

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

- An Overview

National Tax Convention 2015

Western India Regional Council

Hitesh D. Gajaria

4 July 2015

Contents

Particulars	Slide No.
Evolution of UFIA Act	2- 3
Journey so far...	4
Structure of the UFIA Act	5
Important Definitions	6
Applicability and Basis of Charge	7
Residential Status	8
Computation of Total UFIA and tax thereon	9 - 10
Valuation Rules & Prescribed Forms	11
Procedure of Assessment and Appeals	12
Recovery of Tax - Key Provisions	13
Penalty Provisions	14
Prosecution Provisions	15
One Time Compliance – An Opportunity	16 – 18
Other Matters	19
Way Forward	20
Glossary	21

THE ECONOMIC TIMES

Yash Birla Among 5 Indians Named by Swiss Authorities

Realtor Ponty Chadha's son-in-law, City Limousines scam accused also on list

Our Bureau

New Delhi: The fabled secrecy of Swiss accounts may soon be history. Switzerland on Tuesday disclosed the names of five Indians being probed for alleged tax evasion in this country, giving them 30 days to approach a Swiss administrative court, failing which info will be shared with Indian authorities.

The five, named in a gazette notification in Switzerland, are industrialist Yash Birla, Gurjit Singh Kochar, son-in-law of late liquor baron Ponty Chadha, Delhi-based businesswoman Ritika Sharma, and two other women — Sneh Lata Sawhney and Sangita Sawhney.

Birla Denies Swiss Account >> 25

Swiss Roll

Swiss govt reveals names of 5 Indians who have accounts in banks there

These individuals are facing tax probes in India

Revelation part of multi-country disclosures by Swiss authorities

More names likely to come out with India providing evidence

WHAT IT MEANS

Disclosures will raise heat on those having foreign accounts

More people could come clean under black money law



I have been repeatedly saying the veil of secrecy with regard to assets & monies kept by Indian entities outside India is going to be lifted

ARUN JAITLEY
Finance Minister

SWFs, PEs may Get Highway Stake

The government is finalising a mechanism that will allow private equity firms and sovereign wealth funds to buy stakes in highway projects, freeing up resources for the sector, report Ruchika Chitravanshi & Deepshikha Sikarwar. **FULL REPORT** >> 23

Black Money may Soon See Light of Day

Cracking the Whip

STIFF PROVISIONS IN LAW...

Non-disclosure of foreign assets to lead to up to 10 years jail

Penalty of up to 90% plus 30% tax

Banks, others aiding an Indian to stash funds abroad to face heat

Beneficial owners & beneficiaries of trusts need to disclose assets

ADEQUATE SAFEGUARDS...

Persons with up to ₹5 lakh in bank account to be spared

Tax officer to issue notice, give opportunity to be heard

Right to appeal to ITAT, HC, SC

LAST CHANCE TO COME CLEAN...

Compliance window only for limited period

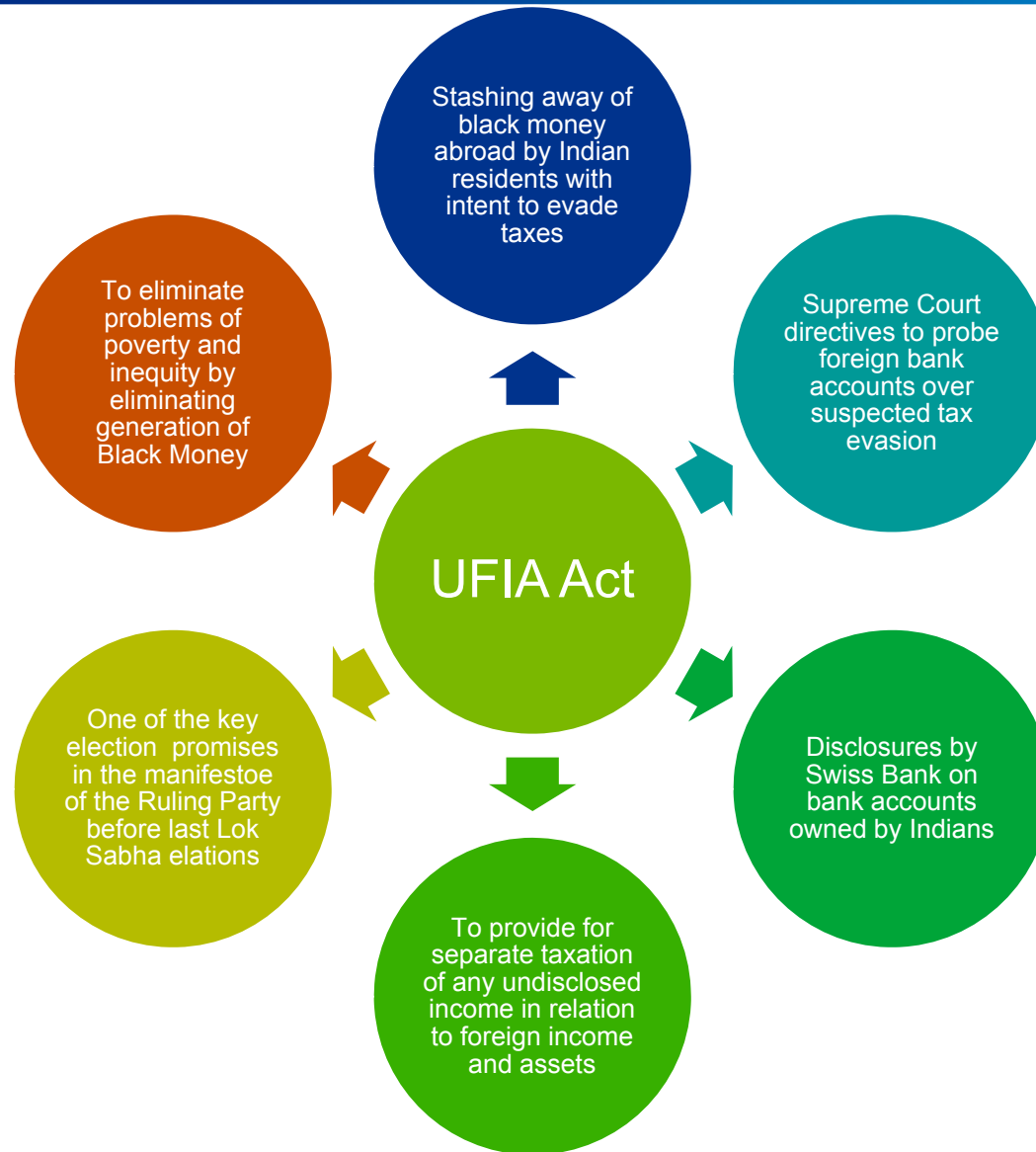
Incomes disclosed to face 30% tax plus penalty, but no prosecution

Govt says it's no amnesty scheme

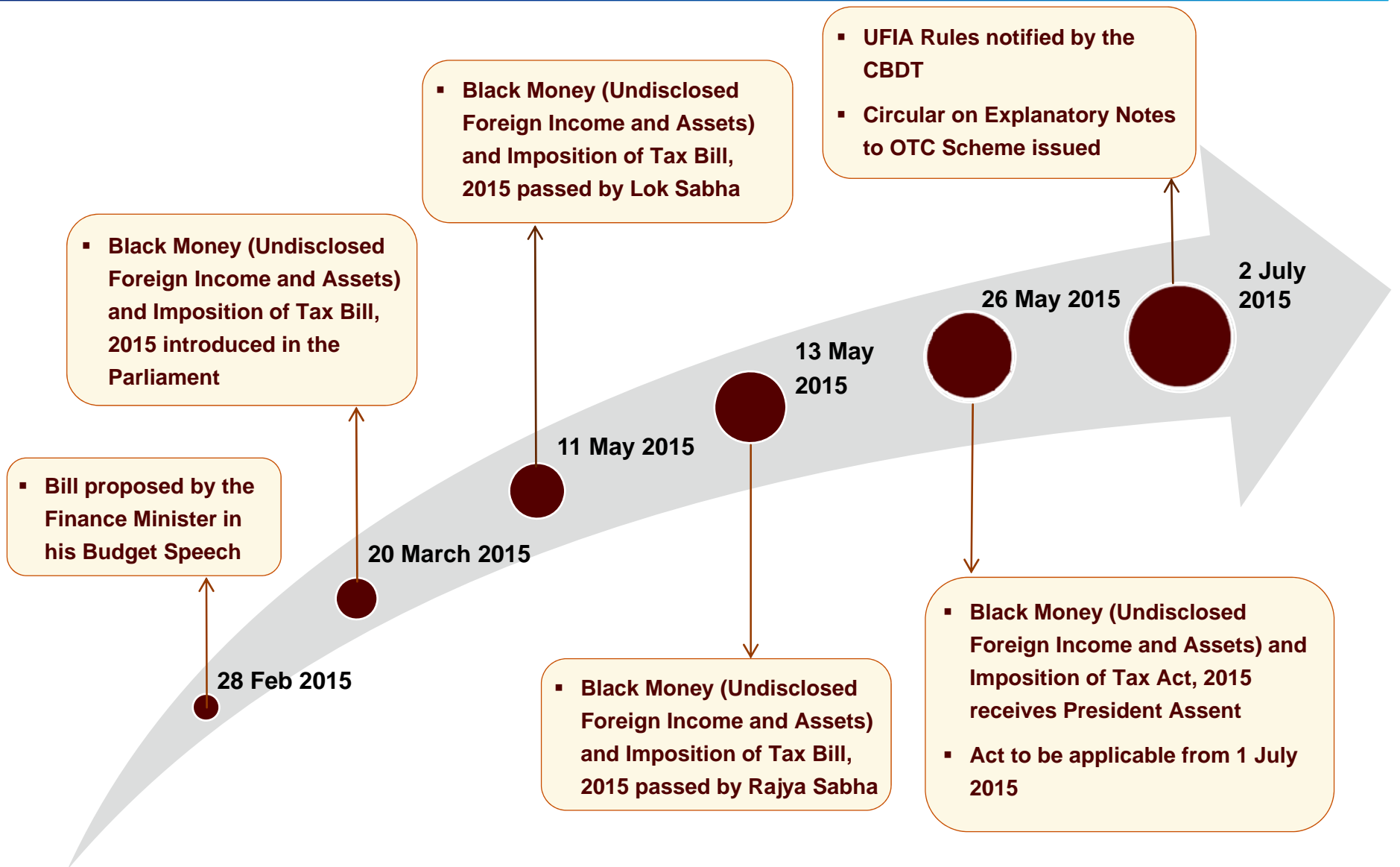
Black money: Income Tax department files 121 cases against HSBC account holders

Govt tables Bill on hush money in Parliament

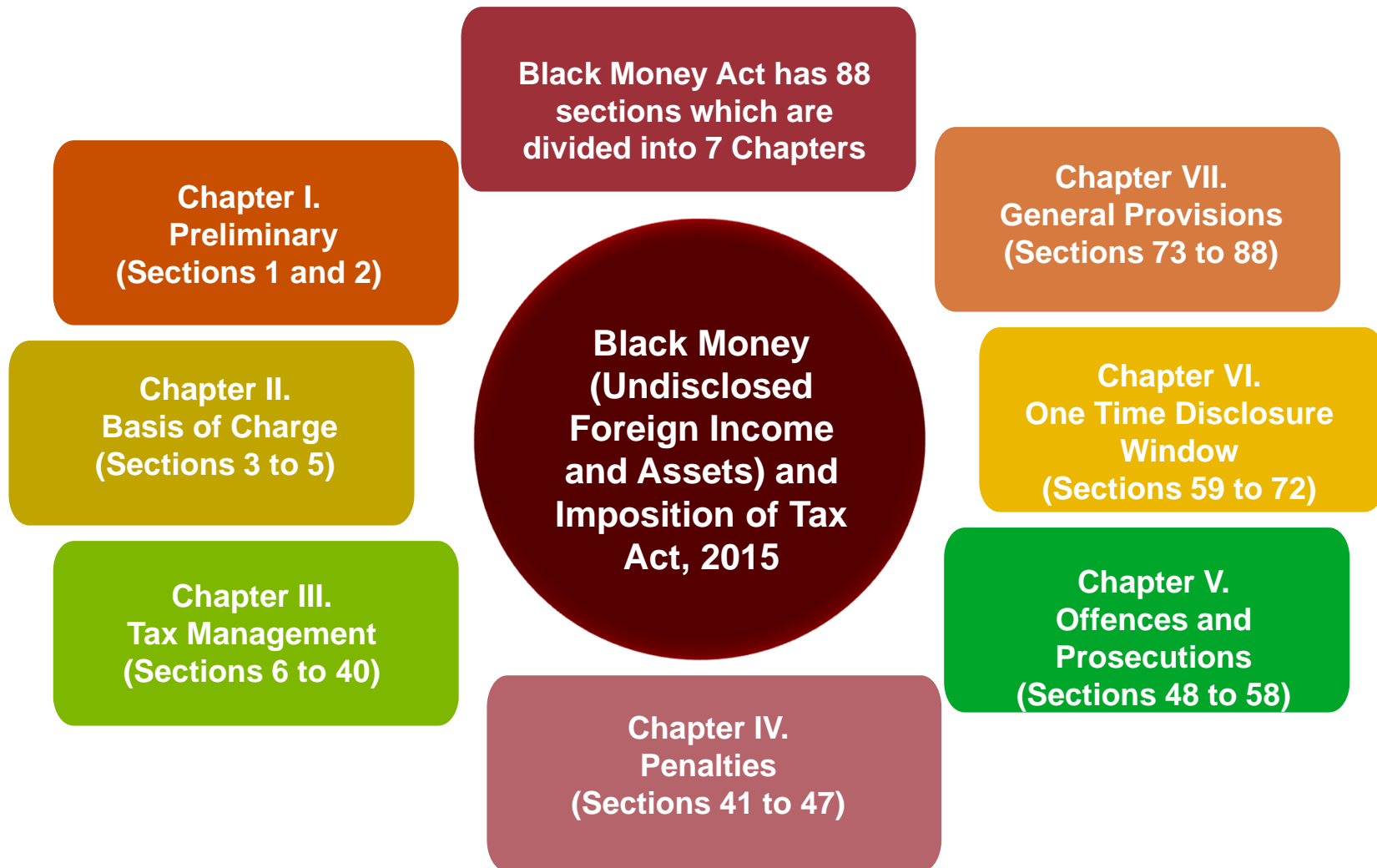
Evolution of UFIA Act



Journey so far...



Structure of the UFIA Act



Important Definitions

Section 2(2) - Assessee

- Means a **person**, being a **resident** other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the IT Act,
- by whom tax in respect of undisclosed foreign income and assets, or any other sum of money, is payable under UFIA Act and
- **includes** every person who is deemed to be an assessee in default under UFIA Act.

Section 2(11) – Undisclosed Asset located outside India

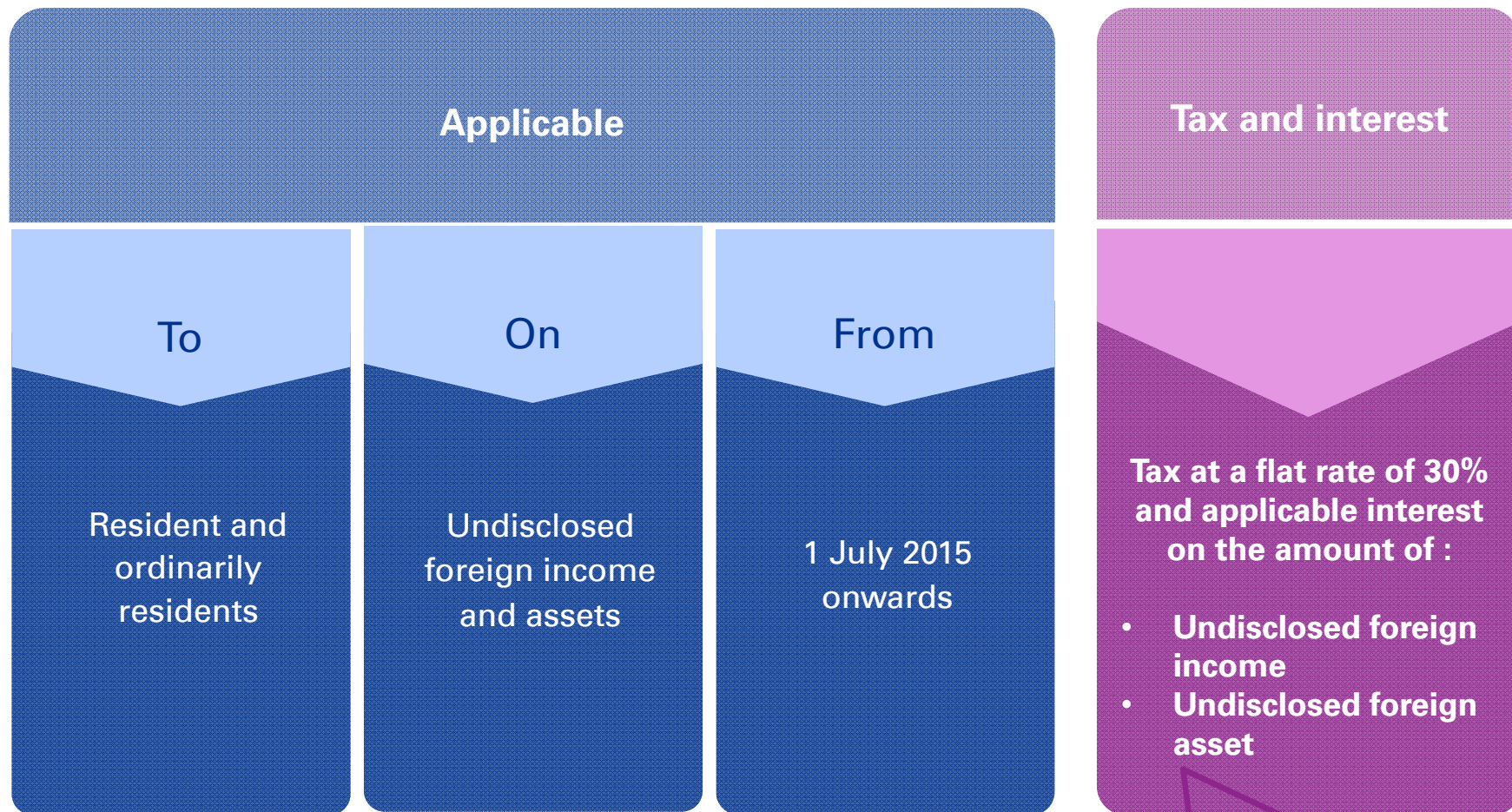
- Means an asset (including **financial interest** in any entity) located outside India, held by the assessee in his name **or in respect of which he is a beneficial owner, and**
- he has no explanation about the source of investment in such asset **or**
- the explanation given by him is in the opinion of the AO unsatisfactory.

Section 2(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.

1. *The term 'person' has not been defined under UFIA Act. As per Section 2(15) of the UFIA Act, reference needs to be made to the IT Act for words / expressions not defined under the UFIA Act. Accordingly, the term assessee means person as defined under the IT Act to include individual, HUF, company, firm, AOP, BOI, local authority and every artificial judicial person.*
2. *The term 'financial interest' has not been defined under the UFIA Act, IT Act and Income Tax Rules, 1962. A reference can be made to the Instructions to the form of ROI.*

Applicability and Basis of Charge



Note: Value of an undisclosed asset (located outside India) means the fair market value of an asset (including financial interest in any entity).

- Interest u/s 234A to 234C as per IT Act
- No Surcharge and Education Cess on Tax and Penalty

Residential Status

Individuals

- Residency based on number of days' physical presence in India.
- Not applicable to RNOR who is:
 - NR in 9 out of 10 preceding previous years;
- OR**
- Presence in India during preceding 7 years for 729 days or less.
- Not applicable to NR.

Other persons (AOP, BOI, Firm etc.)

- Resident, unless control and management of affairs is wholly outside India.

Companies

- Indian company is a resident,
- Further, the Finance Act, 2015 (in case of other than Indian companies) has replaced the phrase “wholly controlled and managed within India with “place of effective management”.

Concept and Impact of POEM

- POEM is defined under IT Act as “a place where key management and commercial decision that are necessary for the conduct of the business of an entity as a whole are, in substance made”.
- It will be important to analyze whether the activities carried by a foreign company would create POEM of foreign company in India.
- If a POEM of foreign company is created in India, will it be required to comply with the provisions of the UFIA Act?

Computation of Total UFIA and tax thereon

Section	Particulars	
4(1)(a)	Income from source located outside India, which has not been disclosed in the ROI	XX
4(1)(b)	Income from a source located outside India, in respect of which no ROI has been furnished	XX
4(1)(c)	Value of an undisclosed asset located outside India	XX
Less:		
5(1)(ii)(a)	If any income is assessed prior to 1 July 2015 under the IT Act	(XX)
5(1)(ii)(b)	Any Income is assessed / assessable under UFIA Act	(XX)
Total value of UFIA		XX
Tax @ 30%		XX

Notes:

- Any variation in disclosed foreign income on account of business or profession, income from other sources or transfer pricing provisions due to assessment / reassessment under the IT Act shall not to be included in the total undisclosed foreign income [Section 4(1)(2)].*
- Income included in the total undisclosed foreign income and asset under the UFIA Act shall not form part of the total income under the IT Act [Section 4(1)(3)].*
- No deduction of any expenditure / allowance or set off of any losses [Section 5(1)(i)].*
- In case of immovable properties, the deduction will be - the value of a undisclosed foreign asset as on first day of financial year in the same proportion as assessed / assessable foreign income bears total cost [Section 5(2)].*

Computation of Total UFIA and tax thereon

Illustration:

- Mr. A acquired foreign asset (immovable property) in the AY 2010-11 for INR 50 lakhs. Out of the total investment, INR 20 lakhs was assessed to tax in an earlier year.
- In AY 2018-19, the AO identified the undisclosed asset having value of INR 1 crore for which no explanation was provided.

Computation of Total Undisclosed Foreign Asset (Immovable Property) and tax thereon

Particulars	Amt (INR in crores)
Fair Market Value of Undisclosed Foreign Asset (no explanation provided or explanation not satisfactory)	1.00
Less:	
Income which has been assessed to tax for any AY under the IT Act prior to relevant AY in which UFIA Act applies [1 Crore – (1 Crore x 0.20 lacs / 0.50 lacs)]	0.40
Total Undisclosed Foreign Asset chargeable to tax under the UFIA Act	0.60
Tax on above at 30 percent	0.18

Valuation Rules & Prescribed Forms

Salient Features

- The CBDT notified the UFIA Rules, 2015 on 2 July 2015 to determine the Fair Market Value of the undisclosed foreign assets.
- The Valuation Date to determine the Fair Market Value under the UFIA Rules shall be:
 - For assets declared under One Time Compliance Scheme / FY 2015-16 : 1 July 2015
 - Any other case : 1 April of the Previous year
- The UFIA Rules prescribe valuation methods for following undisclosed foreign assets to compute tax, interest and penalty thereon:
 - Bullion, Jewellery or Precious Stone;
 - Archeological Collections, Drawings, Paintings, Sculptures or any work of art;
 - Shares and Securities (quoted / unquoted);
 - Immovable Property;
 - Bank Account;
 - Value of interest of a person in Firm, AOP, LLP;
 - Any other asset.

UFIA Rules have prescribed the following forms:

- Form 1 – Notice of Demand
- Form 2 – Appeals to Commissioner (Appeals)
- Form 3 – Form of appeal to the Appellate Tribunal
- Form 4 – Form of Memorandum of Cross – Objections to the Appellate Tribunal
- Form 5 – Certificate under section 31 or 33 of UFIA Act (Tax Arrears)
- Form 6 – Tax compliance for undisclosed foreign asset under section 59 of UFIA Act (OTC Scheme)
- Form 7 – Acknowledgement of declaration of undisclosed foreign asset under OTC Scheme

Note:

The UFIA Rules also provide for converting the value of foreign assets into Indian rupee as on the date of valuation.

Procedure of Assessment and Appeals

Assessment / Appellate Provisions

- a) No separate ROI is required to be filed under the UFIA Act.
- b) The UFIA Act also incorporates provisions dealing with assessment and the appellate mechanism viz.
 - Requirement of mandatory issue of notices to the person against whom proceedings are being initiated (no time limit provided for issue of notice for assessment or reassessment);
 - Grant of opportunity of being heard and principles of natural justice to be followed;
 - Tax Authorities may inquire or investigate into the matters of the assessee even though there are no proceedings pending before it;
 - Necessity of taking the evidence produced by assessee into account;
 - Passing of orders in writing [two separate orders expected to be passed in a period covered by a single ROI – under Section 143(3) of the IT Act and Section 10(3) of the UFIA Act];
 - Time limit for completion of assessment and reassessment shall be **2 years** from the end of the FY in which notice was issued.
- c) The UFIA Act also provides for the right to appeal to the Commissioner (Appeals), Income-tax Appellate Tribunal. On substantial questions of law, to the jurisdictional High Court and to the Supreme Court
- d) Remedial measures viz. rectification of mistakes, revision of orders and recovery of arrears also provided for in the UFIA Act.

Recovery of Tax – Key Provisions

- a) AO / TRO may recover the outstanding demand from the assessee as per any mode specified.
- b) AO / TRO may:
 - i. Require the ***employer of the assessee*** to deduct from any amount payable to the assessee, tax in arrear from the assessee.
 - ii. By notice in writing, require any ***debtor*** of the assessee to pay such amount (not exceeding the amount of debt) as is sufficient to meet the tax arrear.

If ***debtor*** fails to make payment, ***he shall be deemed to be assessee in default*** and proceedings may be initiated against him for realization of amount.
- c) If the **amount is not recovered** from the **Company, Unincorporated Body**, the UFIA Act also imposes **personal liability** on the following:
 - i. Manager (including Managing Director) of a Company;
 - ii. Partners;
 - iii. Members of AOP or BOI etc.
- d) Manager of a Company and a Partner of LLP will not be held liable, if they prove that non-recovery cannot be attributed to any neglect, misfeasance or breach of duty on their part in relation to the affairs of the Company / LLP.

The UFIA Act is silent on the liability of partners of the firm other than LLP and members of AOP and BOI.



Penalty Provisions

Where tax assessed on undisclosed foreign income and assets

3 times the tax amount

Non – furnishing of ROI / Non-disclosure / inaccurate reporting of foreign assets and income

INR 10 Lakhs

Default in payment of tax arrears

Amount equal to tax arrears

Failure to:

- ❖ answer any question
- ❖ sign a statement
- ❖ attend or produce books of account

INR 0.5 Lakhs to INR 2 Lakhs

No penalty for undisclosed bank accounts upto INR 5 Lakhs

Time limits for initiation and closure of penalty proceedings*

** No notice for imposing penalty shall be issued after three years from the end of the FY in which the default is committed.*

No order imposing penalty shall be passed after expiry of one year from the end of FY in which notice for imposition of penalty is issued.

Prosecution Provisions

❖ Non – furnishing of ROI / Non-disclosure /inaccurate reporting of foreign assets and income

❖ False statement in verification

❖ Abetment of offence

6 months to 7 years
+
Fine

❖ Wilful attempt to evade payment of tax, penalty or interest

Resident Person:
3 years to 10 years + Fine

Any Person: 3 months to
3 years + Fine

❖ Second and subsequent offences

3 years to 10 years
+
Fine
(INR 5 Lakhs to INR 1Crore)

Culpable mental state assumed*

Compounding not possible

Fact proved only if beyond reasonable doubt and not merely by preponderance of probability

Offender not absolved from prosecution under other laws

** The Court shall presume Mens rea, i.e. culpable mental state. The taxpayer will be required to prove the fact that he had no such mental state. "Culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.*

Onus to prove non-culpability beyond reasonable doubt shifted on the accused.

One Time Compliance – An Opportunity

- Any person to declare (only once) undisclosed foreign asset acquired from income chargeable to tax under the IT Act by **30 September 2015** in Form 6 as prescribed under UFIA Rules.
- Tax payable at flat rate of 30% plus equal amount of mandatory penalty. Total 60%
- Tax will be on the value of undisclosed foreign asset as on the date of commencement of this Act.
- Tax and penalty to be paid (non-refundable) within prescribed timeline of **31 December 2015**.
- OTC Scheme is not an amnesty scheme, there is no immunity from penalty.
- Non payment of tax and penalty by 31 December 2015 and misrepresentation or suppression of facts by the declarant would make the declaration void.
- No further liability for tax, interest or penalty under UFIA Act or IT Act or Wealth tax Act, 1957.
- Undisclosed foreign asset declared not to affect the finality of the completed assessments. No reopening of assessment due to disclosure under this scheme.
- The amount of undisclosed foreign asset so declared shall not be included in the total income for any assessment year under the IT Act.

One Time Compliance – An Opportunity

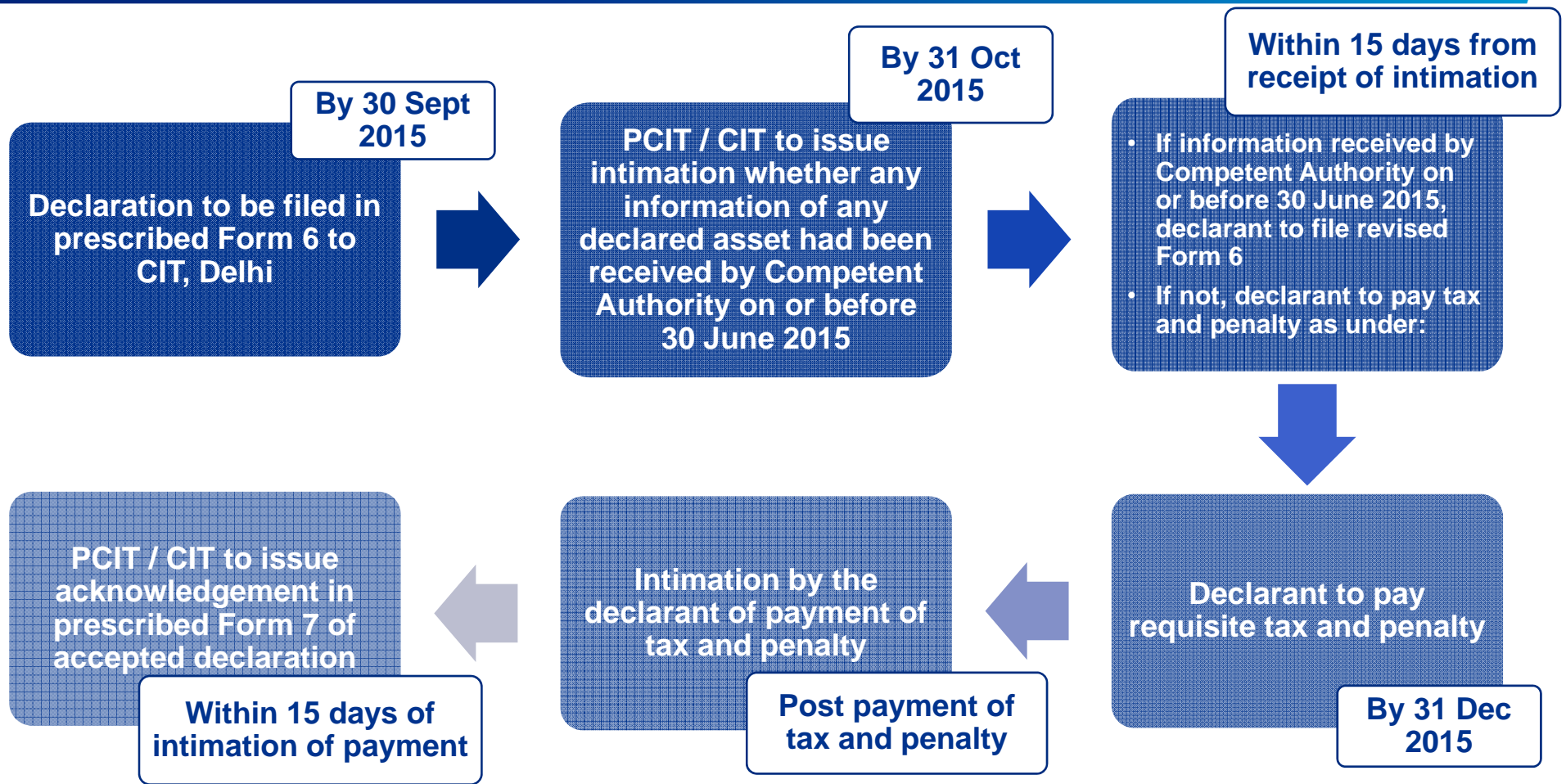
Declaration shall not be considered as an evidence against the declarant for initiating penalty or prosecution proceedings under the following Acts:

- IT Act;
- Wealth Tax Act, 1957;
- Foreign Exchange Management Act, 1999;
- Companies Act, 2013; or
- Customs Act, 1962.

One Time Compliance Window not open for any person -

- Who has been issued an order of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (subject to certain conditions);
- Who is subject to prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Unlawful Activities (Prevention) Act, 1967, the Prevention of Corruption Act, 1988;
- Notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992;
- Against whom notice of assessment / reassessment has been issued under the IT Act;
- Against whom time limit for furnishing of notice of assessment has not expired due to search, survey under the IT Act;
- Against whom information has been received in respect of undisclosed foreign asset from competent authority under a formal pact.

One Time Compliance – An Opportunity



- 1. Declarant not liable for any consequences under the UFIA Act in respect of any asset declared under OTC scheme but has been found ineligible for declaration as the Central Government had prior information on such asset.*
- 2. However, such information may be used under the provisions of the IT Act.*

Other Matters

1 No concept of treaty residence.

2 Adequate documentation and records to be maintained in relation to foreign income and assets.

3 Asset not defined and income defined as per IT Act.

4 PML Act to be amended to include concealment of income and tax evasion under UFIA Act as a 'predicate offence'.

5 As per the Finance Act, 2015, FEMA to provide for **seizure of equivalent value of property in India** for foreign exchange, foreign security or any immovable property held outside India in contravention to FEMA provisions.

6 It seems that the Foreign Tax paid will not be allowed as a credit. No provision under the to grant relief against double taxation of income.

Way forward

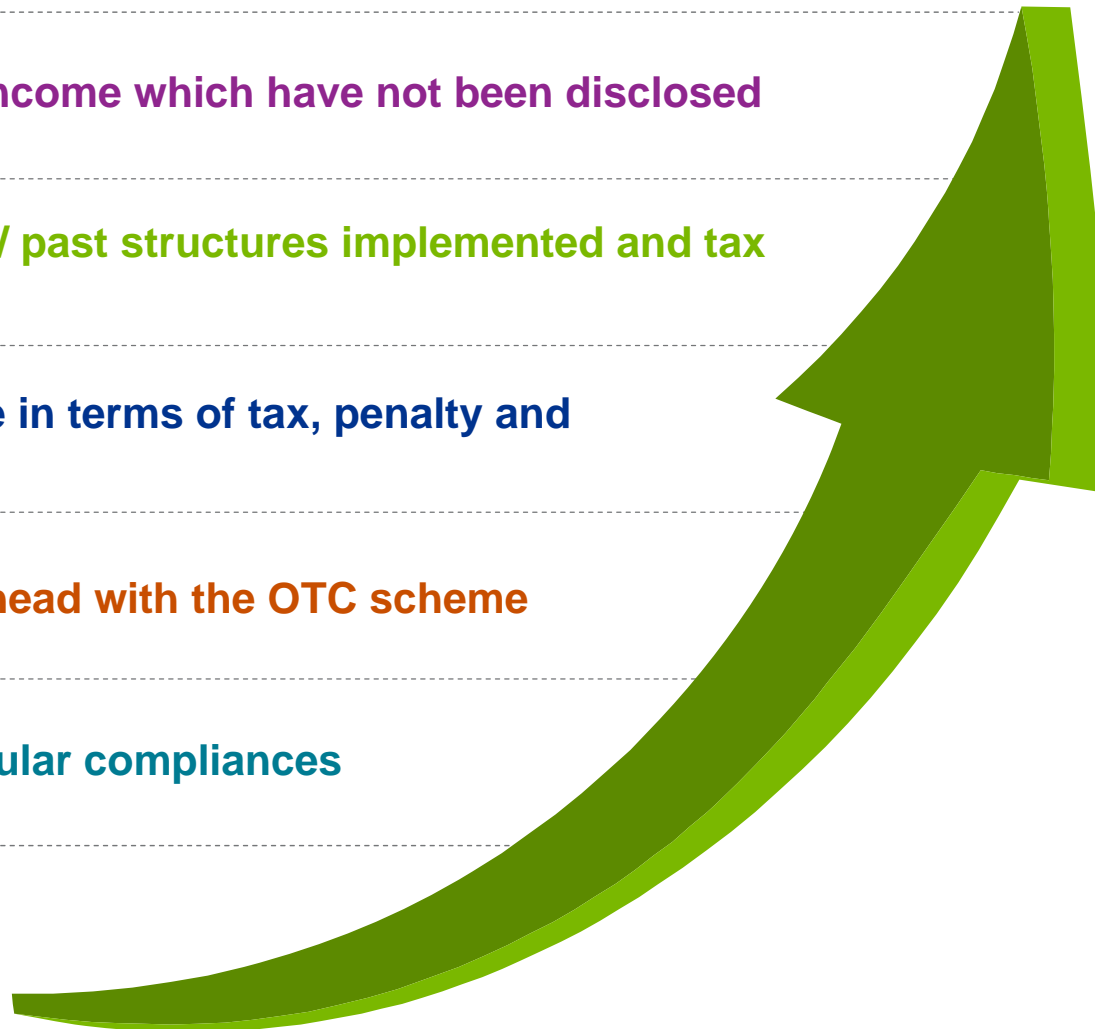
Assess assets and income which have not been disclosed

Reconsider existing / past structures implemented and tax positions adopted

Assess the exposure in terms of tax, penalty and prosecution

Plan on how to go ahead with the OTC scheme

Keep a check on regular compliances



Glossary

Acronym	Explanation
AO	Assessing Officer
AOP	Association of Person
AY	Assessment Year
BOI	Body of Individuals
CBDT	Central Board of Direct Taxes
FEMA	Foreign Exchange Management Act, 1999
FY	Financial Year
IT Act	Income Tax Act, 1961
LLP	Limited Liability Partnership
NR	Non Resident
OTC	One time Compliance Scheme
PCIT / CIT	Principal Commissioner of Income Tax / Commissioner of Income Tax
PML Act	Prevention of Money Laundering Act, 2002
POEM	Place of Effective Management
RNOR	Resident But Not Ordinarily Resident
ROI	Return of Income
TRO	Tax Recovery Officer
UFIA Act	The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
UFIA Rules	The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015



Thank you