



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

In his budget speech on February 28, 2015, the Finance Minister (“**FM**”) made it clear that black (unaccounted) money was eating into the Indian economy and this problem would have to be tackled forcefully. While the FM acknowledged that there were limitations under the Income-tax Act, 1961 (the “**IT Act**”) to deal with black money, the FM conveyed his intention to enact a comprehensive new law to deal with black money, particular that which was stashed away abroad.

Pursuant to this, on March 20, 2015, the Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015, (the “**Bill**”) was introduced in the Lok Sabha (lower house) for consideration, and will have to be discussed and passed by the lower house and Rajya Sabha (upper house).

We have provided certain crucial features of the Bill as below:

One-time Compliance Opportunity

The Bill provides a one-time compliance opportunity for a limited period (the time frame has not been specified) to persons who have undisclosed foreign assets which have not been disclosed for tax purposes in India. Persons seeking to disclose undisclosed foreign assets can file a declaration before the tax authorities within the period (to be specified) and pay tax at the rate of 30% on the value of the disclosed assets or income without any exemption, deduction or set-off in respect of carried forward losses that may be available under the IT Act. In addition to the tax, a penalty being 100% of the tax amount will also have to be paid. Such persons will not be prosecuted under the provisions of the Bill.

Scope

The term “undisclosed asset located outside India” has been defined to mean an asset (including a financial interest in any entity) located outside India, held by the taxpayer in his/her name or in respect of which he/she is the beneficial owner, and for which the source of investment is unexplained or that the explanation given is unsatisfactory, in the opinion of the Indian tax authorities.

The Bill will apply to all “persons resident in India”, and will include every person who is deemed to be an assessee in default under the Bill. Note that the term “assessee in default” has not been specifically defined in the Bill.

Penalty and Prosecution Provisions

If a person resident of India does not disclose all of his/her undisclosed foreign income and/or assets located outside India within the stipulated timeframe and if such undisclosed foreign income and/or assets located outside India is uncovered by the Indian tax authorities, such a resident will have to pay tax at the rate of 30% on the value of the uncovered assets or income without any exemption, deduction or set-off in respect of carried forward losses that may be available under the IT Act. In addition to the tax, a penalty being 300% of the tax amount will also have to be paid. Moreover, if it is proved that a resident willfully defaulted in either filing or disclosing appropriately in his/her return of income under the IT Act,



any undisclosed foreign income or assets, failure to do so may attract a penalty of INR1,000,000 (INR one million) and a jail term (rigorous imprisonment) ranging between six (6) months to seven (7) years.

The Bill also proposes to punish an assessee who willfully attempts to evade tax in relation to a foreign income or an asset located outside India with rigorous imprisonment between three (3) years to ten (10) years, along with a fine.

The penal provisions will also apply to beneficial owners or beneficiaries of such illegal foreign assets or to any person who willfully abets or induces to make and deliver an account or a statement or a declaration relating to tax payable which is false.

Separately, where an offence has been committed by a company, every person who, at the time the offence was committed, is in charge of, and is responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. A company under the Bill has been defined to mean a body corporate and includes: (a) an unincorporated body; and (b) a Hindu Undivided family.

Certain Safeguard Measures

In order to ensure that the principles of natural justice are followed, the Bill: (a) requires mandatory issue of notices to the person against whom proceedings are being initiated; (b) grants an opportunity of being heard; and (c) allows the right of appeal to the Income-tax Appellate Tribunal, the jurisdictional High Court and the Supreme Court on substantial questions of law.

The Bill protects from penalty and prosecution persons holding foreign accounts that may not have been reported out of oversight or ignorance and in which the maximum balance is up to INR500,000 (INR five hundred thousand) during the financial year.

The Bill also proposes to amend Prevention of Money Laundering Act (“PMLA”), 2002, to include the offence of tax evasion under the Bill as a scheduled offence under PMLA.

Our Comments

Although the Bill is a positive move, it is unlikely that persons resident in India will come forward to declare their foreign assets under the Bill for fear of retribution. Therefore, the Bill and the IT Act should give specific directions to the tax authorities not to unnecessarily harass in future assessment years any person who makes a disclosure under the Bill.

Additionally, the Bill should also cover Indian tax residents who may be living or otherwise domiciled abroad. The coverage of tax residents in India may also bring within the fold expatriates who are legitimately in India on long-term work permits. An exception should be made for this category of assesses.

For successful recovery of black money, the availability of reliable information of foreign assets and evidence will remain critical. In our view, the ITA will have to fall back on the provisions contained in the



Double Taxation Avoidance Agreements and the Tax Information Exchange Agreements that India has with a number of countries. Although there is greater willingness on the part of many jurisdictions to exchange information under these agreements, whether information for past years when no agreement was in place will be made available is unclear. Generally speaking, information relating to past years is shared only if specific names and identities of offenders are provided. It does not seem that the existing road blocks in this respect will get removed by the proposed Bill.

On Indian Undisclosed Income and Assets

As regards curbing domestic black money, a new and more comprehensive Benami Transactions (Prohibition) Bill is going to be introduced in Parliament. This law will enable confiscation of benami property (i.e., property actually owned by someone but held in the name of a third party) and provide for prosecution, thus blocking a major avenue for generation and holding of black money in the form of benami real property.