Review penalty for non-disclosure of foreign assets

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A recent tribunal decision upholding a penalty of ₹10 lakh for non-disclosure of foreign assets brings up concerns about the proportionality of the penalty. The government should consider whether the cost of litigation is in the country's interest and if a more nominal penalty would be appropriate.

There are a large number of cases where foreign assets have been acquired out of disclosed incomes. (iStockphoto)

Under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, a penalty is provided for failure by a resident taxpayer to furnish or furnishing inaccurate particulars of foreign assets or foreign incomes in the return of income. The penalty is ₹10 lakh, and the only exception is for a foreign bank account whose balance was less than equivalent of ₹5 lakh during the year. The CBDT, in a circular issued in 2015, had clarified that non-disclosure in Schedule FA (Foreign Assets Schedule) of the tax return, of a foreign asset acquired out of disclosed income, would attract the penalty.

A recent tribunal decision upholding levy of penalty on a taxpayer for three years brings out how draconian such a provision is, if interpreted literally. In this case, the taxpayer

and her husband had remitted funds from India to a bank account abroad under the Liberalised Remittance Scheme and invested jointly in an overseas fund from such bank account. Interest income from the fund was disclosed as income in the first year, and the capital gains was offered to tax in the fourth year. The taxpayer, however, did not disclose her investment in the fund in the Foreign Assets Schedule for the first 3 years, nor did her husband.

A penalty of ₹10 lakh was levied for each of the first three years on the taxpayer, but not her husband. The taxpayer claimed that it was a genuine mistake, and that the asset was not an undisclosed foreign asset, as it was acquired out of taxed funds remitted from India. The tribunal confirmed the levy of the penalty for all three years, on the ground that for such penalty, it was not necessary that the asset was acquired out of undisclosed funds, and there was nothing to show that it was a genuine and bona fide error.

In other earlier similar cases, the tribunals have taken a more lenient view of the matter, holding that the language of the law showed that there was a discretion as to whether to levy penalty or not in such a case. In the context of penalty generally, the Supreme Court has taken a view that penalty should not be imposed merely because the law permits levy of such a penalty. It should be imposed only where the law was deliberately flouted, or there was dishonest conduct or an obligation was consciously disregarded. The tribunals have therefore earlier held that in such genuine cases of oversight to include such assets in Schedule FA, penalty should not be levied.

Another interesting aspect is that the law does not require the asset to be disclosed only in Schedule FA of the return—any disclosure in any part of the return should suffice. Disclosure of income from such assets in the return, besides amounting to an indirect disclosure of the existence of the foreign assets, also clearly demonstrates the bona fide of the taxpayer—that the intention was to pay tax on all such income and disclose such assets.

There are a large number of cases where foreign assets have been acquired out of disclosed incomes, and the income from such assets has been offered to tax, but the foreign assets may not have been separately declared in Schedule FA due to oversight. Notices are being issued in many such cases for verification. If penalty is imposed in all such cases and matters have to be disputed in appeal before the Tribunal, it would lead to unnecessary litigation, tension and expense for taxpayers. In many such cases, the

amount of penalty for all the relevant years may even exceed the value of the asset which was not included in Schedule FA.

Should the penalty not match the gravity and size of the offence? Can it be so disproportionate, with a large penalty being levied for mere oversight, which is normally the case where the asset was acquired out of disclosed funds? Would a nominal penalty not be more appropriate in such cases? Unfortunately, the law requires levy of either no penalty or a penalty of ₹10 lakh.

The whole purpose of the Black Money Act was to punish offenders who had acquired foreign assets out of undisclosed income. Such assets of course attract a penalty of three times the value of the asset, again linked to the size of the offence. The penalty for non-disclosure in Schedule FA was maybe intended also for such cases.

The government needs to take a view as to whether levy of such penalty on so many taxpayers, and the cost of the resultant litigation is in the interest of the country or not. The mere fact that a notice is issued should suffice to warn taxpayers of the possible consequences of negligence in filling up the return, and ensure that they are more diligent in doing so. A clarification or action in this regard would save many genuine taxpayers from unnecessary harassment.

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