

Multi-Lateral Attack on Black Money

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Short Forms:

AO	:	Assessing Officer
BM	:	Black Money
BML	:	Black Money Law.
Benami	:	Benami Transactions (Prohibition) Act.
FEMA	:	Foreign Exchange Management Act.
FATCA	:	U.S. Law asking financial intermediaries to report.
ITA	:	Income-tax Act.
PMLA	:	Prevention of Money Laundering Act.
VDS	:	Voluntary Disclosure Scheme. (1997)
VCS	:	Voluntary Compliance Scheme. (2015)

Note:

This paper briefly raises some of the issues arising out of the Attack on Black Money. As time passes, there will be considerable litigation. FEMA amendment is clearly draconian and worth being struck down in a Court of Law. VCS does not give adequate relief and will need many clarifications to be successful in bringing back black money held abroad.

Part A - Black Money Law (BML)

Basic Scheme of BML: (Paragraphs 1 to 3):

1. Current package of laws to attack black money has following parts:
 - (i) Enforcement for bringing back black money (under FEMA);
 - (ii) Compliance scheme (under BML); and
 - (iii) Penalty, prosecution & administration (under BML).

The enforcement provision is permanent. Compliance scheme is temporary. Investigation machinery will be as existing at present under Income-tax Act.

2. **Key Sections:**

Section 2 (11) & 2 (12) define “undisclosed foreign asset” and “undisclosed foreign income and asset”.

Section 3 is the charging section and also provides rate of tax.

Section 4 lays down the scope of Tax Base.

Section 5 provides for computation of Tax Base.

Section 10 provides for assessment procedure.

Section 41 provides for penalty.

Section 42 – Penalty for Incorrect Return.

Chapter V – Sections 48 to 58 provide for prosecution.

Chapter VI – Sections 59 to 72 provide for Voluntary Compliance Scheme, charge of tax & penalty under VCS.

Black Money Law (BML) and Income-tax Act (ITA) both operate simultaneously. (Is it constitutionally valid?) Black Income or Asset may be taxable under one or the other; or both laws. BML is targeted only against “Foreign” black money. ITA covers foreign as well as domestic black money.

3. **Important Components of the Scheme:**

- 3.1 **Assessee: Section 2 (2).**

This law applies only to: **Residents** and Ordinary Residents (**ROR**) of India. In other words, if a non-resident has black money abroad, this law does not apply to him. Apparently, the objective of the law is to bring back into India, the black money held abroad by Indian residents.

This legal position arises out of the definition of an assessee. This law makes a new definition of “assessee” which is different from the definition of assessee under the Income-tax Act. Only when a person is

liable to pay tax under this law, he is an assessee. Since a non-resident or an NOR is not an assessee under this law, the BML does not apply to him.

Consider a situation where a person was an Indian resident. He had foreign income which was un-disclosed. Then he became a non-resident of India. **Two possible interpretations:** (i) The black money law will not apply to the person because he is no longer an assessee under this law. (ii) Once a person has not paid taxes in India, that money becomes undisclosed income. Thereafter, even if the person becomes a non-resident of India, the law continues apply to him. In our view, the first interpretation is a better interpretation.

This law does not apply to Non-Residents & NORs. Such a person is NOT even an assessee.

Beneficiary in a discretionary trust is not covered.

BML has no retrospective effect. Hence, Income of the period prior to 31st March, 2015 is NOT covered. However, if any asset is still available, then it will be covered.

3.2 Income:

As far as incomes are concerned, BML applies only to **foreign sourced incomes** which have not been disclosed in the Indian tax returns.

Section 2 (12) defines undisclosed foreign income and asset. Consider a case were an assessee had foreign undisclosed income of \$ 500 every year for 5 years totaling to \$ 2,500. This income became the undisclosed asset of \$ 2,500 in the sixth year. Since both - undisclosed income and undisclosed asset are taxable does the assessee become liable to pay tax on \$ 5,000 or \$ 2,500?

Section 5 (1) (ii) (b) provides that income assessed to tax under BML shall not be again considered as undisclosed income. In other words, once an income or asset is assessed to tax under BML, it cannot be taxed again. Hence the assessee will pay tax on only \$ 2,500.

Section 2 (11) defines undisclosed Foreign Assets.

Section 2 (12) creates a new phrase: "Undisclosed Foreign Income & Asset". Specifically, this law covers only **assets located outside India**. Indian undisclosed assets are not covered.

The undisclosed foreign income is further specifically restricted to income **earned from a foreign source**. There is no reason why the income is restricted to foreign income. Is there an intention - not to cover undisclosed Indian sourced income? We don't know. But the clear language of the law states that.

However, Indian Sourced Income – if it is held outside India; it is covered by S.2 (11) as undisclosed foreign asset.

3.3 Assets:

As far as the asset is concerned; to be covered under BML, only conditions to be satisfied are:

The asset should be undisclosed;

The asset should be located outside India;

And the assessee should be unable to offer satisfactory explanation for the source of the asset.

The asset may be created out of Indian sourced income or foreign sourced income. The Country of Source of Income is irrelevant.

If the assessee has a satisfactory explanation for the undisclosed foreign asset; such asset gets out of the Tax Base. By the term “**satisfactory**” we understand:

If the source of the asset was taxable in India, full tax was paid. If it was not taxable, proper explanation & evidence for the source should be provided by the assessee.

Undisclosed foreign assets form part of the tax base and are treated at par with undisclosed income. Even Indian sourced income if held abroad, becomes undisclosed foreign asset. Hence it becomes a tax base.

3.4 Consider an illustration. Mr. I, a doctor is a surgeon in India. In the year 2010, he operated on a foreign patient in India. Hence his income is Indian sourced income. The NR patient directly deposits Rs. 10 lakhs to the credit of the doctor in a Swiss bank. In the year 2014, Dr. goes abroad and spends away entire amount.

(i) Black Money Law (BML) does **not apply to Indian sourced income**. Hence the doctor’s professional fees are not covered by this law.

(ii) BML covers **only assets in existence** when the assessing officer (AO) finds out the same. Since the doctor has already spent the money, there is no asset outside India. Hence BML cannot be applied.

(iii) In case, doctor **becomes a NR of India**, he will have a third protection. The law cannot be applied to him.

This interpretation is supported by combined reading of Sections 2 to 5 & also is in keeping with the objective of the law. **Objective** is to bring back the black money held abroad. If there is no money, the

objective cannot be served. (Note: ITA provisions continue to apply to undisclosed incomes.)

3.5 Previous Year:

This law makes a unique provision. The **previous year** in which the AO **discovers** the undisclosed income or asset becomes the relevant previous year in which the AO shall charge income-tax. The year in which the income was earned is irrelevant.

Consider the illustration that the income belonged to the year 2010. It was an undisclosed income. AO discovers the income. There is no provision making a presumption that the **income** of the year 2010 will be treated as income of the previous year 2015-16.

BML takes effect from 1st April, 2016. In other words, it takes effect from Assessment Year 2016-17 and Previous Year 2015-16. If the income pertains to the year 2010-11, it is not covered under BML. Since BML is a permanent law, one can say that it will cover the future generation of black money. As far as income is concerned, **it does not cover income prior to 1st April, 2015**. However, if the undisclosed income continues to remain abroad as an asset in some form, it will become a tax base as an undisclosed asset and will be liable to tax under BML.

3.6 Tax: Section 3, the charging section also provides for rate of tax at 30% of the tax base.

3.7 Assessment: Section 10 of BML provides for the assessment procedure. Sections 142 to 148 of the ITA have been compressed into one section – 10.

3.8 Penalty:

(i) If a person makes voluntary declaration as per the scheme, under Section 61, he will be liable to pay 30% of the value of Undisclosed Asset as penalty.

(ii) If the black money is discovered by the Income-tax department, section 41 provides for penalty at three times the amount of tax computed under Section 10. (90% of black money.)

3.9 Prosecution: Not discussed in this paper.

3.10 Voluntary Compliance Scheme: Please see paragraph 9 below.

3.11 Inward Remittance:

The BML does not make a provision that the applicant must bring foreign assets back into India. The 60% amount which he has to pay can be

paid from Indian funds and then 100% money can be kept abroad. Hence BML by itself does not cause return of foreign money into India. However, FEMA provisions still apply to the person. The protection under Section 67 of FEMA is for the past. Having made disclosure, Section 8 of FEMA will apply and the party must bring back his funds into India. Otherwise, there will be a new violation of FEMA and BML protection will not be available. Ideally, the person concerned should bring back foreign assets into India and pay the 60% tax and penalty.

3.12 Observations:

BML is a complete law by itself. It covers all provisions from charging section, including computation, assessments to appeals & prosecutions. All this in thirty pages. This raises questions:

(i) Why make a whole separate law? All the powers necessary to tax black money already exist in the ITA. It includes powers to deal with black money abroad. Sections 68 to 69D and S.147 already provide these powers.

In any case, this law does not provide for survey & investigations. For those functions, ITA & existing department have to be used.

Even for BML assessments etc., it will be the existing department that will function. Then why a separate law?

(ii) Assuming without accepting – that a separate law is necessary – it is good to know that in thirty pages entire law can be completed. If so, can the ITA be reduced to 60 pages or even 90 pages?

Or is the brevity achieved at the cost of natural justice?

4. Tax Base:

4.1 Tax Base: Scope: Section 4:

Section 4 provides for the Scope of the tax base – “undisclosed foreign income & undisclosed foreign assets” - on which tax can be levied. **We call it Tax Base.**

This is a Unique law. Normally we have Income-tax Act to charge tax on income; and Wealth-tax Act to charge tax on wealth.

Under the Income-tax Act, undisclosed assets are taxed u/s. 69 – “Unexplained Investments”. Hence the unexplained investment is “deemed to be income” and then taxed.

Under BML, no such deeming provision is made. Asset remains asset. A tax is charged u/s. 3. What is this tax? Section 3 just calls it a “Tax”.

Under the ITA, Section 4 charges Income-tax. Under WTA, Section 3 calls it wealth-tax. Under BML it is just a tax.

When we discuss Income-tax Act, we refer to taxable income. While discussing Wealth-tax Act, we refer to taxable wealth. Under BML income & assets – both are clubbed together.

Section 4 (1) (a) covers undisclosed foreign asset within the Scope of Tax Base. Any undisclosed foreign asset is taxable.

4.2 **Illustration:**

Facts: Mr. A had tax paid, white income. He kept a portion of the money abroad. Hence asset was undisclosed.

Query: Can it be taxed under BML?

Opinion: Scope of Tax Base is given u/s. 4 (1) (c). Undisclosed foreign asset is a tax base. However, such asset is defined u/s. 2 (11). Since full tax has been paid, the source has been explained. Hence while the asset is undisclosed, it does not form part of the Tax Base. Section 4 (1) (a) makes it clear that only that amount is to be considered under BML – which has not been disclosed as income under ITA. And S.5 (1) (ii) (a) gives specific deduction for such amounts. There will be **No Double taxation** of the same income.

Observation: Where the source of asset can be explained, the asset falls outside the Tax Base. Hence technically, the assessee cannot file his return under BML – even if he wanted to file. Hence he can't get the immunity under BML. The Enforcement Director can proceed against him under FEMA.

It may be noted that the Voluntary Compliance Scheme applies only when there is a tax evasion. There is no VCS for FEMA violations which are not tax violations.

4.3 **Computation:**

(i) **Section 3 (1)** – Proviso gives a method of computation of the value of undisclosed asset. The value has to be taken as the **market value** on the first day of the previous year. There is no deeming provision making past incomes as income of the previous year 2015-16 or subsequent years. This means that BML does not cover past concealed incomes.

(ii) **Section 5:** No deduction of any expenses or carry forward losses is available.

(iii) Deduction Available: Section 5 (1) (ii) (a): Income assessable under ITA:

If the assessee can produce evidence that – the whole or any part of his undisclosed asset held abroad – has been assessed to income-tax in India; or is assessable to tax in India; that portion will be reduced from the total value taxable under BML.

Issues: It is fair that if an income is taxed under ITA, it cannot again be taxed under BML. However, if the assessee is holding undisclosed asset outside India; it would be a FEMA violation. Hence under amended FEMA, the enforcement officer can go ahead and acquire the assessee's Indian assets. Please see discussion in Part B under FEMA.

(iv) Section 5 (1) (ii) (b): Once an amount is considered as taxable under BML; the same amount cannot again be considered as taxable under BML. This has been illustrated above in Paragraph 3.2.

(v) Section 4 (2): Adjustments or additions made during assessment proceedings shall not be considered black money under BML.

(vi) Section 4 (3): Once an income or asset is included as Black Money under BML, the same cannot be considered as income under ITA.

4.4 Constitution:

S. 245 – (1) Parliament and State Legislatures are authorised to pass laws.

Article 245 (2) A law shall not be held to be invalid on the grounds of extra-territorial operation.

Article 246 Distribution of law making powers between Center & State legislatures.

Seventh Schedule List I. Union List.

- | | |
|--------|---------------------------------------|
| No. 82 | Taxes on Income. |
| No. 85 | Corporation Tax. |
| No. 86 | Taxes on Capital Value of the assets. |

Article 265 – Taxes not to be imposed save by authority of law. No tax shall be levied or collected except by authority of law.

Article 300A – persons not to be deprived of property save by authority of law. No person shall be deprived of his property save by authority of law.

Observation:

Constitution gives specific authority to Parliament to pass laws imposing Income-tax, Wealth-tax & Estate Duty. What is this tax under BML? Is it Income-tax or Wealth-tax or something else?

It would have been better if BML had first deemed undisclosed assets as undisclosed income and then levied income-tax (similar to S.69) or considered both undisclosed income and undisclosed wealth as "Tax Base" and then levied a tax on the Tax Base.

This anomaly does not make the law unconstitutional (Article 248 (2)). Just inappropriate.

Section 3 charges tax on total undisclosed foreign Income AND Asset. However, undisclosed income soon becomes undisclosed asset.

Once an item is taxed under BML, it cannot be taxed again - S. 5 (1) (ii) (b) of BML. Hence the department can tax either the income or the asset and not both.

4.5 Scope of Disclosure:

Let us say \$ 100 Bn. Black Money is lying outside in India. \$ 90 Bn. is Indian Sourced Income. This won't be covered under the definition of Undisclosed Income. In fact, the applicant cannot even disclose Indian sourced income under the Voluntary Compliance Scheme. Once the money is lying outside India, he can disclose the assets as Undisclosed assets held abroad.

5. Applicability of BML:**5.1 Applicability of the Law: Section 1:**

This is a new law. This is not like Finance Act - which would be annual in application. The Finance Act of every year provides tax rates for the relevant year - which are effective from 1st April of the concerned assessment year. For any other provision in the law - for example amendments in the Income-tax Act, specific dates are provided from which the relevant amendment will be effective.

This Act provides for effective date being 1st April, 2016. [Section 1 (3)]. There is no specific provision applying the law with retrospective effect. [Also see discussion on Section 3 (1)].

Conclusion: This law applies to foreign undisclosed assets which exist after 1st April, 2015; and foreign incomes which are earned and concealed after 1st April, 2015.

5.2 BML & ITA both continue to **simultaneously apply.**

Illustration: Mr. X had concealed income of the past years. Accumulated income has been kept abroad as concealed asset. If the AO finds out either the asset or the income, he can proceed under BML or under ITA.

Section 2 (11):

Undisclosed asset located outside India.

Means an asset (including **financial interest** in any entity).....
Which assets are covered and which are not covered?

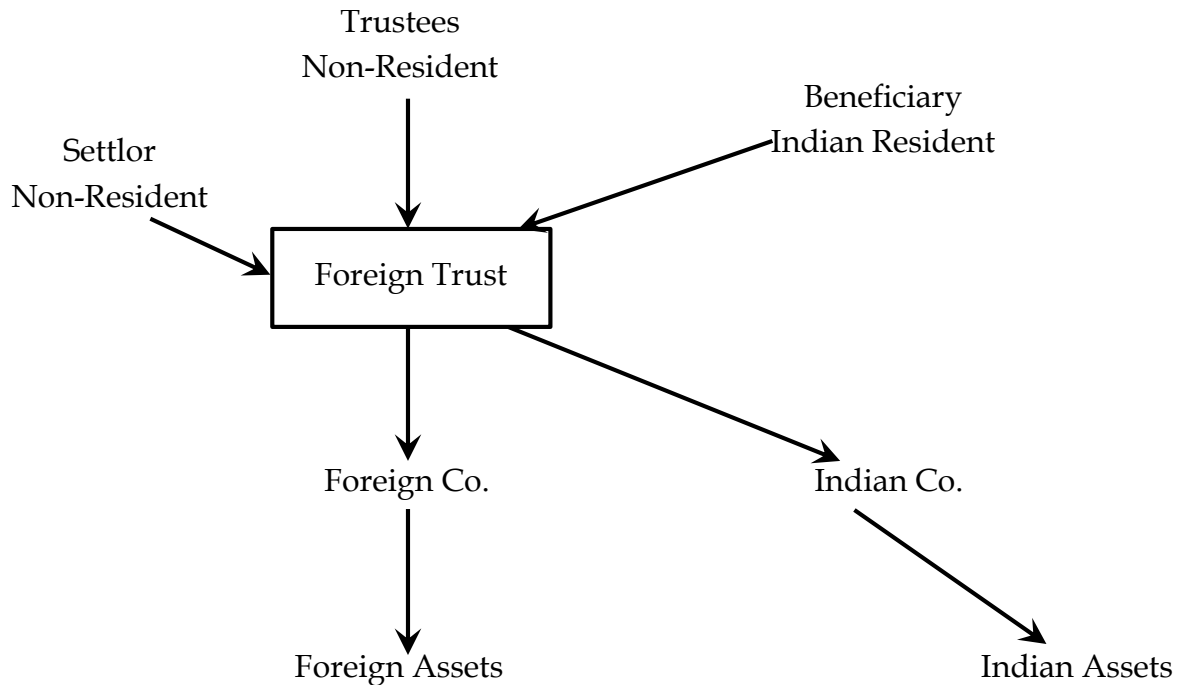
5.3 Consider several illustrations of undisclosed assets.

(i)	Mr. IR has Black Money in cash \$ 10,000 lying outside India.	Covered
(ii)	Mr. IR has movable or immovable property situated outside India.	Covered
(iii)	An NRI holds \$ 10,000 benami, for the benefit of IR. This is also, in substance & reality an asset owned by the IR. It may be difficult to find out and difficult to prove. But the asset is covered under BML.	Covered
(iv)	IR is a beneficiary in a Specific Trust settled outside India. The trust has assets in &/ or outside India. IR's beneficial interest is a "Financial Interest".	Covered
(v)	IR is a beneficiary in a discretionary trust. All beneficiaries are Indian residents. The trust itself is taxable as an Indian resident assessee.	Covered
(vi)	IR is a beneficiary in a discretionary trust. One or more beneficiaries are non-residents. The trustees have not allotted any funds to IR.	Not Covered
(vii)	IR has floated a company/ trust in a tax haven. IR is the 100% shareholder/ 100% beneficiary. All the funds of the entity are invested in India. The shareholding/ trust benefit is a foreign asset.	Covered

5.4 Illustration of a Foreign Trust.

Consider the illustration of an Indian Resident - Mr. IR. He sent abroad his Indian black money worth \$ 10,000. His consultant in a tax haven settled a trust for him. Some NRIs act as trustees. This trust holds

hundred percent shares in two separate companies. One company invests and operates outside India \$ 2,500. Another company operates in India. The trust has invested \$ 7,500 in India. The Indian company has grown and now shares are worth \$ 30,000. Can Mr. IR say that since \$ 30,000 are located in India, they do not constitute Tax Base under BML? See these facts in the chart below.



Observation: Beneficial Interest in trust and shares in Co. are also assets.

An asset is held by a series of intermediate entities. The interest in each foreign entity is a foreign asset. Even if final asset is held in India, the foreign asset will be exposed to BML & FEMA. Thus his total foreign assets of \$ 32,500 are Tax Base under BML.

5.5 Another illustration:

Mr. IR's NRI uncle gifted him \$ 10,000.

U/s. 8 of FEMA, he has to bring the amount into India. Keeping the same abroad is a FEMA violation. There is no tax violation. However, in the next succeeding income-tax return, the foreign asset has to be disclosed. Assume that he has not disclosed the gift. If the AO finds out and enquires; he should be able to give satisfactory explanation. Then it will be a case of incorrect return. Penalty u/s. 42 of BML will be Rs. 10,00,000. However, the asset is not a Tax Base under BML and cannot attract tax @ 30% & penalty @ 90%.

**6. What the Black Money Law does NOT cover:
Brief List:**

- 6.1 All assets and incomes within India.
- 6.2 All Non-Residents and Not Ordinary Residents.
- 6.3 Incomes arising from Indian Sources.
- 6.4 Gold Monetisation Scheme is not VDS.
- 6.5 There is NO Voluntary Disclosure Scheme (VDS).
- 6.6 S.115 BBD is not a VDS.
- 6.7 BML does not give good and adequate immunity.
- 6.8 In our view, beneficiaries of discretionary trusts are not covered. This is discussed further in Para 6.D below.
- 6.9 BML has no retrospective effect. Income of the period prior to 31st March, 2015 is NOT covered. However, if any asset is still available, then it will be covered. Elaborated further in Para 6.C below.

Elaboration of some issues from the list:

6.A BML not to apply:

The law applies only to Undisclosed Income and Undisclosed asset. Once an income has been disclosed, this law cannot apply to it. There may be any amount of disputes during assessment proceedings. Assessee may claim exemption. AO may refuse the exemption. However, the income or the asset has been disclosed. Hence this law cannot apply.

6.B Consider Section 3 (1) & the proviso - a person can get out of the provisions of BML by adopting any one of the following courses:

- (i) If the asset is no longer existing.
- (ii) If the asset has come back to India.
- (iii) If the asset has been disclosed.

Simple disclosure of foreign asset in the Indian income-tax return will not be sufficient. Because the income-tax returns being filed will be assessed under the existing Income-tax Act. Once a person discloses an asset, he has to explain the source of the income. Otherwise under Section 68 & 69 of the ITA, the AO can add that asset to his income.

6.C BML is applicable for previous year 2015-16 and onwards. It is not applicable for earlier years.

Under ITA, upto 31st March, 2016, a person can disclose his past undisclosed income for the previous two years. Previous years 2014-15 & 2013-14. If the income pertains to earlier years, the same cannot be disclosed under the Income-tax Act. If any assets still survive, the same can be disclosed under BML.

6.D Discretionary Trust:

(i) If a discretionary trust is properly documented, an Indian Resident included in the list of beneficiaries is not liable to tax under BML. Simple reason for this legal position is: It is entirely at the discretion of the trustees to give or not to give any amount to any beneficiary. Unless and until the trustees allot any amount to the beneficiary, he is not the owner of a single rupee of the trust fund. He has no vested interest in the trust fund. Apply this legal position to the provisions of BML. Different provisions are considered below.

(ii) Section 2 (11) Undisclosed asset located outside India means an asset **"HELD"** by the assessee. In the case of a discretionary trust, the beneficiary holds nothing. All assets are held by trustees.

(iii) Section 2 (11) Undisclosed asset located outside India means an asset in respect of which the assessee is a **"beneficial owner"**. In a discretionary trust, the beneficiary owns nothing.

(iv) **Section 4 (1)** Scope of black money - **"foreign asset of an assessee shall be,"**.

Since none of the trust fund belongs to the beneficiary, it cannot be said that they are: **"assets of an assessee"**. Hence the trust fund in a discretionary trust is outside the scope of BML. Hence such trust assets are not liable for tax etc. under BML.

(v) Consider illustration of a foreign trust deed which is faulty. For example, in one discretionary trust, there was only one beneficiary. In such a case, the trustees have no discretion except to give all the assets and income to that individual beneficiary. Trustees may postpone distribution. But can't give the trust fund or income to anyone else. In such a case, the beneficiary has a **"Financial Interest"** in the trust fund. This asset can be liable to tax under BML.

(vi) Another illustration: In a foreign discretionary trust, there are several beneficiaries. All are Indian residents. In such a case, while no individual beneficiary will be liable to tax, the trustees of the trust will be liable to tax in India. The trustees – all of them may be foreigners and non-residents. But they are liable to Indian tax “in the like manner and to the same extent as beneficiaries”. In this case, there is no uncertainty that the whole of the trust fund and income will be liable to tax in India. If undisclosed, the trustees are liable under BML. They can file declaration under VCS.

(vii) Consider again the case of a foreign discretionary trust where one of the beneficiaries is an Indian resident. As and when the trustees make any distribution in his favour, he will be liable to tax in India. If he clearly discloses the same under his regular income-tax return; BML will not apply.

Let us say, trustees don't make any distribution. However, when the beneficiary goes abroad, they directly pay his foreign travel cost; or the trustees pay the costs of education for beneficiary's children studying abroad. These payments also amount to the incomes of the beneficiary and are liable to tax in India. If they are not disclosed in the regular return, they become undisclosed income.

7. Risk Analysis:

One may do risk analysis before taking a decision. In the present context we may discuss following decisions to be taken.

7.1 Whether to declare under VCS:

The way, the scheme is drafted, it does not give any immunity. Small relief given under Section 67 is not adequate. There are many pitfalls. These are discussed at length in paragraph 9 below.

7.2 Becoming Non-Resident:

Can an assessee become a Non-Resident of India and avoid the consequences of BML? The legal issues that may be considered for decision making are:

(i) Once a person becomes a Non-Resident, he is no longer an assessee under the definition of an “assessee” under BML – Section 2 (2). Hence the BML cannot be applied to him.

(ii) If the person had violated Income-tax Act or FEMA; those violations continue. He will be exposed to the penal provisions of both the laws. New Sections 13 (1A) and 37A brought about by Finance Act, 2015 will apply to him even if he has become a Non-Resident. Consequences

under FEMA are much harsher than under BML. This is discussed further under Part B, Paragraph 2 below.

(iii) Mr. IR has income abroad. Should he disclose the same and pay Indian taxes; or can he take a chance and keep the money abroad as black money?

Please consider the total consequences discussed below in para B.2.5. If caught, the consequences are so harsh; it may not be worth taking the risk.

8. Comparisons:

8.1 Brief Comparison with Existing Law: Tabular Form.

Taxable under ITA/WTA			Under BML		
			Taxable	Not Taxable	Remarks
1.	Black Money Income after 31 st March, 2015.	√	√		
2.	BM Income before 1 st April, 2015.	√		X	
3.	BM Wealth existing after 31 st March, 2015.	√	√		
4.	BM Wealth existing before 1 st April, 2015.	√		X	
5.	BM Income sourced in India.	√		X	
6.	BM Income sourced abroad.	√	√		
7.	Income earned abroad/ & spent away before 31 st March, 2015.	√		X	
8.	Assessee resident when he earned income Non-Resident on or after 31 st March, 2015. Black Money Income & Wealth	√		X	

9. Voluntary Compliance Scheme:

9.1 Sections 59 to 72 of BML provide for the Voluntary Compliance Scheme or VCS. A person holding Black Money abroad, can file the prescribed form, pay 30% tax and 30% penalty. For him, the Previous Year will be 2015-16. First day of the Previous Year is 1st April, 2015. Hence

he has to take the market value of his foreign black money as on 1st April, 2015.

If the foreign assets are held in bank balance, he can remit the same to India. If there are other assets, he may liquidate the assets, deposit in his foreign bank account and then remit the funds into India.

For assets held abroad, he may take reliable valuation report. It is possible that the assessing officer will challenge his valuation. Hence it will be important to support the valuation by adequate evidence.

9.2 Violations of Several Laws:

Black Money can amount to violation of several laws. Consider an illustration. A person has undisclosed foreign income which is retained abroad. Then it is a violation of **Income-tax Act** and, if the foreign asset is liable to wealth tax, then this is also a violation of **Wealth Tax Act**. It also amounts to multiple violations of **FEMA**. If a company's income is held abroad, then it becomes a violation under the **Company Law** also. Company's final accounts do not give a true and fair view of the financial position of the company. If funds belonging to the company are held abroad by the directors, then it is a breach of trust by the directors. Under the Companies Act, directors can be prosecuted. If the funds have been kept abroad by under invoicing or over invoicing of imports/ exports, then it will be a violation of the **Customs Law** also. Thus the existing law itself has several harsh provisions.

9.3 No Immunity - Section 67:

BML under Section 67 provides for protection from penalty & prosecution under Income-tax Act, Wealth-tax Act, FEMA, Companies Act & Customs Act. Hence, wherever there are chances of a person getting caught under any of the laws, one may consider voluntary disclosure; pay 60% & get the protection. **Under Income-tax Act**, if concealed income is found out; tax, interest and penalty together can be far more than 100%. For the same offence, under FEMA, substantial penalty can be charged. Similarly, for the same offence, there can be penalty under different laws. Compared to all these financial costs and a probability of prosecution under several laws, the cost of paying 60% under the compliance scheme may be better.

However, before taking a decision, several issues need to be considered.

9.4 NO Immunity S.67:

It should be clearly noted that there is NO immunity granted under the VCS of BML. Section 67 merely provides that: (In simple, separate phrases):

- (i) The **declaration** made by the assessee.
- (ii) Will not be admissible as evidence against the declarant.
- (iii) For penalty; or
- (iv) For prosecution under ITA, WTA, FEMA, Companies Act & Customs Law.

This means:

If the Government gets any other independent information then the Government can use that information to penalize or prosecute the person.

So, if a person is afraid that the Government may/ will get information in any manner:

- (i) under the Information Exchange Agreement or
- (ii) under intelligence by FIU; or
- (iii) by any other person reporting (disgruntled business associate or competitor etc.);

Then he will not get any peace by making this declaration. His 60% money will be lost; and he will still be exposed to all the dangers including
- Black Money Law - 120% cost + prosecution;
- FEMA - confiscation, penalty & prosecution.

Please note that there is NO protection even against prosecution under BML. (If the department gets independent information.)

Government must give complete immunity under these laws for the scheme to be successful.

9.5 The protection is **only for the declarant**. Thus, if one partner in a **partnership firm** makes declaration, other partners and the partnership firm itself will be exposed to all the consequences. One may consider properly before making declaration.

Consider: An Indian Resident **company** has black money abroad. The foreign bank account is held in the name of a director. He has operated the account and used part of the funds. Now the company makes a declaration under VCS and pays 60% of the bank balance existing on 1st April, 2015.

Holding assets abroad is a FEMA violation committed by the company and the director. Company gets protection under VCS but the **director** does not get. For getting the protection, director cannot again pay 60%.

9.6 Declaration u/s. : VCS: Some Issues:

Section 59 of the BML provides for the declaration to be made. If we analyse the section and look at individual phrases following issues emerge:

(i) U/s. 59 “**any person**” can make a disclosure.

However, probably only an Indian Resident can make the disclosure because of the following provisions.

(a) Section (2) (2) read with S.2 (10) define an “Assessee” as person who is Indian Resident u/s. 6 of the Income-tax Act. U/s. 3 Charge of tax is only on an “Assessee”.

Can a person other than an “Assessee” file declaration? A non-resident or a Not Ordinarily Resident (NOR) is not even an assessee. BML does not apply to him. He cannot make a declaration under VCS.

(ii) This declaration can be made ONLY FOR –

(a) Assets located outside India; and

(b) Acquired out of income chargeable to tax in India.

This confirms the discussion earlier that –

(a) If black money is held **in India**, the owner cannot make declaration under BML.

(b) If the black money has been used up – so that **no asset exists**, the assessee cannot make any declaration.

(c) If the source of asset (income) was not chargeable to tax in India, the owner cannot file declaration under BML.

(d) It is not possible to get immunity for ownership of any asset that may be a violation of FEMA/ Customs/ Company Law, etc.; but not a violation of the tax law.

9.7 Government has not yet published the VCS form to be filed. Hence one cannot proceed right now.

9.8 Some institutions have requested for clarifications. One may watch out for clarifications before taking a decision in the matter.

10. The US Government has passed **FATCA** enforcing US law on global financial intermediaries. It is clearly **extra territorial jurisdiction**. Indian law does not target foreign institutions. There is no extra territorial jurisdiction.

11. This is a Unique Law having two separate charging sections:

Section 3 -	Normal tax	30%
Section 60	VCS tax	30%.

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Part A - Completed.

Next Page - Part B

Part B- FEMA, PMLA, etc.

B.1 Macro View.

1.1 Multi-lateral Attack on Black Money:

So far the attack on tax avoidance was Unilateral - Government of India attacking all kinds of tax planning. Now the attack is "Multilateral". It means attack from several fronts, in several manners. Some attacks are already incorporated in law. Some are at discussion stage.

A. Scope:

- | | |
|-------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|
| (i) Attack on Tax Planning
also called "Tax Avoidance". | Place of Effective Management.
(POEM).
Whole range of actions under
BEPS, GAAR, CFC, SAAR. |
| | |
| (ii) Attack on Tax Evasion | BML, FEMA, PMLA, Benami. |

B. Domestic & International:

- | | |
|---------------------------|------------------------------------|
| (i) Attack within India. | As seen in 'A' above. |
| (ii) International Attack | U.N., OECD, G20.
BML Vs. FATCA. |

C. Legal & Technical Approaches:

- | | |
|---------------------------|---------------------------------------------------------------------------------|
| (i) Attack under the law. | Automatic, Immediate Exchange
of Information. |
| (ii) Tracking black money | Financial Intelligence Units.
(FIUs) of the world.
Through banking system |

D. Target Group:

Black money is generated & held abroad by:

- | | |
|------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|
| (i) Politicians,
(ii) Bureaucrats &
(iii) Businessmen etc.
Within these people,
Some are in "Protected" category | <div style="font-size: 2em;">}</div> The attack is targeted
on whom?

<div style="font-size: 2em;">}</div> Please see 1.6 below. |
| Politicians & bureaucrats are never targeted. | |

"All Tax Payers are equal. But some are more equal than others".

With apologies to George Orwell. His famous Book "Animal Farm" shows how authorities create distinctions for themselves; and how the concept - "Equality before Law" is a mere academic concept.

1.2 **Attack on Black Money: Elaboration:**

Indian Government has started a serious attack on: (i) Tax Avoidance (or Tax Planning) & (ii) Tax Evasion. Both the attacks together are considerably stronger than any attempt at unearthing black money in the past.

1.2.1 **Attack on Tax Avoidance:**

The first serious attack under the present Government is on tax planning by creation of SPVs (**Special Purpose Vehicles**) outside India. Indian residents incorporate companies in tax havens. These companies then conduct business abroad or hold properties/ investments abroad. Under the Income-tax Act 1961, all these incomes and assets were exempt from Indian taxes.

The Government knew about it for many years. In the **Direct Taxes Code (DTC)**, it was proposed to change the definition of a company's residential status. This proposal of DTC has been accepted. Now a foreign company will be treated as Indian resident if its "**Place of Effective Management**" (**POEM**) is situated in India. The term POEM is similar to "Control & Management". However, there are some fine differences.

Indians have formed thousands of **SPVs in tax havens**. Most of these SPVs will be considered as Indian Residents under POEM rules. If they do not disclose their incomes in the assessment year 2016-17; **Black Money Law** will apply. Harsh consequences can result. Once a foreign company is treated as Indian resident, its Global Income is liable to Indian tax. It is also liable to Tax Audit, Transfer Pricing audit, TDS provisions, etc.

Apart from POEM, following attacks have already been incorporated in the Income-tax Act (ITA). Transfer Pricing provisions, Taxing Indirect Transfers and several deeming provisions under S.9. Further provisions to come will be: GAAR & CFC.

BEPS reports will be announced at the end of year 2015. Then Government of India is committed to make further amendments in law appropriately.

1.2.2 **Tax evasion:**

This is the most serious attack. Following is the list of laws that Government of India has enacted or modified to attack the black money.

(i) **Black Money Law:** The new law has been passed under the title "The Black Money (Undisclosed Foreign Income and Assets) And Imposition of Tax Bill, 2015". This law is in response to BJP's election promise to bring back black money held abroad. It provides for tax,

penalty & prosecution. It has created serious fear in the minds of many persons including politicians having assets abroad.

The law offers a **Voluntary Compliance Scheme (VCS)** as an opportunity to voluntarily comply with the law. Those who are caught violating the law are threatened with harsh consequences.

(ii) **Foreign Exchange Management Act (FEMA):** Finance Act, 2015 has introduced Sections 13 (1A) to (1D); and Section 37A in FEMA. The provision will be to confiscate Indian assets of equivalent value for any assets held abroad in violation of Section 4 of FEMA. These amendments also provide for penalty and prosecution.

(iii) **Prevention on Money Laundering Act (PMLA):** This law also makes it a scheduled offense if an assessee evades tax etc. payable under the BML.

(iv) **Benami Transactions (Prohibition) Act.**

1.2.3 Global Attack on Black Money:

(i) This time, Government of India is not alone in its attack on black money. USA, UK, Germany, France; OECD, G20, EU – and other countries and Groups are making a concerted attack on black money. The US Government has targeted money laundering very seriously. Their attack is mainly on terror money. However, it also covers black money.

(ii) All these associating together have entered into several agreements for “**Automatic, Simultaneous Exchange of Information**”. Financial Intelligence Unit (**FIU**) has been formed under **United Nations (UN)**. Similar FIUs are formed in several countries including India.

Internationally, the attack is through the **banking system**. In a computerised world, a transaction between two persons in Switzerland & Mauritius can be tracked at New York & reported to New Delhi. This was not possible earlier. Now it is possible. This is how Hasanali Khan’s case came to light.

Tax Haven Governments & banks are on the firing line.

(iii) Under the **PMLA**, global banks and financial institutions have been instructed to track and report all **suspicious movements of funds**. When any movement is considered suspicious, it gets automatically reported to the **FIU** of the relevant country. This movement has caused maximum pressure on movement of funds within tax havens. People, who have earlier held black money in tax havens, now find it difficult even to move

the funds from one tax haven to another or to return the funds from abroad to India.

(iv) Banking Secrecy: Under the leadership of US Government & OECD, Several Governments are forcing the tax havens including Switzerland to open up their secret records and get the information on black money. The stand taken by these tax havens that their domestic laws don't permit sharing of information is not accepted by global Governments. **Banking Secrecy** is being demolished with strong blows.

(v) Double Non-Taxation: In academic conferences and even before Courts of Law, we had eloquent arguments justifying Double Non-Taxation. FIIs and companies like Hutchison - Vodafone have escaped double non-taxation and media has widely supported it. BEPS is a direct and frontal attack on Double Non-Taxation. Simultaneously several country laws and Double Tax Avoidance Agreements/ commentaries will be amended to disallow double non-taxation.

Tax havens will be hurt. Old Tax Planning structures are no longer profitable. Dismantling them can also invite substantial taxes.

All these actions together will substantially change International Tax Practice.

1.3 **Micro & Macro Approaches:**

How do we study a law? Micro approach: Take a section. Study. Interpret. See how you will argue before the AO/ Court. This paper is designed to have a macro look at the Attack on Black Money. Hence let us examine the applicable laws from a macro angle.

What is the difference between - (i) Narrow interpretation or micro approach; & (ii) Macro View?

Compare with illustration:

A new-comer is searching for a home in the streets of Old Delhi. He is wandering from one street to another. Not sure about which is the right street. This is narrow interpretation.

Another man has Google map on his phone. He takes an aerial view of the area, knows where the house is located and then goes for the address. The **aerial view is macro view**.

1.4 **Macro Angle is:**

"My client should not come into difficulties from any angle. His assessments should, in principle, be completed at AO level".

"How do I ensure this?"

By making him aware of all the aspects of: “Attack on Black Money”.

- 1.5** **The international scene** has changed significantly after the American financial crisis that erupted in the year 2008 with insolvency of “Lehman Brothers”. Indian scene has changed significantly after the change in Government in May, 2014.

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Having seen the Macro view of course we have to walk down the street. We have to take micro view.

- 1.6** **Counter View: “All Tax payers are equal.....”**

- 1.6.1** Jain Hawala Case, Telgi Stamp Paper scandal, Hasanali Khan case – in all cases Politicians of different parties were involved. Which politician has been punished?

- 1.6.2** **FII. MAT (Please see 1.1.D above.)**

On 28th February, 2015 the Finance Minister presented budget & proposed relief from **MAT for FIIs** – with **prospective effect**. FIIs raised a hue & cry & claimed benefit with retrospective effect. On 6th April, Mr. Arun Jaitley made a formal statement: “**India is not a Tax Haven**. You can’t avoid paying all taxes.”

In May, Mr. Arun Jaitley agreed to reconsider the issue. First the relief was announced to FIIs coming from DTA countries. Now even non-DTA investors are being considered by a committee headed by Justice Mr. A. P. Shah. What made Finance Minister take an about turn?

This is not unique to India. Economist article “America the not so brave” – 23rd May, 2015 – says that even U.S. Government has been soft on bankers abetting tax frauds. Lobbying has its effect in USA.

Some persons believe:

“All these massive attacks will not hurt the politicians, the bureaucrats and the favoured business houses. Only the common businessman will be left to bear the brunt”.

Let us see how the attack on black money unfolds.

Paragraph B.1 – “Macro View” completed.

- B.2** **FEMA:**

- 2.1** **Basic Understanding in Short:**

Even after all the liberalisations, an Indian Resident cannot do following transactions unless and until he is permitted to do so – (i) by some notification or circular; or (ii) by a specific permission given by RBI.

Section 3 of FEMA prohibits all Indian residents from making any payment to a Non-Resident.

Section 4 – No Indian Resident can hold any assets outside India.

Section 8 – if an Indian Resident is entitled to receive any assets outside India, he is bound to bring the same to India.

Now Finance Act 2015 has introduced two new provisions in FEMA. Intention is to bring back Indian black money held abroad.

2.2 FEMA – S.37 A. Enforcement:

This provision is to enforce the person into bringing to India his black money held abroad. Consider the section:

Extracts: If the Enforcement Officer SUSPECTS that a foreign asset is held in violation of S.4 of FEMA, he can seize assets in India of equivalent value. He shall record the reasons in writing.

Implications:

- (i) An enforcement officer needs to **only suspect**. No evidence required. No notice to be given. Just go ahead and seize assets.
- (ii) Identity of the **owner** of foreign assets; and **identity** of the owner of Indian **assets** – do not have to be established or **linked**. If he suspects that Foreign Assets are held in violation of FEMA; can he go ahead and seize in India – any one's any asset?

This law is without reasonable protection for the citizens of India; is arbitrary; and has unacceptably harsh implications. It needs to be struck down at the earliest.

2.3 Section 13 (1A): Penalty & Enforcement:

Kindly separate each phrase of the section and then read.
First phrase is cause of action.
Subsequent phrases are consequences.

First Phrase: Cause of Action:

“If any person is found to have acquired”.

(Note: Simple words are “have acquired”. There is no qualification that “acquired in violation of FEMA”.)

“Foreign assets
situated outside India
exceeding limits prescribed u/s. 37A(1).”

Second Phrase: Consequences:

- (i) “He shall be liable to a **penalty of up to three times**”
the sum involved –
..... in **such** contravention.”

(**Note:** the word “such” means that there is a preceding reference to a contravention. However, the preceding phrase simply refers to acquisition of foreign assets. There is no mention of any violation of law. A clear case of bad drafting of law.)

A fair and hence correct interpretation of law would be: If the original acquisition of the asset was in violation of FEMA, then only S.13 (1A) will apply.

- (ii) “And **confiscation** of value equivalent”
(Again grammar fails. Value equivalent to what? The word “to” is missing. Because the sentence is so structured that it is difficult to place the word “to”.) Held / owned by whom?

For example, **TISCO & TELCO** have acquired shares in **CORUS**. Can the Enforcement Officer seize the assets of Mr. Ratan Tata or Mr. Cyrus Mistry? (Please see paragraph 2.2(ii) above.) This illustration seems outlandish. However, the way, the law is drafted; this can be an interpretation of the law.

Hindustan Aluminium (HINDALCO) has acquired shares in a Canadian Company **Novellis** at an all cash price of \$ 6 billion in the year 2006. It was being debated that Hindalco has paid an excessive price. This can be an alleged violation of FEMA. Enough suspicion. Enforcement Officer **need not issue any notice**. He can go ahead and confiscate the foreign asset; and then impose a penalty of upto \$ 18 billion.

Note: Under FEMA, there is **NO time limit** upto which the Enforcement Officer can take action. FEMA became operative on 1st June, 2000. So the enforcement officer cannot go to a date prior to 1st June, 2000.

Comment: When an officer is given arbitrary powers, someone somewhere is bound to abuse those powers. In Hindalco’s own case, we have seen arbitrary decisions passed by Transfer Pricing Officer: “Guarantee given by Hindalco for loans taken by Novellis.”

Observations: Hindalco will fight such arbitrary actions in a Court of Law. Can everyone afford going to Court?

2.4 FEMA: S.37 A & 13 (1A) - Combined effect:

Are both the sections **cumulative or complementary**? In other words, for a suspected offence of \$ 100 under FEMA, can the Enforcement Officer -

- (i) Confiscate Indian property worth \$ 100 u/s. 13 (1A); and
 - (ii) Seize Indian property worth \$ 100 u/s. 37A(1)?
- Both sections are drafted as if they are separate.

2.5 Combined effect of FEMA & BML:

When a person transfers his black money outside India by Hawala; he violates both - ITA & FEMA. What will be the combined effect of the **penalties under both the laws**? Apart from penalties and seizure of assets; can there be **prosecutions under both the laws**?

Illustration: Mr. IR, an Indian Resident sent abroad Rs. 10 lakhs by hawala when the exchange rate was Rs. 50 = 1 \$. He got \$ 20,000. On 1st July, 2015, the AO gets this information. Current rate is say Rs. 65 and value of the foreign undisclosed asset is Rs. 13 lakhs.

Consequences:

(i)	u/s. 3 of BML	Tax @ 30%	Rs. 3,90,000
	u/s. 41 of BML	Penalty @ 90%	Rs. 11,70,000
	Under BML	Total (No discretion) 120%	Rs. 15,60,000
			=====
(ii)	Under FEMA		
	u/s. 13 (1A)	Penalty upto 3 times - 300% (Discretionary)	Rs. 39,00,000
	And confiscation of the asset	- 100%	Rs. 13,00,000
	No provision for returning the asset		
	u/s. 37A	Seizure of equivalent value Indian asset - 100%	Rs. 13,00,000
		Seized asset may be returned.	
	Under FEMA Total		Rs. 65,00,000
			=====
(iii)	Gross Total	Maximum Possible 620%	Rs. 80,60,000
			=====
(iv)	PMLA	Confiscation.	
(v)	Prosecution is possible under all these laws.		

Clear case of punishment completely disproportionate to offenses committed. Under the constitution, there have been decisions - many

decades back; that penalty for any offense has to be commensurate with the gravity of the offense. Today, it seems, such principles of civilised democracy are given a burial – together with the burial of “equality before the law”. One may make a **risk analysis** before embarking on any black money transaction.

If the asset is brought back into India, seizure can be set aside – S.37A. So bring the assets, pay up the tax and reduce penal action by 100% of black money.

2.6 Consider the practical difficulties.

(i) Mr. IR remitted \$ 2,50,000 under LRS and incorporated a company in the UAE. The company purchased an apartment in UAE worth \$ 2,45,000.

(ii) In the year 2010 RBI decided that IR could not have incorporated a foreign company under LRS. Hence the shares held by IR would be a violation of S.4 of FEMA. RBI did not issue any circular or notification. Just started taking action against such investors.

(iii) RBI continues to behave in such arbitrary manner in many matters with no scope for appeals.

(iv) When RBI says, something is a violation of FEMA; Enforcement officers accept it as a conclusive evidence of violation and take further action.

Now, countless innocent Indian residents are exposed before a draconian law – FEMA. Their exposure is more vulnerable because of arbitrary behaviour by RBI.

Note: RBI is the most respected institution in India today. Hence my statement may not be palatable for many. But those who have suffered on account of LRS investments, may appreciate this statement.

2.7 In the year 2000, FERA, a Criminal Law was replaced by FEMA, a civil law. The power to prosecute was taken away. Now FEMA has become a criminal law. Prosecution is back. Can high value corruption and harassment be far behind?

You decide: Do we have a civilised democracy in India?

FERA was an absolute law. Very harsh. Contrary to Business Logic. No one could win in an appeal in a Court of Law.

And it completely failed.

[This is a radical statement and can take one hour discussion. Suffice it to say that: (i) Law makers themselves used hawala system on a large scale; and (ii) Anyone could transfer black money in either direction at Will.]

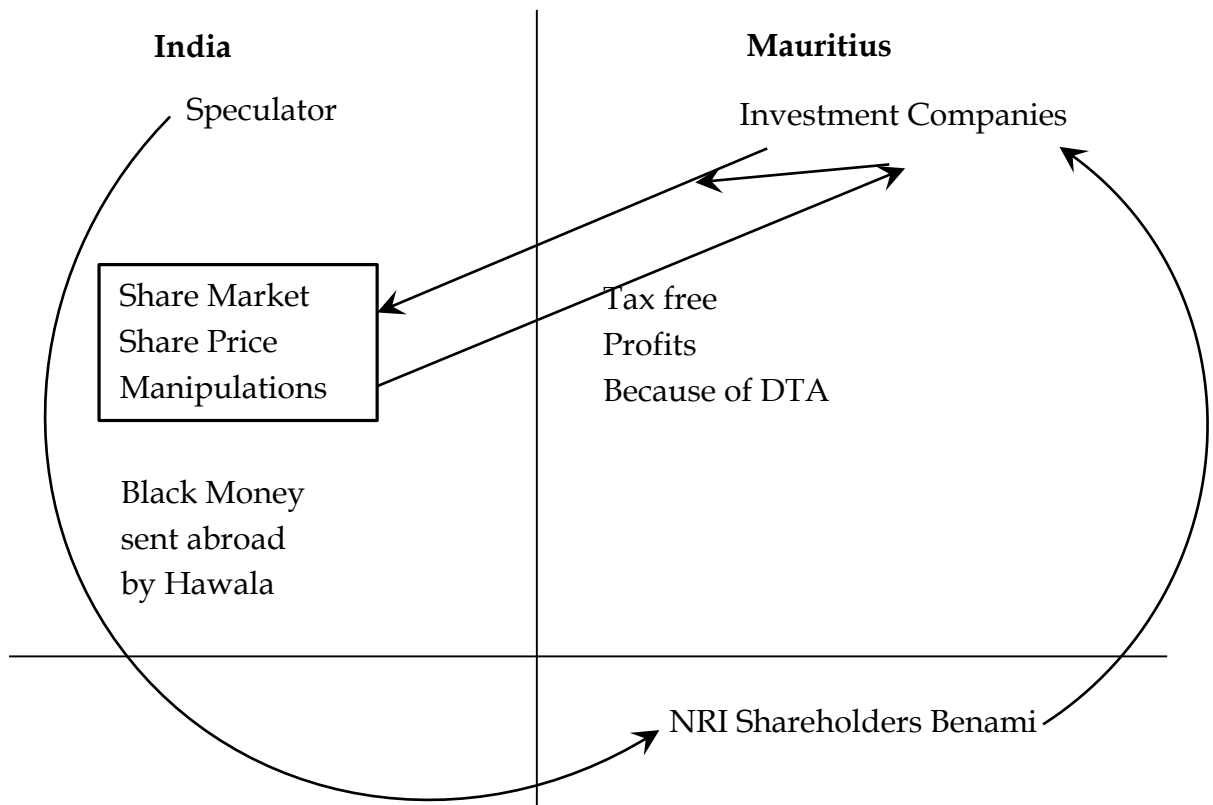
My submission: When a law is too harsh; and Even courts have little jurisdiction - The law fails.

FEMA is back to FERA stage.
A draconian law bound to cause more harm than good.

B.3 Charts:

Chart 1

Alleged Route employed by some share market manipulators in the years 1991-92.



When Azadi Bachao Andolan (An NGO) challenged India - Mauritius DTA, Government of India put up all the fight to protect the DTA.

Black Money Routing:

Chart I - Explanations.

Share market speculator had real ownership of Mauritius companies that speculated in the Indian share market. He held those companies through Benami NRIs & manipulated share market.

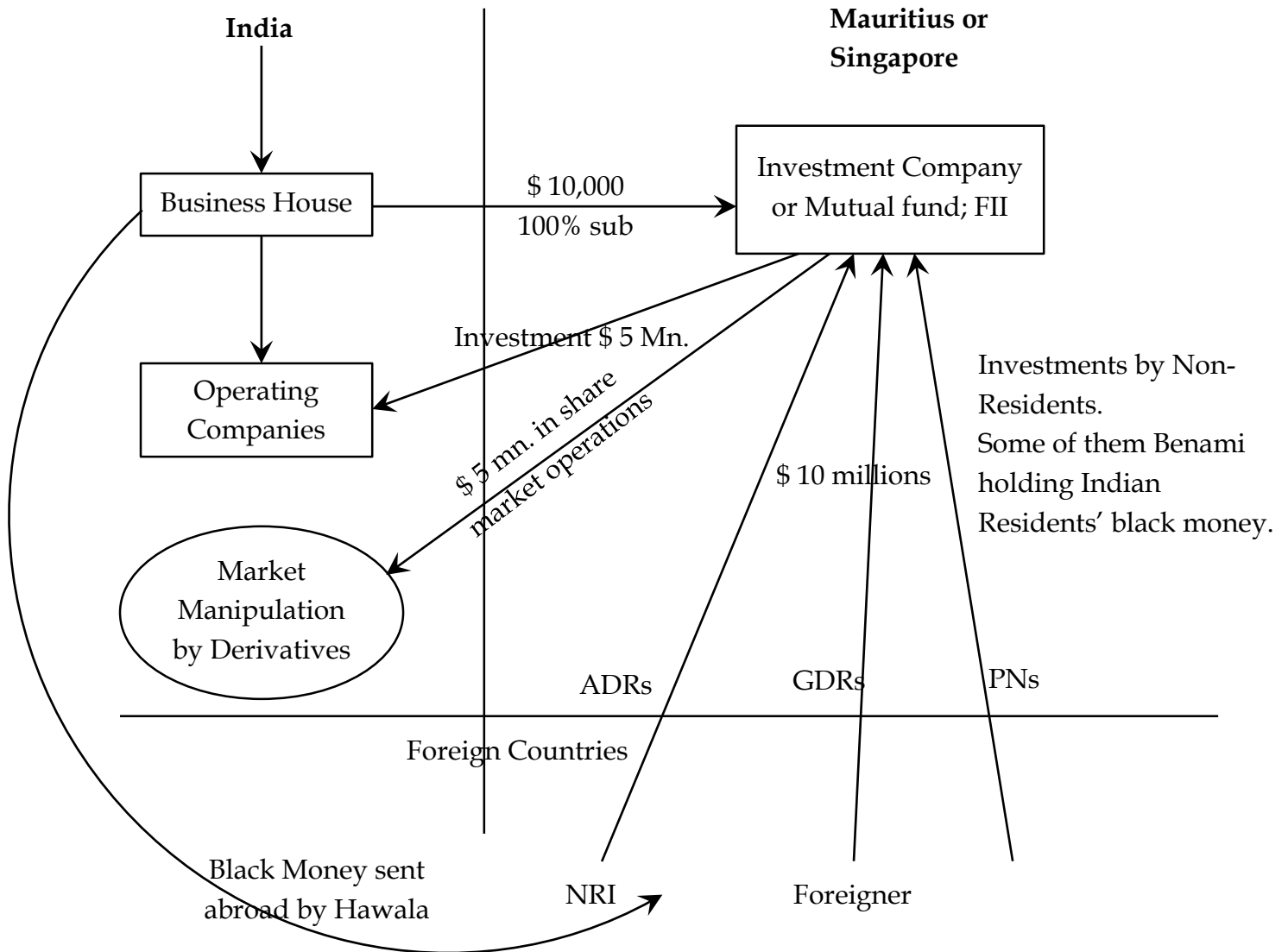
Even in those years, more than a thousand cases were filed by several regulators against the share market speculators.

Under the current regime, holding assets abroad is a violation of - Tax laws, FEMA & Benami Transaction Law. Now add BML. SEBI and related laws have their own consequences.

These brokers acted individually and faced harsh consequences. Compare their fate with FIIs in Chart 3.

Alleged Black Money Routing by Business Houses

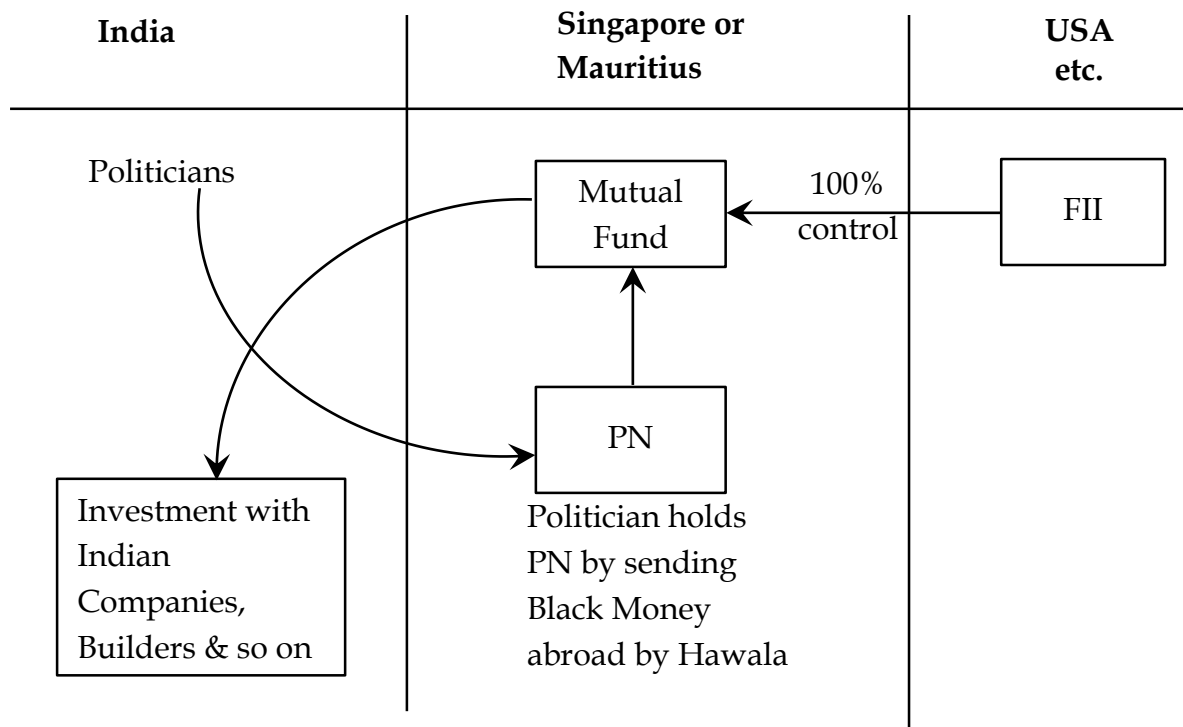
Chart 2



All these ADRs, GDRs, PNs are Financial Interest/ Assets. Some of them are Indian Residents' black money held abroad Benami and used for financing business & financing share market operations. They abuse DTA and get tax free profits to manipulate markets. These are violations of FEMA, ITA, Benami Transactions Law & BML.

Chart 3

An Alleged Route of Money Laundering



Notes:

- SEBI, RBI, Ram Jethmalani & Supreme Court - all have raised voices at different times. It is rumoured that PNs are used to launder black money into India. A provision has been made that while FIIs have to obtain KYC for the investors, it will have to disclose only if & when the regulators enquire in specific cases. There have been cases where FIIs have not disclosed information to SEBI & instead agreed to pay penalties.
- If anyone has conducted this transaction, it was a violation of FEMA even before amendment. After amendment, it is exposed to seizure and violator is exposed to prosecution.
- When a politician does this series of transactions, it becomes a PMLA violation also.
It is of course a tax violation.
- Now under BML, the FII can also be prosecuted. Also, the tax consultant can be prosecuted.

5. However, in India FIIs have tremendous influence. All Governments pass laws specifically suitable to FIIs. Latest amendment made by the present Government is to treat FII assets as Capital Assets. S.2 (14) of the ITA. The tax benefits they get is a subject beyond the scope of present paper.

Notes to Para B.3 – Charts - Completed.

B.4 Prevention of Money Laundering Act (PMLA):

4.1 Confiscation of Indian Property:

Finance Act has introduced a new concept under FEMA. Indian residents may have black money held abroad through tax haven countries and tax haven banks. When the Government demands return of those funds, the tax havens may not co-operate. Government's move may be frustrated. In such a situation, the Enforcement Officer is authorised to confiscate Indian assets equivalent in value to the foreign undisclosed assets.

This concept is brought into PMLA vide Section 2 (1) (u) by amending the definition of Proceeds of Crime (POC). Section 5 of PMLA authorises Enforcement Officer to attach POC. Under Section 8 (5), the POC may be confiscated. Thus now, assets in India equivalent in value to POC located outside India can be attached and confiscated.

Note: Confiscation/ seizure under FEMA is for FEMA violation. In law, there is no link between tax evasion and confiscation under FEMA. Similarly confiscation under PMLA is only for PMLA violations.

4.2 Tax violation included under PMLA:

Section 88 of BML makes an addition to the list of scheduled offences under PMLA. "Willful attempt to evade any tax, penalty or interest payable under BML" now is a scheduled offence under PMLA. And then there are powers to confiscate property.

Who will have this power? Not the Income-tax department. It will be the Enforcement Department under PMLA. This will be in addition to the powers under BML for prosecution of the assessee.

DOE had seriously tried in the nineties to get a power to act on tax evasion. So far it was not granted. Now DOE has succeeded in getting that power. DOE to act for tax evasion not involving any money laundering crimes. Businessmen are exposed to even more risks.

B.5 Miscellaneous Provisions:

5.1 Gold Monetisation Scheme

- 5.1.1** Banks will take deposit of gold from public.
Banks will lend this gold to Jewellers.
or sell gold for their own needs of CRR/ SLR/Foreign exchange.

Who will bear the price fluctuations? Banks.
Who will bear the risk of Bad Debts? Banks.

- 5.1.2** Following factors advise against trusting anyone for gold:

- (i) Wild fluctuations in gold price per US ounce - \$ 400 - \$ 600 - \$ 1900 to \$ 1200.
- (ii) Huge losses suffered by U.S. Government & Banking Cartel.
- (iii) Huge derivatives trading in gold.

- 5.1.3** My personal view - "Gold is my reserve for unforeseen circumstances. I do not expect income on it. Stability against inflation is adequate for me. For earning 1% or 2% interest, I shall not part with my gold".

Rich man's perspective.

"Holding gold bond takes away the hassle of storing & protecting physical gold".

- 5.1.4** Will the bonds be transferable?
This is a Gold Saving A/c.
Hence there won't be gold bonds. Hence transferability is an issue.

If they don't give some sort of transferability, the attraction will be less. If transferability is given - it will be better.

- (i) Formal transfer to be registered - Good.
- (ii) Transferable by delivery - like cash - this will help movement of black money.

- 5.1.5** **This scheme is NOT for black money conversion into white. Depositor has to give KYC.**

5.2 Section 115 BBD:

This section provides for concessional tax @ 15% on foreign dividends. Does it constitute an open tap for converting black money into white?

Illustration: IR Pvt. Ltd. is an Indian Resident Private Limited Company. It opens a 100% subsidiary under ODI scheme of FEMA in a Free Trade Zone in UAE. The UAE company makes massive profits, declares dividends and gets money into the country at 15% tax.

Observations: Of course, it is NOT a VDS. There may be people who will be tempted to use S.115 BBD as a VDS. Some of them will cross logical limits. Since no immunity is given, those caught under BML will suffer badly. Similar trends have happened in the past.

5.3 Compare Past Voluntary Disclosure Scheme VDS (1997) with present VCS. VDS # VCS

5.3.1 Under the VDS, people did resort to several schemes and converted black money into white by paying hardly 2% tax.

Consider one of the schemes:

Mr. A would disclose that he had 20 kilos of silver utensils acquired at the time of his marriage - in the year 1972. Silver was purchased @ Rs. 550 /kg. Cost of silver - Rs. 11,000 was disclosed as his concealed income. He paid tax @ 30% under VDS Rs. 3,300. Then in 1997 he sold silver utensils @ Rs. 7,000 /kg. & got a cheque of **Rs. 1,40,000**. Being personal effects, they were not liable to capital gains tax. His tax cost was **2.35%**.

Under the VCS, current market value of the asset has to be considered as tax base. There is no reference to the income from which the undisclosed foreign asset was acquired.

Whether the assessee now sells the asset or not, his tax & penalty amount has been fixed @ 60%. He can't avoid these.

5.3.2 In the year 1997, even without any game of silver etc., assessee disclosed their incomes under VDS and paid 30% tax. At the same time, normal rate for tax at the highest slab rate was 40%. Very clearly, honest tax payers were at a disadvantage compared to those who used VDS. Under the VCS, tax & penalty together will be 60% of the current market price of the asset. A person using VCS cannot gain advantage over an honest tax payer (who pays tax & surcharge etc. @ 34%).

B.6 Conclusion or Macro View Final:

Ultimate issue is: "My client should not come into difficulty".

How do we ensure this?

Best way is, pay up all the taxes that are payable and don't violate the law.

Next questions are:

CA: "Why should the client come to me for advice and pay me fees?"

Tax Payer: "Government laws are such; and the multiple, varying interpretations by the regulators are such that it is impossible to do any significant business and comply with all the laws."

“When all my competitors are violating the laws, evading several taxes; how can I remain in competition if I pay all the taxes?”

“Once I evade any indirect tax, black money becomes unavoidable.”

Only answer to those who are still tempted is: “Please look at the breadth & depth of the attack on black money. Do your own Risk Analysis and then decide.”

There have been **debates** for many decades on following issues.
Now Parliament has decided:

- (i) There is no difference between Tax Evasion & Tax Avoidance.
- (ii) Tax evasion is a crime and will be treated as such.

One may go on debating this. It may be better to realise the facts.



Pranam

Rashmin C. Sanghvi.