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HIGHLIGHTS OF THE BLACK MONEY BILL

UNDISCLOSED FOREIGN INCOME AND ASSETS (IMPOSITION OF TAX) BILL, 2015

Contributed by CA MithileshSai

Background:

The Finance Minister, in his budget speech, while acknowledging the limitations under the existing law, had conveyed the considered decision of the Government to enact a comprehensive new law on black money to specifically deal with black money stashed away abroad. He also promised to introduce the new Bill in the current Session of the Parliament.

In order to fulfil the commitment made by the Government to the people of India through the Parliament, the Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 has been introduced in the Parliament on 20.03.2015. The Bill provides for separate taxation of any undisclosed income in relation to foreign income and assets. Such income will henceforth not be taxed under the Income-tax Act but under the stringent provisions of the proposed new legislation.

Summary of the Bill:

This Article is our effort to summarize the introduction of the Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 (“Bill”) in the lower house of the Parliament.

Presently, the Bill is applicable to a person resident of India who has undisclosed foreign income/assets (including financial interest in any entity). The Bill proposes to tax such income at the rate of 30% and also levy stringent penalties.

The Bill provides for stringent prosecution mechanism. However, as a one-time voluntary compliance, the Bill proposes to provide immunity from prosecution if appropriate taxes and penalty have been paid. The Bill, once passed, proposes to be effective from tax year 2015-16.

With Effect from:

The Bill proposes to be enacted with effect from 1 April 2016 i.e., tax year 2015-16.

Residents covered:

The Bill proposes to include all taxpayers who are resident in India under the Indian Tax Laws (ITL). The Bill however, excludes category of “resident but not ordinarily resident” from its ambit.

Domain of the Bill

- The Bill proposes to include undisclosed foreign income/asset which is defined to mean (a) undisclosed income from a source located outside India, and (b) value of undisclosed asset (including financial interest in any entity) located outside India which is held in the name of the taxpayer/where the taxpayer is a beneficial owner.

- Undisclosed foreign income/value of undisclosed foreign assets is taxable at 30% on gross basis, without any benefit deduction/allowance/set of losses as provided under the ITL.

- Foreign income is considered as "undisclosed" if the same is not reported in the return of income (ROI) of the relevant year furnished under the ITL, or in respect of which ROI was to be furnished, but was not filed within the stipulated time under the ITL. Foreign asset is "undisclosed" if the taxpayer is not able to explain the source of investment in such asset or explanation offered, in the tax authority's opinion, is not satisfactory.

- Undisclosed foreign asset will be chargeable to tax with respect to fair market value, which will be determined in accordance with the prescribed rules. Such asset will be taxable in the year in which the same comes to notice of the tax authority.

Tax office Audit procedure

- The Bill does not require the taxpayer to file ROI under the proposed law. The Bill proposes direct assessment of undisclosed foreign income/asset on the basis of information received from any sources. In such a case, the Bill proposes to follow the principles of natural justice, such as, issue of notice (no specific time limit prescribed in the Bill for issuance of notice), granting an opportunity of hearing to taxpayer, furnishing documentary evidences etc.

- Subsequent thereto, the tax authority is required to pass a final order, in writing, within two years from the end of tax year in which the notice was issued.

- The Bill proposes remedial measures such as appeal etc., along the lines of the ITL. The Bill also lays down guidelines on rectification/revision of tax authority's orders, provisions for recovery for arrears etc., which is largely on the lines of the ITL.

Levy of interest

- The Bill proposes to levy interest if ROI has not been furnished, or in case of default on compliance with advance tax liability under the ITL, in relation to the undisclosed foreign income.

Penalties:

- The Bill has proposed stringent penalties in respect of undisclosed overseas income/asset which are as follows:

Particulars	Penalty
Penalty for concealment of overseas income/asset	3 times the amount of tax
Failure to furnish ROI within specified time under ITL • Resident taxpayer (excludes resident but not ordinarily resident) who fails to furnish • ROI within specified time under ITL, and who, at any time during the relevant year • Held any overseas assets (including financial interest in any entity) as beneficialowner/otherwise; or • Held beneficial interest in any overseas assets (including financial interest in any entity); or Earned income from a source outside India No penalty will be levied if overseas asset comprises of bank account only, and wherethe aggregated balance does not exceed INR 5,00,000 at any time during the tax year	INR 10 lakhs
Failure to furnishing information or furnishing inaccurate information in ROI under ITL • Resident taxpayer (excludes resident but not ordinarily resident) who has furnished ROI under ITL but does not furnish any information/furnishes inaccurate particulars inrelation to any overseas asset (including financial interest in any entity); or • Any income from a source located outside Indiaoverseas assets could be held as a beneficial owner or held on account of a thirdperson • No penalty will be levied if overseas asset comprises of bank account only, and wherethe aggregated balance does not exceed INR 500,000 at any time during the tax year	INR 10 lakhs
Failure to pay tax under proposed law • Where taxpayer is treated as a defaulter in making payment of any tax and he is incontinuing default	Equal to the amount of tax

Particulars	Penalty
Other penalty Any person is liable to penalty if, without any reasonable cause, fails to: • Answer any question from the tax authority in exercise of its powers conferred under the Bill; • Sign any statement in any proceedings under the Bill, which the tax authority may legallyrequire such person to sign; • Attend/produce book of account/documents/evidence as required	INR 0.50 lakhs– INR 2 lakhs

Key aspects for levy of penalty:

- Principle of natural justice will be followed, i.e., issue of notice, opportunity of hearing etc.
- Prior approval of Joint Commissioner,subject to specific quantum of penalties.
- No penalty can be imposed after expiry of one year from the end of the tax year in which notice for levy of penalty was issued.

Prosecution:

The Bill has proposed initiation of prosecution for certain non-compliances in respect of undisclosed overseas income/asset. The Bill clarifies that prosecution for offences shall be in any other Indian laws. The Bill proposes the following:

Offence	Punishment
Resident taxpayer (excludes resident but not ordinarily resident) who “wilfully” fails to furnish ROI within specified time under ITL, or who has furnished ROI, wilfully fails to furnish any information/furnishes inaccurate particulars in relation to: • Any overseas asset (including financial interest in any entity); or Any income from a source outside India • No prosecution if ROI is furnished before the end of the assessment year • Overseas assets could be held as a beneficial owner or held on account of a third person	Rigorous imprisonment(RI) for 6 months-7 years, with fine

Offence	Punishment
• Resident taxpayer (excludes resident but not ordinarily resident) "wilfully attempts" toevade any tax/interest/penalty under proposed law • Any person who "wilfully attempts" to evade payment of any tax/interest/penaltyunder proposed law • The term "wilful attempt" has been defined widely.	RI for 3 years –10 years, with fine RI for 3 months –3 years, plus if the Court levies any fine
• If a person makes a statement in any verification, or delivers any account/statementwhich is false or which he believes to be false • If a person abets/induces another person to make and deliver an • account/statement/declaration which is false or which he believes to be false	RI for 6 months -7 years,with fine
• Punishment where any person is convicted for the same offence in the above cases more than once	RI for 3 years -10 years, with fine of INR 5lakhs -INR 1Crore

Key aspects on prosecution:

- Court shall presume *mensrea*, i.e., culpable mental state (which includes intention/motive/knowledge etc.), and it is for the taxpayer to prove absence thereof.

- Approval from Principal Commissioner/Commissioner/Commissioner (Appeals) is a pre-requisite to initiate prosecution proceedings.

- For offences committed by a company, all persons responsible for the conduct of the company's business (generally, director/manager/secretary etc.) at the time of the offence will be held guilty,unless such person proves that the offence was conducted without his knowledge or that he had exercised due diligence to prevent the commission of such offence.

- There is no provision for compounding offences.

One time window-period for compliance:

- The Bill provides for a one time limited period opportunity for taxpayers to declare any undisclosed foreign income/asset which he has acquired from income chargeable to tax under the ITL.

- The Taxpayer will need to file declaration in prescribed form before the specified tax authority within a stipulated time period, and pay tax at 30% of the value of asset, and an equal amount of penalty. In such cases, no prosecution proceedings will be initiated. Such person will enjoy exemption from levy of wealth tax for past years in relation to the declared assets.

- Such declaration will be invalid if the taxpayer does not pay the appropriate tax and penalty within the notified period, or in cases where there is any misrepresentation/suppression of facts.

- The Taxpayer is not eligible for one time declaration (a) if in relation to the undisclosed foreign asset including (bank account whether having any balance or not) located outside India, any proceeding under the ITL is pending for any past year; or (b) where information in respect of such assets has been received by competent authority from other country under an agreement, or (c)prosecution proceedings have been initiated under certain specific statutes.

Analysis/Comments:

- The Bill also proposes to amend Prevention of Money Laundering Act (PMLA), 2002 to include offence of tax evasion under the proposed legislation as a scheduled offence under PMLA. Thus, in keeping with the commitment of the government for focussed action on black money front, an unprecedented and multi-pronged attack has been launched to root out the menace of black money. The Government is confident that this new law will act as a strong deterrent and curb the menace of black money stashed abroad by Indians.

- Income/assets which are stashed overseas, particularly in tax havens, and offshore financial centres, have dominated public debate in the recent past. Evasion of tax robs the nation of critical resources to undertake programs for social inclusion and economic development.

- The Supreme Court of India and the public, at large, have unequivocally expressed concerns on the issue.

- In the past, the GOI had, on a number of occasions, promised to track down and bring back undisclosed foreign assets/incomes.

- Recognizing the limitations of existing laws in India and in keeping with its commitment, the GOI has launched a multi-pronged attack to root out the menace of undisclosed overseas assets/incomes by tabling the Bill in the lower house of the Indian Parliament.

- The Bill provides separate regime for taxation of undisclosed foreign income/asset which was not disclosed or reported under the ITL and which has come to the notice of the tax authority on or after 1 April 2015.

- The foreign income/asset detected by the tax authority before 1 April 2015 wil lcontinue to be governed by the ITL. Further, by providing taxation of undisclosed foreign assets in the year in which such asset comes to notice of the tax authority, the Bill has tried to overcome challenges in reopening past assessments under the ITL including reopening within a period of 16 years.

- The Bill proposes to apply to all persons resident in India, and may extend to expatriates who, by virtue of their presence in India, acquire the status of a 'resident.' The Bill may also apply to a foreign company which, on account of the residency test of place of effective management, proposed in Finance Bill 2015, becomes a 'resident' in India. The Bill, however, offers a one-time opportunity to the taxpayer to pay taxes/penalty and mitigate rigour of stringent prosecution risk.

- The Bill will need to be passed in the lower house of the Parliament, and thereafter, in the upper house. Once passed, the GOI will await ascent by the President of India before the Bill is enacted.

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DOUBLE TAXATION

SOURCE AND RESIDENCE BASED TAXATION AND THEIR RELEVANCE IN DOUBLE TAXATION:

Contributed by CA Ram Prasad |

Income or profits which result from international activities such as cross border investment may be taxed where the income is earned (source country) or where the person who receives it normally based (Country of residence).

Residence taxation of income is based on principle that the people and firms should contribute towards the public services provided for them by the country where they live, on all their income wherever it comes from.

Source based taxation of income is based on the principle that the country that provides the opportunity to generate income or profits should have the right to tax it.

Source/Residence base and Double Taxation:

For example, if country A and country B both tax income at a rate of 50%, and a resident of A derives 100 units of income from a source within B, that income could first be taxed by B at 50% (paying 50 units in taxes) at source, and the remaining income of 50 units could be taxed by A at 50% (paying taxes of 25 units) on the basis of residence jurisdiction. So the taxpayer would be left with only (100-50-25) = 25 units, paying an effective tax rate of 75%.

The double taxation can be eliminated or reduced by completely exempting the income derived from foreign sources from residence taxes. But this could encourage business or investors to go abroad to countries where tax rates are lower than at home.

Alternatively, credit for foreign taxes paid can be provided so that if the source tax rate is lower, the investor would pay the difference in the country of residence.

Treaties and Double Taxation:

To prevent this double taxation, the League of Nations and its successors the United Nations (UN) and the Organisation for Economic Cooperation &Development (OECD) developed a series of model treaties that led to the current set of over 2,500 bilateral income tax treaties, which provide the framework of the international tax regime.

Fundamentally, the treaties strike a compromise between source and residence taxation. Some rights to tax are given to the source, and the residence country is required to relieve double taxation either by giving a credit for such source taxes paid, or by exempting the relevant income from its taxes.
Generally, source jurisdictions retain their right to tax active (business) income, except for short-term activities, but give up some of their right to tax passive (investment) income.

The main effect of the tax treaties is to reduce source-based taxation in favour of residence-based taxation of passive income (sometimes referred to as income from capital). The degree to which this is done depends on each treaty: *capital-exporting richer countries prefer the OECD model treaty, which is more favourable to residence, while capital-importing developing countries tend to favour the UN model treaty, which is more favourable to source.*

Principles in Income tax Act, 1961 relating to basis of taxation:

The provisions of sections 5, 6 and 9 of the Income Tax Act, 1961 provides for residence based and source based taxation principles. Section 5 provides that Residents are taxed on their worldwide income. Non-Residents are taxed on India source income (Income received in India or deemed to be received in India and Income Accrued in India or deemed to be accrued in India).

Residential Status of a person is determined with reference to the provisions of section 6 of Income Tax Act, 1961.

Section 9 of the Income Tax Act, 1961 provides for source based taxation on the basis of characterisation of income. Income from business connection or property or assets in India or from the transfer of capital asset situated in India is deemed to have their source in India.

Dividends paid by the Indian company always treated as Indian source income. Interest payments received by a non-resident have their source in India if it relates to debt incurred in connection with payer's business or profession in India. Royalty and fees for technical services, is also treated as having Indian source as long as underlying right, information, property or service is used in connection with the payer's business or profession carried on in India.

If there is any conflict between domestic law and treaty rules, the domestic law to the extent benefit the tax payer will apply.

Which method to adopt?

Theoretically, one can imagine a world in which all countries adopted either pure residence jurisdiction or pure source jurisdiction. Economists tend to favour residence jurisdiction, both because they consider the source of income to be hard to pin down (income often has more than one source), and because they think residence jurisdiction promotes economic efficiency, since the decision where to invest should be unaffected by the tax rate.

However, pure residence taxation is unrealistic, for three reasons.

- First, countries are unlikely to give up the right to collect tax from foreigners doing business within their economy and territory.

- Second, pure residence based taxation would reduce revenues in poor developing countries, who rely heavily on source-based taxation, in favour of the rich developed countries where investors reside. Most importantly, residence taxation is much easier to evade or avoid, by channelling international investments through tax havens.

- Third strong protection of bank confidentiality and other secrecy provisions in heavens makes it hard for the residence country to get the information about its resident's foreign source income.

Pure Source Taxation enables investors to play countries off against each other to obtain lowest source based tax rate. It also provides for problems of determining the source of income and of combating abusive transfer pricing (i.e shifting of profits artificially for a tax advantage).

Conclusion:

A compromise which gives primacy to source-based taxation but keeps the option of residence-based taxation, still seems the best option to preserve the revenue base of both developed and developing countries.

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TECHNICAL SESSIONS:

S.No.	Event	Date	Speaker	Venue
1	Overview on Dormant company - Companies act	10 April 2015	CS Phanindra DVK	SBS - Hyd
2	Service tax vis-à-vis SEZ	17 April 2015	CA Sri Harsha	SBS - Hyd
3	Complete overview on Individual Income tax return	24 April 2015	CA Suresh Babu S	SBS - Hyd
4	Technology Impact on Chartered Accountants	1 May 2015	CA Saran Kumar U & Mr. Jay Gopal T	SBS - Hyd

How to handle numbers - Analysis and Interpretation - CA Saran Kumar U

Budget updates in service tax - CA Sri Harsha

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