights or that they did not beach their code of conduct. Imposition of such liability on professional advisors and intermediaries may adversely affect advising of Indian clients by practitioners may apprehend the risk of undue harassment at the hands of Revenue officials.

There is a dire need for the Government to step in and clear the air on many issues and by not just issuing a press release stating the views in the media reports are based on surmises and may not be factually accurate or correctly reflecting the legal position. Thus, until and unless the Government lends an ear to the problems faced and helps in resolving them, this dreadful Black Money Law will only be a tool of tax terrorism. ■

"I encourage everyone to pay attention to the issues that matter to you, from jobs and the economy, to education and our schools, to criminal justice reform. Whatever it is that you care about, make sure you use your voice." —**Two Chainz**