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Global Employment Solutions

# Global InSight

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**In this issue:**



## India:
## New law proposed to tax undisclosed foreign income and assets

### Overview

- As a part of the Budget 2015 speech, the Honorable Finance Minister had indicated that due to limitations in the existing legislation, i.e., the Income-tax Act, 1961 (the "Act"), a comprehensive new law will be introduced to deal specifically with undisclosed income and assets stashed abroad.
- Pursuant to the same, the Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 (the "Bill") has recently been tabled before the Parliament with an intent to track down and bring back the wealth.

### Salient features of the Bill

**Applicability –**

- The Bill intends to levy tax on undisclosed foreign assets (including financial interest) and income earned outside India.
- The Bill shall apply to all persons qualifying as "Resident" as per the Act; however, individuals or Hindu Undivided Family qualifying as Resident but Not Ordinarily Resident under the Act will be excluded.
- The tax officers shall be empowered to consider the undisclosed foreign income and assets as taxable income of the tax year in which the income/asset is detected.

**Effective date –**

- The Bill is proposed to be effective from Indian tax year 2015-16 (April 1, 2015, to March 31, 2016) onwards.

- Consequently, assessment of undisclosed foreign assets and income would be assessed as per the provisions of the Bill, and not under the Act.

**Taxation of Undisclosed Foreign Income and Assets –**

- Tax shall be levied on undisclosed foreign assets (including financial interest) and income earned outside India at 30% without allowing any deductions, exemptions or setoff of losses.
- Any income from a source located outside India, which is not reported in the tax return already filed (whether original, belated, or revised) or where no such return has been filed to report such income, will be considered as Undisclosed Foreign Income.
- Undisclosed Foreign Asset means "an asset (including financial interest in any entity) located outside India, which is held by a person in his name or in someone else's name (such person is a beneficial owner), and he has no explanation about the source of investment in the asset or the explanation is unsatisfactory in the tax officer's opinion".
- The taxable value of such undisclosed foreign asset will be based on the fair market value, as determined in a manner to be prescribed.
- If the source of investment is partly explained to be income which is duly assessed (where assessable) to Indian tax, the taxable value would be considered on the lower amount on a proportionate basis.

**Penalties –** The Bill provides for stringent penalties for defaults:

<table>
<tr><th>Sr. No.</th><th>Default</th><th>Penalty</th></tr>
<tr><td>1</td><td>Undisclosed foreign asset or income</td><td>Three times the amount of tax payable</td></tr>
<tr><td>2</td><td>Failure to furnish return of income within prescribed time limits, disclosing foreign assets, and income *†</td><td>INR 1 million</td></tr>
<tr><td>3</td><td>Furnishing inaccurate or inadequate particulars regarding foreign assets and income in the return of income *†</td><td>INR 1 million</td></tr>
<tr><td>4</td><td>Default in payment of tax arrears and continuing default</td><td>Equal to tax arrears</td></tr>
<tr><td>5</td><td>Failure to:<br>1. Answer question raised by a tax authority<br>2. Sign statement during proceedings<br>3. Attend or produce evidence/books of account or documents in response to summons issued</td><td>INR 50,000 to INR 200,000</td></tr>
<tr><td colspan="3">*No penalty will be applicable in cases where foreign asset comprises of bank account(s) only and the aggregate peak balance at any time during the tax year is less than INR 500,000.<br>† Penalty will be applicable to a person, who at any time during the year, held any asset located outside India as a beneficial owner or otherwise, or was a beneficiary of any asset located outside India, or had income from sources outside India.</td></tr>
</table>

The penalties are discretionary and opportunity will be accorded to the tax payer before levy of penalty. Penalty would not be imposed after expiry of one year from the end of the tax year in which notice for levy of penalty is issued (certain periods will be excluded for computing the one year period).

**Prosecution –** The Bill also provides for punishment, in addition to penalties, for nondisclosure of foreign income and assets:

| Sr. No. | Offence | Punishment |
|---|---|---|
| 1 | Willful failure to furnish return of income within prescribed time limits, disclosing foreign assets and income | Rigorous imprisonment of six months to seven years, plus fine |
| 2 | Willful furnishing of inaccurate or no particulars regarding foreign assets and income in the return of income held as a beneficial owner or otherwise, or in which such person was a beneficiary at any time during the year or to disclose income from sources outside India. | Rigorous imprisonment of six months to seven years, plus fine |
| 3 | Willful attempt by an assessee to evade any tax, interest, or penalty | Rigorous imprisonment of three to ten years, plus fine |
| 4 | Willful attempt by a person to evade payment of any tax, interest, or penalty | Rigorous imprisonment of three months to three years, plus fine |
| 5 | Making a false declaration or delivering false account/statement | Rigorous imprisonment of six months to seven years, plus fine |
| 6 | Abetment or inducement of another person to make a false return or a false account or statement or declaration under the Bill. This provision will also apply to banks and financial institutions aiding in concealment of foreign income or assets of resident Indians or falsification of documents. | Rigorous imprisonment of six months to seven years, plus fine |
| 7 | Second or subsequent offence | Rigorous imprisonment of three to ten years, plus fine of INR 500,000 to INR 10 million |

**One-time compliance opportunity –**

- The Bill also provides for a one-time compliance opportunity to persons who have any undisclosed foreign assets or income within a stipulated period (to be notified).
- A person will need to make a declaration (in form to be prescribed) before the tax authority in respect of any undisclosed asset located outside India acquired from foreign income which is not reported in the Indian tax return filed in the past or where no Indian tax return has been filed.
- Upon filing the declaration, such person will not be prosecuted, if the tax payment and the penalty equal to tax amount is paid within the time limits (to be prescribed).
- Such declaration, however, shall not affect the finality of completed assessments and will not be admissible in evidence against the declarant under various laws. The tax paid on voluntarily disclosed asset is also not refundable.
- Such persons would not be liable to pay any wealth tax (even though otherwise payable) for any prior years in respect of such foreign assets.

- However, this opportunity would not be available for income in relation to any year for which any assessment proceedings are ongoing before the tax officers or if any information about such asset has already been received by the competent authority under any tax treaty. Offenders under various other prescribed laws shall not be protected under this one-time compliance opportunity.

**Other key changes proposed in the Bill –**

- Empower tax officers to carry out direct assessment of undisclosed income or asset in the hands of the beneficial owner as well.
- Mandatory interest for late filing of return as well as non/late payment of advance tax.
- Empower the Government to enter into tax treaties to avoid double taxation, exchange information, and enforce tax recovery.
- Principles of natural justice are incorporated, such as mandatory issue of notices to allowing opportunity of being heard before passing any order, issuing of written orders within timelines, appeals to higher authorities up to the Supreme Court, etc.
- Presence of a culpable mental state is deemed to be existent during prosecution proceedings and the assessee will need to prove otherwise.
- There are no provisions to compound offences into fines in lieu of imprisonment.
- In case of corporates, offence will be deemed to be committed by all persons who were in charge of and were responsible for the corporate affairs (including director, manager, secretary, or other officer), unless the individual proves that the offence was committed without his knowledge or he had performed due diligence in preventing such an offence.
- Any offence under the proposed Bill is included as a scheduled offence under Prevention of Money Laundering Act, 2002

**Deloitte's view**

The Bill is an unprecedented one in India and is seen to be a strong deterrent to curb the menace of black money, especially due to the stringent penalty and prosecution provisions.

It is imperative that employers sensitize their expatriate population (inbound into India and outbound from India) about the proposed new law, as this may directly have an impact in the year in which they qualify to be an Ordinarily Resident. Such individuals would need to ensure that their tax returns are filed in an accurate and timely manner, disclosing complete information about their foreign assets and income. It is also an opportunity for the employers and tax payers to review their past filings to ensure that they have been compliant with the law.

Given the stringent provisions for penalties and prosecution, it is imperative that compliances related to disclosure are adhered to, so as to obviate any adverse implications at a later date.

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## Global Rewards Updates:
## United Kingdom: Tax and social security treatment of conditional share awards from 6 April 2015

### Background

Significant changes to the UK taxation of share awards for internationally mobile employees (IMEs) took effect from 6 April 2015.

These changes require that where a relevant “chargeable event” (e.g. exercise of share options or vesting of restricted shares) occurs for IMEs on or after 6 April 2015, the UK income tax treatment will generally be based on the apportioned income earned in the UK over the grant to vest period. UK social security on share based gains will generally also be apportioned, based on the amount of time during the grant to vest period for which the employee was UK insured (i.e. chargeable to UK social security).

This update is specifically focused on the application of the new rules to the taxation of conditional share awards (also known as restricted share units).

### Charging provision applicable to restricted share units (RSUs)

By RSU, we mean an incentive arrangement whereby a company will deliver shares to the participant after a certain period (the vesting period) generally if the individual is still in employment and/or performance conditions are met. The employee does not have ownership of the shares during the vesting period but, on vesting, the shares are automatically delivered to the employee – i.e. the employee does not have a choice on when to crystallise their gain.

For many years, there has been uncertainty as regards what UK charging provision should apply to such awards – in particular, should they be taxable under either:

- The “securities option” legislation in Part 7, Chapter 5 Income Tax (Earnings & Pensions) Act 2003 (‘ITEPA’); or
- The “general earnings” legislation in Section 62 ITEPA (‘s62’)?

A “securities option” is defined in the legislation as the employee having a “right to acquire securities”.

Notwithstanding some uncertainty in the legislation, HM Revenue & Customs (‘HMRC’) guidance states that RSUs will normally be taxed under s62 but where s62 does not apply on vesting, the securities option legislation can apply instead. It is unclear which charging provision should take precedence for RSUs vesting on or after 6 April 2015.

With effect from 6 April 2015, the distinction between “securities options” and “general earnings” broadly disappeared for income tax purposes. However, the distinction remains potentially important for both social security (‘NIC’) and capital gains tax purposes. In particular:

- If RSUs are taxed under the securities option legislation, NIC will be apportioned as above – i.e. based on the period for which the employee was UK insured over the grant to vest period; or
- If RSUs are taxed under s62, there will be no NIC apportionment – it will be payable on the full gain or no NIC will be due, as is generally the case under the legislation that applied before 6 April 2015. (This would also be the case for cash based plans).

**Determining the charging provision**

Companies therefore need to consider how the new legislation impacts the way their RSU awards are treated for tax and social security purposes, if at all. Factors to consider include:

- How have the awards for IMEs been taxed historically? Has the company previously agreed the treatment with HMRC?
- Does the company transfer the employer’s social security cost to employees? If so, this would indicate that the RSUs are taxed under the “securities option” provisions.
- Does the RSU plan/award agreement allow the company to settle the RSU in cash or can the award only be settled in shares?
- If there is a cash alternative in the plan rules, is it a ‘genuine’ cash alternative or would the company settle in shares unless delivery of shares was not possible in practice?
- How has the company treated the awards from an accounting perspective? HMRC have previously stated that where a company has accounted for the awards as equity settled awards, this could be taken as evidence (although not conclusive) of the award being a securities option.
- How has the company reported the RSUs on their previous share plan returns (form 42)?

It is necessary to consider these factors ‘in the round’ and in many cases it will not be clear which provision should apply. Unfortunately, HMRC’s guidance also does not make clear which charging provision they expect would apply to a ‘normal’ RSU plan. Deloitte are discussing this issue with HMRC but pending further clarification, companies must determine what provision they will apply to their awards and then make sure they apply it consistently for inbound and outbound employees.

**Action**

As noted above, these rules came into effect on 6 April 2015 so companies operating RSU plans will quickly need to review the plans and determine which charging provision applies.

Pending further clarification, companies may wish to continue with the tax treatment they have applied historically but consider the impact if HMRC confirm a change in their stated position.

Where appropriate, companies may also need to:

- Analyse whether the company's costs could increase due to new/increased NIC charges. If necessary, ensure that appropriate provisions are made for the increased costs;
- Communicate with employees impacted by any changes; and
- Ensure that payroll teams are notified and can manage their withholding and reporting obligations.

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