

Direct Tax Alert

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The retrospective application of Black Money Act 2015 is unconstitutional - Karnataka High Court

Background

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (the BMA) was introduced in 2015. The BMA originally promulgated was to come into effect from April 1, 2016. However, by a subsequent notification, the applicability of BMA was pre-dated to July 1, 2015. The BMA essentially deals with taxation of undisclosed foreign income and assets of Indian Residents. Under the BMA, tax rate on undisclosed foreign income and assets is prescribed at the rate of 30%. Further, penalty may also be levied which equals to three times of tax computed.

As per the provisions of the BMA, if a taxpayer did not avail the one-time disclosure window, tax is 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 foreign asset was acquired).

The BMA prescribes various prosecution related provisions, inter alia, prosecution for failure to furnish information in the return of income about an asset located outside India. It provides for punishment with rigorous imprisonment, which shall not be less than 6 months but may extend to 7 years, and with a fine.

The Supreme Court in case of *Union of India v. Gautam Khaitan*¹ discussed the applicability of penal provisions under section 50 and 51 of the BMA where the assessee fails to take the benefit of declaration under section 59 of the BMA and the assets remain undisclosed. The Supreme Court confirmed the applicability of CBDT notification dated July 1, 2015 which predated the applicability

¹ Union of India v. Gautam Khaitan [2020] 420 ITR 140 (SC)



of the BMA to 1 July 2015 from the earlier applicable date of April 1, 2016.

Whether the provisions of the BMA apply retrospectively on past transactions has been a matter of debate before the courts. Recently, the Karnataka High Court in the case of Dhanashree Ravindra Pandit² quashed criminal prosecution initiated under section 50 of the BMA, against several individuals for offences allegedly committed few years before the BMA Act came into force. The Court held that the retrospective application of the BMA was unconstitutional and violated the petitioners' fundamental rights under Article 20 of the Constitution. The decision has been summarised as follows:

Facts of the case

The petitioners in the present case are individuals (resident in India) who were directors of a company incorporated in the British Virgin Islands (BVI) that held a bank account in Singapore. They had certain deposits in the Singapore bank account to the tune of US\$16,000 and US\$40,000 during FY 2009-10 which were not disclosed in the return of income. The BVI Company got struck off on November 2, 2010 and its bank account in Singapore was also closed on May 27, 2010.

In 2018, summons were issued to the petitioners under section 8 of the BMA and pursuant thereto, assessment proceedings were commenced for FY 2018-19 vide issuance of notice under section 10(1) of the BMA, dated June 25, 2018.

After six months of commencement of proceedings under section 10 of the BMA, show cause notices for prosecution under section 50 of the BMA (for failure to furnish information about an asset located outside India), were issued on the petitioners.

Aggrieved by the initiation of the prosecution proceedings, the petitioners filed writ petitions before the Karnataka High Court challenging the show cause notice issued under section 50 of the BMA and thereby challenging the retrospective application of the BMA.

Revenue's contentions

As per section 72(c) of the BMA, where any asset has been acquired or made prior to commencement of this Act, and no declaration in respect of such asset is made, such asset shall be deemed to have been acquired or made in the year in which a notice under section 10 is issued by the Assessing Officer and the provisions of this Act shall apply accordingly.

Therefore, Section 72(c), allows for the initiation of proceedings against individuals for offences committed prior to the BMA was enacted.

The retrospective operation of the BMA was necessary to address the issue of black money stashed abroad and that the petitioners should be held accountable for their actions, regardless of when they occurred.

Assessee's Contentions

The companies and the bank accounts in question were not in existence at the time the BMA came into force, and therefore, they could not be prosecuted under the BMA.

The retrospective application of the BMA was unconstitutional. The petitioners strongly relied on Article 20(1) of the Constitution, which prohibits the conviction of any person for an offence except for violation of a law in force at the time of the commission of the Act.

High Court Ruling

² Dhanashree Ravindra Pandit [TS-440-HC-2024(KAR)]



The retrospective application of the BMA was unconstitutional and violated the petitioners' fundamental rights under Article 20 of the Constitution.

The provisions of the BMA could not be applied to the petitioners for actions that predated the Act's existence.

By applying Section 72(c) of the BMA to fasten criminal liability upon the petitioners falls foul of Article 20 of the Constitution. Constitution is not a statute. It is the fountain head of all statutes including the special statute. Therefore, the rigour of any provision of the Act should pass muster of Article 20 of the Constitution³ of India and if it fails to pass such muster in the case at hand then the failure leads to obliteration of the crime against the petitioners.

The Court quashed the criminal proceedings initiated against the petitioners and held that non-disclosure of an assessment of the tax return for the year 2007-08 or 2009-10 cannot be used to criminally prosecute these petitioners, for an Act that has come into force in the year 2015.

The Supreme court decision in case of Gautam Khaitan has been distinguished which discussed the applicability of penal provisions under section 50 and 51 of the BMA where the assessee fails to take the benefit of declaration under section 59 of the BMA and the assets remain undisclosed. In the instant case, the court observed that the question of retrospective applicability of sections 50 and 51 qua Article 20 of the Constitution of India was not even an issue in the case before the Supreme Court.

The High Court's decision underscored the importance of constitutional safeguards

against retrospective criminal laws and the need for a law to be in force at the time of the commission of an act for it to be applied.

Dhruva Comments

This is a first judgement where the High Court has invoked Article 20 of the Constitution to quash retrospective application of the BMA (enacted in 2015) qua invocation of criminal prosecution. It is a pathbreaking decision and it would help taxpayers in various situations while dealing with inquiries under the BMA.

It may be relevant to keep in mind that in the case before the Karnataka High Court, the undisclosed sums deposited in the Singapore bank account were subsequently withdrawn and the account was closed. There was no undisclosed asset once the BMA Act became applicable. Whether the principle upheld by the High Court regarding 'no retrospective application' of BMA could sustain where an undisclosed asset is held after BMA has come into effect. This would require a careful consideration.

While the tax department may take this matter to the Supreme Court, it would be interesting to see how the Supreme Court will deal with this matter. However, this decision will have far reaching implications in similar cases.

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For any queries in relation to this tax alert, please feel free to reach out.

³ Covered under chapter III of the constitution which is a fundamental right



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