Friday, February 18 2011 | 4:43:35 PM
The world of personal finance
MONEY mantra

Chasing Black Money

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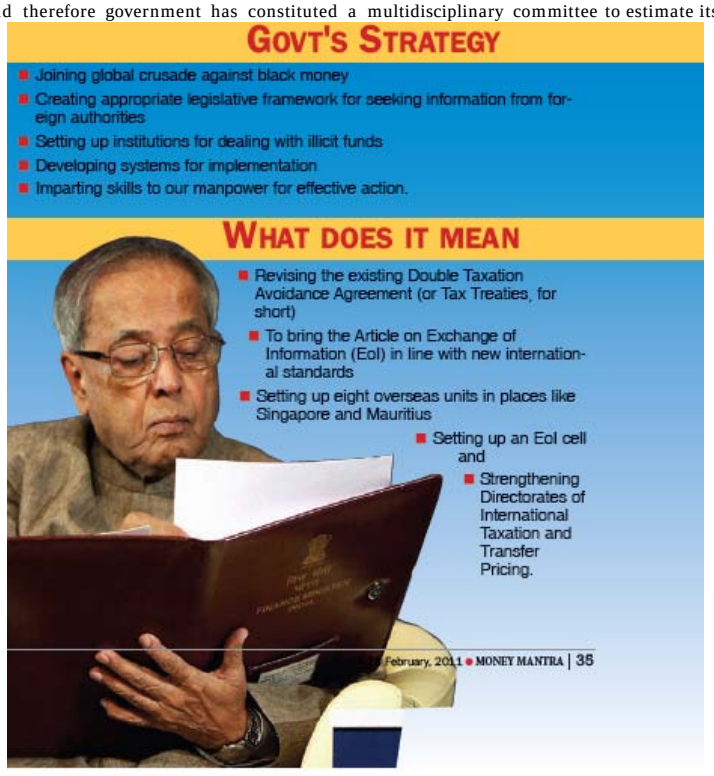
The issue of the hordes of money stashed by Indians in Swiss and other foreign banks has captured public imagination like never before. It has nicely dovetailed into the public outrage at the mega corruption scandals of 2G spectrum allocation and Common Wealth Games. Civil society groups are trying to shake the conscience of the nation. A PIL being heard by Supreme Court on the subject is making sensational headlines in the media. Standing Committee of Parliament on Finance, chaired by a former Finance Minister, has reportedly grilled the bigwigs of Finance Ministry and Central Board of Direct Taxes on the issue. Major political parties have jumped on the bandwagon with little concern for facts and the legal issues involved. Thus, we have the main opposition party telling us that the Government is deliberately delaying the process of recovering black money stashed in Swiss banks, as trails would singe Congress party, and the Law Minister responding vigorously that the government has nothing to hide.

FIVE PRONGED STRATEGY

When the issue started acquiring rather explosive media profile the Finance Minister was forced to share Government's strategy for dealing with this menace. He said that existing estimates of black money are based on unverifiable assumptions and therefore government has constituted a multidisciplinary committee to estimate its quantum.



He then outlined a five-pronged strategy, namely, joining global crusade against black money; creating appropriate legislative framework for seeking information from foreign authorities; setting up institutions for dealing with illicit funds; developing systems for implementation; and imparting skills to our manpower for effective action. In practical terms this amounted to revising the existing Double Taxation Avoidance Agreement (or Tax Treaties, for short), to bring the Article on Exchange of Information (EoI) in line with new international standards; setting up eight overseas units in places like Singapore and Mauritius; setting up an EoI cell; and strengthening Directorates of International Taxation and Transfer Pricing. He informed that during the last 18 months, the Tax Department has detected mispricing of Rs 33,784 crore in international transactions, which prevented shifting of equivalent amount outside India. He, of course did not tell us as to whether this amount has been recovered or is being contested in the myriad appellate and judicial fora. He maintained that information received from other sovereign jurisdictions is confidential because of treaty obligations and that it will become public once the evaders are prosecuted.

The central issue

His statement did not show any fresh thinking for addressing a serious problem. Instead it was perceived as typical bureaucratic exercise of North Block bigwigs to

calm/deflect public anxiety. Neither the multifarious causes for generation of black money, its movement out of the country (and return in white garb) were touched upon nor the question whether government's own policies are making these activities economically advantageous was answered. A central issue is that whether tax evasion and flight of capital at such massive scale can possibly be curbed only by measures bolstering deterrence - like strengthening departmental machinery, or would it also simultaneously need a relook at the entire ecosystem of policies and practices that enable such wholesale violation of domestic laws. The bit about prosecution of tax evaders is particularly disingenuous. The fact is that virtually nobody is prosecuted in this country for tax evasion. The condition of our criminal justice system is such that prosecuting tax evaders is regarded by the department itself as persecution of the prosecutors and their witnesses. The mismatch between number of searches and detection of concealed incomes on the one hand and number of prosecutions/convictions on the other, speaks for itself.

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MISPLACED CLAIMS and SILENT CHAMBER

Understandably the opposition were furious. The most explosive salvo however, came from BJP vice president Shanta Kumar. In a statement on January 28, he called government's statement eyewash and said that UN convention against Corruption is the only legal instrument to recover our money from tax-havens but India despite signing it in 2005, has not yet ratified. This was followed by a startling claim that Swiss government has termed the amount kept by Indians in Swiss banks as acquired through illegal and corrupt practices, and therefore 'stolen property'. He stated that Swiss representative had declared in UN General Assembly last year that his government had enacted a law to return such money. He went on to say that some countries after ratification have even started recovering their amounts. The countries were of course not named.While the bit about India not yet ratifying the UN convention against corruption is correct, the claim that Swiss authorities have declared funds held by Indians in Swiss banks as stolen property or that they have enacted any legislation to provide banking information and to transfer funds in these accounts but for the asking, is typical political grandstanding. In fact, UN convention against corruption requires the signatory countries to render mutual legal assistance in gathering evidence for tracing, freezing, seizure and confiscation of the proceeds of corruption, and to extradite offenders. What this means is that if a country (say India) is conducting criminal investigation against specific accused persons and needs access to details of their Swiss Bank accounts, it can make an official request for international judicial assistance with the Swiss authorities, which will then be duty bound to provide the above type of legal assistance and bank secrecy will not come in the way.

This, however, is no carte-blanche for seeking or giving blanket information about all bank accounts held by nationals of one country in another. During the recent World Economic Forum at Davos, Switzerland Federal Department of Finance State Secretary Miachael Ambuhl said in the context of the Tax Treaty being finalised between India and Switzerland that if Indian authorities can show that there is evidence that people have evaded tax, they would get the information as also administrative assistance (to deal with) tax evasion.

Nevertheless political parties are not interested in these legal niceties. Speaking at Chennai a little later BJP President said "I want to ask a million dollar question to the Congress party. Why are you not declaring the names of those who have deposited the black money in Swiss bank accounts?" He said that if the black money deposited in the Swiss Bank accounts was brought back to the country, it could be used for interlinking of all Indian rivers. Another of its respected leaders, himself a former Minister and a legal luminary, solemnly promised the countrymen that he will get the black money stashed abroad and ensure that the guilty are punished. He, however, did not indicate any time limit for delivering on his promise. All this is grist for the media and some TV anchors are going hysterical with their "breaking news". One section which is deafeningly silent in this cacophony is the Chambers of Industry and Commerce.

Fallacious Premises

This discussion is proceeding on the premise that black money is some static stockpile of currency; that it has been generated by a slew of criminal activities - corruption, drugs, etc, siphoned off out of India and held in clandestine foreign bank accounts in the name of Indians; that the Swiss and other bank authorities are aware as to which of the accounts held by them contains illicit/tax evaded amounts of Indians; that information

about these accounts will be given if only the government of India cares to ask the foreign authorities to do so; that the foreign authorities would also be only too happy to transfer these funds to India; and finally that once the government gets information about these accounts (and hopefully the funds), it has to make it public.

Almost all of these premises are fallacious in varying degrees. Black money, whether in India or outside, is not a static stockpile but more likely a part of economic activities, ever-changing shape, mode and hands. In fact, there is growing body of evidence that significant part of the foreign investment coming to India - particularly via Mauritius and other tax havens and taking the PN route is actually Indian money stashed abroad and metamorphosing itself - all for the sake of country's economic growth. Next, it is highly unlikely that these foreign bank accounts are held in the names of their real and beneficial owners. Anecdotal evidence with tax authorities shows that these are held through a web of front companies with cross holdings, trusts, attorney-holders and variety of other benami fronts.

The popular term for this is 'multi-layering', i.e. create chain of transactions and ownership arrangements across countries between funds and their illicit source to obscure their linkage with criminal activities and to make the investigators lose their way in the labyrinths of international tax jurisdictions. Then, to say that Swiss or other bank authorities would know the bank accounts and safe vaults held by Indian citizens - residents or non-residents, with them (or would share list of all their Indian customers) without our establishing that these contain proceeds of crime or tax evasion, is rather naive. Actually, even Indian banks operating in India do not share general information of their customers with tax authorities unless specific queries with names and identity particulars are made. The Tax department itself prohibits "roving and fishing enquiries" with banks. Then, the stage of recovering the proceeds of crime or tax evasion hidden in foreign banks comes much later, after information of these accounts has been received, appropriate proceedings under the relevant Indian laws - including possible appeals/ revisions/references and writs etc, have been completed, and demands raised for recovery proceeding to ensue in foreign jurisdictions. Then comes the question whether and at what stage the information can be made public. If the information is received under an international treaty between sovereign nations that specifically provides for confidentiality and is used only for the purpose for which it is given, then one does not see how it can be lawfully made public only because there is a public clamour for it. Violation of international treaties has obvious consequences.

Incidentally, the Income Tax Act provides punishment of imprisonment of up to six months if a public servant furnishes any information in contravention of the Act, and all the Tax Treaties have been entered under the powers conferred on the government by this Act.

None of this is in any way meant to diminish or undermine the critical importance of the subject or the need for informed public discussion and concerted action on it. It is only to highlight the extreme complexity of the subject and the kind of obstacles in the way. Therefore, the necessity to understand its various dimensions while eschewing political grandstanding cannot be overstated.

HOW MUCH MONEY

India	$1,456 billion
Russia	$470 billion
UK	$390 billion.
Ukraine	$100 billion
China	$96 billion

(Source: Swiss Banking Association Report, 2006)

$500 billion to $1,400 billion

BJP Task Force 2009 has estimated the amount of black money to be between $500 billion to $1,400 billion.

$462 billion.

A recent study by the Global Financial Integrity has estimated the present value of illicit money out-flow to be close to $462 billion.

"All these estimates are based on various unverifiable assumptions and approximations. Government has been seized of the matter and has constituted a multi-disciplinary committee to get studies conducted, to estimate the quantum of illicit fund generated by Indian citizens … Legalities come in the way of detecting and recovering black money… Union Government has detected undisclosed income of around ~15,000 crore in the last 18 months."

Pranab Mukherjee, Union Finance Minister

Estimates of Black Money

In December 2008, Global Financial Integrity (GFI), a Washington-based think tank released a seminal study "Illicit Financial Flows from Developing Countries: 2002-2006." It found that on a conservative estimate, illicit financial flows out of developing countries for the five year period ranged from 850 billion to 1.06 trillion USD per year. The report was later updated to cover the period 2000 - 2008. It found that illicit outflows have increased to 1.26 to 1.44 trillion USD and that, on average, developing countries lost between 725 to 810 billion USD per year over during 2000- 2008. GFI then published the study, "The Drivers and Dynamics of Illicit Financial Flows from India: 1948-2008" in November 2010. Its primary findings were that between 1948 and 2008 India lost 213 billion USD in illicit financial flows and that these were generally the product of corruption, criminal activities and efforts to shelter wealth from country's tax authorities. The present value of this amount was estimated to be 462 billion USD.

The study estimated that total capital flight represents approximately 16.6% of India's GDP as of 2008; these illicit financial flows grew at a rate of 6.4% per year in real terms; and India lost 16 billion USD per year from 2002-2006. The study found that India's underground economy, its high net-worth individuals (HNIs) and private companies were the primary drivers of these illicit flows. It also found that the Indian deposits abroad shifted away from developed country banks towards offshore financial centers (OFCs) and share of OFC deposits increased from 36.4% in 1995 to 54.2% in 2009. The study estimated value of illicit assets held abroad to be 72% of India's underground economy which itself was estimated at 50% of India's GDP. In other words 28% of assets of our black economy are held domestically. The report argued that one of the primary motivations behind these cross-border transfers is the desire to amass wealth without attracting government attention. Significantly, the study also found that in the post-reform period of 1991-2008, deregulation and trade liberalization accelerated the outflow of illicit money from India. A more worrisome finding of the study is that there is a statistical correlation between larger illicit flows and deteriorating income distribution.

Undoubtedly, 462 billion USD is a staggering amount. But more dangerous than this is its corroding influence on the political economy of the country. Therefore, the subject of illicit financial flows from India, their impact on domestic revenues and the steps needed at national and international levels to counter this menace, is too serious to become a subject for political recrimination or a fight for TRPs through sensational TV headlines.

Cross border tax evasion

Tax havens are characterised by no or nominal taxes, minimal reporting requirements, ease of registration, bank secrecy and low transaction costs. They, therefore, are ideal hunting ground for cross-border tax evasion. The OECD initially identified 35 countries/territories as tax havens. These are places like Mauritius, Cyprus, Guernsey, Isle of Mann, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Isles, Gibraltar, Montserrat and St. Helena. It is easy to set up multiple legal entities in such jurisdictions. Most companies in these places are mailbox addresses. Cayman Islands is reported to have nearly 400 banks operating from the same mailbox. Transactions can be so arranged that income from international investment or business activities is shown to arise in the country where there is no tax on that class of transactions. Another common device to shift profits from a "high tax" country to a tax haven is through payment of fees for technical services allegedly rendered by an entity in a tax haven. These provide equally good opportunities for money laundering. The term money laundering originated from mafia's use of laundering business in the US to legitimize income earned from illegal activities like gambling, prostitution, bootlegging etc. It is now used for activities by which money earned from illegal businesses or tax evaded incomes are routed through entities in different jurisdictions and then introduced into legitimate businesses, thereby 'laundering' tainted money.

The basic problem with tax havens is their lack of transparency and exchange of information. Since the cost of setting up such entities is minimal and reporting requirements non-existent, even treaty partners cannot get any information as to how a transaction is structured or who is the ultimate beneficiary.

Treaty shopping

India has a wide treaty network covering most of its trading partners. Each treaty reflects a separately negotiated "deal" and is different in some respect from the other. These variations offer multinational corporations of third countries tax avoidance opportunities, known as treaty shopping, by routing their investments in India through favourable jurisdictions such as Mauritius, Malta, Singapore or Cyprus etc. Under our treaty with Mauritius, capital gains on shares etc arising to a Mauritius resident is exempt from tax in India. Mauritius itself does not tax such capital gains.

Therefore, if a third country resident, say a Netherlands resident sets up a company in Mauritius and routes its investment in India through such a Mauritian company, any capital gains arising to it on such assets in India will not get taxed in either country. As a result Mauritius has become a most favourable destination to create holding companies or conduit companies to nominally hold assets, including shares of group companies. In addition, a company can be incorporated in Mauritius with just one of its promoters being a local resident. Common belief is that Mauritius has more offshore companies than citizens.

The main argument against treaty-shopping is that it breaches the reciprocity of a treaty, thereby altering the balance of concessions negotiated between two contracting states and instead extends treaty benefits intended for the residents of the Treaty partner country to those of a third country which is not a signatory to this treaty and may not reciprocate corresponding benefits. However, in the race to attract foreign investments, developing countries have turned a blind eye to such arguments. Though there has been persistent information in business circles that Mauritius has been the preferred destination for substantial sums of black money generated in India, including slush funds stashed by corrupt politicians, bureaucrats and businesspersons being routed through shell companies, very little has been done to correct this. In the JPC investigations of 2001 relating to Ketan Parekh, SEBI had brought out how certain Mauritius-based FIIs were issuing Participatory Notes (PN) to anonymous entities for large transactions in Indian stock market. Government stand, however, has been that there is no "hard evidence" for this. In other words we don't want to see what is visible to the big wide world.

The subject of treaty shopping reached Supreme Court in 2003 in an interesting quirk of events, in what is known as Azadi Bachao Andolan case (263ITR 706). Some officers of Income Tax department declined to grant the benefits of Indo-Mauritius Tax Treaty to certain Mauritius-based off-shore companies on the ground that these are shell companies and not genuine Mauritius residents. Instead of agitating their claims in usual appellate channels the affected parties approached Central Board of Direct Taxes, which issued what is known as a beneficial circular (No.789 of 13.4.2000) effectively saying that the assessing authorities need not go into the genuineness of residence claims of such companies and the residence certificate issued by Mauritius Government should be treated as conclusive.

The validity of the Circular was challenged by an intrepid group of citizens under the banner of Azadi Bachao Andolan by way of a PIL before the Delhi High Court. Two of the many grounds taken before the High Court were that Double Taxation Avoidance Agreement (Tax Treaty) would come into play if the same income is taxed in both countries and not when it escapes tax in both countries; and that if residents of third countries set up conduit companies in Mauritius only to take advantage of a favourable tax treaty with Mauritius, this would be treaty shopping. The high court found the circular as illegal on several grounds, including these and quashed it. The Government moved Supreme Court in 2003 where it was represented by its top Law Officers Soli Sorabjee and Harish Salve, amongst others. Reversing the High Court order and upholding the validity of the circular, Supreme Court held that in the absence of specific anti-treaty shopping provisions in a treaty, the benefits of a treaty cannot be denied to persons qualifying as residents of a treaty partner.

It held that- "124. Overall, countries need to take, and do take, a holistic view. The developing countries allow treaty shopping to encourage capital and technology inflows, which developed countries are keen to provide to them. The loss of tax revenues could be insignificant compared to the other non-tax benefits to their economy. Many of them do not appear to be too concerned unless the revenue losses are significant compared to the other tax and non-tax benefits from the treaty, or the treaty shopping leads to other tax abuses. 125. There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing economy, in the interest of long term development."

Anonymous movement of money across borders

Post-liberalization and dilution of exchange controls, various policy steps have been taken for attracting foreign investments. These have been spectacularly successful in doing so. But these have also left gaping holes for dirty money to slip in and glide out. The KYC norms have been tightened for the citizens in the aftermath of concerns on terrorist funding but there remain a variety of loopholes for anonymous movement of foreign funds. Though FIIs have to be registered with RBI and SEBI, in most cases it is considered sufficient if these are registered with a regulator in some other country, including tax havens. Some of the financial instruments used for movement of foreign funds are designed to protect the anonymity of sources. Partcipatory Notes (PN): PNs are derivative instruments issued by foreign funds against an underlying security for trading in Indian market. The underlying security can itself be a derivative instrument i.e. there could be multi-level downstream PNs. Investors wishing to buy PNs can deposit funds in foreign operations of an FII that legitimately operates in India.

While ownership disclosure of FII and their sub-accounts is given to SEBI, the actual owner of a derivative-based PN would never be known due to multi-layering. The due diligence mechanism for acceptance of clients at different levels is such that often the FIIs have no direct knowledge of the ultimate clients or their sources of funds. This enables entities otherwise not eligible to trade in Indian market to do so via PN route. The process of multiple derivative products with complex multi-layered holding structure creates an impregnable veil of secrecy to conceal the identity of real owners. Therefore, PNs have become an attractive mechanism for Indian parties, to first take illicit funds out of the country through hawala and then bring these via PN route.

Technological hurdles: Though tax evasion has long been a public policy issue in India globalisation, increasing interdependence of national economies and the huge impact of Information Technology on the way business is now conducted have added a new dimension to it. A company can now be incorporated in an Offshore Financial Center (OFC) or in a tax haven online. Internet banking, payment gateways and digi-cash, e-cash etc allow swift and unhindered movement of funds across geographical boundaries. Money can move instantly and anonymously across national borders. Transnational business operations, that

Features of Tax Haven

1. No or nominal taxes
2. Minimal reporting requirements
3. Ease of registration
4. Bank secrecy and low transaction costs

How Many?: The OECD initially identified 35 countries/territories as tax havens. These are places like Mauritius, Cyprus, Guernsey, Isle of Mann, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Isles, Gibraltar, Montserrat and St. Helena.

Mailbox Address: It is easy to set up multiple legal entities in such jurisdictions. Most companies in these places are mailbox addresses. Cayman Islands is reported to have nearly 400 banks operating from the same mailbox.

Shifting profits: Another common device to shift profits from a "high tax" country to a tax haven is through payment of fees for technical services allegedly rendered by an entity in a tax haven.

cut across tax jurisdictions with investments coming via tax havens, manufacturing facilities set up in one country, intellectual properties held in another, and sales in yet other are now common. All this has opened up enormous opportunities of cross-border tax evasion, while throwing new challenges to tax administrators.

Historically, tax regimes have operated within their national jurisdictions. Cooperation in tax matters emerged at international level initially to protect citizens from double taxation i.e. taxation of same income in host country as well as home country. There was little interest in providing support to tax authorities of another country for their anti-evasion work. Exchange of information to combat tax evasion was at best a peripheral part of Tax Treaties. Most of India's Tax treaties negotiated in last three decades of 20th century provided that the "contracting states shall exchange such information as is necessary for carrying out the provisions of this agreement or of the domestic laws concerning taxes". Some countries insisted on the principle of dual criminality i.e. assistance would be provided only if the conduct under investigation is also a crime under laws of the other country. General information about taxpayers of one State and deriving income in another could not be obtained under such treaties. Some countries had no information to share as they either did not impose any personal income tax (e.g. UAE) or do not collect any information (e.g. Mauritius).

Global efforts for Tax Transparency

The borderless world of international commerce has, however, thrown up a new realisation, namely, that it is in the interest of national tax authorities to cooperate in realising their legitimate tax dues. OECD report, 'Harmful Tax Competition: An Emerging Global Issue' (1998) initiated the process of identifying "tax havens" and seeking their commitment to principles of transparency and effective exchange of information and encouraging other countries to join. However, international cooperation in tax matters required a legal framework which could be created only

through international treaties. Considering that there are more than 160 independent tax jurisdictions priding on their sovereign right to tax and having different domestic tax laws and interests, creating an international legal framework is no small task. Initiative came from OECD which developed standards of transparency and exchange of information that became Article 26 of its Model Tax Convention and Tax Information Exchange Agreement. This was adopted by G20 Ministers of Finance in 2004 and by UN Committee on International Cooperation in Tax Matters in October 2008. These envisaged that contracting country will agree to provide information on request of the other country if it is "foreseeably relevant" to enforcement of domestic laws of the requesting country, and that Information will not be denied on account of bank secrecy or limitation of domestic tax laws. The model convention also required that Taxpayers' rights to privacy will be respected and that strict confidentiality of information will be maintained.

In parallel with the work on harmful tax practices, OECD published "Improving Access to Bank Information for Tax Purposes" in 2000. This stipulated that "all member countries should permit access to bank information, directly or indirectly, for all tax purposes so that tax authorities can fully discharge their revenue raising responsibilities and engage in effective exchange of information with their treaty partners". With the announcements in 2009 by Austria, Belgium, Luxembourg and Switzerland, all OECD countries now endorse this standard.

The need to tackle cross?border tax evasion received a big boost in the aftermath of the global financial crisis. It resulted in moving issues of international tax evasion and exchange of information high on the political agenda of major economic powers since 2008. Issues of tax transparency figured prominently in the G20 summits in Washington (November 2008), London (April 2009) and Pittsburgh. An OECD backgrounder of February 2010 captures the development succinctly - "Tax avoidance and tax evasion threaten government revenues throughout the world. The US Senate estimates revenue losses amount to 100 billion dollars a year and in many European countries the sums run into billions of euros. This translates into fewer resources for infrastructure and affects the standard of living for all of us in both developed and developing economies. Globalisation generates opportunities to increase global wealth but also results in increased risks. The increase in cross?border flows that come with a global financial system require more effective tax cooperation. Better transparency and information exchange for tax purposes are key to ensuring that taxpayers have no safe haven to hide their income and assets and that they pay the right amount of tax in the right place."

A Global Forum on Transparency and Exchange of Information for Tax Purposes, including G20 and OECD countries and all major financial centres, was set up. It agreed on a three-year mandate to promote implementation of standards through peer review and report progress to G-20 leaders. Austria, Belgium, Luxembourg and Switzerland which had earlier entered reservations to Article 26 withdrew these in March 2009. So did the 30 non?OECD countries. In June 2010 at their Toronto summit G20 leaders stated that: "We fully support the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and welcome ------ the development of a multilateral mechanism for information exchange which will be open to all interested countries. Since our meeting in London in April 2009, the number of signed tax information agreements has increased by almost 500. We encourage the Global Forum to report to Leaders by November 2011 on progress countries have made in addressing the legal framework required to achieve an effective exchange of information...We stand ready to use countermeasures against tax havens."

All jurisdictions surveyed by Global Forum have by now either implemented or committed to implementing these standards. More than 600 tax treaties conforming to these have been signed so far.

Scope of exchange of information

Article 26 of the model convention provides broad modalities for information exchange between treaty countries. The main forms of exchange are: automatic (i.e. information exchanged routinely e.g. particulars of interest, dividends, royalties, etc from sources in the other country); spontaneous (information gathered by one country in administering its own laws which it believes will be of interest to its treaty partner); and on request of the other country.

The scope of information that can be requested under Article 26 is fairly wide. The only requirement for the requesting country is to establish that the information is "foreseeably" relevant to enforcement of its tax laws. The type of information that can be requested include things like fiscal residence or formation documents or tax status of a legal entity; the nature of its income, accounting records and financial statements and income/expenses shown by it in its return; the names/addresses of its directors and employees etc and their remuneration; their bank information; transfer pricing information e.g. price paid for goods in transactions between independent companies; information involving triangular situation where in transactions between two companies situated in the two countries a company of a third country is interposed, fiduciary information relating to trusts; and so on. Where specifically requested, the information may include depositions of witnesses and authenticated copies of original records. The Model Convention specifically stipulates that bank secrecy cannot be a basis for declining to provide information. The obligation to exchange information is also not limited to information contained in the tax files. If the requested information is not available, the requested country must use its information gathering measures to obtain it from the taxpayer(s) or third parties.

Is it possible to get general information? Article 26 of Model convention does not allow "fishing expeditions," i.e. requests of a speculative nature for general information that have no apparent nexus to an ongoing inquiry or investigation of a particular case. The effort is to maintain a balance between the competing considerations of the need for countries to enforce their tax laws and privacy of taxpayers is captured in the standard of "foreseeable relevance." A requesting country has to enter a checklist to demonstrate "foreseeable relevance" before requesting information from its treaty partner. Where a country fails to provide the checklist, the treaty partner may be led to believe the request to be a fishing expedition.

Limitations to exchange of information

The main limitations to exchange of information under Article 26 relate to trade, industrial, or professional secrets; confidential communication between a client and an attorney; information against public policy of the other country e.g. where a tax investigation is motivated by racial or political persecution. Requests for such information can be declined. Article 26 approves doctrine of reciprocity. The underlying idea is that a contracting country should not be able to take advantage of the information system of the other country if it is wider than its own system.

Confidentiality of information received

Finally, where information is exchanged it is subject to strict confidentiality rules. Article 26(2) expressly lays down that-

"2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities

(including courts and administrative bodies) concerned with the assessment or collection, of the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions."

It is therefore fundamental for international co-operation in matters of information exchange that the information exchanged is treated as confidential within the four corners of above provision.

The sum and substance is that the tax treaties even where executed create a complicated framework of do's and don'ts within which information can be asked or given. Although the framework has advanced considerably in the last few years and a large number of tax treaties and information exchange agreements have been signed, this is still a work in progress. The process is fairly intricate. The larger point is that neither under the domestic laws nor under the Tax Treaties is there any mandate to seek information of an omnibus or wholesale nature or to make fishing and roving enquiries from foreign tax authorities or banks. Thus, where a specific case for tax evasion or other crime is registered and is being investigated against specific persons, information concerning them can be asked from foreign jurisdictions, it is not permissible to ask general information, say of all Indian citizens or even all Indian arms dealers having bank accounts in Switzerland. Thus, the fact remains that names of parties/groups to be investigated will still have to be discovered by Indian authorities before any assistance of foreign authorities can be requested.

The information coming otherwise than through the operation of Tax treaties, for example, from whistleblowers like Julian Assange or Rudolf Elmer, or the instance where the US was able to force Union Bank of Switzerland to itself disclose information about some US citizens would, of course, not be protected by the above treaty clauses.

Obviously, tackling cross-border tax evasion is going to be a long battle. Political mudslinging and one-upmanship on TV shows is certainly not going to win it. This would need to be fought on a national level with bipartisan political support and with participation of all instrumentalities of the State.

STEPS TAKEN BY INDIA

At the policy level India has taken various steps of a corrective and deterrent nature, e.g. revision of Tax treaties, setting up anti-money laundering machinery, joining Financial Action Task Force - an inter-governmental body for promotion of policies to combat money laundering and terrorist financing, introducing General Anti-Avoidance Rules and Rules relating to Controlled Financial Corporations and Thin Capitalisation etc in the draft Direct Taxes Bill 2010. Some other steps at international level such as curtailing trade mispricing, requiring country-wise reporting of sales, profits and taxes by multi-nationals, and mandating confirmation of beneficial ownership in all banking and securities accounts, will go a long way in tackling cross border tax evasion.

Lastly, the larger question begging an answer is when the problem has such a vast magnitude, dimensions and implications can it be addressed only by creating such elements of post facto investigation or is it necessary to strike at the economic causes behind generation of black money and flight of capital?

(The author has served as Member, Central Board Of Direct Taxes, Ministry of Finance, Government of India. He held the post of Director General (Investigation) as well as Director General (Sytems) in Income Tax Department. He is winner of PM's award for excellence in public adminitration)

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