

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (“BMA”)

What is it?

It's a law, in addition to the Income Tax Act, 1961 (“ITA”) to tax the black money i. e. the undisclosed foreign income and assets.

When is it applicable from?

It is applicable from the 1st of April, 2015 i. e. Assessment Year 2016-17 onwards.

Am I covered?

Applies to all resident and ordinary residents (“ROR”). Moreover, applicability of the provisions shall be restricted to those who have undisclosed foreign income and assets (UFIA)

What is UFIA?

UFIA is defined under section 2(12) of the BMA as: “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

Again, what is UFIA?

Basically, UFIA is your KHUFIA (secret) wealth! However, this is covering only foreign secret money and wealth, leaving the domestic secret money to be dealt with under the Income Tax Act, 1961. This includes undisclosed asset located outside India and undisclosed income from a source located outside India (maybe received in or outside India).

What is included in the definition of undisclosed asset located outside India?

It is defined under section 2(11) of the BMA as “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;

How are the undisclosed assets and income valued?

In relation to assets:

Section 3(1) of the BMA states that there shall be charged a tax in respect of total undisclosed foreign asset of the previous year on the *value* of such undisclosed asset.

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.

Section 3(2) of the BMA contains that the “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.

In relation to income:

Tax shall be on the amount of income for that previous year.

Is there any deduction available while valuing UFIA?

No deductions, other than the following shall be allowed in the value of the UFIA:

1. Income already assessed to tax under ITA;
2. Income already assessed or assessable under the BMA;
3. From the value of the asset, subject to the Assessing Officer getting convinced that the tax-payer has acquired the undisclosed foreign asset out of the income, which has been assessed or assessable under the BMA, the same proportion as the assessable or assessed foreign income bears to the total cost of the asset.

For e. g.,

- Property purchased in FY2009-10 for INR5million
- Income out of which asset is acquired, offered to tax in FY2009-10: INR2million
- Fair value of property in FY2015-16 (year in which UFIA is noticed by AO): INR10million
- Deduction available: $(\text{INR}2\text{million} / \text{INR}5\text{million}) * \text{INR}10\text{million} = \text{INR}4\text{million}$
- Amount of undisclosed foreign asset chargeable under the BMA: INR6million.

What is the rate of tax?

The tax rate on UFIA is 30% (thirty percent). However, the penalty on the same is three times that of the tax amount, making the effective pay-out percentage at 120% of the amount of UFIA.

Is there any voluntary compliance window?

Yes, an initial voluntary compliance window is available till the 30th of September, 2015 wherein people holding UFIA can disclose the same and pay tax on such UFIA at 30% plus another 30% of penalty. Such voluntary compliance not only reduces the penalty from three times to one time but also immunizes the defaulter from prosecution under the BMA.

Tell me more about the voluntary compliance window.

1. Voluntary compliance allows all persons to disclose the UFIA till 30th September, 2015 in the prescribed Form – 6 to the CIT or Principal CIT.
2. Such disclosure is to be accompanied with payment (of tax and reduced amount of penalty) which is to be made before the 31st of December, 2015.
3. Failure to make the payment shall nullify the declaration.
4. Such declaration shall give immunity to the person making the declaration from the following other Acts which are ITA, FEMA, Customs, Companies Act, 2013, Wealth Tax Act.
5. No relief/ set-off of tax/ penalty paid can be claimed under the ITA.
6. Once asset/ income is disclosed under the BMA, the same shall not form part of total income under the ITA.
7. Disclosure by firm is mandatory and declaration by partner alone shall not suffice. Declaration by company shall immune all of the company's directors in respect of the said UFIA.

Is there any limitation period under the BMA?

The limitation period is only for the purpose of completing the assessment, once the assessment is commenced. The assessment needs to be completed within two years of issuing the notice under section 10(1) of the BMA.

There appears to be no limitation period for commencing the assessment i. e. any old UFIA can also be brought under the BMA tax at any future time.

Does it include assets acquired when I was studying/ working abroad?

It may so happen that you may have been a non-resident as per the ITA for years when the asset was acquired or income was earned. Let's take an example of Mr. XYZ, an Indian resident till 2002. He had gone to the United States of America for studying in 2002 and then pursued job there till 2007. He wasn't a resident of India as per the ITA for the said period. For the said period, he earned USD250,000 and had bought a small apartment for USD150,000. Without disposing the same, Mr. XYZ returned to India and is now living in India. He

is a ROR as per the ITA in 2015. He has also not disclosed the said income earned in the said period and the asset acquired during the same. What would happen?

A plain reading of the applicability and the definitions cover such situations making them liable to tax. However, the same remains outside of the applicability of the BMA:

1. Explanation about the source of investment – For most of the cases falling in similar lines with that of Mr. XYZ, it may so happen that there shall be an explanation that the same was acquired in the said period out of income earned in the foreign nation while residing there.
2. The FAQs (no. 24) released by the CBDT also have the same treatment of non-applicability of BMA on such assets/ income.

Adequate disclosure in ITR should be made from AY2015-16 if not made already.

Hence, the crux is that if you have acquired any undisclosed asset or have earned any undisclosed income, **at a time when you were a ROR in India**, the source of which cannot be explained, then the BMA has far reaching impact on you and one should consider exploring the voluntary compliance window till it is available.

Some important FAQs from those issued by the ITD on July 6, 2015

Where an undisclosed foreign asset is declared under Chapter VI of the Act and tax and penalty is paid on its fair market value then will the declarant be liable for capital gains on sale of such asset in the future? If yes, then how will the capital gains in such case be computed?

Yes, the declarant will be liable for capital gains under the Income-tax Act on sale of such asset in future. As per the current provisions of the Income-tax Act, the capital gains is computed by deducting cost of acquisition from the sale price. However, since the asset will be taxed at its fair market value the cost of acquisition for the purpose of Capital Gains shall be the said fair market value and the period of holding shall start from the date of declaration of such asset under Chapter VI of the Act.

Where a notice under section 142/ 143(2)/ 148/ 153A/ 153C of the Income-tax Act has been issued to a person for an assessment year will he be ineligible from voluntary declaration under section 59 of the Act?

The person will only be ineligible from declaration of those foreign assets which have been acquired during the year for which a notice under section 142/ 143(2)/ 148/ 153A/ 153C is issued and the proceeding is pending before the Assessing Officer. He is free to declare other foreign assets which have been acquired during other years for which no notice under above referred sections have been issued.

A person has a foreign bank account in which undisclosed income has been deposited over several years. He has spent the money in the account over these years and now it has a balance of only \$500. Does he need to pay tax on this \$500 under the declaration?

Section 59 of the Act provides for declaration of an undisclosed asset and not income. In this case the Bank account is an undisclosed asset which may be declared. Tax on undisclosed asset is required to be paid on its fair market value. In case of a bank account the fair market value is the sum of all the deposits made in the account computed in accordance with Rule 3(1)(e). Therefore, tax and penalty needs to be paid on such fair market value and not on the balance as on date.

A person inherited a house property in 2003-04 from his father who is no more. Such property was acquired from unexplained sources of investment. The property was sold by the person in 2011-12. Does he need to declare such property under Chapter VI of the Act and if yes then, what will be the fair market value of such property for the purpose of declaration?

Since the property was from unexplained sources of investment the same may be declared under Chapter VI of the Act. However, the declaration in this case needs be made by the person who inherited the property in the capacity of legal representative of his father. The fair market value of the property in his case shall be higher of its cost of acquisition and the sale price as per Rule 3(2) of the Rules.

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