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New law proposed to tax undisclosed foreign income and assets

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Background

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

Salient features of the Bill

- **Applicability**
 - The proposed Bill intends to provide for levy of income-tax on undisclosed assets (including financial interest in any entity) and income earned outside India.
 - The Bill applies to all persons qualifying as a Resident as per the Act. However, individuals or Hindu Undivided Family ('HUF') qualifying as a Resident but Not Ordinarily Resident under the Act are excluded.
 - The tax officer is empowered to consider the undisclosed foreign income and asset as taxable income of previous year in which income/ asset is detected.
 - Tax is levied on such amount @ 30% without allowing any deductions, exemptions or set-off of losses whatsoever.
- **Effective date**
 - The Bill is proposed to be effective from Indian tax year 2015-16 onwards.
 - Consequently, assessment of undisclosed foreign assets and income would be assessed as per the new provisions of the Bill, and not the Act from next year onwards
- **Taxation of Undisclosed foreign income and assets**
 - 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, despite a requirement to do so within the prescribed time

period, is 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 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 the prescribed manner.
- If the source of investment is partly explained to be from income which is duly assessed (where assessable) to Indian tax, the taxable value would be considered on the lower amount in a proportionate basis.

• Penalties

The Bill provides for stringent penalties for defaults:

Sr. No.	Default	Penalty
1	Concealment of foreign asset or income *	Three times the amount of Tax payable
2	Failure to furnish return of income within prescribed time limits, disclosing foreign assets and income *	INR 1 million
3	Furnish inaccurate or no particulars regarding disclosing foreign assets and income in the return of income *	INR 1 million
4	Default in payment of Tax arrears and continuing default	Equal to Tax arrears
5	a) Failure to answer question put by tax authority b) Failure to sign statement required by tax authority during proceedings c) Attend or produce evidence/ books of account in response to Summons issued by tax authority	INR 50,000 to INR 200,000

* No penalty will be applicable in cases, where the foreign assets comprises of bank account(s) only, aggregate peak balance at any time of the year, is less than INR 500,000.

• Prosecutions

The Bill also provides for punishment upon prosecution of offences, which is in addition to prescribed penalties:

Sr. No.	Offence	Punishment **
1	Wilful failure to furnish return of income within prescribed time limits, disclosing foreign assets and income	Six months to Seven years, plus Fine
2	Wilful furnishing of inaccurate or no particulars regarding disclosing foreign assets and income in the return of income	Six months to Seven years, plus Fine
3	Wilful attempt*** by an assessee in any manner to evade any tax, interest or penalty	Three to Ten years, plus Fine
4	Wilful attempt*** by any other person in any manner to evade any tax, interest or penalty	Three months to Three years, plus Fine
5	Making a false declaration or delivering false account/ statement	Six months to Seven years, plus Fine
6	Abetment by any person of offences	Six months to Seven years, plus Fine
7	Second or subsequent offence	Three to Ten years, plus Fine of INR 500,000 to INR 10 million

** Punishment to be by way of rigorous imprisonment

***Wilful attempt is defined very widely

- **One time compliance opportunity**

- The Bill also provides for a one-time limited period (to be notified) compliance opportunity to persons who have any undisclosed foreign assets or income.
- Under this compliance opportunity, 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 a Indian tax return filed in the past or no Indian tax return has been filed.
- Upon filing such 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 persons would also not be liable to pay any Wealth tax (even though otherwise payable) for any prior years in respect of such foreign assets.

- However, such 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.

- **Other key changes**

- Provisions are made to empower 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 would continue to be payable for tax paid/ payable under the Bill.
- Provisions are also made to empower Government of India 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 allow opportunity of being heard before passing any order, written orders to be passed within timelines, appeals to higher authorities upto the Supreme Court, etc.
- Presence of a culpable mental state is deemed to be existent against the accused during prosecution proceedings, who will need to prove otherwise to the trial court.
- 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 offence was committed without his knowledge or he had performed due diligence in preventing the offence.
- Any offence under the proposed Bill is included as a scheduled offence under Prevention of Money Laundering Act, 2002.

Comments

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 on their tax cases, 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, duly including complete information about their foreign assets (bank accounts, stock options, etc.) and income (e.g., salary during overseas assignment, passive income earned on overseas bank accounts, etc.).

In addition to the undertaking an impact assessment to identify the affected cases, the employers may also consider planning future assignments in a manner so that the individuals do not trigger Ordinarily Resident status in India. Given the stringent provisions for any defaults and prosecution, if these are not taken care of, it could raise significant risks to the individual and may also cause reputational risk to the employer organization.

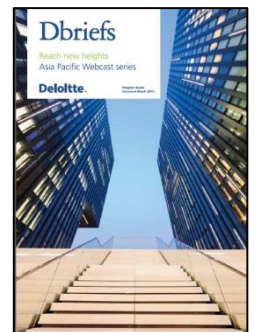
Lastly, the one-time opportunity window may also be availed to regularize any past cases, and mitigate the risk of more stringent penalties and prosecution becoming applicable under the Bill.

Source: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=117477>

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Contacts

Ahmedabad

Heritage, 3rd Floor,
Near Gujarat Vidyapith,
Off Ashram Road,
Ahmedabad – 380 014.
Tel: + 91 (079) 2758 2542
Fax: + 91 (079) 2758 2551

Coimbatore

Shanmugha Manram
41, Race Course,
Coimbatore
Tamil Nadu - 641018
Tel: + 91 (0422) 439 2801
Fax: +91 (0422) 222 3615

Kolkata

Bengal Intelligent Park Building Alpha,
1st floor, Block EP and GP Sector V,
Salt Lake Electronics Complex,
Kolkata - 700 091.
Tel : + 91 (033) 6612 1000
Fax : + 91 (033) 6612 1001

Bangalore

Deloitte Centre, Anchorage II,
100/2, Richmond Road,
Bangalore 560 025.
Tel: +91 (080) 6627 6000
Fax: +91 (080) 6627 6010

Delhi/Gurgaon

Building 10,
Tower B, 7th Floor,
DLF Cyber City,
Gurgaon 122 002
Tel : +91 (0124) 679 2000
Fax : + 91 (0124) 679 2012

Mumbai

Indiabulls Finance Centre,
Tower 3, 28th Floor,
Elphinstone Mill Compound,
Senapati Bapat Marg, Elphinstone (W),
Mumbai – 400013
Tel: + 91 (022) 6185 4000
Fax: + 91 (022) 6185 4101

Chennai

No.52, Venkatanarayana Road,
7th Floor, ASV N Ramana Tower,
T-Nagar,
Chennai 600 017.
Tel: +91 (044) 6688 5000
Fax: +91 (044) 6688 5050

Hyderabad

1-8-384 and 385, 3rd Floor,
Gowra Grand S.P.Road,
Begumpet,
Secunderabad – 500 003.
Tel: +91 (040) 6603 2600
Fax: +91 (040) 6603 2714

Pune

106, B-Wing, 7th Floor,
ICC Trade Tower,
Senapati Bapat Road,
Pune – 411 016.
Tel: + 91 (020) 6624 4600
Fax: +91 (020) 6624 4605

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