Gaurav Jain (Partner, Vaish Associates)

[B.Com (H), FCA, LLb][https://www.linkedin.com/in/gaurav-jain-8954325/]

## Black Money Law – Prospective and not Retrospective or Retroactive, An arduous plea

With an intent to tax illegitimate / undisclosed foreign income and assets earned / acquired outside India by residents of India, the Central Government had enacted The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (hereinafter referred to as "Black Money Law or the Act") which received assent of the President on 26th May, 2015.

At the time of enactment, the new law was stated to come into force on the 1st day of April 2016, which was subsequently antedated to 1st July, 2015. [Reason for such antedating has been discussed in detail infra].

### Basic Scheme of the Act

Section 3(1) of the Act brings to charge to tax (@30%) the undisclosed foreign income and asset of an assessee "of the previous year" and clearly provides that such tax shall be charged for every assessment year commencing from 2016-17 and onwards. The relevant portion of the said section reads as under:

> **"Charge of tax**
>
> **3.** (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:…."

On perusal of the aforesaid charging section, it would be noted, that tax is sought to be imposed on undisclosed foreign income and asset of the "previous year" relevant to assessment year 2016-17 and onwards.

The meaning and scope of "undisclosed foreign asset" and "undisclosed foreign income" has to be gathered on reading of definitions contained in section 2(11)/(12) and section 4 together, which are reproduced hereunder for ready reference:

**"Definitions**

**2.** In this Act, unless the context otherwise requires,—

**…**……

(11) "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;

(12) "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;

……..."

**Scope of total undisclosed foreign income and asset**

**4.** (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.

……

(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."

On harmonious reading of the aforesaid provisions, it follows that:

- the Act seeks to tax two items, viz., "undisclosed foreign income" and "undisclosed foreign asset";
- Undisclosed foreign income is an income which has not be declared in the return of income filed or to be filed as per the provisions of section 139 of the Income-tax Act, 1961 ('the Tax Act');
- Undisclosed foreign asset is an asset located outside India **and is held by the assessee**, for which there is no explanation for the source of acquisition.

**Scope of Prospective or Retrospective application**

**A. Undisclosed foreign income - Prospective application**

Considering that the charging section, i.e., section 3(1) makes the Act effective from the assessment year 2016-17 and onwards, the tax under the Act can be levied on undisclosed income only in relation to foreign income earned from AY 2016-17 and onwards and not before. In other words, the charge of tax on undisclosed foreign income is prospective in nature. Such income pertaining to periods prior to AY 2015-16, would be taxable under the Income-tax Act, subject to the period of limitation contained therein.

**B. Undisclosed foreign asset - Retrospective application**

The issue, however, arises with respect to applicability of said Act on undisclosed foreign assets, which were acquired (from undisclosed sources) prior to AY 2016-17, but are – (i) disposed before the enactment of the Act, or (ii) continued to be held after the enactment of the Act. In other words, the issue is of retrospective [for clause (i)] and retroactive [for clause (ii)] applicability of the law on undisclosed foreign assets.

Reasons behind such ambiguity are as under:

(i) Proviso to section 3(1) provides that undisclosed asset shall be charged to tax on its value in the previous year in which such asset **comes to notice of the assessing officer;**

(ii) Section 60 read with section 59 of the Act provides for charge of tax (at concessional penalty and immunity from prosecution) on the value of undisclosed foreign assets, voluntary declared by an assessee under the special declaration opportunity provided under the latter section for a specified period (upto 30th September, 2015), as on the commencement of the Act, i.e., 1st July, 2015 [**meaning thereby, that the Act intends to tax assets held before 1st July, 2015 and, therefore, special rate of tax on such assets if declared within the specified period, otherwise normal consequences as contained in the Act to follow**];

(iii) Section 72(c) provides that, if the foreign asset "has been acquired or made prior to commencement of this Act and no declaration in respect of such asset" is made under section 59, "such asset shall be deemed to have been acquired or made in the year in which" notice for assessment issued by the assessing officer.

(iv) Rule of Valuation of undisclosed foreign assets contained in "Black Money (Undisclsoed Foreign Income and Assets) and Imposition of Tax Rules, 2015" (hereinafter referred as "the Valuation Rules"), too, gives indication of such retrospective applicability, in the following manner:

(a) Rule 3(1)(e) relating to valuation of asset, being an account with a Bank, provides that – "the sum of all the deposits made in the bank account from the date of opening of the account", shall be deemed to be the value of such asset;

(b) Rule 3(2) provides that, where an asset (other than a Bank account) was transferred before the date of valuation, fair market value of such asset shall be the higher of "cost of acquisition" and the "sale price".

(v) Order dated 15.10.2019 passed by the Supreme Court in the case of Gautam Khaitan: C.A. No. 1563/2019.

In view of the aforesaid various provisions contained in the Act read with the Valuation Rules, the Legislature intends to make rigors of the Act be made applicable to undisclosed foreign assets both retrospectively and retroactively.

The author in the following paragraphs seeks to deal with arguments against the retrospective and retroactive applicability of the said law:

**Plea against retrospectivity/retroactive application**

1. Definition of "undisclosed asset located outside India" (reproduced supra) use the phrases "held by the assessee" and "assessee **is the** beneficial owner of such asset". Both the aforesaid phrases, in the author's view, imply that the asset must continue to be held by the assessee. The word "is" also implies continuous holding of an asset by the assessee. Therefore, on literal interpretation, if a foreign asset is not in current ownership of the assessee, the same would not fall within the scope of undisclosed asset as defined in the Act; such asset cannot be brought to tax on the plea of intention of the legislature. **[Refer: Srinidhi Karti Chidambaram v. PCIT: W.A.No.1125 of 2018 (Madras HC)]** The literal interpretation, therefore, in the author's view, rules out retrospective application of the section; in other words, if the asset is not held by the assessee on the date of enforcement of the new law, the said asset do not qualify as undisclosed foreign asset, to be subjected to tax under that Act. In so far as assets, which were acquired prior to enactment and are continued to be held after the enactment (i.e. retroactive application), the same, in the author's view, cannot be brought to tax under the Act, for the other arguments, discussed infra.

2. Proviso to section 3(1), being couched as a Proviso, cannot extend beyond the scope of main provision. The principle of interpretation relating to a Proviso are that – "A proviso should not be read as if providing by way of an addition to the main provision which is foreign to the principal provision itself. Indeed, in some cases, a proviso may be an exception to the main provision though it cannot be inconsistent with what is expressed therein and, if it is, it would be ultra vires the main provision and liable to be struck down."

   Therefore, if it is argued that the main provision seeks to, *interalia*, tax undisclosed asset acquired in the previous year commencing from AY 2016-17, the Proviso to said section cannot expand its scope to include assets acquired in the earlier period. That apart, on literal reading of the Proviso, the same provides for the **valuation** of undisclosed foreign asset in the previous year in which asset comes to notice of the assessing officer, and do not (nor could) create a separate charge of tax on such assets, when they come to notice of the assessing officer. Therefore, in the author's view, Proviso to section 3(1) has limited applicability.

3. Section 60 read with section 59 creates a separate and additional charge of tax, independent from section 3(1), on disclosed assets declared during the window period, to provide immunity to such

disclosure from consequences in Income-tax Act and Wealth-tax Act, as per sections 64 and 69 of the Act. Therefore, just because section 60 permitted voluntary disclosure of foreign assets in preceding year, does not mean/imply that section 3 also seeks to tax foreign assets acquired in earlier year(s).

4. Section 72(c) by way of fiction deems undisclosed foreign asset to be acquired in the year in which notice is issued by the assessing officer; the question arises as to the validity of said section, since – (i) the said provision is not a charging section and (ii) the same has been couched under the residuary/clarificatory head of "Removal of doubts".

5. As regards Valuation Rules, the same can be argued to be ultra vires, in as much as, the Rules cannot be extended beyond the scope of substantive law/provisions; therefore, if it is held that the provisions of the Act do not or cannot charge undisclosed assets acquired prior to AY 2016-17, the value of assets cannot be brought to tax by invoking the provisions of Valuation Rules. **[Shri Prithvi Cotton Mills Limited v. Broach Borough Municipality (1969) 2 SCC 283; The Chamber Of Tax Consultants & Ors. vs UOI: 400 ITR 178 (Del.)]**

6. Decision of apex Court in the case of in the case of **Gautam Khaitan: C.A. No. 1563/2019**.

   In order to appreciate the decisions rendered in the case of Gautam Khaitan (supra), it would first be pertinent to understand the legislative background of certain provisions.

   Apart from imposing tax and penal consequences on the default of undisclosed foreign income and assets, the Act also provided a one-time compliance opportunity to persons having such undisclosed foreign income/assets, by payment of tax at the rate of 30% and concessional penalty thereon of equivalent amount, without prosecution, which was available for a limited period of time. The CBDT Press release dated 20-3-2015 provided that –"It was merely an opportunity for persons to come clean and become compliant before the stringent provisions of the new Act comes into force."

   In terms of section 59 of the Act, the aforesaid opportunity was made available only in relation to undisclosed asset located outside India and acquired from income chargeable to tax under the Income-tax Act for any assessment year prior to the assessment year 2016-17. As per the Notification No. SO 1791(E), dated 1.7.2015, the date of declaration was fixed at 30th September 2015.

   Section 60 of the Act provided that undisclosed asset declared under section 59 shall be chargeable to tax @30% of the value of such undisclosed asset on the date of commencement of this Act.

   In view of the above, considering that there was dichotomy between the date of Act coming into force on 1.4.2016, whereas section 60 thereof prescribing the charge of tax on the value of assets declared (in the opportunity scheme) for assessment years prior to AY 2016-17, the Central Government passed Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act (Removal of Difficulties) Order, 2015 to precede the effective date of the Act from 1-4-2016 to 1-7-2015.

   In the case of Gautam Khaitan (supra), the assessee had challenged the show cause notices issued under the Act, by way of writ petition before the High Court. Amongst various challenges, the

assessee had challenged the aforesaid Notification No. SO 1791(E), dated 1.7.2015 also to be illegal, ultra vires, null and void.

The Delhi High Court, vide interim order dated 16.5.2019, granted stay on proceedings, primarily on the ground that the aforesaid Notification issued by the Government is illegal and ultra-vires holding as under:

> "4. The issue before us at this interim stage is, as to whether the Government can exercise powers under the said Act, prior to the statute itself coming into force.
> …….
> 10. Parliament in its wisdom enacted the said Act and expressly provided therein that save as otherwise provided in the said Act, it shall come into force on the 1st day of April, 2016. There is, therefore, no gainsaying the legal position that, the power to make Rules or remove difficulties under the provisions of Sections 85 and 86 of the said Act, could only be exercised by the Central Government, once the said Act came into force on the 1st April, 2016, the date expressly stipulated by Parliament in this behalf, and not prior thereto.
>
> 11. A fortiori the Central Government further could not have, prior to the said Act coming into force, altered the date on which the enactment came into force i.e. 1st April, 2016 by exercising the powers available to it under Sections 85 and 86 of the said Act by advancing it to 1st July, 2015.
> ……
> 13. In the case at hand, consequently at this stage we are prima facie of the considered view that, the official respondents could not have exercised powers granted to it under the provisions of Sections 85 and 86 of the said Act, prior to the enactment itself coming into force, in terms of the provisions of sub-Section (3) of Section 1 of the said Act.
>
> 14. In this view of the matter, we are of the opinion that, the petitioner has made out a good prima facie case for grant of interim relief; and that grave prejudice will be caused to him if the official respondents are not restrained at this stage from proceeding further and taking action against the petitioner, under the provisions of the said Act.
> ……."

In view of the above, finding of the Delhi High Court were only with respect to the validity of issuance of Notification for preceding the effect of the Act There was no finding as to the question of retrospective applicability of the Act.

The aforesaid interim order passed by the High Court was challenged by Revenue before the Supreme Court. Again the question before the Supreme Court was in the limited sphere of the issuance of the aforesaid Notification, as noted in Para 4 of the order dated 15.10.2019 passed by the Supreme Court:

> "4. The short question that falls for consideration is, as to whether the High Court was right in observing that while exercise of the powers under the provisions of Sections 85 and 86 of the Black Money Act, the Central Government has made the said Act retrospectively applicable from 01.07.2015 and passed a restraint order."

While answering the aforesaid question, the Supreme Court, quashing the interim order passed by the Delhi High Court, upheld the validity of the said Notification and set-aside the matter back to the High Court to decide the writ petition afresh, without being influenced by any other observation in the decision. The relevant observations of the apex Court in that regard are as under:

> "23. The High Court is requested to decide the writ petition on its own merits. However, **we clarify that the observations made by us are only for the purposes of examining the correctness of the interim order passed by the High Court** and the High Court would decide the writ petition uninfluenced by the same." (emphasis supplied)

The other aspects of the retrospective application of the Act, more particularly with reference to vires of Article 20(1) (explained infra) were not gone into, nor answered by the apex Court, which issues are open to be decided by the High Court in the set-aside proceedings.

It would further be pertinent to draw attention to the decision **dated 13.03.2020** passed by the Bombay High court in the case of **Anila Rasiklal Mehta and others v. UOI: WP(C) No. 1300/2018**, wherein distinguishing the decision of apex Court in the case of Gautam Khaitan (supra), the High Court observed as under:

> "42. Delhi High Court in **Gautam Khaitan** (*supra*), had passed a restraint order restraining the authorities under the Black Money Act from taking any action pursuant to order passed under Section 55 of the said Act for prosecution. This was challenged by the revenue before the Supreme Court. The question which fell for consideration was whether the High Court was right in observing that the Central Government has given retrospective operation to the provisions of the Black Money Act. After dilating on different provisions of the Black Money Act, it was noted that initially, 01.04.2016 was mentioned as the date for coming into force of the Black Money Act. Supreme Court noted that this created an anomalous situation since the declaration under Section 59 was to be made on or before 30.09.2015 and the tax and penalty paid on or before 31.12.2015 which periods were over i.e., had lapsed when the Black Money Act came into effect on 01.04.2016. Therefore, this date appearing in Section 1(3) was substituted and the date of giving effect was notified as 01.07.2015 so as to enable persons desiring of taking benefit under Section 59 of the Black Money Act to avail the benefit. **Thus the date 01.04.2016 was changed to 01.07.2015 only to enable the assessees to take benefit of Section 59. The power to make substitution was exercised only to remove difficulties.** Having clarified the position, Supreme Court observed that assessing officer can charge tax only from the assessment year commencing on or after 01.04.2016. **In the facts of that case, it was noted that the assessment year under consideration was 2019-2020. In such circumstances, Supreme Court held that the High Court was not right in holding that the penal provisions were made retrospectively applicable.** (emphasis supplied)

In that view of the matter, in the author's view, the decision of apex Court in the case of Gautam Khaitan (supra) do not presently hold the field on the issue of retrospective application of said law.

7. It is a settled principle of interpretation that – "unless a contrary intention appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a

current law should govern current activities. Law passed today cannot apply to the events of the past." [Refer: CIT v. Vatika Township (P) Ltd.: 367 ITR 466 (SC)].

In the present law, section 1 of the Act is ex-facie clear in stating that the law shall come into force on 1st July, 2015 and as per section 3, charge of tax is from assessment year 2016-17 and onwards. Therefore, when the language of the Act, as passed by the Parliament, in clear terms points to prospective applicability of law, the retrospective applicability thereof cannot be presumed.

8. Retrospective and Retroactive application is unconstitutional

Article 20(1) of the Constitution of India, inter alia, imposes bar on conviction of a person for an offence, which was not a violation as per the law in force at the time of the commission of the offence, and reads as under:

> "20. Protection in respect of conviction for offences
>
> (1) No person shall be convicted of **any offence** except for violation of a **law in force at the time of the commission** of the act charged as an offence……"

The conditions precedent for the application of the aforesaid provision is – (i) commission of an offence and (ii) such offense is not violative of law in force at the relevant time.

Article 367 of the Constitution provides that, reference can be made to the General Clauses Act for interpretation of any part of the Constitution, which defines the said word as "any act or omission made punishable by any law for the time being in force."

It has been successively held by Courts, that the word punishment used in the aforesaid section read with Article 20(1) is applicable to criminal offences and not to offences which are punishable only with fine. [Refer: Central India Motors vs C.L. Sharma, Assistant: 1980 46 STC 379 MP]. The default under the Act, apart from imposition of higher tax, penalty, etc., also exposes the assessee to prosecution under section 49, 50 and 52 of the Act. Thus, the default under the Act would fall within the meaning of "offence" and, therefore, the Act, in the author's view, is in the teeth of Article 20(1) of the Constitution.

Having discussed as above, that the default under the Act qualifies to be an offence, the other condition of Article 20(1) is that, the conviction cannot be more than the 'law in force' at the time when such act was committed.

"Law in force" has been interpreted by the Courts as not a law "deemed" to be in force and thus brought into force but the law factually in operation at the time or what may be called the then existing law. **[Rao Shiv Bahadur Singh vs. State of Madhya Pradesh 1953 SCR 1188 (SC), West Ramnad Electric Distribution Co. Ltd. vs. State of Madras AIR 1962 SC 1753 (SC), Biswanath Bhattacharya vs. Union of India (2014) 4 SCC 392]**.

The Courts have even denied retroactive application of new law, as per Article 20(1) of the Constitution. **[Refer: State of Maharashtra vs. Kaliar Koil Subramaniam Ramaswamy (1977) 3 SCC 525].**

In view of the above, assuming intention of the Legislature was to make the law as having retrospective or retroactive application, considering that the Act exposes an assessee of severe punishment, the same would be in the teeth of Article 20(1) of the Constitution.

In the present case, as discussed above, the default of undisclosed foreign income, as per section 3(1) is chargeable to tax under the Act, only prospectively w.e.f. AY 2016-17. The issue of retrospective/retroactive application is only qua undisclosed foreign assets, which were acquired prior to enactment, but are either disposed or are continued to be held after the 1-4-2015. Holding of undisclosed foreign assets upto AY 2015-16 could have been a default as per the then prevailing provisions of the Wealth-tax Act, 1957, which was abolished w.e.f AY 2016-17. As per the author's view, if the provisions of Article 20(1) are to be applied, then the undisclosed foreign assets acquired prior to AY 2016-17 (either disposed or continued to be held) can only be prosecuted as per the provisions of Wealth-tax Act and subject to limitations of that law, but not under the Black Money Law.

**Conclusion**

In view of the aforesaid discussion, there is a strong case against retrospective applicability of Black Money Law. Accordingly, it is advisable that where a show case notice is issued to tax undisclosed income or undisclosed asset earned/acquired prior to AY 2016-17, strong objection must be taken against issuance of such notice and, if required, the jurisdiction to issue such notice may be challenged before the High Court under Article 226 of the Constitution.

[Disclaimer: View of the author are personal, who can be reached at gauravj@vaishlaw.com]