

Circular No. 13 of 2015

F. No. 142/18/2015-TPL
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes (TPL Division)

Dated 6th of July, 2015

Clarifications on Tax Compliance for Undisclosed Foreign Income and Assets

The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (hereinafter referred to as 'the Act') has introduced a tax compliance provision under Chapter VI of the Act. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015 (hereinafter referred to as 'the Rules') have been notified. In regard to the scheme queries have been received from the public about the scope of the scheme and the procedure to be followed. The Board has considered the same and decided to clarify the points raised by issue of a circular in the form of questions and answers as follows.-

Question No.1: If firm has undisclosed foreign assets, can the partner file declaration in respect of such asset?

Answer: The declaration can be made by the firm which shall be signed by the person specified in sub-section (2) of section 62 of the Act. The partner cannot make a declaration in his name. However, the partner may file a declaration in respect of an undisclosed asset held by him.

Question No.2: Where a company has undisclosed foreign assets, can it file a declaration under Chapter VI of the Act? If yes, then whether immunity would be granted to Directors of the company?

Answer: Yes, the company can file a declaration under Chapter VI of the Act. The Directors of the company shall not be liable for any offence under the Income-tax Act, Wealth-tax Act, FEMA, Companies Act and the Customs Act in respect of declaration made in the name of the company.

Question No.3: Whether immunity in respect of declaration made under the scheme is provided in respect of Acts other than those mentioned in section 67 of the Act?

Answer: Section 67 provides immunity from prosecution under the five Acts viz. the Income-tax Act, Wealth-tax Act, FEMA, Companies Act and the Customs Act. It does not provide immunity from prosecution under any other Act. For example- if the undisclosed asset has been acquired out of the proceeds of sale of protected animals the person will not be eligible for immunity under the Wildlife (Protection) Act, 1972.

Question No.4: Whether the person making the declaration will be provided immunity from the Prevention of Money Laundering Act, 2002?

Answer: The offence under the PMLA arises while laundering money generated from the process or activity connected with the offences specified in the schedule to the PMLA. Therefore, the primary requirement under PMLA is commission of a scheduled offence. With the enactment of the Act, the offence of wilful attempt to evade tax under section 51 of the Act has become a scheduled offence under PMLA. However, where a declaration of an asset has been duly made under section 59 of the Act the provisions of section 51 will not be applicable in respect of that asset. Therefore, PMLA will not be applicable in respect of the scheduled offence of wilful attempt to evade tax under section 51 of the Act in respect of assets for which declaration is made under section 59 of the Act.

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Question No.5: Where an undisclosed foreign asset is declared under Chapter VI of the Act and tax and penalty is paid on its fair market value then will the declarant be liable for capital gains on sale of such asset in the future? If yes, then how will the capital gains in such case be computed?

Answer: Yes, the declarant will be liable for capital gains under the Income-tax Act on sale of such asset in future. As per the current provisions of the Income-tax Act, the capital gains is computed by deducting cost of acquisition from the sale price. However, since the asset will be taxed at its fair market value the cost of acquisition for the purpose of Capital Gains shall be the said fair market value and the period of holding shall start from the date of declaration of such asset under Chapter VI of the Act.

Question No.6: Where a notice under section 142/ 143(2)/ 148/ 153A/ 153C of the Income-tax Act has been issued to a person for an assessment year will he be ineligible from voluntary declaration under section 59 of the Act?

Answer: The person will only be ineligible from declaration of those foreign assets which have been acquired during the year for which a notice under section 142/ 143(2)/ 148/ 153A/ 153C is issued and the proceeding is pending before the Assessing Officer. He is free to declare other foreign assets which have been acquired during other years for which no notice under above referred sections have been issued.

Question No.7: As per section 71(d)(i), declaration cannot be made where an undisclosed asset has been acquired during any previous year relevant to an assessment year for which a notice under section 142, 143(2), 148, 153A or 153C of the Income-tax Act has been issued. If the notice has been issued but not served on the declarant then how will he come to know whether the notice has been issued?

Answer: The declarant will not be eligible for declaration under Chapter VI of the Act where an undisclosed asset has been acquired during any previous year relevant to any assessment year where a notice under section 142, 143(2), 148, 153A or 153C of the Income-tax Act has been issued and served on the declarant on or before 30th day of June, 2015. The declarant is required to file a declaration regarding receipt of any such notice in Form 6.

Question No. 8: Where an undisclosed foreign asset has been acquired partly during a previous year relevant to the assessment year which is pending for assessment and partly during other years not pending for assessment then whether such asset is eligible for declaration under Chapter VI of the Act?

Answer: In the case where proceedings are pending before an Assessing Officer in pursuance of a notice under section 142, 143(2), 148, 153A or 153C of the Income-tax Act served on or before 30-06-2015, the declarant may declare the undisclosed asset under Chapter VI of the Act. However, while computing the amount of declaration the investment made in the asset during the previous year relevant to the assessment year for which such notice is issued needs to be deducted from the fair market value of the asset for which the person shall provide a computation alongwith the declaration. Further, such investment which is deducted from the fair market value shall be assessable in the assessment of the relevant assessment year pending under the Income-tax Act and the person shall inform the Assessing Officer the investment made during the relevant year in such asset. Also to clarify, where a notice under section 142, 143(2), 148, 153A or 153C of the Income-tax Act is issued on or after 30-06-2015, the declarant shall be eligible to declare full value of asset even if such asset (or part of such asset) is acquired in the previous year relevant to the assessment year for which such notice is issued.

Question No.9: Can a declaration be made of undisclosed foreign assets which have been assessed to tax and the case is pending before an Appellate Authority?

Answer: As per section 65 of the Act, the declarant is not entitled to re-open any assessment or reassessment made under the Income-tax Act. Therefore, he is not entitled to avail the tax compliance in respect of those assets.

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However, he can voluntarily declare other undisclosed foreign assets which have been acquired or made from income not disclosed and consequently not assessed under the Income-tax Act.

Question No.10: Can a person against whom a search/ survey operation has been initiated file voluntary declaration under Chapter VI of the Act?

Answer: (a) The person is not eligible to make a declaration under Chapter VI if a search has been initiated and the time for issuance of notice under section 153A has not expired, even if such notice for the relevant assessment year has not been issued. In this case, however, the person is eligible to file a declaration in respect of an undisclosed foreign asset acquired in any previous year in relation to an assessment year which is prior to assessment years relevant for the purpose of notice under section 153A.

(b) In case of survey operation the person is barred from making a declaration under Chapter VI in respect of an undisclosed asset acquired in the previous year in which the survey was conducted. The person is, however, eligible to make a declaration in respect of an undisclosed asset acquired in any other previous year.

Question No. 11: Where a search/ survey operation was conducted and the assessment has been completed but the undisclosed foreign asset was not taxed, then whether such asset can be declared under Chapter VI of the Act?

Answer: Yes, such undisclosed asset can be declared under Chapter VI of the Act.

Question No.12: Whether a person is barred from voluntary declaration under Chapter VI of the Act if any information has been received by the Government under DTAA?

Answer: As per section 71(d)(iii), the person cannot make a declaration of an undisclosed foreign asset where the Central Government has received an information in respect of such asset under the DTAA. The person is entitled for voluntary declaration in respect of other undisclosed foreign assets for which no information has been received.

Question No.13: How would the person know that the Government has received information of an undisclosed foreign asset held by him which will make the declaration ineligible?

Answer: The person may not know that the Government has information about undisclosed foreign asset held by him if the same has not been communicated to him in any enquiry/proceeding under the Income- tax Act. After the person has filed a declaration, which is to be filed latest by 30th September, 2015, he will be issued intimation by the Principal Commissioner/Commissioner by 31st October, 2015, whether any information has been received by the Government and consequently whether he is eligible to make the payment on the declaration made. If no information has been received up to 30th June, 2015 by the Government in respect of such asset the person will be allowed a time upto 31st December, 2015 for payment of tax and penalty in respect of the declared asset. There may be a case where person makes declaration in respect of 5 assets whereas the Government has information about only 1 asset. In such situation the person will be eligible to declare the balance 4 assets under Chapter VI of the Act. In such case the declarant, on receipt of intimation by the Principal Commissioner/Commissioner, shall revise the declaration made within 15 days of such receipt of intimation to exclude the asset which is not eligible for declaration. Tax and penalty on the eligible assets under the Act shall be payable in respect of the revised declaration by 31st of December, 2015. In respect of the ineligible assets provisions of the Income-tax Act shall apply. (Please also see answer to question no. 15)

Question No.14: What are the consequences if no declaration under Chapter VI of the Act is made in respect of undisclosed foreign assets acquired prior to the commencement of the Act?

Answer: As per section 72(c), where any asset has been acquired prior to the commencement of the Act and no declaration under Chapter VI of the Act is made then such asset shall be deemed to have been acquired in the year

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in which it comes to the notice of the Assessing Officer and the provisions of the Act shall apply accordingly. India is expected to start receiving information through Automatic Exchange of Information (AEOI) route under FATCA from USA later in the year 2015. Further, under the multilateral agreement India will start receiving information from other countries under AEOI route from 2017 onwards. As at 18th March 2015, 58 jurisdictions (including India) have committed to share information under AEOI by 2017 and 36 jurisdictions have committed to share by 2018, including jurisdictions which have beneficial tax regime. The multilateral agreement is expected to cover all the countries in the near future. The information under the AEOI will include information of controlling persons (beneficial owners) of the asset. The possibility of discovery of an undisclosed asset may arise at any time in the future; say for example, information of an immovable property can be unearthed if any utility bills/property tax or even gardener's/ caretaker's salary has been paid through an existing or closed bank account. Therefore, if any information of an undisclosed foreign asset acquired earlier, say in the year 1975, for \$ 100,000 comes to the notice of an Assessing Officer later, say in the year 2020, when its value becomes, say, \$ 5 Million, the liability under the Act amounting to 120 percent of the fair market value of the asset on the valuation date may arise in the year 2020, besides prosecution and other consequences. In this case if the valuation date is in the year 2020 the amount of tax and penalty under the Act will be \$ 6 Million.

Question No.15: If a declaration of undisclosed foreign asset is made under Chapter VI of the Act and the same was found ineligible due to the reason that *Government had prior information under DTAA then will the person be liable for consequences under the Act?*

Answer: In respect of such assets which have been duly declared in good faith under the tax compliance but not found eligible, he shall not be hit by section 72(c) of the Act and no action lies in respect of such assets under the Act. However, such information may be used for the purpose of the Income-tax Act.

Question No.16: In respect of the undisclosed foreign assets referred to in answer to question No. 15 above, where the proceedings under the Income-tax Act are initiated, can the options of settlement commission etc. under the Income-tax Act be availed in respect of such assets?

Answer: All the provisions of the Income-tax Act shall be applicable in respect of those assets.

Question No.17: A person has some undisclosed foreign assets. If he declares those assets in the Income-tax Return for assessment year 2015-16 or say 2014-15 (in belated return) then should he need to declare those assets in the voluntary tax compliance under Chapter VI of the Act?

Answer: As per the Act, the undisclosed foreign asset means an asset which is unaccounted/ the source of investment in such asset is not fully explainable. Since an asset reported in Schedule FA does not form part of computation of total income in the Income-tax Return and consequently does not get taxed, mere reporting of a foreign asset in Schedule FA of the Return does not mean that the source of investment in the asset has been explained. The foreign asset is liable to be taxed under the Act (whether reported in the return or not) if the source of investment in such asset is unexplained. Therefore, declaration should be made under Chapter VI of the Act in respect of all those foreign assets which are unaccounted/ the source of investment in such asset is not fully explainable.

Question No.18: A person holds certain foreign assets which are fully explained and acquired out of tax paid income. However, he has not reported these assets in Schedule FA of the Income-tax Return in the past. Should he declare such assets under Chapter VI of the Act?

Answer: Since, these assets are fully explained they are not treated as undisclosed foreign assets and should not be declared under Chapter VI of the Act. However, if these assets are not reported in Schedule FA of the Income-tax Return for assessment year 2016-17 (relating to previous year 2015-16) or any subsequent assessment year by a person, being a resident (other than not ordinarily resident), then he shall be liable for penalty of Rs. 10

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lakhs under section 43 of the Act. The penalty is, however, not applicable in respect of an asset being one or more foreign bank accounts having an aggregate balance not exceeding an amount equivalent to Rs. 5 lakhs at any time during the previous year.

Question No.19: A person has a foreign bank account in which undisclosed income has been deposited over several years. He has spent the money in the account over these years and now it has a balance of only \$500. Does he need to pay tax on this \$500 under the declaration?

Answer: Section 59 of the Act provides for declaration of an undisclosed asset and not income. In this case the Bank account is an undisclosed asset which may be declared. Tax on undisclosed asset is required to be paid on its fair market value. In case of a bank account the fair market value is the sum of all the deposits made in the account computed in accordance with Rule 3(1)(e). Therefore, tax and penalty needs to be paid on such fair market value and not on the balance as on date.

Question No. 20: A person held a foreign bank account for a limited period between 1994-95 and 1997-98 which was unexplained. Since such account was closed in 1997-98 does he need to declare the same under Chapter VI of the Act?

Answer: Section 59 of the Act provides that the declaration may be made of any undisclosed foreign asset which has been acquired from income which has not been charged to tax under the Income-tax Act. Since the investment in the bank account was unexplained and was from untaxed income the same may be declared under Chapter VI of the Act. The consequences of non-declaration may arise under the Act at any time in the future when the information of such account comes to the notice of the Assessing Officer.

Question No.21: A person inherited a house property in 2003-04 from his father who is no more. Such property was acquired from unexplained sources of investment. The property was sold by the person in 2011-12. Does he need to declare such property under Chapter VI of the Act and if yes then, what will be the fair market value of such property for the purpose of declaration?

Answer: Since the property was from unexplained sources of investment the same may be declared under Chapter VI of the Act. However, the declaration in this case needs be made by the person who inherited the property in the capacity of legal representative of his father. The fair market value of the property in his case shall be higher of its cost of acquisition and the sale price as per Rule 3(2) of the Rules.

Question No.22: A person acquired a house property in a foreign country during the year 2000-01 from unexplained sources of income. The property was sold in 2007-08 and the proceeds were deposited in a foreign bank account. Does he need to declare both the assets under Chapter VI of the Act and pay tax on both the assets?

Answer: The declaration may be made in respect of both the house property and the bank account at their fair market value. The fair market value of the house property shall be higher of its cost and the sale price, less amount deposited in bank account. If the cost price of the house property is higher the declarant will be required to pay tax and penalty on (cost price – sale price) of the house. If the sale price of the house property is higher the fair market value of the house property shall be nil as full amount was deposited in the bank account. The fair market value of the bank account shall be as determined under Rule 3(1)(e) and tax and penalty shall be paid on this amount. (Please also refer to the illustration under Rule 3(3) for computation of fair market value.) Further, it is advisable to declare all the undisclosed foreign assets even if the fair market value as computed in accordance with Rule 3 comes to nil. This may avoid initiation of any inquiry under the Act in the future in case such asset comes to the notice of the Assessing Officer.

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Question No.23: A person is a non-resident. However, he was a resident of India earlier and had acquired foreign assets out of income chargeable to tax in India which was not declared in the return of income or no return was filed in respect of that income. Can that person file a declaration under Chapter VI of the Act?

Answer: Section 59 provides that a declaration may be made by any person of an undisclosed foreign asset acquired from income chargeable to tax under the Income-tax Act for any assessment year prior to assessment year 2016-17. Since the person was a resident in the year in which he had acquired foreign assets (which were undisclosed) out of income chargeable to tax in India, he is eligible to file a declaration under section 59 in respect of those assets under Chapter VI of the Act.

Question No.24: A person is a resident now. However, he was a non-resident earlier when he had acquired foreign assets (which he continues to hold now) out of income which was not chargeable to tax in India. Does the person need to file a declaration in respect of those assets under Chapter VI of the Act?

Answer: No. Those assets do not fall under the definition of undisclosed assets under the Act.

Question No. 25: If a person has 3 undisclosed foreign assets and declares only 2 of those under Chapter VI of the Act, then will he get immunity from the Act in respect of the 2 assets declared?

Answer: It is expected that one should declare all his undisclosed foreign assets. However, in such a case the person will get immunity under the provisions of the Act in respect of the two assets declared under Chapter VI of the Act and no immunity will be available in respect of the third asset which is not declared.

Question No. 26: A resident earned income outside India which has been deposited in his foreign bank account. The income was charged to tax in the foreign country when it was earned but the same was not declared in the return of income in India and consequently not taxed in India. Does he need to disclose such income under Chapter VI of the Act? Will he get credit of foreign tax paid?

Answer: Declaration under Chapter VI is to be made of an undisclosed foreign asset. In this case, the person being a resident of India, the foreign bank account needs to be declared under Chapter VI as it is an undisclosed asset and acquired from income chargeable to tax in India. The fair market value of the bank account shall be determined as per Rule 3(1)(e). No credit of foreign taxes paid shall be allowable in India as section 84 of the Act does not provide for application of sections 90(1)(a)/90(1)(b)/ 90A(1)(a)/ 90A(1)(b) of the Income-tax Act (relating to credit of foreign tax paid) to the Act. Further, section 73 of the Act does not allow agreement with foreign country for the purpose of granting relief in respect of tax chargeable under the Act.

Question No. 27: Can a person declare under Chapter VI his undisclosed foreign assets which have been acquired from money earned through corruption?

Answer: No. As per section 71(b) of the Act, Chapter VI shall not apply, *inter- alia*, in relation to prosecution of any offence punishable under the Prevention of Corruption Act, 1988. Therefore, declaration of such asset cannot be made under Chapter VI. However, if such a declaration is made and in an event it is found that the asset represented money earned through corruption it would amount to misrepresentation of facts and the declaration shall be void under section 68 of the Act. If a declaration is held as void, the provisions of the Act shall apply in respect of such asset as they apply in relation to any other undisclosed foreign asset.

Question No. 28: If a foreign asset has been acquired partly out of undisclosed income chargeable to tax and partly out of disclosed income/exempt income (tax paid income) then whether that foreign asset will be treated as undisclosed? Whether declaration under Chapter VI needs to be made in respect of such asset? If yes, what amount should be disclosed?

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Answer: As per section 5 of the Act, in computing the value of an undisclosed foreign asset any income which has been assessed to tax under the Income-tax Act from which that asset is acquired shall be reduced from the value of the undisclosed foreign asset. Only part of the investment in such foreign asset is undisclosed (unexplained) hence declaration of such foreign asset may be made under Chapter VI of the Act. The amount of declaration shall be the fair market value of such asset as on 1st July, 2015 as reduced by the amount computed in accordance with section 5 of the Act.

Question No. 29: Whether for the purpose of declaration, the undisclosed foreign asset should be held by the declarant on the date of declaration?

Answer: No, there is no such requirement. The declaration may be made if the foreign asset was acquired out of undisclosed income even if the same has been disposed off and is not held by the declarant on the date of declaration.

Question No. 30: Whether at the time of declaration under Chapter VI, will the Principal Commissioner/Commissioner do any enquiry in respect of the declaration made?

Answer: After the declaration is made the Principal Commissioner/ Commissioner will enquire whether any information has been received by the competent authority in respect of the asset declared. Apart from this no other enquiry will be conducted by him at the time of declaration.

Question No. 31: A person is a beneficiary in a foreign asset. Is he eligible for declaration under section 59 of the Act?

Answer: As far as ownership is concerned, as per section 2(11) of the Act "undisclosed asset located outside India" means an asset held by the person in his name or in respect of which he is a beneficial owner. The definition of "beneficial owner" and "beneficiary" is provided in *Explanation 4* and *Explanation 5* to section 139(1) of the Income-tax Act, respectively (which is at variance with the determination of beneficial ownership provided under Rule 9(3) of the PMLA (Maintenance of Records) Rules, 2005). Therefore, for the purpose of the Act "beneficial owner" in respect of an asset means an individual who has provided, directly or indirectly, consideration for the asset for the immediate or future benefit, direct or indirect, of himself or any other person. Further, "beneficiary" in respect of an asset means an individual who derives benefit from the asset during the previous year and the consideration for such asset has been provided by any person other than such beneficiary. Therefore, as per the Act the beneficial owner is eligible for declaration under section 59 of the Act.

There may be a case where a person is listed as a beneficiary in a foreign asset, however, if he has provided consideration for the asset, directly or indirectly, he will be covered under the definition of beneficial owner for the purposes of the Act.

Question No. 32: A person was employed in a foreign country where he acquired or made an asset out of income earned in that country. Whether such asset is required to be declared under Chapter VI of the Act?

Answer: If the person, while he was a non-resident in India, acquired or made a foreign asset out of income which is not chargeable to tax in India, such asset shall not be an undisclosed asset under the Act. However, if income was accrued or received in India while he was non-resident, such income is chargeable to tax in India. If such income was not disclosed in the return of income and the foreign asset was acquired from such income then the asset becomes undisclosed foreign asset and the person may declare such asset under Chapter VI of the Act.

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