

Income Declaration Scheme 2016 - and various constitutional issues:

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Introduction

1. The Finance Minister has provided one more opportunity to permit the non-filers, stop filers and persons with unaccounted income/investments to pay a moderate tax to declare their untaxed incomes by announcing the Income Declaration Scheme 2016 (the Scheme) through the Finance Bill – 2016 *vide* Chapter-X (Sections 197 to 208 of the said Bill) which is now passed in Loksabha.

2. The Scheme will come into force from 1st of June, 2016 and shall remain open up to the date to be notified by the Central Government. It is proposed to be made applicable in respect of undisclosed income of any financial year up to 2015-16. The income tax will be charged @30% on the declared income. It will be increased by a surcharge @ 25% of tax payable (to be called the Krishi Kalyan Cess) and a penalty @ 25% of the tax. Thus, the declared income will suffer a tax burden of 45% in aggregate.

Scope

3. Under the Scheme, an errant, desiring to make a declaration, will be able to do so in respect of any income chargeable to tax under the Income-tax Act, 1961 (the Act) for any assessment year prior to the assessment year on the 1st day of April, 2017:

(a) For which he failed to furnish a return under Section 139 of the Act or

(b) He did not disclose the income in his return furnished under the Act before the date of commencement of the Scheme or

(c) Which escaped assessment by reason of the omission or failure on the part of such person to furnish a return under the Income-tax Act or to disclose fully and truly all material facts necessary for the assessment or otherwise.

Exclusion from the Scheme

4. The Scheme shall not apply in the following cases where:

- Notices have been issued under Sections 142(1) or 143(2) or 148 or 153A or 153C, or
- A search or survey has been conducted and the time for issuance of notice under the relevant provisions of the Act has not expired, or
- Information is received under an agreement with foreign countries regarding such income,
- Cases covered under the Black Money Act, 2015, or
- Persons notified under Section 3 of the Special Court Act, 1992 (Trial of Offences Relating to Transactions in Securities), or
- In relation to prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code, the Narcotic Drugs and Psychotropic Substances Act, 1985, the Unlawful Activities (Prevention) Act, 1967 and the Prevention of Corruption Act, 1988.

Immunities including exemption from Wealth-tax

5. The applicant will get immunity from prosecution under Income-tax Act, Wealth-tax Act and the Benami Transaction (Prohibition) Act 1988 subject to certain conditions. The declaration made under the Scheme will also be exempt from wealth-tax in respect of assets specified in the declaration. The declarant will also get immunity from any scrutiny or enquiry of the declaration under the Income-tax Act and Wealth-tax Act.

Procedure

6. The declaration will be made to the Principal Commissioner or the Commissioner of respective jurisdiction and shall be in such form and be verified in such manner as may be prescribed. The person making the declaration in respect of his income or as a representative assessee in respect of income of any other person shall not be entitled to make any other declaration. Detailed procedure will be prescribed in the Rules that are proposed to be made.

7. The tax, surcharge and penalty shall be paid on or before the date to be notified by the Central Government in the Official Gazette. The proof of payment of tax, surcharge and penalty shall be filed with the Principal Commissioner or the Commissioner, as the case may be. The amount of undisclosed income declared shall not be included in the total income of the declarant for any assessment year under the Act, if he makes the payment of tax, surcharge and penalty within the prescribed time. If the declarant fails to pay the total amount payable under the Scheme, the declaration shall be treated as void and *nonest*. The undisclosed income will then be chargeable to tax in the previous year in which such declaration is made and the normal provisions of the Act will be applicable. The amount paid will not be refunded. The Assessing Officer shall not be entitled, in respect of undisclosed income declared or any amount of tax surcharge paid thereon, to reopen any assessment or re-assessment made under the Income-tax Act or Wealth-tax Act or permit any set off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment.

Declaration Scheme is not amnesty for the errant tax-payers

8. In his Budget speech, the Finance Minister stated that the Income Declaration Scheme to unearth the black money is not an amnesty scheme. This is what he stated in his speech:-

"It is not a VDIS (Voluntary Disclosure of Income Scheme) and it is not an amnesty-inequality arises in amnesty that on a certain income you as an honest taxpayer have paid 30% and you come after 20 years and say that I would also pay 30%. This is not structured that way. You pay 30% tax and 7.5% surcharge and another 7.5% penalty, which is 45% ending up paying 1.5 times more. So you are paying penalties for not paying tax in time".

9. To conform to the speech of the Finance Minister that it is not an Amnesty Scheme, clause 194 in Chapter-IX of the Finance Bill, 2016 has been provided to make a similar stipulation as stated below:

"For the removal of doubts, it is hereby declared that:

(a) Save as otherwise expressly provided in sub-section (1) of Section 180, nothing contained in this Scheme shall be construed as conferring any benefit, concession or immunity on any person other than the person making the declaration under this Scheme"

10. Although the Finance Minister has stated that it is not an Amnesty Scheme but according to the experts, the Scheme falls squarely within the ambit of definition of "Amnesty" which means granting an official pardon to people who are guilty of an offence. In the Scheme, except collecting 45% by way of tax, surcharge and penalty, the tax evaders have been granted immunity from prosecution, scrutiny and enquiry whereas the honest tax-payers who file their tax returns every year on time, have to face scrutiny and enquiries to verify the correctness of the income declared by them in their returns. The Scheme is also a dampener for those who have received notices seeking explanation on the returns filed by them. According to those experts, this Scheme will shake the confidence of the honest taxpayers in the credibility of the Government to deal with law breakers and invite contempt for its enforcement machinery, namely; the Income-tax Department.

Here we can make a reference to the Earlier Voluntary Disclosure Schemes and important judicial decisions thereon which will clarify the matter further:

11. Several disclosure schemes have been announced by the Government since 1949, the last one being **the Kar Vivad Samadhan Scheme, 1998**. The honest taxpayers, either singly or through the associations, have protested against the Schemes claiming them as discriminatory and violative of the equality Article-14 of the Fundamental Articles in our Constitution. It is sufficient if two writ petitions filed by the All India Federation of Tax Practitioners (AIFTP) are dealt with to clarify the central controversy in relation to such Schemes.

12. The earlier Amnesty scheme, from 1951 onwards namely **Voluntary Disclosure Schemes, National Defence Gold Bonds, Special Bearer Bonds, Indira Vikas Patras** etc. failed to collect any significant amount of black money from the tax evaders. The Comptroller and Auditor General (C&AG) in its report dated 14-2-2014 has criticised the Income-tax Department for its poor administration of prosecution matters. There were substantial delays of 50 years in the launching of prosecution cases. The half hearted and routine approach of the Income-tax Department to prosecute tax offenders, broken down institution of public prosecutors and a clogged justice delivery system all conspire to ensure that tax evasion pays.

AIFTP v. UOI (1997) 228 ITR 68 (Bom.) and AIFTP v. UOI (1998) 231 ITR 24 (SC)

13. The AIFTP, soon after the Scheme for the Voluntary Disclosure of Income, 1997 was announced, filed a writ petition in the Bombay High Court. Shri Soli E. Dastur, senior Advocate, raised several points including the gross discriminatory treatment meted out to the honest tax-payers. The Court

agreed that "the honest tax-payer in the society is at a discount". However, considering the prevailing and social and economic scenario in the country, it could not be said that the Government was having any other alternative. Dismissing the writ petition by rejecting the contention that the Scheme was discriminatory and will discourage the honest tax-payers to pay their due taxes and wait for such Voluntary Schemes, the Hon'ble Bombay High Court observed that "the honest tax-payer pays his tax not because of inducement but because he believes that it is his duty to the State to pay tax for better living in a civilised society".

14. The AIFTP did not rest content with the judgment of the Hon'ble Bombay High Court and filed an SLP to the Hon'ble Supreme Court. Taking into consideration the statement of the Attorney General, the Court dismissed the SLP very well argued by Shri Dinesh Vyas, senior Advocate, by upholding the view of the Bombay High Court. The policy statement of the Attorney General is rather instructive as to the Government's efforts in checking the tax evasion and, can possibly be interpreted to mean that the Government would in future depend upon administrative measures to prevent tax evasion. The five points made by the Attorney General are as under:

"1. After 31st Dec., 1997, the IT Department will considerably step up survey operations under s. 133A of the IT Act, 1961, and search operations under s. 132 of the IT Act, 1961.

2. According to Chapter XIV-B of the IT Act as amended w.e.f. 1st Jan., 1997, if, in the course of a search, undisclosed income is

detected, then the assessee is liable to the following:

(i) Tax at the rate of 60 per cent;

(ii) Penalty which can be up to 300 per cent. on the tax evaded;

(iii) Interest under s. 158BFA.

3. In addition, the Finance Minister has announced that in every case of detection of undisclosed income, prosecution will be launched. The relevant provisions are in Chapter XXII of the IT Act.

4. Besides tightening up of legal provisions, the following steps have also been taken:

(i) Acceleration of the process of issuing Permanent Account Number (PAN) ;

(ii) Acceleration of the computerisation of the IT Department ;

(iii) Installation of software to detect assesseees who satisfy the criteria laid down under the proviso to s. 139(1) of the IT Act.

5. Government is committed to making a success of the VDIS-97 for fulfilling the objectives set by the Government in the Finance Minister's Budget Speech. We also wish to emphasise that s. 72 of the VDIS-97 guarantees complete confidentiality in respect of declarations."

Validity of Kar Vivad Samadhan Scheme, 1998

15. The Government brought another disclosure Scheme soon after the 1997 Scheme. This Scheme was applicable to the assesseees who are in arrears of taxes both, direct and indirect taxes, as on 31st March, 1998 but to whom notices were issued after 31st March, 1998. Here also, the Hon'ble Supreme Court in *UOI v. Nitdip Textile Processors (P) Ltd (2011) 245 CTR 241 (SC)* upheld the constitutionality of the Scheme.

16. From the above discussion, it appears that the constitutionality of the present Income Tax Declaration Scheme, 2016, is not likely to be decided against the Government particularly because, some element of penalty has been included in the Scheme and it is by and large, confined to the class of non-filers and stop-filers and persons against whom there are pending proceedings for assessment/re-assessment or under contemplation.

Conclusion

17. The declarations received and amount declared under the compliance window under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 declaring undisclosed foreign income and assets worth Rs 3,770 crore which was later revised to Rs 4,147 crore was a considerable disappointment to the present Government. Now let us wait for declaration of the Scheme in Finance Act, 2016 officially as the bill is already passed and what will be the extent of success of the scheme to unearth undisclosed income lying stashed within the country and outside. If history is reviewed, it is most unlikely that the scheme will not be success.