Ignorance no longer bliss, as transparency roils India's wealthy

TP Janani of Nishith Desai Associates explains the far-reaching impact of information exchange on India's HNIs and UHNIs.

In just a few months' time, more than 50 countries are expected to have completed their first annual exchange of information obligations. More than 90 countries are expected to exchange information by September 2018. Information exchanged would include information regarding financial accounts held in their respective country by tax residents of other signatory countries.

Thus, post September 2017, several tax evaders may be exposed.

Even honest taxpayers (with financial accounts in countries outside their tax residence) have been concerned about the Common Reporting Standard (CRS).

There are several reasons for this, including risk of aggressive behaviour by tax authorities, risk of confidentiality of information collected and exchanged not being properly protected, reputational risk on account of information leaks (without full appreciation of all facts), etc.

As a result, CRS has led to a tremendous increase in workload for legal and tax firms, as HNIs and UHNIs scramble to get their books and houses in order.

Even before CRS and its predecessor in the US, FATCA, tax information exchange has been happening, though on a limited basis, explains TP Janani, senior wealth planner at Nishith Desai Associates.

India, as part of its domestic law, introduced offshore asset-reporting requirements for Indian residents in 2012. It then followed this up with a law in 2015 on black money, to impose severe and onerous tax liability and penalty on unaccounted and undisclosed offshore wealth and income. In addition, in November 2016, the Indian government demonetised INR1,000 and IND500 currency notes to tackle the issue of black money. "This is the background in the context of which information exchange under CRS and FATCA have become critical, at least in an Indian context," says Janani, a lawyer by training.

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Several HNIs resident in India have legitimately acquired wealth outside India under various circumstances. Some prominent examples include wealth ac-

cumulated while residing outside India, wealth acquired by way of inheritance from persons residing outside India, wealth acquired in compliance with the Indian exchange control laws, etc.

In some of these circumstances, no tax may be payable in India, for instance owing to the timing when they were earned, or owing to relief under tax treaties. However, the practical concern involved in such cases relates to maintenance of records, especially if the acquisition happened more than 10 years back.

In such cases, even banks or other financial institutions may be unable to share records. "The concern [of HNIs] is now if [their wealth] becomes public, after so long when they may be unable to demonstrate the source of funds, if it now comes into the limelight, how do they justify their position?" asks Janani.

STEPPING UP ON ADVICE

Nishith Desai Associates has focused and developed a niche in cross-border transactions over the years, including cross-border succession and wealth planning, says Janani.

The firm was ranked as the 'Most Innovative Indian Law Firm' (2014 and 2015) at the Innovative Lawyers Asia-Pacific Awards by the Financial Times - RSG Consulting. Nishith Desai has also been recognised as a Recommended Tax Firm in India by World Tax 2015 (International Tax Review's directory), in addition to collecting many other accolades along the way.

Still, nothing can help clients if their wealth is ill-gotten, illicit or received from 'under the table'. "We have been quite clear that we will be careful in terms of the kinds of clients we work with when it comes to black money and these kind of aspects, which tend to be tricky," explains Janani.

She cites the law that holds even advisers liable for abetting people who are rebating money. "One of the things that we tell [a client]... even if the structure / steps advised by us were to be published on the first page of the newspaper in the future... [is that] we should be comfortable to defend what we are recommending."

WARNING SIGNS

Indians, or people of Indian-origin who are residents in the US, or have obtained US citizenship / Green Cards, certainly have reason to be concerned, as they would be covered by FATCA.

"There have been a lot of reporting requirements in the US with respect to assets held by 'US persons' outside the US, but [many Indian families and HNIs] weren't probably doing it for some time, either out of ignorance or because the property was very small and they did not think it was important," says Janani.

Also, US citizens and Green Card holders who moved out of the US were perhaps under the impression that they were no longer connected to the US.

For many such clients, their focus over the last couple of years has been trying to see how best they can make use of various amnesty schemes, explains Janani.

Although Nishith Desai Associates doesn't advise on US tax, and only practises Indian law, based on experience in dealing with various cross-border matters, the firm focuses on providing advice which is workable and which satisfies the client's objectives taking into account key considerations involved in major jurisdictions like the US, UK, Singapore, Japan, Germany, etc, she adds. The firm clearly communicates to its clients that any advice in relation to other jurisdictions needs vetting by respective local counsel. ■

Playing by international rules

India signed the Intergovernmental Agreement (IGA) to implement FATCA to promote transparency on tax matters in July 2015, with the deadline for the first annual exchange of information being September that year.

The US had enacted FATCA in 2010 to obtain information on accounts held by US taxpayers in other countries. It requires US financial institutions to withhold a portion of payments made to foreign financial institutions (FFIs) who do not agree to identify and report information on US account holders.

As per the IGA, FFIs in India are required to report tax information about US account holders to the Indian government, which will, in turn, relay that information to the IRS. The IRS will provide similar information about Indian account holders in the US.

Meanwhile, under CRS, the deadline for the first exchange of information is September 2017 for new accounts (both individuals and entity) opened since January 1, 2016, and for pre-existing accounts (except non-individual accounts with balance less than USD250,000), according to India's Ministry of Finance.