

JURISPRUDENCE OF BLACK MONEY IN INDIA *

INTRODUCTION

So long, there was a perception which has been created that the Government's response to address Black Money issue has been a piecemeal and inadequate. There is no doubt that manifestation of Black Money in social, economic and political space of our lives has a debilitating effect on the institutions of governance and conduct of public policy in the country¹. There is no particular definition for the term Black Money, it refers to the funds earned in the black market on which the income has not been disclosed nor have the taxes on the income not been paid. This wealth may consist of income generated from legitimate activities or activities which are illegitimate per se, like smuggling, illicit trade in banned substances, arms trafficking, terrorism, corruption etc. The generation of Black Money is through some of the methods such as out of book transactions, under reporting of production, manipulation by way of international transactions through associate enterprises, also generation is through some vulnerable sections of the economy added with land and real estate transactions domestically.

However there are no reliable estimates of Black Money generation or accumulation neither is there an accurate well- accepted methodology for making such estimation. Methods popularly known as a) input/ output method b) survey approach being a flop methodology as often the comfort level with the interviewers is limited as people are unwilling to admit any illegality before strangers c) the fiscal approach where the economy is viewed as comprising several sectors each having its own sets of practice. Also there is lack of uniform standards to ascertain Black Money in India. Generally Government while preparing the estimate of Black Income, the study excludes the income generated through illegal activities like smuggling, black market transactions and acceptance of bribes. However, the Black Income estimate is inclusive of income through production of goods and services, income generated in relation to capital receipts on sale of asset, capital formation in the public sector and also income through income from export and sale of import licences.

The Author has fragmented this Article into 4 chapters bearing Introduction in Chapter 1, History of the Act inclusive of Legislative History, passing of the Bill in the Parliament as Chapter 2. Features of the Act with emphasis laid on the Single window Clearance and Double Taxation Avoidance Agreement in Chapter 3 and finally Conclusion in Chapter 4.

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¹ White Paper on Black Money" -Ministry of Finance, Government of India. 2012.

HISTORY

The definition of Black Money is in relation with the definition used by the National Institute of Public Finance & Policy (NIPFP). THE NIPFP defined “Black Income” as an aggregate of income which are taxable but not reported to the tax authorities.² The offence through which Black Money has been generated is mentioned in the Schedules of the Prevention of Money Laundering, Act 2002³. The factors leading to generation of both international and domestic circulation of Black Money is because of social and administrative reasons. The political parties and the candidates require huge funds to build and sustain themselves, garner support and contest elections. The need to raise funds for election expenses paves the way for collecting and diverting huge amounts of money through illegal route.⁴Invariably Indian corporate giants under invoice their exports and over invoice their imports from Tax heaven countries such as Singapore, Hongkong, Mauritius, UAE etc. politicians, political parties and corrupt officials of Government take bribe from Multi National Companies (MNC’s) and invest money in tax haven countries and thereby retransferring it to India whenever they require it. Such is the case of tax evasion found in Vodafone International⁵ as well as Shell Companies⁶ cases by transferring the funds to tax heaven countries.

This concept of retransferring the funds from the tax heaven countries to India inturn is called as Round-tripping of Black Money. Also this Black Money is stocked in Swiss Banks. According to White Paper on Black Money in India report, published in May 2012, Swiss National Bank estimates that the total amount of deposits in all Swiss Banks, at the end of 2010 by citizens of India were INR 92.95 billion, US\$ 2.1 billion.⁷

Several social activists such as the yoga guru popularly called as Baba Ramdev had stayed protests against corruption during the year 2011 in the country. Such other examples of money laundering and black money generation would be Hassan Ali Case⁸ and Bank of Baroda Case⁹ which were reported to be the top most scandals in money laundering as well as black money generation.

MC Joshi Committee on Black Money¹⁰

After a series of ongoing demonstrations and protests across India, the government appointed a high-level committee headed by MC Joshi (the then CBDT Chairman in June 2011 to study the

² 1985 report on Aspects of Black Money (Accessed on 25th November 2015 at 4.44pm)

³ The Prevention of Money Laundering Act

⁴[http://ijlljs.in/wp-content/uploads/2015/10/20._ Black Money and the funding of elections](http://ijlljs.in/wp-content/uploads/2015/10/20._Black%20Money%20and%20the%20funding%20of%20elections%20.pdf) , Ayush Mishra & Jyoti Kumari, Symbiosis Law School, Pune

⁵ 2009(4)BomCR258, (2008)220CTR(Bom)649,

⁶ <http://www.firstpost.com/business/economy/shell-wins-transfer-pricing-tax-case-what-the-verdict-means-and-why-it-matters-1996741.html>(Accessed on 30th November 2015 at 11.42 am)

⁷ White Paper on Black Money" -Ministry of Finance, Government of India. 2012.

⁸ Ali was arrested under PMLA in 2011 on the charges of money laundering and stashing huge amounts of black money in foreign banks. He is also accused of obtaining five passports in different names.

⁹ <http://www.ndtv.com/india-news/six-arrested-in-bank-of-barodas-rs-6000-crore-money-laundering-case-1231648> (Accessed on 30th November 2015 at 11.06 pm)

¹⁰ "M C Joshi takes over as CBDT new Chairman". *Jagran Post*. 2 August 2011. Retrieved 10 August 2012.*Accessed on 24th November 2015 at 11.32 am*)

generation and curbing of black money. The committee finalised its draft report on 30 January 2012. It observed that major political parties spend Black Money on Election Expenses. There is need for alteration in the punishment tenure under the Prevention of Corruption Act, 1988¹¹ And also changes in the years of punishment in the Income Tax Act, 1961. This further added to the observation that there was a set up All- India Judicial Service and a National Tax Tribunal for such matters. Apparently, when compared to the USA Patriot Act 2001¹² Citizens disclose the global financial transactions above a threshold limit and get themselves reported to law enforcement agencies. Similarly India should also set up a threshold limit and a disclosure mechanism.

Other statutory authorities such as Central Board Of Direct Taxes (CBDT) functioning across India under the Central Board of Revenue Act of 1963¹³ AND THE Director General of Income Tax(International Taxation) is in charge of taxation issues arising from cross border transactions and transfer pricing. The Enforcement Directorate which administers Foreign Exchange Management Act, 1999 (FEMA)¹⁴. Financial Intelligence Unit (FIU), Central Board of Excise and Customs & Directorate of Revenue Intelligence, Central Economic Intelligence Bureau together to work for combating the menace of Black Money.

LEGISLATIVE HISTORY- PASSING OF THE BILL IN LOK SABHA

The undisclosed Foreign Income and Assets Bill was passed in Lok Sabha on May 11, 2015. The bill was first introduced by the Finance Minister in March 2015. The bill was introduced with the intention to tax the unlawful and undisclosed income abroad. A compliance window would be open so that 30% tax can be paid with 30% penalty; once the compliance window is closed any one found still having undeclared overseas assets would be required to pay 30% tax. Hence its 90% penalty and also liable to face criminal prosecution. Tax on all foreign income shall be paid at a flat rate of 30% without any exemption, deduction, set off or carry forward losses that the Income Tax Act, 1961 permits. The bill empowers the centre to enter into agreements with other countries for the exchange of information recovery of tax and avoidance of Double Taxation. To include tax evasion under the proposed legislation as a scheduled offence the bill proposes to amend the prevention of Money Laundering Act, 2002.¹⁵ Failure to meet the compliance timeline will attract an additional penalty of 90% for a total tax liability of 120% on the Black Money. A Separate binami bill is also said to be introduced to tackle the domestic Black Money. The unofficial assessments shows that the Black Money is somewhere between \$466 billion and \$ 1.4 Trillion.¹⁶ This bill was notified as a money bill. However, no action would be taken against persons having Rs. 5 lakhs or an equivalent amount in their overseas bank accounts. India and other G-20 members have committed to a global framework on automatic information exchange.

DTAA

DTAAs (Double Taxation Avoidance Agreements) promote international trade by allocating taxation rights between the country of source and the country of residence, avoiding double tax and enabling corresponding adjustments in the face of transfer- pricing adjustments in the other country. Also, DTAAs can also enable mutual assistance in collecting information, tax

¹¹ Prevention of Corruption Act, 1988

¹² The US Patriot Act, 2001

¹³ The Central Board of Revenue Act of 1963

¹⁴ Foreign Exchange Management Act, 1999

¹⁵ <http://www.thehindu.com/news/national/10-things-to-know-about-blackmoney-bill/article7194290.ece> (Accessed on 23rd November 1.16 pm)

¹⁶ [http://www.ndtv.com/india-news/black-money-bill-passed-in-lok-sabha-762254-\(Accessed on 23rd November 12.19 pm\)](http://www.ndtv.com/india-news/black-money-bill-passed-in-lok-sabha-762254-(Accessed on 23rd November 12.19 pm))

investigation and collection of taxes between the respective countries as well as help in resolution of tax disputes.¹⁷

Where a DTAA does not exist for whatever reason, the countries can choose to enter into a TIEA (Tax Information Exchange Agreement) which is focused primarily on mutual facilitation of sharing tax information. The development of this network of DTAAAs and TIEAs has been an important development in our capacity to prevent misuse of international transactions and transfer pricing for evading tax and generating Black Money. The Government has already introduced the APA (Advance Pricing Agreement) in the financial year 2012-2013. The APA is an instrument through which the arm's length price of an international transaction will be determined in advance. There is also a need to set up research into multi-layered cross border transaction and ever changing transfer pricing manipulations to prevent considerable opportunities for tax avoidance and generation and transfer of black money.¹⁸

CONFIDENTIALITY OF INFORMATION UNDER DTAAAs/ TIEAs

The government is bound by the treaty provisions under which the information is received. As per the international standard, tax information exchanged under DTAAAs/TIEAs is protected by the confidentiality clause of the respective DTAAAs/TIEAs under which the information is received. India has been trying to renegotiate its DTAAAs or conclude new DTAAAs/TIEAs by excluding the confidentiality clause. While some countries have agreed to include a provision that allows sharing information with other law enforcement agencies subject to fulfilment of certain conditions they have generally refused to accept what India states. However these countries insist on such confidentiality in order to protect human rights which are also recognized in India. The major reason for maintaining confidentiality is that the information should not be made accessible to public at large before the case comes up to the court.

In order to ensure that there is no delay in these names becoming public after completion of assessment, the government has taken a view that in cases where any undisclosed overseas asset is detected(including undisclosed foreign bank accounts) one need not wait for disposal of first appeal or imposition of penalty in order to launch prosecution. However India is also under the obligation to maintain confidentiality regarding the information under DTAAAs/TIEAs. Moreover there arises a question as to how the treaty with France is relevant for not disclosing the names of Indians having accounts in Swiss Banks. Under the DTAA, countries are obliged to exchange information available within their country if it leads to detection of tax evasion and it does not matter from which country the information has been taken from. Hence France is under the obligation to exchange information with India under the India- France DTAA if it is holding information about Indian citizen's bank accounts, which is likely to lead to detection of tax evasion even if the bank accounts are located in the third country. Also it is an international standard that the supplying state should exchange information even if it does not have domestic interest in it. Moreover in procedural context a declaration is not required to be made in respect of foreign income which was not chargeable to Tax under the Act since the person was a non-resident in India as per the tax treaty¹⁹.

www.lawmantra.co.in

¹⁷ White Paper on Black Money" -Ministry of Finance, Government of India. 2012.

¹⁸ White Paper on Black Money" -Ministry of Finance, Government of India. 2012.

¹⁹ <http://www.kpmg.com/IN/en/services/Tax/TaxDocuments/Clarifications-on-Tax-Compliance-for-Undisclosed-foreign-income-and-assets-2>(Accessed on 25th November 2015 at 10.30 am)

FEATURES OF THE ACT

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 received the assent of the President on 26th May 2015 and the Act to be effective from 1st July 2015²⁰. The Act comprises of 88 sections divided into 7 chapters. this Act intends to tax " undisclosed foreign income" and " undisclosed foreign assets (including financial interest in an entity). this forms to be the reason that it would not be taxable in the Income Tax Act,1961²¹.Also the undisclosed foreign asset shall be charged to tax at Fair Market value. However 30th September 2015 was the deadline provided for the persons who were liable to make declaration in respect of an undisclosed foreign asset and income. This is called as the one time compliance window. Moreover, under section 71of the said Act no declaration under compliance window which has been acquired from income chargeable to tax for assessment year 2015-2016. This would include a notice under section 142 or section 143(2) or section 148 or section 153A or sec 153 of Income Tax Act, 1961 has been issued in respect of such assessment year and the proceeding is pending before the Assessing Officer. Person not eligible if any notice referred above has or where any info has been received by the competent authority under an agreement entered into by the Central Government under section 90 or 90A of the Income Tax Act, 1961 in respect of such undisclosed asset.²²

CONCLUSION

Is Black Money Scheme a super flop?

Black Money is a term used in common parlance to refer to money that is not fully legitimate in the hands of the owner. The problem of Black Money is no longer restricted to the geopolitical boundaries of any country. It has become a global menace that cannot be contained by any nation alone. According to reports²³, total disclosures under the scheme were an underwhelming Rs 3,770 crore, and since only 60 percent of that will come in as tax revenues (30 percent tax, plus 30 percent penalty).This present Black Money law is only a first step. The citizens will of course need measures to deter the creation of future Black Money and make Business become legit, but that needs changes in election funding, real estate reforms, etc. such harsh and draconian legislation does not stand to be fruitful over the long run.

In 1997, when then Finance Minister Mr. P Chidambaram unveiled an amnesty scheme for black money holders, he got declarations of around Rs 33,000 crore and collected taxes of more than Rs 10,000 crore. Today, given that the money value of the Indian economy is nearly 10 times greater, the present Finance Minister Mr. Jaitley should have got declarations of a magnitude of 10 times larger than what Mr.P. Chidambaram got in 1997. This means

²⁰ To remove difficulties under section 86 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, the Central Government has clarified that the Act shall come into force on 1st July 2015. similarly compliance provisions under Chapter VI of the Act shall also come into force with effect from the date of commencement of the Act i.e. 1st of July.

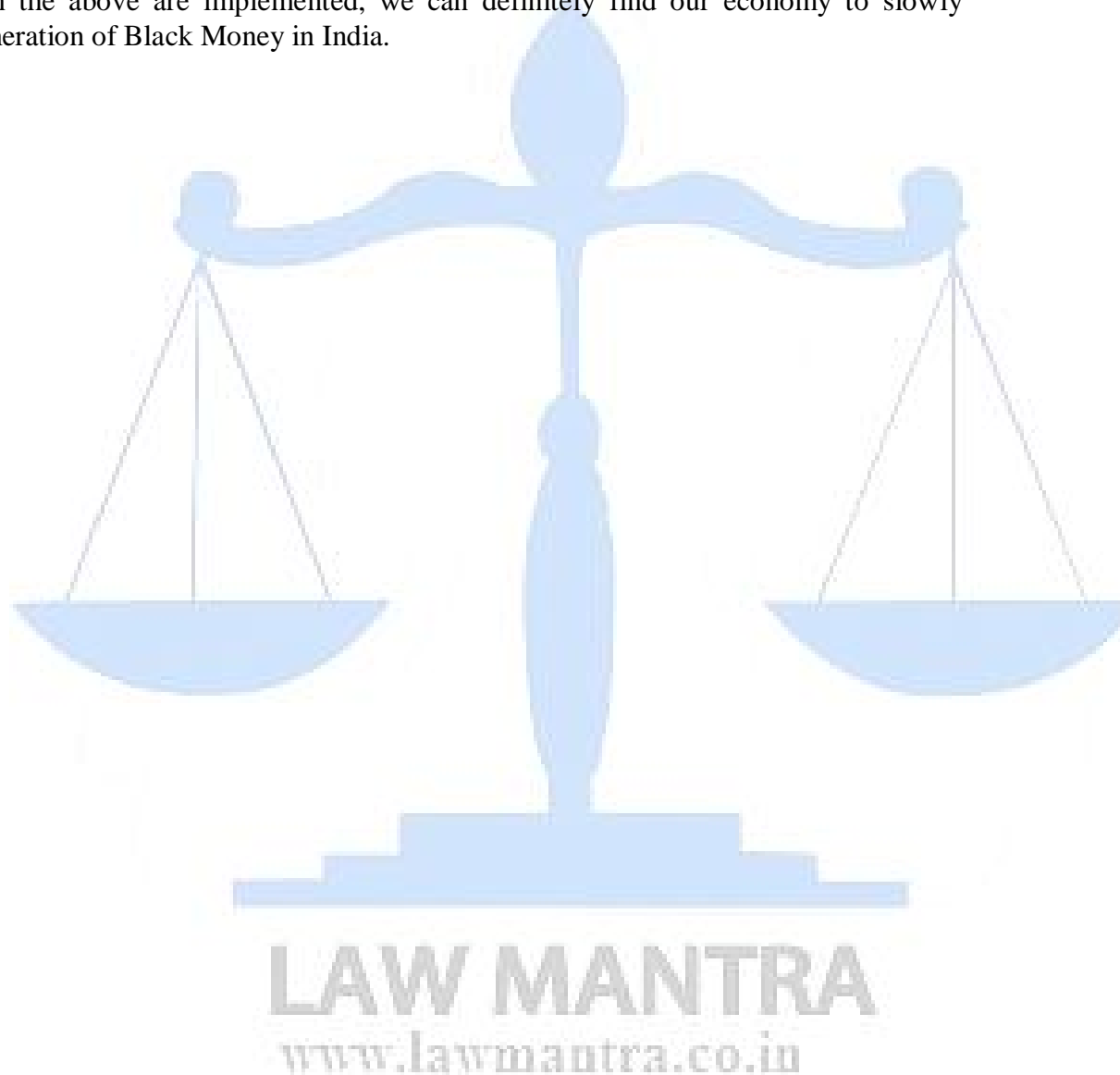
²¹ Income Tax Act,1961

²² Circular No 12 of 2015, F.NO.142/18/2015-TPL Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes(TPL Division)

²³ <http://economictimes.indiatimes.com/news/economy/finance/black-money-government-collects-rs-3770-cr-from-over-600-stash-holders/articleshow/49177887.cms>By PTI | 1 Oct, 2015, 11.12AM IST (Accessed on 26th November 2015 at 11.07 pm)

declarations should have been of the order of more than Rs 3 lakh crore, and tax collections of around Rs 2 lakh crore – assuming the tax penalty was the same 60 percent²⁴.

The possible steps with which Black money generation could be stopped could be reducing cost of compliance and non- tariff barriers to economic activity are generally worse than the tariff barriers. Where one cannot get a permit to undertake a legitimate activity, this creates insurmountable incentives for unreported and unaccounted activities that will inevitably generate Black Money. Some of the steps to curb generation of Black Money within India would majorly be the need to recognize serious and habitual tax evasion as a crime and implement strict penal actions. Also creating public awareness is a must. Moreover enhancing the accountability of auditors, compared to other countries. Also such accountability has not been imposed so far. Reinforcing value/ moral education in school curriculum and build good citizens. when the above are implemented, we can definitely find our economy to slowly reduce the generation of Black Money in India.



²⁴ <http://economictimes.indiatimes.com/news/economy/finance/black-money-government-collects-rs-3770-cr-from-over-600-stash-holders/articleshow/49177887.cms> By PTI | 1 Oct, 2015, 11.12AM IST (Accessed on 26th November 2015 at 11.07 pm)