Opinion | Taxing gifts made overseas may be govt's way to check illegal transactions

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Remittance to unrelated parties may not be gifts but loans that are not allowed

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The recent budget saw quite a few significant and not-so-significant changes to the tax laws. One of the significant changes was about taxation of gifts made by a resident overseas to a non-resident Indian (NRI).

Under the Liberalised Remittance Scheme notified by the Reserve Bank of India (RBI) under the Foreign Exchange Management Act, an individual resident in India, is permitted to remit up to $250,000 per financial year for certain specified purposes. These purposes include gifts and donations, overseas travel, maintenance of close relatives, overseas medical treatment, overseas studies, purchase of property abroad, opening of an overseas bank account, making overseas investments, giving loans to NRI relatives, etc. There is no restriction that such overseas gifts can only be made to relatives, unlike the requirement for maintenance, which can only be for close relatives.

Under the tax laws, until the Budget, gifts received by a person in money or of immovable property or of certain specified properties, were taxable unless received from a relative as defined, or under any of the other specified exemptions. However, the scope of the tax laws extends only to India. Further, in the case of an NRI, only income accruing or arising in India, deemed to accrue or arise in India or received in India is taxable. Therefore, where you remit money to an NRI as a gift, since the gift is completed outside India when your bank pays the recipient's bank, such gifts were not considered as taxable in India at all.

The recent change in the budget has, however, meant that such overseas gifts made on or after 5 July 2019 would be deemed to accrue or arise in India, and would have to be considered for the purposes of taxation in India. This would not only mean the requirement of payment of taxes in India by the recipient NRI, but also the requirement of withholding of tax by the resident donor remitting the money to the NRI, the filing of the relevant forms certifying deduction of tax at source (TDS) by the resident donor as well as the statements of TDS, and the filing of an income tax return in India by the NRI recipient of the gift.

However, the exemption available to receipts from defined relatives will continue to apply even to an NRI recipient. So, if you remit money to your NRI daughter as a gift, she would continue to be exempt from taxation in respect of that receipt, as it is made from a parent, and no filing requirements would arise.

Similarly, some tax treaties have a provision that “other income" (other than that listed in specific clauses of the treaty) will be taxable in the country of residence of the recipient. Gifts don’t fall under any other clause of tax treaties, and in case of a treaty where there is such a clause, the recipient of the gift will not be liable to pay tax in India for such a gift. Of course, the benefit of the tax treaty would be available only if the recipient has a certificate of tax residency issued by the other country.

There is, however, a greater problem faced by foreign non-profit organisations (NPOs). Even donations received by such organisations from Indian residents would be liable to tax in India, with attendant consequences. Under tax laws, there is an exemption for donations received by charitable organisations, but that applies only to charitable organisations registered under Indian tax laws. So if you wish to make a donation to your alma mater, which is a foreign university, like Harvard, Stanford, MIT or London School of Economics, you first need to verify whether they are entitled to get the benefit of the tax treaty exemption. If not, you need to deduct TDS from the donation, and comply with the relevant filing of forms. This taxation of foreign NPOs seems to be an unintended drafting mistake, and one hopes that this will be soon rectified. Since this can happen only in the next budget, in the meanwhile, the government should issue a clarification that such donations to overseas NPOs are not intended to be subject to taxation, but only gifts made to other persons.

Gifts made in India to NRIs were taxable even before the amendment. The amendment, extending the taxation to remittance made overseas, has perhaps been made with the intention of preventing manipulative transactions of giving gifts to unrelated parties, which are not really gifts, but are loans (which are not permitted under Liberalised Remittance Scheme) or intended to be held on behalf of the donors.

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