It's Raining Black

Chronicles of Black Money, Tax Havens & Policy Response

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APPENDICES

(Imposition of Tax)

List of Abbreviations

ACC	Cabinet Committee on Appointment
ADR	Association for Democratic Reforms
AE	Associated Enterprise
AG	Attorney General
AML	Anti money laundering
APA	Advance Pricing Arrangement
BCCI	Board of Control for Cricket in India
BJP	Bharatiya Janata Party
BRICS	Brazil, Russia, India, China & South Africa
CAD	Current Account Deficit
CAG	Comptroller and Auditor General
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise & Customs
CBI	Central Bureau of Investigation
CCIT	Chief Commissioner of Income Tax
CEIB	Central Economic Intelligence Bureau
CFC	Controlled Foreign Corporation
CFS	Container Freight Station
CIC	Central Information Commission
CIT	Commissioner of Income Tax
CJI	Chief Justice of India
COIN	Customs Overseas Intelligence Network
CVC	Central Vigilance Commission

CVO	Central Vigilance Organisation
CWG	Common Wealth Games
DGCA	Directorate General of Civil Aviation
DGIT	Director General of Income Tax
DRI	Directorate of Revenue Intelligence
DTAA	Double Taxation Avoidance Agreement

DTAC	Double Taxation Avoidance Convention
DTC	Direct Tax Code
EC	Election Commission
EDI	Electronic Data Interchange
EoI	Exchange of Information
EU	European Union
EVM	Electronic Voting Machine
FATCA	Foreign Account Tax Compliance Agreement
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act
FII	Foreign Institutional Investor
FIU	Financial Intelligence Unit
FM	Finance Minister
FTP	Foreign Trade Policy
GAAR	General Anti Avoidance Rule
GBC	Global Business Licence
GDP	Gross Domestic Product
GDR	Global Depository Receipt
GFI	Global Financial Integrity
GoM	Group of Ministers
GST	Goods & Services Tax

HC	High Court
HCC	Host City Contract
HLC	High Level Committee
IAS	Indian Administrative Service
IB	Intelligence Bureau
ICAI	Institute of Chartered Accountants of India
ICD	Inland Container Depot
IFSC	International Financial Services Centre
IGA	Inter Government Agreement
IMF	International Monetary Fund

IMFL	Indian Manufactured Foreign Liquor
INTERPOL	International Crime Police Organisation
IO	Investigating Officer
IOC	Indian Olympic Association
IPC	Indian Penal Code
IPL	Indian Premier League
IPO	Initial Public Offer
IPR	Intellectual Property Right
IPS	Indian Police Service
IRS	Indian Revenue Service
ITAT	Income Tax Appellate Tribunal
ITOU	Income Tax Overseas Unit
JPC	Joint Parliamentary Committee
LGT	Liechtenstein Global Trust
LSE	London Stock Exchange
MLA	Member of Legislative Assembly
MNC	Multi national Company
MoC	Ministry of Commerce
MoF	Ministry of Finance

Mr 'Q'	Ottavio Quattrocchi
MROS	Money Laundering Reporting Office
NADT	National Academy of Direct Taxes
NDA	National Democratic Alliance
NGO	Non Governmental Organisation
NIA	National Investigation Agency
NOC	Non Objection Certificate
OCB	Overseas Corporate Body

ODA	Official Development Assistance
ODI	Officers of Doubtful Integrity
OECD	Organisation for Economic Cooperation & Development
P&L	Profit & Loss
PC	P Chidambaram
PE	Permanent Establishment
PIL	Public Interest Litigation
PMLA	Prevention of Money Laundering Act
PPP	Public Private Partnership
PR	Public Relations
RAW	Research & Analysis Wing
RBI	Reserve Bank of India
RMS	Risk Management System
RTI	Right to Information
SC	Supreme Court
SEBI	Securities & Exchange Board of India
SEZ	Special Economic Zone
SG	Solicitor General
SIE	Small Island Economy
SIT	Special Investigation Team
SWA	Scotch Whisky Association

TA

TDS

TIEA

TII

TIOL

TP

TVR

UBS

UN

UNCTAD

UPA VAT WMD WTO

Tax Assistant

Tax Deduction at Source

Tax Information Exchange Agreement

Taxindiainternational.com

Taxindiaonline.com

Transfer Pricing

TV Viewership Rating

Union Bank of Switzerland

United Nations

United Nations Conference on Trade & Development

United Progressive Alliance

Value Added Tax

Weapons of Mass Destruction

World Trade Organisation

PART I

BLACK MONEY IN WORLD ECONOMY: AN INDIAN PERSPECTIVE

Introduction

Tax evaded income is generally construed as black money which owes its modern history to the process of industrialisation and globalisation. This is not to say that black money was not present in the medieval and ancient periods. Its history goes back to the history of taxation. In the Indian context, one may trace it to noted economist Kautilya's book '*Arthashastra*' (300 BC) which refers to different types of *kar* (tax) coupled with the science of punishment. Wherever taxes were levied in any part of the world, there were tax evaders - a few did not want to pay as a protest for lack of state security guaranteed to the common man; a few found the tax rates too high and a few were smart enough to devise ingenuous ways to evade taxes. And all such income on which no tax was paid was historically termed as 'black money'. The expression 'black money' came to acquire different names such as 'parallel economy', 'underground money', 'tainted money', 'laundered money', 'illicit funds' and 'tax haven funds' only in the recent past which is a little over a century. But all types of 'black money' are not 'tainted money'. The concept of 'tainted money' owes its origin to criminal activities such as bribery, *hawala* (informal system of remitting money cross-border), crime proceeds from gun running, drug peddling, unlicensed prostitution and kidnapping. In the recent decades and from this year in the context of India[1], trade mispricing is going to be treated as laundering of black money.

'Black money' and 'tax havens' are historically perceived

as Siamese twins. They are the two sides of the same coin. Since high tax rates were the common feature of tax regimes across the world in the past century, it obviously led to poor compliance and large-scale evasion. This is where some of the small island countries spotted an opportunity to make a kill of foreign funds by offering low tax rates and attractive bank secrecy laws. When some of the early birds were seen attracting mountains of tainted or tax evaded funds from different parts of the world, a few more organised economies joined the race to graduate to a more attractive tax havens. And such a race took the tally of tax havens to as many as 90 in less than a century. In fact, to outsmart and to lure depositors from others, a few tax havens began to bundle more attractive services such as no inquiry about the beneficial owners of deposits; no tax information exchange agreements

1. See, the Union Budget 2015-2016.

with any country and minimal capital gains tax rate. Some of the key tax havens popular in India are Cyprus, Singapore, Switzerland, Cayman Islands, Liechtenstein, Monaco and Andorra.

When, in early 2000, the global community felt that a huge amount of state funds were stolen by political heads and rulers of poor countries, and the same were deposited in banks implementing secrecy laws, the UN General Assembly adopted a convention against corruption which came into force in 2003. Since this Convention enables a country to recover corruption money from any part of the world, India finally ratified it in 2011. In the same year, India also ratified the 'Convention to prevent and control trans-national organised crime including money laundering'. Although India has an option to initiate recovery proceedings of its lost wealth under these conventions, but it has not done so. The BJP government which committed itself to speedy recovery of 'Indian funds stashed in tax havens' during the polls has so far followed the path envisaged under the Double Taxation Avoidance Agreements

and Tax Information Exchange Agreements. Only during the Union Budget 2015-2016, the Finance Minister promised to bring a new Black Money legislation and has declared non-disclosure of foreign income or foreign assets in tax returns as a predicate offence.

With this background, in Part-I of this book - "Black Money in World Economy: An Indian Perspective", I will take you through some of the critical global milestones pertaining to black money as they have unfolded with the passage of time while simultaneously dealing with the Indian position *vis-à-vis* such events. In fact, this journey is less about reporting the events as they took place, but is more about insightful analysis of the unseen 'windows' throwing new sets of issues for tax administration in India and elsewhere. Part-I takes readers through the notorious tax havens like Liechtenstein, Mauritius, the obstacle of secrecy laws and the controversial information of Indians holding accounts in HSBC bank. Part-I questions how legally justified was the stand of the UPA Government in showing reluctance in sharing the identity of those Indians especially in the backdrop of the Supreme Court judgment in *Ram Jethmalani v. Union of India*[2]. In this Part readers would come across that way back in 2008 I had stressed upon effective utilization of the in-built scheme of exchange of information provided in the DTAA. Quite surprisingly, years later, this has now been translated into the idea of automatic exchange of information as mooted under the aegis of G-20 summit.

To sum it up, Part-I undertakes a journey in an unapologetic and objective manner with the sole motive of unearthing answers to the most pertinent question i.e., whether the much talked about global crackdown on black money has actually resulted in any meaningful change and where India as a nation stands on this issue?

2. 2011-TII-05-SC-INTL : (2011) 8 SCC 1.

Challenge before Revenue in C-21[1]

Chapter 1 opens in the context of the OECD meeting held in Capetown in January, 2008 for addressing the new challenges faced by the global tax administration. On the same note, this Chapter flags the new trend where India is increasingly becoming a party to parking money in tax havens and devising strategies to aggressively avoid tax.

CHANGING CONTOURS OF GLOBAL BUSINESS AND CHALLENGES BEFORE REVENUE ADMINISTRATION IN 21ST CENTURY[2]

When it comes to hogging the headlines in the national media and also stirring some of the political hornet's nests, it is generally the Supreme Court or a couple of High Courts from the judiciary side. However, for a change, this honour went to the Income Tax Appellate Tribunal (ITAT) which decided the *Mayawati gift* case,[3] reported first by TIOL about three weeks back. Many national political parties sharply and adversely reacted to the final findings of the Tribunal. A few were also very candid in commenting that such a decision may legitimise political corruption in the country. Such a comment certainly calls for a debate. But I do not intend to participate in such a debate at this stage. What I want to focus on is a much larger, not only domestic but also international issue of tax shelter schemes like gift from supporters to a politician, growing magnitude of international non-compliance, highly specialised tax advisory agencies assisting MNCs in tax avoidance, the nexus between tax and corporate governance, role of accounting and tax intermediates, rapid changes in tax policies and focused programmes to reduce transaction costs for taxpayers. In a nutshell, I intend to take a look at the challenges before tax administration in the 21st Century.

What really provoked me to embrace such a challenging topic for this article this week is the OECD's Alert which is sent to all registered journalists with the OECD Media Group.

And this Alert was about the fourth meeting of the Forum on Tax Administration which is scheduled to kick start today at Cape Town. Close to 130 participants from 40 countries, including India and China, are

C-21 means 21st Century.
Published in www.taxindiaonline.com, TIOL - COB(WEB) - 65, 10 January, 2008.
Ms. Mayawati v. Deputy Commissioner of Income Tax, 2007-TIOL-455-ITAT-DEL.

attending this high-profile conclave of revenue strategists. Interestingly, this is going to be chaired by an Indian-origin Commissioner of South African Revenue Service, Mr. Pravin Gordhan. Ideally, I should have attempted this piece only after the deliberations are over, and key recommendations are made public. But, so interesting and challenging I found the agenda items that I quickly caved into my temptations to pen my perceptions about the challenges before the Indian fiscal planners.

Popular Tax heavens among rich and famous Indians & Indian diaspora

The first item on the agenda is - New trends in global business and wealth management and the implications for revenue bodies. I do not think that TIOL readers really need to be told in details about the rapidly-changing contours of global business. India has, in 15 years' time, earned the status of being an integral part of the global business map. And, the pace at which established principles of global business are paving ways for new rules of the marketplace because of irresistible trade and capital liberalisation coupled with history-making growth in communication technologies is stunning. Those who are at the centrestage of this change may agree with me if I say even

sand dunes at the peak of scorching and windy summer cannot change at this pace! If we take the example of Indians, one can clearly see how the moneyed, wealthy and even middle-level business entities have started enjoying the borderless global business prospects. What our policy makers used to read about how taxpayers in developed economies use shell corporations, fake trusts, phantom companies in offshore financial centres, undue advantage of tax shelter schemes and tax havens to minimise their tax

liabilities or transport their profits to such destinations for future enjoyments have indeed become a reality for the Indian economy. And this is where a great challenge lies for our fiscal administration which has to gear up to meet the global challenges of tax evasion not only by the resident taxpayers but also by the international entities which are doing a great deal of business with India. The significant issue is how to curb the international non-compliance with the domestic fiscal laws?

Cross-border violation of domestic tax statutes can put on different types of clothes, including belligerent tax frauds. Going by the facts that the RBI has unrecognisably liberalised the foreign exchange and overseas investment norms for individuals, firms and companies, the possibility of all such entities creating overseas capital assets and bank accounts but not declaring the same to tax authorities here cannot be ruled out. And what helps them in making good use of their concealed assets is the genre of international debit and credit cards. Going by the trend that a large number of Indian corporates have been taking over business abroad and setting up their own shops, can it be ruled out at this stage that they would not channelise their funds in offshore trusts and shell companies to evade tax. Or, let's take the example of legal transactions in the

form of transfer pricing whereby profits of one centre can be shifted to other where tax rates could be lower than in India. Mauritius is one fine example of tax shelter which is being increasingly used by not only mega Foreign Institutional Investors (FIIs) but also a large number of domestic companies which are floating OCBs and channelising their funds to our bourses for making untaxed profits. Multi-location business shops also help one in undervaluing traded goods and services. In the years to come, the related parties transactions are going to be more than 85% worldwide, and no fiscally sensitive country can afford to ignore this reality-in-the-pipeline. Therefore, what is required for a country like India is to assimilate the change drivers insightfully in their fiscal policies and also adapt their organisational structures to tackle such challenges. Ideally**,** there should be a dedicated Directorate for both Income Tax as well as Customs and Service Tax, to work on long-term strategies.

In tune with the global trend to identify tax shelter schemes and tax minimisation arrangements being practised by large corporates, India should also compile a directory of all such schemes to counter them effectively. This becomes highly critical in the backdrop of the growing gaps between the tax legally due and the tax actually collected. Tax avoidance is a global phenomenon where accounting & tax advisory agencies and other legal intermediates specialise and coolly fight a battle of wits with taxmen! How to neutralise their efforts and also wits, to maximise revenue is going to be the biggest challenge of the 21st century for tax administration in every country. So far as India is concerned, it certainly needs to jack up its Tax: GDP ratio close to 14-15% for funding various socio-economic infrastructure projects. And to manage such a

ratio is going to be a Herculean task. It needs to identify tax shelter schemes like charity institutions, various sorts of trusts and societies which have evidently become a mega tool for tax evasion. True, politics may not make it an easy task but the history of globalisation is witness to the fact that the politics has to ultimately give in to economic and fiscal rationales.

Another area where India should kick-start a debate is the relationship between tax and corporate governance. Our fiscal planners should initiate a dialogue with the top management of potential revenue contributors and take much greater interest in tax strategies or planning they are following to manage their tax liabilities. Here, the Government may also examine the role of tax advisors and financial institutions to fortify the culture of tax compliance. Going by the fact that huge private equity funds are on prowl worldwide, and they flourish partly on tax shelter and avoidance schemes, revenue administrations worldwide seem to be gearing up to keep a close watch on them. And India also needs to do the same.

And lastly, I would like to recommend that India should actively and aggressively identify its major business partners and tie up with their revenue administration for regular exchange of information. Here the in-built scheme of exchange of information under DTAA should be effectively utilised to get an insight into such cross-border transactions. For the Customs, getting online information of shipping bills filed in exporting countries should be the future goals to curb undervaluation and mis declaration and also non-tax functions like trade facilitation. Advance Pricing Agreement (API) is one highly efficacious global mechanism to curb undervaluation problems in Customs. A time has come for India to embrace this instrument to mitigate the rampant problem of undervaluation. Enforcement is an integral part of tax collection and India should also modernise its tax collection machinery at the pace being dictated by the changing profiles of global business patterns. Since humans stand at the centrestage of all such planning and policies, training of tax officials abroad should not be ignored in the name of austerity. Regular

exposure to overseas transactions norms is ultimately going to sharpen their skills to detect non-compliance cases in India. The need of the hour is to set up a special task force to lay down the roadmap for future fiscal strategies rather than somehow managing with in-house committees of experts known for jaded ideas. But will our Finance Minister do it? Only time will have an answer to this question!

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Flirtations with Liechtenstein – A Tax Haven

Chapter 2 introduces the problem of tax havens in this book and there could not have been a better way to do so than demystifying the story of picturesque "Liechtenstein tax haven" which runs into three articles. Devoting three back to back articles certainly reflects my love for this picturesque yet notorious tax haven. These articles would take readers back to the year 2008 when the German Revenue Authorities bought a CD from a former employee of the LGT Bank of Liechtenstein which contained details of 87 Indians coming from small districts in Maharashtra to villages in Bihar. Readers would face an unconventional recommendation made in this Chapter as to why India needs its own tax haven.

The third article of Chapter - 2 ***"Liechtenstein Episode: India needs to pursue fiscal diplomacy to obtain black money database"*** *records the official feedback coming from the CBDT in response to my immediate previous article i.e.,* ***"Liechtenstein black money database"*** *- How should India respond to it?, where I have strongly questioned the inaction of CBDT for not taking enough actions to obtain the precious data from the German authorities.*

LIECHTENSTEIN - A BELEAGUERED TAX HAVEN - TAXING TIME LIES AHEAD[1]

As I had promised, in my last week article, to take a critical look at the German offer of providing sensitive data on black money owned by Indians but stashed away to a tax haven in Europe. Readers may recall the news reported by some of the News Dailies that Germany which has bought the disc containing names of mega tax evaders from one of the former employees of the LGT Bank of Liechtenstein has apparently offered India that part of the database which contains the Indian names, the addresses and the sums deposited with the Bank located in one of the few surviving tax havens in Europe. Tax evasion costs billions of dollars not only to Western governments but also to rising economies like India, annually. And tracking it down costs another billion in terms of money, time consumed and barriers of bank secrecy laws. These tax havens which have been branded as 'uncooperative' by OECD have survived for centuries as they offer a safe parking place for ill-gotten wealth and taxes evaded across the world, for their own parasitical existence.

1. Published in www.taxindiaonline.com, TIOL–COB(WEB)–85, 29 May, 2014.

Since this issue involves many critical dimensions of global tax evasion scenario, and also combined fight against black money by multilateral agencies and governments across many continents, I would like to split it into two parts. In the first part, I would like to touch upon the history and financial chemistry of some the tax havens which are relevant for the Indian tax authorities and the second part would focus on the on-going battle between Germany, Britain and others on the one side, and Liechtenstein on the other side, and the implications of the black money database on the Indian political economy!

What is a tax haven? If one goes by the dictionary meaning

it is an independent country with low tax rate. But it has many more attractive features like bank secrecy laws, no fiscal bilaterals with any country, no inquiry about the depositors, minimal capital gains and savings tax rate, exempted tax shelters like trusts and foundations and many more. In simple words, a tax haven offers a safe and protected shelter to not only tax evaders worldwide but also to drug, gun-running and smuggling syndicates across the world. Since the banks located in these tax havens strongly believe that the money has no colour, it allows all sorts of criminal syndicates to hire its services for safe keeping of their ill-gotten money.

So far as common Indians are concerned, all of us are familiar with Switzerland. But there are dozens of other tax havens like Monaco, Cayman Island, Cyprus, Andorra and Liechtenstein. Some of these tax havens have responded to the rising global concern about the use of ill-gotten money by terror outfits. After September 11, the USA took many initiatives and OECD came under pressure to introduce 'cooperation framework' for them. And, many of them have indeed signed such pacts and they do share information provided an investigating agency has specific information about a terror group. Switzerland is one of the cooperative variety. But Liechtenstein is not. Of late tax havens like Liechtenstein have gained from growing relaxation on cross-border movements of capital, electronic transfer of payments and progressive elimination of withholding taxes.

Let's focus on Liechtenstein more as this is the country which is in news. It is a 160 sq km landlocked country perched on a barren mountainside between Switzerland and Austria. About 80 years ago, it was known as island of penury in Europe. But it is now one of the vibrant financial centres in Europe, having put in place a policy of freedom for tax and financial privacy. Immediately after the First World War when the opulent population across the world was looking for safer vaults, it offered the same at virtually no cost. Although it has an elected Parliament but it is virtually ruled by a dynasty.

Since 1712, the Royal family has been ruling it from a mountain side castle known as *Vaduz*.

It was all kicked off by the father of the present prince Hans-Adam when he began inviting banks to this bald mountain. The Royal family itself is at the centre of main financial group known as LGT Group. LGT Bank which offers tax shelter has about 76000 loyal customers and it made about Euros 100 million profits last fiscal. Its key publicity oneliner is "Invest like the Prince"!

The present Prince Hans Adam took over the reigns of power from the long time ruling prince Franz Josef II in 1989. He was more power hungry and adopted a revised Constitution in 2003 and vested in himself the power to dissolve Parliament and to appoint an interim Government and also nominate five ministers. In short span of time, it has turned into a highly industrialised country with some of the globally known brand names like Hilti, a power tool-maker and Ivoclar Vivadent, the world's largest manufacturer of false teeth!

Today, this landlocked country has no obligation to share any information with any country. What adds lure to its banking secrecy is the presence of most beneficial trust law in Europe. Its trust which is known as Stiftung or Foundation, is an independent entity which holds assets with utter anonymity. There is no legal requirement for information about beneficiaries or trustees to be made public. In other words, these entities have really no knowledge about the real owners of the assets.

Only in recent years, when OECD put pressure on the Royal Family, Liechtenstein offered a database of 163 suspicious activity reports, and about 113 of the same were forwarded for prosecution. In the recent months it has been locking legal horns with Germany and Britain because these countries have bought database of one of its principal banks which contains the names of tax evaders in these countries. Germany loses huge taxes because of geographical proximity

with this tax haven which lures wealthy taxpayers by providing tax shelters. Germany loses about Euros 30 billion annually because of unpaid taxes. Its tax authorities believe that about Euros four billion are stashed away to this tax haven by German social elites.

Armed with such a detailed homework, Germany paid USD 4.2 million and bought a DVD of database containing names of tax-evaders. Taking a cue from this database the German authorities have been chasing as many as about 900 wealthy taxpayers who have moved away their wealth out of the country. About 160 taxpayers have been netted and about USD 41 million have been recovered from them. About 90 of them have admitted making payments to the tune of Euros 28 million. The most prominent evader so far is believed to be former Deutsche Post top executive who has allegedly evaded USD 1.5 million.

The British Response

For the rich and famous in Britain, the traditional hot spots for sheltering wealth under various schemes have been Gibraltar, Channel Islands, Virgin

Islands and Switzerland. According to one estimate, commercial property worth Pound 380 billion across Britain are guesstimated to be held by funds and investment groups located offshore in these islands. So, when this opportunity came up from Liechtenstein which has of late become a big attraction among the wealthy population in the country, the HM Revenue & Customs is also believed to have paid about one lakh Pound to one former employee of the LGT Bank. A keen investigation has already begun against hundreds of Britons, and the tax authorities look forward to recovering about 200 million Pounds. Readers may recall that last fiscal when the HM Revenue introduced an Amnesty Scheme, it mopped up about 400 million Pound revenue from 65000

taxpayers who had held offshore accounts. Now, this Liechtenstein database is believed to be containing about 1200 names of British nationals, and a nationwide probe under the leadership of Acting Chief Dave Harnett, is already underway.

I am sure TIOL readers are very curious to know what is there in 'store' for the rich and famous from India in this database. But, let's wait for the second part to know its 'real' implications for India.

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LIECHTENSTEIN BLACK MONEY DATABASE - HOW SHOULD INDIA RESPOND TO IT?[2]

BEFORE I delve a little deeper into the Liechtenstein issue and its implications for India, let me first pick up the thread from the last week's article. The two major powers of the European bloc and strong legs of the OECD - Germany and Britain - have paid huge price (or call it reward to an 'informer') for the most controversial disc of database in the history of Information Technology. Since Liechtenstein authorities declined to share any information with them about all those who benefited from its foundations and banks, Germany and Britain seem to have drummed up swelling diplomatic and political support for what Liechtenstein calls as illegal purchase of stolen data.

The latest is that the US Internal Revenue Service has also taken keen interest in the information stored in this much-

wanted DVD. It is learned that the US Exchequer loses about USD 100 billion annually due to offshore tax evasion. About 100 US rich taxpayers are under probe for their funds stashed away in Liechtenstein trust. In fact there has been a virtual rush in launching

2. Published in www.taxindiaonline.com, TIOL–COB(WEB)–86, 5 June, 2008.

investigations by European and other developed countries like Canada, New Zealand and Australia.

There are live chances that under pressure from many of the EU Members the European Commission is likely to work out a new legislation to plug the loopholes which lead to escapement of income to Trusts and other tax shelter schemes. Although the majority of EU Members are in favour of exchange of information and dilution of bank secrecy but such a move is likely to be resisted tooth and nail by countries like Austria, Luxembourg and Belgium. Some of the key international institutions like IMF is also likely to look into possible checks against money-laundering, fraud and terrorism.

A Look at Liechtenstein's Response to Crisis

Liechtenstein is a beleaguered country today. It is fuming with rage that no State has a right to look into private details of any taxpayer as tax avoidance is different from tax fraud. It is very clear in its thought that ''fiscal interest of any country cannot be placed ahead of the rule of law''. Its Prince has promised to expedite the reforms of trusts and foundations but without diluting the confidentiality clause! It has already signed the Schengen Agreement this February and is likely to sign a money-laundering agreement but not at the cost of diluting bank secrecy laws!

Impact on India

So far as India is concerned, our elected democratic

Government seems to have shown strange lethargy in accepting the German offer to share the data related to Indians who figure in that sensitive database. It is believed that there are about 87 names of rich and famous Indians**,** including a few politicians of all hues. In fact, if our politicians would not have figured in the list, I would have doubted the authenticity of the database. Luckily, some of them are very much there!. But 'informed sources' believe that a large number is accounted by stock brokers. Let's see what is the truth in it when the actual action begins and the truth unfolds in the coming months. Once the database is formally handed over to the CBDT, it would be important for the Dr. Manmohan Singh Government not to examine it from political perspective of tax evasion as the nation is close to a general election and it would be right time to bring such black money carriers to book and improve the image of his Government before the polls. It has never ever happened in the fiscal history of India that such a compiled database with details of funds parked in an offshore country has been made available. Our tax sleuths should be given a free hand to bring such tax evaders to the surface.

Another important benefit to the country which may accrue is that for the first time, our tax analysts will have an opportunity to peep into the magnitude of

black money being parked outside country in just one country, and they may be able to work out some rough estimates of such funds stashed away in various tax havens. After September 11, it is learnt that when the US began putting pressure on some of its friendly tax havens to share data with its authorities to detect funds of terror outfits, thousands of Indians had brought back their offshore funds to India in various forms through the Mauritius route, OCBs and NRI-route. And thus, our forex reserves benefited from it.

Besides all these measures, what India needs to consider is

to create its own tax haven in Lakshdweep or Andaman Islands to exercise better control over the black money moving out of the country and also the funds of terror outfits if any. Black money is a reality as it cannot be wished away, so is the tax haven. Since no government worldwide can completely eliminate generation of black money in any economy like prostitution, smuggling, liquor and cigarette, it is better to offer it a legal vault where such funds can be parked, and the same can be ploughed back into the infrastructure and social welfare activities in the country. All we need to do is to pass a Parliamentary legislation and give assurance to patrons of such a bank that their secrecy would not be disclosed to Indian tax authorities.

Conclusion

What the world needs to learn from the Liechtenstein episode is that if a robust financial system is the future goal of the well-regulated and transparent global economy, a coordinated onslaught against tax havens needs to be launched by all multilateral agencies, including the United Nations. The fact is that more than the rich getting away with fiscal or financial crime, the real danger emanates from money-laundering by global terror outfits which pose a serious challenge to the authority of the institution of the State and a Republic. Some of the developed countries may treat the sporadic incidents of violence as a mere scar on their cheeks but such organised and well-funded terrorist activities in a country like India do attack at the root of the power of the State which finds it beyond its means and abilities to completely frustrate their crude designs. India has got to take a tough stand against black money agents who have habitually been behaving like the pirates of 17th and 18th centuries or the parasitic Britishers who took away the best of our historical treasure-trove! It is high time India should start behaving like a future leadership to the humanity like in the past and take all divisive and cross-border terror outfits by their horns. It can be done by cutting their cash-rich umbilical cord. And what can indeed help in this war is a possible battle against black money and its

high-profile carriers! Let's hope our elected government does not disappoint us!

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LIECHTENSTEIN EPISODE: INDIA NEEDS TO PURSUE FISCAL DIPLOMACY TO OBTAIN BLACK MONEY DATABASE[3]

TIOL readers may be surprised to see yet another piece being added to the already concluded series on Liechtenstein and other tax havens. But what literally compelled me to write one more article is the overwhelming feedback coming from a reasonable number of thinking readers who share our concerns and also the steps suggested. Some of them even suggested additional measures which can be taken to bring back the stolen public funds or tax evaded to India. The second reason is the official feedback coming from the CBDT which claimed that it is not true that India has not shown keenness to obtain the precious data from the German authorities. In fact, they claimed that having seen some news coverage in foreign media CBDT had taken the initiative to write a letter to the German authorities and coaxing them to share the database related to the Indians who have stashed away corruption money or tax evaded or public funds stolen to the tax haven.

The CBDT told us that after they had written to the German authorities, the BJP leader, Mr. L.K. Advani, wrote a letter to the Prime Minister who in turn forwarded the same to the Finance Minister. And the Finance Minister assured Mr. Advani that proper steps have already been taken. But the enthusiasm of German authorities apparently did not match the zeal of Indian tax authorities. They sent a nicely-worded letter but the underlying message was a simple 'thank you'! Recently a reminder was dispatched to the Germans and this time, it is learnt that they have given some positive response. But even

then none in India can tell us how much time will it take?

Meanwhile, the feedback coming from our Readers suggest that India should not solely depend on the Germans, and try to open up a new line of fiscal diplomacy by contacting the HM Revenue which has also acquired a similar DVD of database of rich and famous having accounts with the Liechtenstein Foundations. Given the long history of diplomatic relations with the British, the success here could be quicker. In fact, one of the Readers suggests that India should not take the database free and should volunteer to pay for a part of the cost incurred in acquiring the DVD from a former employee of the LGT bank.

A few retired revenue officials suggest that India should simultaneously take up the issue with some of the multilateral agencies and all those international organisations which work against the presence of tax havens and obscure financial centers on the global financial map. And I fully agree with such a suggestion as agencies like UN and World Bank have voiced their serious concerns over the pernicious role being played by tax havens against the growing

3. Published in www.taxindiaonline.com, TIOL–COB(WEB)–87, 12 June, 2008.

transparency and accountability in cross-border movement of capital. The United Nations has even formed a Convention against Corruption and also an initiative for recovery of stolen assets which find a friendly shelter in about 50 tax havens that exist today worldwide.

Studies by various universities and global bodies indicate that offshore assets which are beyond the effective taxation of a legitimate government, are about one-third of total global assets. A little over half of world trade is routed through tax havens. Developing and poor countries lose revenue far greater

than annual aid flows. Certain studies reveal that the magnitude of funds held offshore by wealthy individuals is about USD 16 trillion which result in annual loss of revenue to the tune of USD 300 billion. An old study of World Bank suggests that the cross-border flow of the global proceeds from criminal activities, corruption, and tax evasion is about USD 1-1.6 trillion per year (See Box for some stunning facts).

Examples of Successful Repatriation from Tax Havens

It took 18 years for Philippines to get repatriation of USD 624 million of Ferdinand Marcos money held in Swiss Bank accounts.

Between 2001-2004, Peru recovered USD 180 million stolen by Vladimiro Montesinos from several tax havens.

Between 2005-2006, Nigeria recovered USD 505 million of the Sani Abacha money frozen and forfeited by Swiss authorities.

A Few Stunning Facts

The cross-border flow of global proceeds from criminal activities, corruption, and tax evasion is pegged at between USD 1 trillion and USD 1.6 trillion per year.

25 % of the GDP of Africa is lost to corruption every year, amounting to USD 148 billion.

Corrupt money from developing and transition countries is conservatively estimated at USD 20 billion to USD 40 billion per year.

Source: *The World Bank and The United Nations*

Of late, a new realisation has dawned on global leaders that tax havens, generally developed economies, have become safe conduit for corruption and criminal funds coming from

poor and developing countries in addition to rich nations. Corrupt politicians and government from Africa, Asia and South America often park their ill-gotten funds there. And its implications on poor countries are so devastating that they often get caught in debt trap. For such

economies, the tax burden shifts away from capital onto labour which leads to insidious rise in income and wealth inequality. The damage is more if one considers the 'collateral fall-out' on growth opportunities lost for a nation.

So far as India is concerned, it has Double Taxation Avoidance Agreements with more than 80 countries but it has never aggressively pursued some of the global conventions against dirty money and shelters being provided by countries like Switzerland, Cayman islands etc. Knowing that a major chunk of national wealth has been taken out of the country, and the powerful developed economies have started talking about diluting the role of tax havens in favour of transparency, India should identify some of the tax havens which are favourite among Indians and try to forge some sort of official relationship for official exchange of information. True, it would be difficult but India can leverage the pressure with the help of agencies like UN and World Bank.

A time has come for many citizens groups within the country to trigger off a debate on this issue and build up pressure on the Government to make sincere efforts to achieve a shade of success in bringing back the lost wealth of the nation. There are many live examples worldwide where recovery of stolen public funds or revenue evaded has been executed (See box). Even the conscientious voice within our polity should join hands to sensitise the political framework to continue working in this direction. Rather an organised mechanism should be developed to study the investigative efforts and the complexity of legal framework involved in not only recovering such money but also prosecuting the corrupt

and money launderers. Let's hope a new chapter is opened up with the Liechtenstein episode!

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The Bank Secrecy and G-20 Initiatives

Chapter - 3 maps the journey of the G-20 initiatives from 2009 to 2012 and its concerted course of action for a crackdown against tax havens and bank secrecy laws. Simultaneously, the Chapter also records the position of India vis-a-vis this changing international dimension. This Chapter shares some startling figures and statistics based on various international surveys for showing the enormity of loss suffered by nations to these tax havens.

Chapter-3 begins in year 2009 onwards, when the global recession was at its peak and US had suffered billions of dollars to these tax havens, which gave enough reasons for the Obama administration to target these tax havens and bank secrecy laws. The bank secrecy laws have always been one of the biggest impediments in aggressively tracking funds parked in foreign banks. So obviously, this blockade has to be breached by the international community, if we want to make any serious stride towards putting screws on these black money generators. This chapter would make a reality check on how much we have been able to achieve on this front.

The article ***"G-20: Will it be a 20-20 against tax havens? Will PM come back with some good news for India?"*** *captures a critical political episode in India in the backdrop of 2009 general elections. This was the time when the then BJP Prime Ministerial Candidate Mr. L.K. Advani in April 2009 promised the constitution of a Special Investigation Team (SIT) for dealing with the black money issue, if BJP is voted to power. The article* ***"Battle Against Tax Haven: G-20 Needs to Put More Pressure on Switzerland"*** *is set in the backdrop of landmark G-20 summit at Cannes in November, 2009 which was a success from Indian perspective on the issue of automatic exchange of information.*

In the next article, ***"Tax Haven - Sharing of Banking Information - Is it Not a Bluff?"*** *I have questioned the stand of the Indian Government not to disclose the identities of the 700 Indians names present in the list of the HSBC bank account holders provided by the French Government. This article not only dwells into the evasive/ circumventing approach of the Indian Government when it comes to signing of bilateral agreements like DTAAs but also exposes how India*

had assumed an unwarranted non-disclosure obligation in not disclosing the identity of those Indians holding the foreign bank accounts.

Towards the end, this Chapter revisits the question doing a reality check -whether era of bank secrecy laws can come to an end? I have cautioned the trend as how the parked funds are merely getting relocated from Tax Haven A to Tax Haven B, and of course, the double standards of G-20 when it comes to aggressive tax planning by the MNCs in the developing nations. Chapter - 2 ends on a note when the present Prime Minister, Mr. Narendra Modi, attended the G-20 summit in Australia in November, 2014, followed by the Indian predicament in signing the Foreign Account Tax Compliance Act.

Chapter 3

TAX HAVENS UNDER SIEGE - OBAMA, G-20 LITERALLY LAUNCH WAR AGAINST OFFSHORE BANK SECRECY JURISDICTIONS[1]

Tax havens across the world are under siege. The rapidly deepening global economic and financial crises have, for the first time, comprehensively directed the attention of many developed economies towards harmful effects of tax havens. Perhaps, for the first time, big economies facing worst fiscal crisis, have begun to look at tax havens as such offshore jurisdictions which have been 'stealing' their legitimate tax revenue by actively conniving with wealthy tax dodgers.

The Obama-led US Administration has literally launched a war against tax havens. And what has lent it a major bout of support is the US Congress which has firmly stood by Mr. Obama for a back-breaking crackdown on tax havens and opaque offshore financial centres. One of the senators Carl Levin has gone to the extent of sponsoring a bill which was once piloted by Senator Barack Obama himself. This bill has listed out as many as 34 offshore secrecy jurisdictions, including Switzerland, Hong Kong, Cayman Islands, British Virgin Islands, Liechtenstein, Cyprus, St. Kitts and St. Vincent, for sustained action and penalty. It further proposes to direct the Treasury Secretary to add and subtract a name from the list

of offshore jurisdictions with secrecy laws that unreasonably prevent US tax authorities from collecting information unless they have information exchange framework that overcomes such secrecy barriers. It proposes a host of special measures against such jurisdictions, financial institutions and others which impede US tax enforcement.

What has triggered such a massive campaign against tax havens is the stunning revelation by one of the top executives of the Swiss Bank UBS AG - a leading player in global wealth management industry with enviable record of client secrecy and virtually no information exchange track record. The revelation was about the extra mile the top executives of the private banker go to please their rich clients. One of the American clients having earned a good profile with the banker asked its wealth manager to bring in precious diamonds with part of his offshore funds. And it was done by smuggling in valuable diamonds in toothpaste tube. This scandal brought into the focus how huge wealth has been moving out of the US Economy without paying taxes. More than 47000 US

1. Published in www.taxindiaonline.com, TIOL–COB(WEB)–125, 5 March, 2009.

wealthy taxpayers have stashed away their wealth in Switzerland which amounts to several billion dollars. One estimate puts that tax abuse costs the USA as much as USD 100 billion a year. Soon, the US Senate Committee started probing into the scam and a top UBS executive has also testified before it about the magnitude of tax evasion resorted to by its clients in the USA.

Admitting the guilt, the UBS has agreed to pay as much as USD 780 million in fines as part of a deferred prosecution agreement with federal prosecutors.

Although the Swiss economy suffers from the siege mentality and it has begun to orchestrate support for its 'rich' tradition of bank secrecy but it has agreed to the UBS initiative to share information about the tax dodgers with the US administration.

An US Government report has revealed that 83 of the 100 largest publicly traded US Corporations had placed subsidiaries in tax haven jurisdictions to pay less on their tax bills. This included many corporations that had received billions of dollars in bailout funds from the federal government, such as Morgan Stanley (158 subsidiaries in the Cayman Islands and recipient of USD 10 billion in TARP money), Citigroup (90 subsidiaries and USD 45 billion in TARP funds), and Bank of America (59 subsidiaries and USD 45 billion).

Given the fiscal deficit of USD 1.2 trillion of the US Government, Senators believe that if the US has to succeed in enhancing the share of revenue collections from 16 per cent to 19 per cent by 2013 it will have to reduce the tax gap by sustaining the crackdown against tax havens.

The reverberations of the war against opaque jurisdictions and small island economies (SIEs) hosting offshore finance centres can also be heard in Europe where the UK and Germany have been actively cracking down on tax havens. The issue has risen to such a political height that it is going to be acrimoniously discussed and debated at the G-20 Summit in London next month. In fact, the French President, Mr. Sarkozy, was recently quoted as having said that the Switzerland private bankers may be blacklisted by many EU countries for their unwillingness to share information about tax abuses.

It has been reported that following the G-20 preparatory summit in Berlin recently, officials have been preparing a new blacklist of uncooperative havens.

Notably, leading centres of secretive offshore activity including Liechtenstein and Panama are among more than 30 nations that have failed to sign agreements to hand over information about corporations and individuals who take advantage of their secrecy and their low taxes. Now, the G-20 nations plan to promote a series of sanctions which are designed to deprive them of billions of dollars of business.

The G-20 is believed to be scripting its blacklist from three overlapping groups of tax havens: those which have no double taxation treaties; those which

have declined to accept the idea of new Tax Information Exchange Agreements (TIEAs); and those which had agreed in principle to TIEAs but have failed to sign them.

Last week, British Prime Minister Gordon Brown called for more rigorous global supervision of the banking system. No hedge fund or tax haven should be allowed to fall through the cracks, he added.

Most Studies indicate that the UK is losing at least Four billion Pound a year through its residents stashing away their taxable money in offshore tax havens.

The global campaign against tax havens has become so serious that one could see Britain targeting some of its own overseas territories, including the Cayman Islands and the British Virgin Islands, where British banks and corporations use scores of subsidiaries to avoid tax.

Some of the private studies have found that so popular are these tax havens among private banks that mind-boggling number of their subsidiaries operate from them. As many as 1207 subsidiaries have been counted. And that is about 22% of all the banks' subsidiaries. In the case of Barclays almost 30% of its subsidiaries were found to be in tax havens. An

equivalent survey in the USA found that no bank had more than 10% of its subsidiaries in tax havens, and their overall exposure to this market was much lower than that of the UK banks overall. Cayman Island is the most popular haven location: 262 of the subsidiaries are based there. Jersey comes next with 170.

According to a Study done by Tax Justice Network, as much as USD 255 billion a year of revenues are lost due to tax havens. Another study estimates that developing countries alone lose USD 160 billion desperately needed revenues through a lack of transparency in the way multinational and other companies conduct international trade - and of course tax havens play a critical role in providing that opaque system.

Tracking History

In the past 25 years or so, there has been a stunning rise in the number of small countries graduating as tax havens and fake locations for actual as well as shell corporations. A large of these *'paradis fisscaux'* as the French describe them are small tourist centres. Out of about 70 or so tax havens identified in a latest count, a major chunk merely provide the service of a booking centre for large global financial hubs in Tokyo, London and New York. It is estimated that as much as half of the global stock of funds either resides in tax havens or passes through them!

Different studies estimate that the stock of wealth held offshore is estimated at USD Six trillion. Many small island economies host offshore finance centers,

and some SIEs are highly dependent upon offshore finance. Since 1998 a series of international initiatives have been launched to combat harmful tax practices, money laundering, and inadequate financial regulation. These initiatives will transform the economies of many SIEs. What may further change the landscape of global

wealth management industry and political economies of these SIEs is the USA and G-20 led crackdown on tax havens which may see the glorified tradition of banking secrecy laws paving the way for global tax information exchange treaties. And if that happens, besides the big economies, developing and underdeveloped economies from the Third World would be a major beneficiary.

What about India? Our next week article will focus on India - the opportunities lost by our elected governments in the past, the much-debated size of our parallel economy and which are the favourite tax havens for the rich and famous from India. We will also discuss what India can do to bring back some part of the total Indian wealth vaulted in some of these tax havens

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G-20: WILL IT BE A 20-20 AGAINST TAX HAVENS? WILL PM COME BACK WITH SOME GOOD NEWS FOR INDIA?[2]

Today is April 2, and it is going to be a historic day for the global economy as the political heads of G-20 nations will be breaking their heads together in a few hours in London, to find ways to wriggle out of the festering financial cesspool. Indian Prime Minister Dr. Manmohan Singh is one of the few from the emerging economies to be invited to this event. The agenda for this mega event is simple - how to revive the 'oxygen-starved' global economy, particularly developed Western economies, which are close to zero growth rate and seized of the rising graph of unemployment, resulting in hostility of local populace towards expatriates and, thereby upsetting the global socio-economic equilibrium.

Apart from the fiscal stimulus packages and perhaps a consensus to prevent a 'relapse of protectionism' in global trade, one of the items on the agenda which may concern India (least hurt by economic meltdown so far)

is going to be the issue of tax havens. After the sub-prime crisis originated in the USA and gradually engulfed all the financial centres worldwide, the global perception towards tax havens has drastically changed against their deleterious effects. Political leaders in leading EU countries and the USA have come out with a string of measures and statements for concrete measures against offshore and obscure financial centres, pledging commitment to bank secrecy regulations.

2. Published in www.taxindiaonline.com, TIOL–COB(WEB)–129, 2 April, 2009.

Incidentally, the history of tax havens is rich with threads of linkages with London - the host country for today's Summit. A large number of most attractive and seducing tax havens have historically been the colonies of the erstwhile British Empire or autonomous entities having strong diplomatic and financial linkages with London even today. In other words, there is a Commonwealth thread running through some of the prominent tax havens today like Singapore, Cayman Islands, British Islands, Isles of Man, Jersey Islands, Caribbean Islands, Cyprus and many more.

But the iron hand of irony has swung so swiftly and ruthlessly that the same patron under Prime Minister Gordon Brown is about to outlaw the system of offshore tax havens and shadow banking systems. Under the Chairmanship of Mr. Brown, the G-20 may arrive at substantive decisions to either blacklist or declare some of the micro-state tax havens as financial *pariah*. If not outright blacklisting, they may fix a deadline for them to join the OECD framework on tax information exchange standards, and OECD may be directed to furnish a report on compliance till the next meeting is scheduled.

No doubt, some of the OECD officials were recently heard dispelling the myth of tax havens being responsible for the present financial crisis. And they are perhaps correct in their perspective but the fact remains that these tax havens have become 'islands of unaccounted wealth' stolen from various countries, and a good percentage of it may be held by terror outfits, criminal and drug syndicates, corrupt politicians and bureaucrats and unpatriotic wealthy class. At least half of the global finance is routed through these offshore islands which manage anywhere between USD 7 to USD 11 trillion funds.

A clue to such a Himalayan magnitude of tax evaded funds can be found from the statement of US President Barack Obama when he said that there is "a building in the Cayman Islands that supposedly houses 12000 corporations. That is either the biggest building in the world or the biggest tax scam in the world". The fact is that whether these are dirty money or not, governments in poor countries have been deprived of legitimate tax revenue which could have been used for development and banishing poverty and malnutrition.

Thanks to the pressure of the USA and major EU countries, some of the micro-state tax havens have recently changed their official stands to follow the international norms for cooperation and transparency in fund-management. In a rush to catch April 2-deadline, several European tax havens, including Cayman Islands, have agreed to sign bilateral tax information exchange agreements. Till yesterday, about a dozen of them have given in to the international pressure.

Let's now move closer to home to see how the BJP's Prime Ministerial candidate L.K. Advani last Sunday reacted to the black money issue. In a Press Conference he blamed the UPA Government of adopting 'evasive' approach to

the issue. True, Mr. Advani had written a letter to the Prime Minister last May when the episode of

Liechtenstein had come out in the open, and the German tax authorities had found many Indian names in the tax evaders' list they had bought from a former LTG Bank employee. Former Finance Minister P. Chidambaram has retorted by saying that the Liechtenstein issue is being 'diligently pursued'. He is also correct when he says so but the fact remains that India has got nothing tangible so far even after one year of 'diligence'! Probably, the fault lies in our approach and also the intention behind our efforts. Even in the past our investigating agencies have traced certain funds upto the point of secrecy-shrouded Swiss Banks but we have not done anything except reporting so. India has never utilised its diplomatic and political powers to bring back its own money (estimated to be about USD 1.4 trillion in Swiss banks alone). Rather we have allowed such fund managers like tainted UBS, to operate from our financial centre in Mumbai.

By all conservative estimates, about USD two trillion funds of India are parked in various tax havens. And it is high time that our elected government makes serious efforts with the help of all multilateral and international agreements and guidelines to recover even a part of such wealth which could be ploughed into our infrastructure and social development. Kudos to Mr. Advani that he has gone to the extent of proposing a Task Force if he is voted into power. The Four-Member Task Force has been announced with names like S. Gurumurthy, well-known chartered accountant and writer specializing in investigative journalism; Dr. R. Vaidyanathan, Professor of Finance at the Indian Institute of Management, Bangalore; Mahesh Jethmalani, a renowned lawyer; and Ajit Doval, an acclaimed national security expert. All of them have agreed to work voluntarily on this Task Force. But if Mr. Advani is voted into power, he will have to expand this panel by inducting a couple of experts from the Revenue Service. This is not an internal security issue where a former police officer or others will be of great help. This is

a typical tax evasion issue for India where experience in Revenue matters would be required more than any other experience.

Before leaving for G-20 Summit, the Prime Minister has thankfully been briefed at length about the tax havens issue, and how galvanised is the international environment against them, and what can be achieved by India. Let's hope our Prime Minister who may not have preferred to speak on this issue in public in India but does speak out his mind and the damage tax havens have done particularly to poor countries and emerging economies like India. His efforts should also be to earn support of G-20 to bring Swiss Banks under pressure for exchanging information with Indian agencies like Income Tax, Financial Intelligence Unit, CEIB and Enforcement Directorate.

Apart from these efforts what may bring quick relief to the Indian economy in terms of its own finance is an Amnesty Scheme. This will perhaps persuade a

good number of Indians who might have stashed away funds to various tax havens. An attractive and flat tax rate of 25% may persuade a larger number. No doubt, many may argue for a much higher rate but the short-term objective should be to lure the wealth back into the country so that the outflow of wealth caused by downfall of our bourses may be offset and the financial crunch may ease significantly. Let's hope the Prime Minister comes back from G-20 with some India-specific good news as well.

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BATTLE AGAINST TAX HAVEN: G-20 NEEDS TO PUT MORE

PRESSURE ON SWITZERLAND[3]

The global economy is once again tottering (economists say we are heading for double-dip recession), and how to halt this pejorative process is a trillion dollar question. To find an answer to this question, the G-20 leaders last week met at Cannes in France. While discussing a host of issues, they renewed their commitment to Common Future if we go by the Final Declaration. One of the areas which predictably commanded their attention was tax evasion and offshore abuse syndrome. French President Nicolas Sarkozy told the media persons that they have identified 11 tax jurisdictions which apparently needed to do more to scale up to the expectations of the global financial system. One of such jurisdictions named by him is Switzerland.

The Swiss Government may be crying from the roof-top that they have largely complied with the OECD-sponsored international standards for exchange of information in tax matters but the halo of bank secrecy in Switzerland continues to be seen as not-yet-fully-pierced. True, Switzerland has caved in to pressure from certain rich and powerful countries like the USA and the UK but they have not yet done enough to inspire confidence in developing and poor countries of Third World which could easily gain access to critical information relating to their own citizens having illicit funds in Swiss banks.

Let's take the example of India itself. After Germany, India has obtained certain ''free'' information from the French Government which had bought a list of HSBC account holders from one of its former employees. And having found many Indian names, the same was passed on to India by the French authorities. The CBDT has been busy digging into old returns and assessment orders of some of these account holders. In fact, a few of them have voluntarily come forward to revise their returns and pay up. But a large number is not expected to come forward for any voluntary revision of their returns but the key issue is that the CBDT also cannot move many inches

forward as there is no legal sanction to

3. Published in www.taxindiaonline.com, TIOL–COB(WEB)–265, 10 November, 2011.

such information. True, India has revised its DTAA with Switzerland, and the same has also got approval of the Swiss Parliament but India is almost sure that as per even the amended provisions of Article 26, it may not succeed in getting much information on HSBC data 'gifted' by the French authorities. This clearly shows the limitations and the barriers Switzerland continues to pose to most countries in exchange of effective and meaningful information. Thus, G-20 has indeed rightly and boldly put pressure on Switzerland to come out clean by effectively diluting their bank secrecy laws and more proactive system for quicker exchange of tax information.

This Summit was also a landmark event from India's perspective as it almost endorsed the views of Finance Minister Pranab Mukherjee on automatic exchange of banking information. For quite sometime, Mr. Mukherjee has been championing the cause of auto-piloted information exchange system which is indeed more meaningful for investigation in tax matters. Making requests for certain information is by all standards a placid and reactive system which chains the hands of most countries before they make such requests. If a request for more information is to be made to a tax haven or low-tax jurisdiction, the country making requests has to have concrete details about the account holders etc. If such information is available with a country, where is the need to make a request? The present limitations in-built in most DTAAs or TIEAs may not succeed in fully piercing the veil of secrecy, zealously guarded by tax

havens.

Let's now go back to the Cannes Summit Declaration which noted that:

the Global Forum has now 105 members. More than 700 information exchange agreements have been signed and the Global Forum is leading an extensive peer review process of the legal framework (phase 1) and implementation of standards (phase 2). We ask the Global Forum to complete the first round of phase 1 reviews and substantially advance the phase 2 reviews by the end of next year. We will review progress at our next Summit;

many of the 59 jurisdictions which have been reviewed by the Global Forum are fully or largely compliant or are making progress through the implementation of the 379 relevant recommendations. We urge all the jurisdictions to take the necessary action to tackle the deficiencies identified in the course of their reviews, in particular the 11 jurisdictions whose framework does not allow them at this stage to qualify to phase 2;

We welcome the commitment made by all of us to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and strongly encourage other jurisdictions to join this Convention. In this context, we will consider exchanging information automatically on a voluntary basis as appropriate and as provided for in the convention.

During the Summit the OECD Secretary General Angel Gurria made a detailed presentation highlighting the major milestones achieved by the Global Forum since April 2009 meeting of the G-20 leaders. Kudos to the efforts made

by the Global Forum which led to additional revenue of EUR 14 billion to 20 countries in the past two years (See table). But what may be of special interest to TIOL readers is the future roadmap suggested to fully clip the wings of tax havens. They are as follows:

Move towards Multilateral Agreements: This is certainly a more comprehensive and sound proposal. In 1988, the OECD had tailored a Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Subsequently, in response to a call from G-20 leaders, the Convention was updated and opened to all countries. The Convention provides for all types of assistance on exchange of information (e.g., on request, spontaneously and automatic) and for all types of taxes. It now has 21 signatories. Six G-20 countries have already signed. This Convention offers G-20 and other countries a very powerful tool to ensure tax compliance by both individuals and corporations. Now that G-20 countries are leading by example, other countries should also consider signing the Convention.

Improve the effectiveness of automatic exchange of information:

Today, a good number of OECD and G-20 countries already use automatic exchange of information for certain income flows, whether under their bilateral agreements or in the context of multi-country agreements. The OECD and the EU are working to improve the effectiveness of these exchanges by developing standard formats, by improving countries' ability to match information, helping tax administrations to use the information more effectively and by reinforcing provisions that protect the confidentiality of the information exchanged. With an increasing number of countries showing an interest in this form of cooperation, the OECD promises to intensify its work to remove practical barriers that may hamper such exchanges.

(C) Create an Offshore Compliance Network: In its fight

against tax
evasion, the Forum on Tax Administration has established a dedicated
network of specialists, led by France and the US, and open to all G-20
countries, to tackle offshore evasion. This network held its first meeting in
Paris in September 2011. The network will identify the methods used to
evade taxes and develop co-ordinated responses to leverage the G-20
initiative, including the risks posed by e-commerce and new internet based
payment methods and the ways that non-residents use opaque corporate
structures established in offshore jurisdictions. As a basis for sharing
knowledge and experience, the network has already compiled a catalogue
of some 200 separate initiatives that tax administrations have taken to
tackle offshore evasion. Joining this Network is a good idea, and most third
world countries should take advantage of it.

(D) Put tax compliance in the broader context of countering illicit activities: Earlier this year developed and developing countries came together in Oslo to launch a new initiative aimed at facilitating cooperation between tax authorities and law enforcement agencies to counter financial crimes and illicit flows. Strengthening this forum would help counter tax frauds, corruption and other types of tax crimes.

Let’s hope the G-20 sustains the momentum of

Armageddon launched against tax havens and offshore abuse of global financial architecture even in future, and countries like India makes full use to the heightened combat environment and gains access to relevant information about the Indian wealth locked in tax havens. Even if India manages to bring back half of such funds, it may wipe off our fiscal deficits significantly, and augment the overall tax compliance environment in the country. If the situation demands India should also not shy away from introducing Offshore Voluntary Disclosure Scheme to mop up quick revenue (See table for how many tax jurisdictions have shown unmistakable propensity for such schemes).

Offshore Compliance Schemes		
Country	**G-20 Initiative - Schemes introduced**	**Additional Revenue Mop-up**
Australia	Offshore Voluntary Disclosure Initiative (2010/2011)	AUD 210 million additional revenue assessed. More than 8000 taxpayers made disclosure.
China	Broadening the network of tax information exchange agreements and increasing numbers of requests.	EUR 80 million (CNY 690 million) additional revenue yield (in 2010), expected to grow significantly.
France	Offshore Voluntary Disclosure Initiative (2009)	EUR 1.2 billion additional revenue yield. More than 4700 taxpayers disclosed undisclosed income.
Germany	Voluntary Disclosures (2010/2011)	Estimated additional revenue yield of EUR 1.8 billion. Between 25000 and 30000 taxpayers availed the scheme.

Italy	Offshore Voluntary Disclosure Initiative (2009/2010)	EUR 5.6 billion additional revenue yield. Total undisclosed assets: EUR 104.5 billion. Representing five times the amount from the 2002/2003 initiative.

Offshore Compliance Schemes		
Country	**G-20 Initiative - Schemes introduced**	**Additional Revenue Mop-up**
United Kingdom	Liechtenstein Disclosure Facility	EUR 160 million additional revenue yield (GBP 140 million). More than 1350 taxpayers declared foreign assets.
	New Disclosure Opportunity	EUR 100 million additional revenue yield (GBP 85 million). Approximately 5 500 disclosures.
United States	Offshore Voluntary Disclosure Initiatives (2009 and 2011)	EUR 2 billion additional revenue yield (USD 2.7 billion) recovered thus far from the 2009 and 2011 initiative. More than 30000 taxpayers involved.

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TAX HAVEN - SHARING OF BANKING INFORMATION - IS IT NOT A BLUFF?[4]

The four tax jurisdictions which prominently figure in every black money and tax haven-related debate in India are Germany, France, Switzerland and Liechtenstein, a German-

speaking small sovereign nation. The first two have triggered and sustained the cauldron of fiery political and academic debate on this issue, and the other two are the 'hot recipe' for all political controversies in India. The latest one is a serious confrontation between the Standing Committee on Finance and the Government, with the former insisting on knowing the identities of the 700-odd names which have figured in the French list of Indian account holders in HSBC Geneva. Several Committee Members put pressure on the Government to let the House Panel take a peep into the list but the Finance Secretary told them that India has given words to the French authorities that no name would be revealed unless prosecution is launched and the case reaches the precincts of a court of law.

This may sound ludicrous to some! But before I elaborate on this aspect, let's take a look at another statement of the Finance Secretary given in Agra where he had last Tuesday gone to address the 35th Meeting of Heads of National Drug Law Enforcement Agencies of Asia and Pacific. Mr. Gujral reportedly said, *"...once the matter is in public domain, we will share them with all other*

4. Published in www.taxindiaonline.com, TIOL–COB(WEB)–267, 24 November, 2011.

agencies, including the Enforcement Directorate." Again, the rationale behind not sharing the vital info received from France with ED or any other agencies is to honour the assurance given to the French Revenue!

Let's now discuss the irony of our system. Although the Government is a creature created by the Legislature (the Parliament) but here is an issue where the Government has said No to the Parliamentary Committee. This 'No' raises the vital question - Has time come now for the Indian Parliament to extend its ambit to all such executive fiscal agreements bilaterally signed

between India and a foreign country. Tax Treaties worldwide are vetted by the Parliament. India is one of the very few nations where tax agreements are not routed through the Legislature. This is what was being feared by the Income Tax former CCIT, Mr. Shiva Kant Jha, in his petition before the Delhi High Court and later in the Supreme Court in famous *Azadi Bachao Andolan*[5] case. Mr. Jha, in his books, have touched on this issue and noted that most developed countries route DTAAs through their parliaments but India bypasses the Legislature which is not healthy for our democracy. What was being feared by him about a decade back seems to be happening now, with the House Panel being denied access to information 'gifted' by the French Revenue.

Worse, as per Mr. Gujral's statement, CBDT cannot share the 'info' received, with other law enforcement agencies like Enforcement Directorate, until it becomes public through a court of law. This is too funny as a legitimate agency which is mandated to investigate into the laundering aspect of the cases, will have to cool its heels for a couple of years before these cases land up before a court of law. Although Mr. Gujral has boasted of launching prosecution in most cases but the Income Tax itself is not sure - to what extent it can rely on such half-baked information as it cannot officially seek the 'missing links' from Switzerland to make a good case. Since the list provided by the French authorities was bought from a whistle-blower, a former employee of the HSBC Geneva, India cannot officially ask Switzerland to provide the missing information. So, the only option left is to persuade them to make voluntary disclosures, and a few have apparently done so. But a good number will not do so. And if there is no substantive information with the CBDT, no case can be made. And if no case is made, there would be no prosecution. Thus, the ED will not gain access to these cases.

Let's now also take a look at why should India give

an assurance to French authorities about not sharing such information with other law enforcement agencies when the information provided does not relate to any activities taking place in France. It is a case where France bought information relating to a third party bank located in another country, which is not covered under India-France DTAA. Since the provisions of DTAA do not cover any information which has

5. *Union of India v. Azadi Bachao Andolan and Shiva Kant Jha,* 2003-TII-02-SC-INTL.

nothing to do with French residents, why can't India inform the French authorities that their information will not be covered by the sanctity of the DTAA provisions, and no secrecy can be administered in such a case.

Even the Supreme Court of India in *Ram Jethmalani v. Union of India*,[6] has observed that,

> *"we have perused the said agreement (DTAA) with Germany. We are convinced that the said agreement, by itself, does not proscribe the disclosure of the relevant documents and details of the same, including the names of various bank account holders in Liechtenstein. In the first instance, we note that the names of the individuals are with respect to bank accounts in the Liechtenstein, which though populated by largely German speaking people, is an independent and sovereign nation-state. The agreement between Germany and India is with regard to various issues that crop up with respect to German and Indian citizens' liability to pay taxes to Germany and/or India. It does not even remotely touch upon information regarding Indian citizens' bank accounts in Liechtenstein that Germany secures and shares that have no bearing upon the matters that are covered by the double taxation agreement between the two countries. In fact, the "information" that is referred to in Article 26 is that which is "necessary for carrying out the purposes of this agreement", i.e. the Indo-German DTAA. Therefore, the information sought does not fall within the ambit of this provision..."*

If a ratio of this decision is drawn, it clearly means that what the Finance Secretary has been parroting, or the Government has been telling the Parliamentary Committee about the secrecy of the information is not only wrong but also patently illegal. What is true for the India-Germany DTAA is equally valid for India-France DTAA. Therefore, any stand taken by the Government that it cannot share the information obtained from France is not only incorrect but also not in tune with the law of the land enunciated by the Apex Court. It is high time the Government follows what the Supreme Court stated in the context of India-Germany DTAA, and also the Article 26 which is about exchange of information. There is apparently nothing extra in Article 26 of India-France DTAA which proscribes India from sharing information of the present nature with other law enforcement agencies and the House Panel. It would be perhaps more ideal for India to be on look-out for certain whistle-blowers in other tax havens and outrightly purchase reliable information if they have, directly from them rather than tying its hands by obtaining them from a third party country and limiting the ambit of probe at its own peril!

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6. *Ram Jethmalani v. Union of India,* 2011-TII-05-SC-INTL : (2011) 8 SCC 1.

Chapter 3
The Bank Secrecy and G-20 Initiatives
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THE WHO'S, THE WHAT'S AND THE WHY'S OF TAX HAVENS[7]

Tax Havens are once again back in the news, with a bang! First, the local news! Even as India's three leading research institutes are in knots to arrive at some realistic figures of black money generation in the economy and

the quantum thereof, the CBI Director sprang a surprise by disclosing a concrete figure of USD 500 billion Indian funds parked in tax havens! Speaking at the first 'Interpol Global Programme on Anti-Corruption & Asset Recovery', Mr. A.P. Singh said that Indians are apparently the largest depositors in Swiss Banks. How realistic is this figure is not known. How did the CBI Director arrive at this quantum, and what were the methodologies applied to work it out are not known. But if there is some science behind his computation, it would indeed help the Finance Minister's team working on the much-talked about 'White Paper' on Black Money and the Indian wealth parked in tax havens.

Meanwhile, to answer the billion-dollar question of how to bring the trillion or billions of dollars owned by Indians back home from tax havens, the outgoing CBDT Chairman, Mr. Mukesh Joshi, who was heading the Black Money Committee, has apparently recommended that the Finance Minister may explore the possibility of an Amnesty Scheme. Will Finance Minister pay studied attention to it or not would be known on March 16 when he is scheduled to roll out various possible measures to tap the lost wealth of the country.

Let's now pan our eyeballs to the global landscape for tax havens related news. A laborious study done by the UK-based NGO Action Aid has been hogging headlines and its content creating ripples across the Euro Zone. As per this study, out of 100 large corporate groups listed on London Stock Exchange, 98 sumptuously use tax havens. And the biggest users are the banking, oil & mining and advertising companies. Readers may recall that the financial whirlwind in which the entire global economy is caught today, originated from none but the banking and financial sector, thanks to their toxic mix of financial products. Before we focus a little more on the key bankers and 'look through' their *modus operandi,* let's first take a 'look at' some of the highlights of this

study:

the UK's 100 largest groups listed on LSE have 34216 subsidiaries, JVs and AEs. About 38% (8492) of their foreign companies are addressed in tax havens;

bankers are the heaviest users of tax havens with a total of 1649 tax haven companies between the UK's big four banks. In Cayman Islands, Barclays alone has 174 companies;

the undisputed biggest tax haven user is the advertising company WPP, which has 611 tax haven companies;

7. Published in www.taxindiaonline.com, TIOL–COB(WEB)–279, 16 February, 2012.

- *the cream 100 companies of the UK have 600 subsidiaries in Jersey; 400 in the Cayman Islands and 300 in Luxembourg; and only about 400 in whole of China.*

Let's go back to 2009 when the G-20 launched its first salvo against tax havens. Since then, hundreds of Tax Information Exchange Agreements (TIEAs) have been signed under the tutelage of OECD, and many economies claiming partial success in cleaning up their banking sectors, but this study shows that the global bankers have still been doing a brisk business via tax havens. HSBC is the biggest user of tax havens with a total of 556 subsidiaries; Lloyds Group has 97 companies in the Channel Islands; and HSBC has 156 companies in the American State of Delaware, compared to 97 in the rest of the USA. Worldwide, banks have also been getting a good deal on their tax liabilities - partly through tax avoidance and partly by setting off their losses accumulated during the financial crisis.

The study further states that oil and mining companies

have also been making a good use of tax havens. Shell and British Petroleum have about 1000 tax haven subsidiaries between them, including 100 in the Caribbean with no oil reserve at all. British American Tobacco, which largely operates in developing countries, has 200 tax haven companies.

All these facts culled out by the Action Aid pose a serious question - What message does it have for a transitional economy like India? Governments in most developing countries are starved of resources. The MNCs operating in the developing world lead to huge revenue losses that no government can afford. How do they do it? Transfer Pricing is the answer to this question. The MNCs pumping FDI into developing economies generate huge profits and shift them to tax havens - no tax or low tax jurisdictions. This explains the reason why so many top UK companies feel compelled to locate their subsidiaries in tax havens. In other words, the message for the countries like India is that it needs to hugely strengthen its transfer pricing and international taxation regime.

Early this week, while addressing the Central Direct Taxes Advisory Committee, the Union Finance Minister, Mr. Pranab Mukherjee, said that the Directorate of Transfer Pricing has helped in saving Rs. 66,085 Crores during the last year by timely stopping the illegal transfer of money through transfer pricing. He further added that 25 tax treaties have been already concluded for improved exchange of Information. He said that India has also signed Multilateral Convention on Mutual Administrative Assistance in tax matters for automatic exchange of information, exchange of past information and assistance in collection of tax claims among others.

Although the UPA Government has been trying hard to launch multi-pronged attack on black money generation and transfer of profits outside India by MNCs, but it is clear that all these measures are not adequate to plug the loopholes. A lot

many measures like APA, CFC rules and thin capitalisation provisions are immediately required in addition to GAAR, and the Exchequer cannot wait for the DTC Bill to be vetted over a period of two years. Why?

Let's go back to the ActionAid study. India and the UK have very good bilateral trade worth 13 billion pounds. But the UK's 100 top companies have fewer subsidiaries in India (334), than in Luxembourg (336). The study underlines that SABMiller uses tax havens to siphon profits out of developing countries across Africa and India. It estimates that the tax it avoids in Africa is enough to educate an additional 250,000 children there.

Let's recall the OECD's study in this context, which underlined that the developing countries lose almost three times more to tax havens than all the aid they receive per annum. Thus, the message for the Indian Finance Minister is not to dissipate his energy in convincing the UK Government not to cut their aid to India in the wake of the defence aircraft deal going the French way, and focus more on safeguarding his legitimate revenue by making time-tested legal provisions and strengthening the Directorate of Transfer Pricing. The tall figures being quoted by the Finance Minister at every meeting about saving of Rs. 66000 Crore through TP may look tiny if the exact quantum of revenue leakage is estimated. The message is loud and clear - it is not prudent to put all our eggs in the FDI basket, and look for resources for our infrastructure and anti-poverty schemes. Instead, India needs to focus on preventing the flight of legitimate tax revenue out of India through the AE-route of the MNCs, in addition to Indian tax dodgers parking their tax evaded wealth in tax havens.

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G-20 CRACKDOWN AGAINST TAX HAVENS: ERA OF BANK SECRECY IS NOT YET OVER[8]

A pretty good chunk of the global population believes that tax havens are a financial fashion statement, which would never go out of business. They can never be robbed off of their inherent charms coupled with the Nature's blessings in the shape of sandy beaches, blue oceans, inviting mountains and adventurous scuba diving. Their another belief is that merely amending and signing of Double Taxation Avoidance Agreement (DTAA), although a popular and most relied upon tool by most countries, may not change the fundamental rules, assiduously nourished by the tax havens to attract tax evaders. Thus it should not surprise anyone when one finds that most mega global corporate takeover events are designed and implemented from the soil of tax havens. Take, for instance, the

8. Published in www.taxindiaonline.com, TIOL–COB(WEB)–291, 10 May, 2012.

most burning example of *Vodafone*[9] case in India. It was executed through the transfer of a single share in the world's most popular tax haven Cayman Islands where corporate tax is zero per cent, and foreign assets are to the tune of USD 1.4 trillion. When one moves to the Caymans, what one may fail to resist is the temptation to scuba dive and snorkel.

In this backdrop, should one believe that what India did yesterday with Malaysia by signing a Protocol for exchange of information and reduction in withholding tax rates for various types of incomes, was largely an exercise in futility? The Indian Finance Minister, Mr. Pranab Mukherjee, in his wisdom, has lined up as many as 68 tax treaties for

amendments. In addition, India has signed a few Tax Information Exchange Agreements, and would sign more in the coming months. In other words, like many other governments elsewhere in the world, India has also put all its 'eggs of hope' in one basket - bilateral tax treaties to contain 'The Unstoppable Monster' called tax evasion and parking of black money in tax havens.

Interestingly, since April 2009 when the G-20 leadership, for the first time, launched a well-coordinated war against tax havens in the wake of the worsening global financial crisis, as many as 860 tax treaties have been signed to meet the OECD International Standards of Transparency and Exchange of Information. Between the G-20 Summit and the end of 2009, as many as 300 tax treaties were signed by tax havens, which had come under aggressive G-20 crackdown. The G-20 had threatened to clamp economic sanctions on all those tax havens, which did not comply with the OECD standards. What was that standard? A minimum of 12 bilateral treaties must be signed. Taking a cue, a good number of tax havens signed such treaties among themselves rather than large economies where rich households indulge in illegal cross-border transfer of their wealth.

In this background, let's discuss the hypothesis - Whether the largest ever policy crackdown against tax havens has really worked for the global financial systems? Are we really better off today? Has the OECD minimum number of bilateral tax treaty tool really made any tangible change to make the revenue-starved Governments a shade richer? Has the well-coordinated crackdown really pushed the funds out of tax havens to non-haven economies? Although the OECD does undertake the ambitious peer-review evaluation exercise to assess whether treaties are properly drafted but it has not yet done any study on the impact of its crackdown on the movement of bank deposits in tax haven. Its Secretary General has recently said that the *"era of banking secrecy is over''!* But, is it not a premature statement when no sincere study has been done to look at and also look through the movement of

global deposits in tax havens.

9. *Vodafone International Holdings BV v. Union of India*, 2012-TII-01-SC-LB-INTL.

Let's visit a recent study done by two academics Niels Johannesen and Gabriel Zucman, who were granted access to the rare data of Bank of International Settlement (BIS). They have concluded that the OECD crackdown has largely failed. The global value of deposits held in tax havens is the same as before notwithstanding the G-20 crackdown which was launched two years back. The deposits data of the BIS indicates that tax havens still sit over a pile of USD 1.7 trillion - about the same amount as in 2007. The only glaring change is that tax havens, which have signed many tax treaties, have lost their deposits to those who signed few treaties. In case of non-haven countries when they signed treaties with tax havens, the deposits from their citizens jumped in havens that have no treaties with them. For instance, banks in Jersey lost USD 110 billion of deposits, about 4% of all the deposits held in tax havens in 2007, while banks in HongKong made gains of USD 65 billion, around 2.5% of all the deposits held in tax havens in 2007. A simple regression, as per the study, suggested that an additional treaty signed by a tax haven resulted in the decrease of only about 3.8% of the deposits in its banks. Thus, the global crackdown has at best only led to miniscule relocation of deposits between tax havens. And the era of bank secrecy is certainly not over.

The findings of the study indicate that most tax evaders did not respond to the blizzard of tax treaties being signed under the tutelage of OECD. So far as many as 800 tax treaties have been signed by tax havens but it has not impacted the quantum of bank deposits in their

economies. In H1 of 2011, the haven to haven deposits accounted for about USD 550 billion - a stunning 25% of all deposits in tax havens. Deposits from British Virgin Islands and Panama were more prominent as both the jurisdictions allow setting up of bogus corporations, which add a layer of secrecy between an account and its owner.

In the light of these findings, it may be inferred that the Article relating to exchange of information in the tax treaties is at best toothless. It has not worked, and will probably not work even in future. As per the U.S. Government Accountability Office (2011), during the 2006-2010 period, the U.S. placed about 894 requests for information under its more than 80 tax treaties. In contrast, a single Swiss Bank admitted in 2008 that it had more than 19000 US clients with undeclared bank accounts. The exchange of information on request will clearly not work to the optimal unless the OECD and global community of governments move towards the automatic exchange of banking information. Unless all the key economies sign a multilateral tax treaty with all tax havens, the OECD standard of signing 12 treaties may not succeed in making any dent into the flourishing business of tax havens.

What about voluntary disclosure initiative? Several European countries like Italy and the UK had gone for such schemes but the Study reveals that the tax evaders paid only about 5% of their assets in taxes and penalties. Although even

5% may translate into many billion dollars but the G-20 needs to halt and do some introspections whether it can take respite in this or do something different to target 100% deposits in tax havens.

To conclude this piece, it would not be wrong to state that merely signing more bilateral tax treaties may not increase the true probability to detect cross-border tax evasion. Tax treaties need to be more strictly worded and must be more demanding if they have to be meaningful against the tax evaders getting effective shelters provided by tax havens. India needs to take a cue from this study and fine-tune its treaties accordingly. India also needs to pursue the automatic route for exchange of banking information rather than the request mode, which has neither worked in the case of Mauritius nor Switzerland as a lot of homework precedes such a request. If the G-20 has to succeed, it needs to embrace a paradigm shift in its strategy against cash-rich tax havens moving faster than non-haven economies in their survival strategies.

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G-8 SUMMIT - TAX HAVENS - STYLE PREVAILS OVER SUBSTANCE[10]

The global economic recovery continues to be sluggish, and whatever meagre growth has been reported in the USA among the OECD countries, experts have identified the laggard DNA lacking in the real and sustainable energy. It basically means that these are occasional bubbles of growth, which may not last long. The two leading growth engines of the global economy - China and India - have also demonstrated a sort of 'soaring fatigue' for lack of domestic as well as overseas demand. As per the latest Reports on G-20 Trade & Investments, jointly stitched by OECD, WTO and UNCTAD, the global trade is projected to grow by 3.3% this year - certainly higher than 2% in 2012 but still far behind the 20-year average of about 5%. One of the factors responsible for the tardy growth is the increasing number of restrictive trade measures being taken not by the poor countries but G-20 economies. Apart from the trade, one of the key areas of worries for most world leaders has been not-so-significant change in the ground realities for tax havens necessitating their repeated calls for greater

transparency in tax matters.

It is in this background that the G8 leaders met under the Presidency of the UK at Lough Erne in North Ireland early this week. A number of experts and organisations were looking forward to some substantial decisions. The British Prime Minister, Mr. David Cameron, had committed that the UK will galvanise international action on tax evasion, a problem shared by both the developing as well as the developed economies; to devise steps to deal with problems of

10. Published in www.taxindiaonline.com, TIOL–COB(WEB)–349, 20 June, 2013.

shifting profits to low tax jurisdictions; improve the transparency in company ownership and explore ways to help lower-income economies to collect taxes due to them.

In his address Mr. Cameron coined the '4 T's' theory - trade, tax evasion, transparency in information sharing and terrorism. On trade, he referred to the negotiations on an EU-US trade deal. Such a deal is forecast to add 100 billion pound to the EU; 80 billion Pound to the USA and 85 billion Pound to the rest of the world. On tax information, he said that all tax authorities across the world should share information so that tax evaders have no place to hide their profits, and on transparency, one should know who really owns the companies.

Let's now take a quick look at the highlights of the official communique of this Summit:

- G-8 leaders are committed to further transparency on the sharing of tax information and bring international tax rules into the modern age;
- G-8 will establish automatic exchange of information between tax administrations as a

new global standard and will work with OECD to evolve a model for this;

they extended their support to the OECD's measures to tackle tax evasion by MNCs, and will design a template for MNCs to report to tax administrations where they make profits and pay taxes around the world;

they will provide tax administrations a new tool against tax avoidance by MNCs and the same will be useful for developing countries. G-8 will also support developing countries to mop up the tax due to them.

From these announcements at the Summit, it may appear that the G-8 is grimly determined to strengthen the anti-tax evasion bandwagon but the tax policy watchers were hoping for more substantive action-oriented decisions rather than the utterances relating to some of the popular metaphors like 'transparency in sharing of tax information' etc. Tax Justice Network has come down heavily on Mr. Cameron for promising a bang but delivering a whimper. Most experts have described the official communique as a 'wish list' and nothing of much consequence. The disappointment across the continents has been more pronounced because the people at large have now been looking for more concrete measures particularly after the G8 has agreed that the tax abuse is a global phenomenon and needs to be fixed as early as possible.

The G-8 leaders also drew flak for not expressly supporting the proposal for Central Registry of Company to verify 'beneficial ownership' information. The issue of knowing beneficial ownership in cross-border transactions has of late become a thorny subject particularly after some of the low tax jurisdictions started inviting treaty-shoppers. With Big 4 resorting to complex architecture of companies for the purpose of M&A, and evading tax payments in developing countries like India, tax litigation over this issue has become a common

phenomenon. To overcome the limitation, Mr. Cameron had come up with a suggestion of introducing a Central Registry where companies may disclose the beneficial ownership of their share-holding patterns.

In fact, the problem of terror-funding is also closely linked to the issue 'beneficial ownership'. Since large tax planners often create a maze of companies with vague share-holding patterns, cutting across nationalities of many continents, it is often difficult for tax authorities to know who actually reaps the benefits of tax avoidance or tax evasion. Since a large chunk of profits shifted from one jurisdiction to another goes into the kitty of some obscure companies having no substantial business operation but they do sit over piles of money, they are the real fronts for terrorist organisations networked across the world.

Interestingly, in the same areas that G-8 has disappointed us, some of the groups and voluntary organisations have been hugely successful in exposing the service recipients of tax havens. For instance, only a few days back, the US-based ICIJ has exposed huge database of persons of all nationalities having companies and bank accounts in some of the tax havens like British Virgin Islands, Cayman Islands, Cook Islands etc. Even as tax administrations in various countries sift through this voluminous data leaked by ex-employees of banks located in these tax havens, they are names of virtually who's who of the world- the wife of Russia's Deputy Prime Minister; the President of Azerbaijan, Baroness from Spain, former Finance Minister of Mongolia and many others. This data has been uploaded on ICIJ's portal and one may look for country-specific data. For India, there are addresses from big metros to smaller towns like Mayurbhanj and Muzzaffarpur in Bihar. Some of the government officials having accounts and being Director in some overseas companies have even given their official residence in their secret records now exposed.

In a nutshell, how many of these 498 Indians and thousands

of nationals of other countries are finally caught on the wrong foot where they have not declared their foreign accounts or foreign companies, can be known only after tax authorities diligently conduct probes and fix the wrong doers or tax evaders as an example for others. But, the fact remains that if there is going to be greater transparency in tax matters, the G8 and others will have to show higher degree of urgency to decimate the word 'secrecy' in sharing tax information or quickly introducing automatic exchange of information for coordinated efforts. No doubt, a number of tax havens have signed more than 50 tax exchange information agreements (TIEAs) but they are useless from tax administration's perspective unless such tax jurisdictions start sharing and exchanging relevant banking information. Let's hope against hope that the world leaders would realise it sooner so that the recovery of financial health of the global economy can find its feet quicker.

■ ■ ■

G-20 SUMMIT - IS IT THE MAKING OF A NEW INTERNATIONAL TAXATION ORDER?[11]

After 28-long years Mr. Narendra Modi happens to be the First Indian Prime Minister to visit Australia. His official tour to the land of Kangaroos also coincided with his first appearance in the G-20 Summit at Brisbane. For Mr. Modi the stage was all set in all the cities he visited in Australia thanks to his great event management skills except for G-20 where it was left to his personal charisma and a sense of timing to leave a mark on the diplomacy horizon dominated by political juggernauts from the rich countries. Mr. Modi did not disappoint not only India but also all those developing countries which have reposed trust in India's efficient leadership to safeguard their interests. If one goes by the last week

Food Security Pact with the USA, it can be safely said that the faith of poor nations in India's ability to lock horns with the powerful enclave of rich nations and make them step down from their rigid stand on many issues has indeed been further cemented.

In this backdrop, when the G-20 leaders were grouping together to isolate Russia on the political issue of Ukraine and focus more on the measures to enhance the global growth rate by two per cent in the next few years, the Indian Prime Minister rose to intervene in the high-voltage discourse and put sufficiently loud emphasis on the issue of black money being channelised out of the developing countries to roughly 80 tax havens and the need for an effective mechanism to recover them. Although the black money and automatic exchange of information issues were not on the original agenda of the Brisbane Summit, the fact that Mr. Modi has globally been acknowledged as a rising political 'rock star' on the international horizon, the G-20 leaders agreed to incorporate his suggestions into the final official communiqué.

So far as India is concerned, all of us minus Congress Party are very happy for two reasons - one, Mr. Modi has finally earned the laurels India deserved long back in terms of patient hearing by the top leadership of the rich nations and a firm place for India in G-20 core group. Second, the all-round applause received by Mr. Modi in Australia and the USA earlier, has done a great deal of good to the morale of our diplomatic corp. which has begun to see the global arena very differently. One MEA insider confides that there is an apparent change in the degree of participation in country-specific policy-fine-tuning by all the layers of officials and nothing can beat their enthusiasm and self-pride.

Indeed, like all other Indians, we at TIOL are equally pleased about these developments. But the most pertinent question that stares in our face is - Whether merely

raising the issue and the G-20 Official communiqué devoting some space (Para no 13) to tax evasion issue would do any good to the larger cause of

11. Published in www.taxindiaonline.com, TIOL–COB(WEB)–423, 20 November, 2014.

recovery of the lost wealth to tax havens which Mr. Modi has promised to the nation on many occasions. Perhaps, NOT!

But before we discuss and find some holes in the OECD/ G-20 approach, let's welcome a major stated change in their 'overtaxed' fiscal approach. For the first time, the G-20 has admitted that the *profits should be taxed where economic activities earning the profits are performed and where value is created.* The doctrine of *situs* of income has been accorded precedence over the concept of residency. This is welcome news for the poor and developing countries which have been thronged by multinational enterprises in the past two decades to develop their infrastructure or the capital-intensive mineral sectors. Most of them have been making huge profits but they hardly pay anything to the host countries nor do they pay to their own countries by parking their profits in low-tax jurisdictions. The G-20 also stated that the Base Erosion and Profit Shifting (BEPS) Action Plan initiated to modernise international tax rules would be finalised by 2015. It also endorsed the global Common Reporting Standard for the automatic exchange of tax information (AEOI) on a reciprocal basis by 2017 or end 2018.

The Official Communiqué also welcomed the progress made on taxation of patent boxes. This concept was first floated in 2000 by the Irish and followed by France in 2001. Both offered concessional tax regime for revenue from Intellectual Property licensing or transfer of IP. Soon the IP box tax regime spread in entire Europe and it has now become so competitive that it has become a conduit for tax avoidance by

large corporations. How do they do it? - by inflating artificially qualifying IP income or by incorporating functionally irrelevant patent or commercially discardable grant of exclusivity for realising eligibility to avail tax incentives. The tax competition among the European countries has become so fierce that France has offered tax breaks to the tune of USD 7 billion for Research and Development this year alone. No wonder, companies like Huawei Technologies from China and Microsoft have set up their R&D centres in France which has come to be described as a *tax haven for technology companies*. Ireland is another such tax haven which has attracted Google Inc, Apple Inc and others. Since too many cases of tax abuse through IP-route have been reported, the issue of taxation of patent boxes has become *Point No 5 of OECD Action Plan* on BEPS.

The story of little impact of G-20/OECD campaign against harmful tax practices will be incomplete unless we visit the nature-blessed Luxembourg. In the neighbourhood of OECD headquarters in Paris, a 'tax storm' recently hit the shores of Luxembourg. As per the Tax Justice Network revelations, as many as 350 large corporations like Pepsi, IKEA, FedEX and Apple have virtually no physical presence in this country but they have been parking billions of dollars of their profits to avoid paying taxes. And this is happening when the European

Commission has been actively campaigning to eliminate tax havens from the map of Europe.

All these controversies clearly indicate that the G-20/ OECD initiatives taken so far against tax havens are nothing but Band-Aid measures rather than long-term foundation for a healthy international tax regime which could do justice not only to the rich nations but to also plundered economies of developing countries. Let's visit the country-by-country reporting solution thrashed by the

OECD. As per this measure it would benefit only the tax authorities but without disclosing *where are these MNEs parking their profits or booking such profits and who are their key beneficiaries*. The poor investors who shoulder the large edifice of global investment regime will never come to know with the help of this OECD solution about the beneficial owners of large profits booked by the MNEs. As per the OECD measure, all information exchanged under the automatic exchange of tax information network will be confidential and cannot be shared even with other law enforcement agencies. This virtually means that the public at large would never come to know about the actual beneficiaries of profits of large corporations. It is estimated that there is about USD 26 trillion funds parked in tax havens but thanks to this OECD measure, the global economy will never come to know *whose wealth are these and where did they steal from?* A simple guesstimate may be made that at least 50% of such funds must have come from the poor nations whose natural resources were plundered and profits were parked in tax havens or their own home-grown plunderers parked the stolen wealth in such havens.

Going by the outcomes of G-20 Summits in the past few years very high hopes are being pinned on the OECD measures like exchange of information and BEPS. But unless a system of registering Trusts created in offshore centres is made and private tax rulings like the ones negotiated in the case of Luxembourg are made public there would be no pressure on tax havens to discard the harmful tax practices. It is common criticism of the rich nations and the OECD measures that they are more keen on buoying up their own revenue rather than stopping the on-going plunder of poor nations. Yet another allegation that is flying thick and thin, against the OECD is that it has come under pressure from the powerful lobby of MNEs and global audit firms and that is why even the G-20 official communiqué has dropped the reference to

'aggressive tax planning and tax avoidance' and now refers to only 'harmful tax practices' *a la* Para 13.

If Mr. Modi wants to succeed in making sufficiently reasonable recovery of India's lost wealth to offshore centres he needs to focus on the poor nations who stand excluded from most of the OECD deliberations and the decision-making on contentious tax issues. Unless they participate in such deliberations as stakeholders it would be far-fetched to say that the OECD measures are really going to alter the fundamentals of international taxation and any measure of

equity and justice can be achieved. The victims of MNEs-favoured international tax practices must be given a voice in building a new edifice of New International Taxation Order which should also have provisions for recovery of stolen wealth parked in tax havens. Secondly, unless there is an enforcement framework of new OECD-sponsored practices like Common Reporting Standards, such measures may not be able to make tangible alterations in the global scenario which promotes the thriving culture of offshoring by large corporates and enriching of low tax jurisdictions by tax evaders and votaries of kleptocracy.

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FATCA - WILL IT HELP INDIA IN BATTLE AGAINST TAX HAVENS?[12]

Unreported foreign account and black money (more precisely, offshore tax evasion) have a symbiotic relationship. Getting access to details of foreign bank accounts of own citizens, shrouded by layers of bank secrecy laws, continues to be a challenge for every sovereign country. Although India has been gifted details of foreign bank accounts by two leading tax

jurisdictions - Germany and France, under the provisions of Double Taxation Avoidance Agreements (DTAAs) but even then its success rate in terms of recovery of lost wealth of the country has been dismal. Even in cases where it has obtained details of transactions and income tax assessments have been done, the Exchequer cannot boast of tangible gains in terms of tax collected from such unreported bank account holders. One of the reasons for lukewarm success notwithstanding the constitution of a Special Investigation Team, has been the cold response from the tax jurisdictions in sharing the pertinent tax information. Switzerland is a notable example.

Interestingly, this sort of malady is not unique to India. Even the richest and financially powerful economies found themselves pitted against such an international culture of no-information-sharing. In this backdrop, let's travel back to 2009 - it was the peak of global discourse against tax evasion, tax haven, illicit funds and the unanimity over the need for a global battle. Even as the G-20 leaders were plucking their hair over how to arm-twist errant tax havens for exchange of information about their taxpayers hiding untaxed income in secrecy-wrapped bank accounts, the spiraling fiscal deficit and the talk about massive offshore tax evasion to the tune of USD 150 billion annually by US taxpayers compelled two Democrats to move a Bill to extend the local tax laws to their assets parked outside the USA. On March 19, 2010, as part of the Hiring Incentives to Restore Employment Act, the President Obama signed the Foreign Account Tax Compliance Act (FATCA). As per this new law, any US Citizen

12. Published in www.taxindiaonline.com, TIOL–COB(WEB)–430, 8 January, 2015.

having assets or income exceeding USD 50,000 outside the USA was required to report the same to the Internal

Revenue Service (IRS).

But since the IRS knew that more than relying on self-reporting system of the taxpayers it was more important to put the onus on banking and other financial institutions to report to the IRS about the investment and income of the US citizens outside the US economy it launched a campaign to enter into agreement with tax jurisdictions across the globe. If one fails to do so, it would attract the penal withholding tax rate of 30% on any payment remitted by an American taxpayer. Thus began the IRS-sponsored drive to rope in all major tax jurisdictions to sign the reporting pact with them. And today, as many as 111 countries have signed the Inter-Governmental Agreement (IGA) with the USA. Although some feeble voice from the Republicans was heard demanding repeal of FATCA but the same was ignored in the light of the additional revenue the IRS was projected to garner. As per one estimate, the IRS was expected to mobilise about USD 10 billion fresh revenue in 2014 from taxpayers hiding overseas income in foreign banks or investment funds.

With more and more economies joining hands with the USA to fight out offshore tax evasion, some of the European giants like the UK and France also called for FATCA-like arrangement for automatic exchange of information. Such a voice was extended support after the scandal in which France's ex-budget minister was charged with tax fraud where he admitted owning unreported foreign bank account. In early 2014, Switzerland which bore the brunt of IRS arm-twisting after the HSBC episode, got into the agreement-Model II with the USA. As per the agreement, several industries were excluded from the ambit of FATCA such as Social security funds, private pension funds and property and casualty insurers and FIs with largely local clientele.

Let's now go back to the home turf. India and the USA, on April 11, 2014, arrived at a pact in substance on

the terms of IGA but the same was to be signed only after the Cabinet approval. On June 27, 2014, the RBI issued an advisory that Indian FIs would have time up to December 31, 2014 to register with US authorities and obtain a Global Intermediary Identification Number (GIIN). It also stated that *"financial institutions having overseas branches in Model 1 jurisdictions should register only after the formal IGA is signed. This will be communicated in due course ... Government of India has further advised that if registration of the parent bank/ head office is a pre-requisite for a branch to register, such banks may register as per the time line ..."*

Then came the news of the US authorities granting one-month extension to India to sign the IGA up to January 31, 2015 as India failed to catch the December 31, 2014 deadline. Although the IRS extended the deadline to assess India's preparedness to sign the agreement, the RBI and the SEBI advised the Financial Institutions numbering about 1000 to register themselves as per the

original deadline. And such an advisory was issued only on December 30 - 24 hours before the deadline lapsed. A good number of banks and other financial institutions have managed to register themselves but many could not do so for various reasons.

Now, the key question is why such a messy management of something which is inevitable right from the Day One. Some of the reasons could be the pool of confusion created by the SEBI on the ground of lack of reciprocity. As per the terms of the IGA, the Indian Finance Institutions will have to furnish details of income and assets owned by the US individual taxpayers as well companies to the IRS but in return, the IRS is going to share bank account information Only about the Indian

individuals earning income from a source in the USA. The IRS is not going to share any information about the beneficial owners of the US-based companies promoted by Indians. This is what the SEBI has pointed out to the Council set up in the North Block to monitor the entire chain of FATCA compliance activities. The Council was also told about the need for a Common Reporting Standard acceptable to all G-20 Member-countries rather than the guidelines for reporting only about the American clients.

Even as the differences persist among the various regulators on the issue of reciprocity, the ground reality is that India has no escape route as like other 111 economies it has also given its approval for IGA and it is going to get mountains of information about its taxpayers from the IRS. In the background of India's fight against unreported funds parked abroad, the IRS has promised that India would get information even about an account having as little a sum as USD 10 interest being paid to the account holder.

Now the vital question is - where is the delay? What has led to such a delay? Why is the Union Cabinet delaying the signing of the IGA? And answers to all these questions lie in the Government affidavit filed before the Supreme Court in the case of *Ram Jethmalani v. Union of India*[13] where the Apex Court has ruled that there is no confidentiality about the information obtained by the income tax authorities under various tax treaties. Since as per the terms of the IGA, the information provided by the IRS will be guarded by the layers of confidentiality, unless the Apex Court reviews its own order, the Union Cabinet will not have the freedom to go ahead with the IGA. Though there is no time line before the Supreme Court, the Government hopes to get clarification by March-end so that it could sign the IGA before FATCA provisions come into effect from September 30, 2015. Let's hope all the key organs of the Republic of India put their heads together before the turf becomes more sticky and messy for the Indian banks and other financial institutions.

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13. *Ram Jethmalani v. Union of India*, 2011-TII-05-SC-INTL : (2011) 8 SCC 1.

PART II

BLACK MONEY IN INDIA: GENESIS AND GROWTH

Introduction

Black money in India is as much a reality as it is in any other developed or developing country. Part II deals with several aspects of black money such as economic, legislative, social, institutional and last but not the least, the political. This story is about the generation of black money in India, how it pervades across a wide spectrum and then finally making its way off to the picturesque tax havens. For achieving this objective, I have covered a journey of six years starting from 2009 when UPA-II Government got re-elected at the Centre and culminating in 2015 when BJP led NDA Government took over the official war against black money. While the focus of Part II is to make an anatomical study of the domestic issues, yet it would have been an incomplete approach if the influence of international dynamics on the domestic turf was ignored. Therefore, Part II has adopted an approach of both micro and macro analysis of the problem of black money. Micro approach refers to specific domestic issues, whereas at the macro level, I have taken up broader aspects like India's policy response towards black money, mapping the trajectory adopted by the International community in its crusade against black money and most importantly, where does India stand amongst all these changing dimensions.

There was a time when scams like *Bofors* and *Harshad Mehta* used to make news for years together, but now the

floodgate of scams has opened up. Before we could get over with one scam, next one knocks at the door. The 2G Spectrum scam, Coalgate scam, Common Wealth Games scam, Indian Premier League cricket fixing scam, you name it and we have it. The propensity to generate corruption in India has gone up several notches. So this hardly needs any debate that black money is just an outcome of corruption, and unless the roots are remedied and cured, mere treating the outcome would not offer any lasting solution. This is exactly what Part II tries to achieve by bringing out the interrelationship between corruption and black money by exposing the fundamental issues, specific areas of concern and their *modus operandi*. Unless, these micro constituents of the problem are addressed, our policy would remain merely peripheral and divorced from the reality.

With the onset of liberalization and globalization, the phenomenon of black money has matured and graduated itself into a highly complex problem. Over the years, the threat and repercussions of black money have compelled the international community to develop a greater commitment and consensus over the need to put the screws over challenges like tax havens and bank secrecy laws, which literally lead all investigations to come to *cul-de-sac*. What better evidence of this international endeavour could be than the recent "Swiss Leaks" revelations done by the Washington-based International Consortium of Investigative Journalists and the Paris-based Le Monde newspaper. Part II closely analyses the story of resistance put up by G-20, G-8 and OCED against tax havens, ways to breach the impediment of bank secrecy laws and of course whether India has managed to secure a prominent position in this global crusade. After years of international diplomacy and deliberations some milestones have been achieved at the global level. India has signed several bilateral Tax Information Exchange Agreements which are a step closer towards the multilateral automatic exchange of information regime. In

October 2014, 51 countries signed the Multilateral Competent Authority Agreement which is again considered to be a major step towards bringing in the much-awaited Automatic Exchange of Information regime (Even the Union Cabinet in India has recently given its consent to sign such an agreement). However, there still remain some major grey areas pertaining to taxation regime where the developed countries have blatantly adopted double standards for protecting interests of their MNCs. Take the example of GAAR deferment in India. The global fact is that GAAR is a reality for several decades in the European countries and even in many Asian countries (for instance Hong Kong adopted GAAR as back as in 1947) but the investors and diplomatic communities from various rich countries put pressure on India to further defer it so that tax avoidance regime could last for some more years. This in turn leads to serious tax avoidance and it is well established that a part of such money ingenuously gets transferred to tax havens. And it further worsens the position of black money in the developing countries adversely affecting their economies.

Part II depicts another inevitable aspect of the Indian democracy, i.e., the constantly increasing friction between the Executive and the Judiciary. The apathy of the Executive has forced the Indian judiciary to step in, even at the cost of criticism for judicial activism. The landmark intervention of the Supreme Court in *Ram Jethmalani PIL*[1] case which finally led to the constitution of the Special Investigation Team (SIT) was a tight slap on the face of the Government of India for displaying its years of politically motivated inertia. The Supreme Court has realized that there are international restrictions and obligations which have to be given due weightage as they have a huge impact on the issue of black

1. 2011-TII-05-SC-INTL : (2011) 8 SCC 1.

money. However, the presence of the Supreme Court has

at least ensured that the Government's action or inaction no longer remains a matter of choice. The impact of judiciary can be gauged from the recent opinion of the Attorney General which states that the names of the Indians present in the list of account holders obtained from the French and the German authorities can be disclosed to the SIT as it constitutes a part of the adjudication process and would not amount to any violation of the provisions of the Double Taxation Avoidance Agreements. This is a welcome change of position of the Executive which otherwise has always adopted a stand of non-disclosure of names despite severe public criticism.

All said and done, in the absence of strong Government's will to act upon the issue of black money, we are going nowhere. Whether the exuberance exhibited by the political parties to combat black money and bring back billions of dollars stashed in tax havens is a mere election manifesto or does it mean something more? Thankfully, the Modi Government has come out with a matrix of penal provisions and two new legislations to fight against the scourge of black money generation; money laundering; overseas assets held by Indians and unauthorised foreign bank accounts of Indians. Besides signing treaties and DTAAs, a lot also depends on the channel of international diplomacy to fight against tax havens. Countries like the U.S. often resort to this channel for obtaining necessary details from its counterparts. However, India is yet to utilize this instrument effectively which would again require strong foreign policy and willingness to engage in such dialogues with countries like Mauritius, Switzerland, Singapore, to name a few. Part II sincerely attempts to draw a road map suggesting a host of measures like amendments of the DTAAs for plugging the existing lacunas, pro-active international diplomacy, domestic legislative amendments and a need for a dedicated

regulator to tackle breeding of corruption at the domestic turf. At the end the challenge is not what is to be done but whether we want it to be done.

4 Black Money Generation in India

Chapter 4 ***"Black Money Generation in India"*** *is an attempt to enlighten my readers about the ubiquitous nature of black money at the domestic level, be it the game of cricket or the shiny yellow metal, or with the clinking of glasses of whiskey. Chapter 4 opens in 2010 with the article* ***"IPL Scam: Income Tax Cyber Lab doing good job!"*** *when this newly found scam echoed everywhere and invited the sleuths of the income tax department to step in. Readers who are not aware of "portable Cyber Lab" would get to know how the department has used this weapon in the investigation of the IPL scam. This article raises a question whether the Government deliberately did not plan a joint crack down by all agencies into the IPL scam to keep the truth away from the vox populi. The next article* ***"Imported whiskey - 'Intaxicated' CBEC forgets to uncork 'bottled' revenue!"*** *exposes the inside story of under-invoicing game of "imported whiskey bottles" taking place right under the nose of the Government. The article* ***"The Tale of 'Liquored' Black Money Economy of India!"*** *is a deeper dive into the darker side of the liquor business, where many readers would for the first time come to know of the notorious channel of "push money". How this channel fuels generation of black money in the National Capital itself and across the nation. The highlights of this article are the sizzling facts and figures which have been captured over months of research and based on information obtained from the insiders.*

Further, Chapter 4 reveals the darker side of the shining yellow metal-gold and makes a strong appeal to the Government as to why the Customs Department needs to be re-armed with the power to arrest which was undone by the infamous Supreme Court's judgment in 'M/s Om Prakash Bhatia v. Commissioner of Customs, Delhi.[1] *Then in the year 2013, when the fiscal deficit was at its worst, the article* ***"The 'Black' has it all!"*** *explains an interesting economic phenomenon i.e., while wasteful expenditure by exchequer worsens the fiscal deficit, but surprisingly spending by consumers resolves the same. Further, the article shows the extent of black money involved in the election process in India, the*

starting point of our democracy. The next article, "India's Economic Growth Story - The Tale of Illicit Fund Haemorrhage!" brings a different aspect of fiscal deficit and how it is attributable to practices like trade mis-invoicing, Hawala transactions and bulk cash dealing.

Towards the end – this chapter draws inspiration from the prophetic observations of the legendary Dr. Rajendra Prasad and makes an argument that unless policy level changes are brought in, we would be in an eternal state of knee jerk reactions towards the monster of black money. A lot of hue and cry

1. 2003-TIOL-06-SC-CUS.

surrounds the issue of funds parked in tax havens. However, the objective of – the Chapter is to caution the Government that unless the humungous amount of black money generated at the domestic level is addressed, we would never succeed in deciphering the bigger picture.

IPL SCAM: INCOME TAX CYBER LAB DOING GOOD JOB[2]

The latest to add to the never-diminishing list of scams in the country is the India Premier League (IPL). In the past few weeks, the IPL matches have dominated the front and sports pages of all newspapers, and the prime time news bulletins of all news channels. Then came a new twist and turn to the IPL - the most expensive sports extravaganza in all cricketing countries. IPL Commissioner Lalit Modi accused Shashi Tharoor of influencing the bidding process for the Kochi Team. Mr. Tharoor of 'Twitter-fame' did try hard to rebut all his charges but the Congress Party treated it as 'feeble tweeting'. Soon the Prime Minister asked him to put in his papers and clear his name from the controversy rapidly assuming murkier dimensions.

As soon as Mr. Tharoor stepped out of the hallowed portal of powers, the emboldened Opposition further decided to

gherao the Government on the raging issue. Mr. Tharoor albeit never stopped tweeting for an independent probe by an agency, but the pressure mounted on the Government to uncover the truth about the Minister abusing his office and also the economics of 'sweat equity' without actually sweating out! The Opposition also called for removing the multi-layers of the opaqueness that surrounded the fund management of the IPL. The wild allegations of the Opposition goaded the Government to wade through the hitherto politically sensitive turfs. The Income Tax (Investigation) was given the unmistakable green signals to carry out a job as professionally as the IPL cricketers have been doing for their bidders!

TIOL readers who have been straining their eyeballs by keeping them glued to their TV screens for the latest sound-bites about the next move of the I-T sleuths, may have been surprised by the pace of events, attributable to a series of raids conducted by the Income Tax Department. Going by the facts that the I-T sleuths investigating this scam have not paused even for an hour to take a long breath clearly indicates that they have been sitting over the piles of their homeworks done in the past. Given the opaque character of the IPL and the gigantic size of money involved, it would indeed have been uncharacteristic for the Income Tax officers to turn a Nelson's eye to the goings-on. TIOL sources do corroborate our presumption that the I-T Investigators have been quietly doing their homework for a politically sensitive event like the current one.

2. Published in www.taxindiaonline.com, TIOL–COB(WEB)–184, 22 April, 2010.

The Income Tax Department has raided Mr. Modi's premises, the IPL office and also the IPL-block of the BCCI office. Yesterday, they conducted searches on the

premises of IPL franchisees across the country besides a few others connected with the event. Although Mr. Modi has been credited to have sensed the I-T moves and is also accused of removing incriminating papers relating to the bidding process before the sleuths could visit him, but I do not see any respite for him if wrong-doings form the foundation for the awe-inspiring money flowing through the cricketing tournament. Why is it so?

Let's train our eyeballs to the yellow-coloured equipments being carried by the I-T sleuths. What are these? For the first time, the I-T Department seems to be effectively utilising its portable cyber lab in Mumbai. These equipments are armed with the capabilities to 'clone' the data stored in a laptop or a desktop. What about the deleted data? Even erased data can be retrieved by these cloning equipment. Data erased in the past few months can be 'cloned' in a few minutes. The I-T Cyber Lab is capable of 'cloning' even a Server. It has become a fad among cash-rich corporates to keep their sensitive data on server which can be sourced from anywhere in the world. And it involves no risk of carrying them in baggage.

The CBDT has so far set up two cyber labs in Delhi and Mumbai. It was in fact conceived by its former CBDT Member S.S. Khan who was conferred the Prime Minister's Award for Excellence in Public Administration only yesterday. True, this award was not for the Cyber Lab project but for the Integrated Taxpayer Data Management System but once the IPL findings are out, the Prime Minister Office should decide to honour him again, maybe, next year. Another idea of his on which the Department has still been working, is the development of Audit Software for Computerised Accounts. He had seen long back that most corporates will be keeping only computerised accounts, and for the scrutiny of the Department to be meaningful it was important to develop a customised audit software. So attractive was his idea of

a cyber lab with forensic capabilities that it was the DRI which managed to set up a cyber lab even before the CBDT could do, and also utilised the same to detect the biggest marble import fraud in Mumbai.

Let's now go back to the IPL and take a hard look at the need for a holistic investigation rather than an isolated probe from the I-T Act perspective alone. Although the Enforcement Directorate has booked a case for the alleged violation of FEMA Act but what is required to be done is to set up a crack team comprising experts from various other specialised agencies. If the Finance Minister is serious about doing a good job which he does sound so, a multi-disciplinary team like the Satyam one needs to be set up. Given the fact that service tax, Customs, money-laundering, FEMA and income tax are involved in this case, it is high time the Finance Minister orders the setting up a 'Crack Team'.

There are more than two dozens taxable services involved in this case. Since there are franchisors, franchisees and also third parties which provide multiple taxable services like event management, management consultancy, business auxiliary service, business support service, IPR Service, Design Service, broadcasting service, Sale of Space service, rent-a-cab service, etc., a thorough probe is required. It is learnt that the Government has so far collected only about Rs. 96 Crore from all the services provided during the IPL tournament in the past three years. A proper probe is, therefore, required from the service tax angle as well.

Similarly, since overseas corporate bodies registered in various tax havens are also suspected to be involved in pumping huge funds during the process of bidding, the effectiveness of India's DTAAs and the MoUs signed for exchange of information are also on stake. People do want to

see how effectively our DTAAs and Money Laundering (Prevention) mechanism along with the might of the FIU can be utilised to remove the veils of bidders in these billion-dollar auctions. Who are the actual owners of these franchisees? None knows - not even the Government. It is time now that the Government rises above the partisan political bonhomie and uncovers the 'True Lie' of the IPL. If everything is hunky-dory, let the *vox populi* know about it. Let's hope our investigators manage to bring the truth to the surface and do justice to both the IPL and the cricket lovers in the country.

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IMPORTED WHISKEY - 'INTAXICATED' CBEC FORGETS TO UNCORK 'BOTTLED' REVENUE[3]

Whiskey is worldwide 'consumed' for its one quality - Intoxication. But if we go by the CBEC Press Release dated September 9, 2010, referring to Customs victory over globally known liquor giant M/s Pernod Ricard India Private Limited (earlier known as Seagram India), whiskey also proved to be 'intaxicating'! This case related to customs duty evasion of Rs. 40 Crore which was described as "only the tip of the iceberg". The Release stated that "in addition, finalisation of provisional assessments on imports by M/s Seagram from 2001 was likely to result in significant revenue to the Government". The optimistic tone of the Release was quite understandable. But the ground realities tend to tell a different tale! More than 60 days have gone past but Seagram India has not paid even the entire duty involved in the lost case, nor the Customs Department has made any effort to recover the same. Given the lack-lustre approach to recover the duty even after winning the case at the Supreme Court-

3. Published in www.taxindiaonline.com, TIOL–COB(WEB)–208, 7 October, 2010.

level, the Finance Minister, Mr. Pranab Mukherjee, certainly does not need an extra bout of wisdom to fathom that no step has as yet been taken to recover the duty locked in provisional assessments since 2001. It is learnt that if all such provisional cases are finalised across the country, the exchequer would be richer by at least Rs. 1000 Crore by the fiscal-end. But no initiative has been taken either by the CBEC or the ICD concerned. What is needed to be done on a high priority note is to form a special task force at the Board-level which just needs to persuade and coordinate the efforts of the Customs Commissionerates to unlock this revenue stuck in bottles for too long! But as I have regularly been reporting, none seems much concerned about 'uncorking' these bottles!

Since whiskey is the unmistakable theme of this article today, let's pan our eyeballs on a couple of other dimensions of this issue. All TIOL readers are aware that the next four months, starting from October are the most 'intoxicating' period for bottlers in India as their sales curves soar up vertically because of a series of festivals and matrimonial alliances which consummate during this period. By virtue of this ground reality, this also happens to be the period when the exchequer loses the maximum revenue. How?

Let's take a quick glance at some of the published statistics of the UK-based Scotch Whisky Association (SWA). As per their March release of trade data, India which had occupied SIXTH position worldwide in terms of volume of imports, has jumped to FOURTH position in the current fiscal. It had imported 2237802 l.p.a. (litres of pure alcohol) in 2009 which has not leapfrogged to 2748202 l.p.a. this year.

What about India's position in value terms? Interestingly, and eye-poppingly, India ranks 20th

position in terms of value in UK Sterling. True, there could be many reasons for this but one of the prominent reasons is a crying clue for the Indian Customs - indiscriminate undervaluation! How is it possible that when the entire whiskey-manufacturing fraternity is intoxicated by the prospects of rising import graph of India, our Indian Customs continues to be sleepy and sloppy in terms of valuation of such imports. When they have some of the strong undervaluation-indicators in public domain like this report of the SWA, why should CBEC show a strong preference for a blinker on its 'vision'!

If we leave aside the global scale, India tops the list of countries in 2010 in terms of the volume of imports in Asia. Only last year it was ranked seventh. A jump of six positions in one year by all means was not less than a Hanuman-jump which should open the eyes of our policy makers. There is a clear-cut indication that something is terribly wrong if there is no rise in the customs duty collection from this commodity!

Let's now take a hard look at some of the statistics collected by TIOL relating to the bulk imports of scotch whisky which largely comprises of two types:

- Bulk vatted malt whiskey for blending with Indian whiskey, which is around 65% of total country's bulk imports (Seagram is a major importer of Vatted Malt Spirit); and
- Bulk blended Scotch whiskey (100 Pipers, Teachers, Black Dog, VAT 60) -this accounts for 35% of country's imports.

The bulk blended scotch whiskey sales is around *Five* lakh cases in a year, according to sources in the Trade. The total imports of Scotch whiskey into India in bottled form is around

10 Lakh cartons (cases). Of the 10 lakh cases, the duty free sales in airports account for over *Four* lakh cases of Scotch whiskey. Nearly two lakh cases again in duty free are accounted by bonders and ship chandlers. Bonders supply duty free to diplomatic missions, 5-Star hotels and other duty free entitlement holders as per the Foreign Trade Policy.

The duty paid sales account for *Four* lakh cases in a year, of which Seagram and Diageo account for 90% of volumes. Johnny Walker Black, Johnny Walker Red (Diageo), Chivas and Ballentines (Seagram/Pernod) are four brands which account for 90% of duty paid volumes. The standard list price of Johnny Walker Black is around GBP 120 to GBP 136 per case (750 ml x 12) but most imports in India are at GBP 50 to GBP 60 per case. Same is the case of Chivas Regal. It is learnt that the standard Price of Johnny Walker Red is GBP 65.00 per case but actual import is at GBP 25 per case in India, said sources in the Trade.

Let's now look at the extent of leakage from duty-free realm. First, in the name of earning foreign exchange, our FTP allows 5-Star Hotels to source duty-free liquor. Who consumes foreign liquor in our hotels? Maximum consumption is accounted by the parties (corporate or matrimonial or post-marriage receptions) hosted in banquet halls. So far as foreign tourists are concerned, they largely consume wine and beer. Imported whiskey is consumed by the rich and the famous of our society, and our Government strangely subsidises it! More than the duty, such a policy mishap results in unlawful trading behaviour in the economy. This is more so, when the State Governments do not grant any excise duty/VAT exemption to such imports by hotels in the name of tourism promotion. Why should the Union Government encourage such leakage of duty-free liquor into the open society. If our rich can afford it, they can also afford paying duties.

Worse, our policy makers have not even thought in terms of putting a healthy system in place so that they could easily keep track of the total quantity being imported and all those segments of the society where the same is being consumed. Let's take a

look at the present regime which encourages import of ‘fake’ Johnny Walker Black Label manufactured in China and other countries and the same being

imported into India and being sold at the price of the original bottles. A major infringement of consumers’ right to access originals. As per the prevailing State Government policies, all brands have to be registered with the States, and the same have to be renewed every year. Such registration can be done only by the subsidiaries of major liquor giants which have their local presence in India. But when it comes to import, there is no restriction as per the FTP. Anybody can import and keep the consignment in bonded warehouse. Most of such bonders focus on duty-free supply to diplomatic missions, hotels and other entitlement-holders. They often import such brands from Dubai or other places. A good quantity of fake bottles is also imported and palmed off to unsuspecting marriage-attending and foot-tapping crowds.

A simple rider that all imports have been made only by the authorised subsidiaries of the global brands (almost all have set up operations in India) which may authorise others only after importing the same, the revenue authorities of all hues may get opportunities to examine their books from the Transfer Pricing perspective either income tax or the Customs as most such imports are from related parties like the present Seagram case. At present, most bonders are third parties who declare all sorts of manipulated prices, and the Customs - often hand in glove with them, does not bother to protect its own turf for collecting precise duty.

And finally, let’s examine the practice of liquor sales at airports. Worldwide practice is that duty-free shops at airports are allowed to sell two litres to each passenger

against his/her passport details. Such a restriction is largely followed at the Arrival but certainly not at Departure. India is the only country which, albeit it knows that more than two litres are not allowed by the Customs in any country, exercises no such restriction on Departure. Ingenuous as we are, the sale of liquors in Departure duty free shops is mind-boggling in some of the airports like Chennai. A good number of 'trippers' travel from Chennai to Colombo with about half a dozen bottles and some cigarettes and come back with the same as accompanied baggage and walk through the green channel. This has indeed become one of the key routes for leakage of duty-free bottles.

If the MoF and MoC, policy makers sit together and apply their mind without getting "emotional" about some of their repercussions, what India needs today is a stable and forward-looking policy which need not restrict genuine importers from importing but must collect the revenue due to the exchequer and also regulate the sales to the 'permitted' segments. A healthy policy matrix must also ensure that the consumers' interests are protected by stopping import of fake brands into the country. Let's hope the North Block mandarins wake up early and take this call in the right 'spirit'!

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CWG SAGA: OUR PROBE SHOULD FOCUS ON RESTORATION OF BRUISED 'BRAND INDIA'[4]

For most of TIOL readers the curtain over the XIX Common Wealth Games (CWG) rolled down last Thursday. It is equally true that most of us ended up, while watching the colourful spectacle of the closing ceremony organised with unparalleled splendour of pyrotechnics and musicals, with a bag of mixed feelings. As Indians, we did take pride in

successful ending of the mega sports extravaganza, the first ever truly-expensive global event organised by India. Going by the comments of the participating sportspersons, their managers and CWG top officials, India scored very high in managing the show, supported by the necessary world-class infrastructure. Our guests have gone back to their respective countries, and it's time now to do some genuine soul-searching.

So far as our electronic and print media are concerned, it is true that they have their eyeballs set on the TRP which is perhaps the existential compulsions for all such commercial entities, but they have also been doing a great deal of service to the greater cause of transparency called for to fathom the depth of corruption, mismanagement, lack of coordination etc. in organising an event of this magnitude. However, the span of probe should also include the infamous dimension of the 'paid news' which was alleged against certain media entities which launched a tirade against the CWG Organising Committee merely because they were not given advertisements as per their choices. This is more important for restoration of common citizens' faith in the institution of 'The Press'. The Press Council of India and the Ministry of Information and Broadcasting do need to come clean with their impartial probe report on this issue as well.

Let's now go to the original show. Before we delve deeper into the history, the uniform reaction of the common man to the wide-scale corruption and mismanagement in the games which is now turning out to be a political battle, is that our *populace* is not feeling aghast about the scale of corruption as it has perhaps seen many such instances in the past. Hundreds of our infrastructural projects which have been executed successfully in the recent past, have also seen similar scale of corruption but the media did not go after them. Some of our projects carried out under the PPP model had similar or larger quantum of budgets with the necessary allegation of cost-overruns and political corruption but we never saw a national outrage because the institutions which have been saddled with the

responsibility to keep people informed, have increasingly been getting co-opted into the system perpetuating corruption and inefficiency. In other words, as common men, we have seen all sorts of corruption, but this one was of a different hue predominantly because the 'Brand India' and the newly-acquired efficient face of tech-savvy India were at stake. Although the intent was

4. Published in www.taxindiaonline.com, TIOL–COB(WEB)–210, 21 October, 2010.

to further enhance the equity of 'Brand India' and we did it to some extent but the greater component of our feelings is the regret about missing the opportunity to earn full points in the eyes of foreign audiences.

What went wrong? Who are responsible for failing the Nation? Can our Governments identify them? Delays, corruption, mismanagement and lack of coordination among various arms of the Government are some of the areas which must be investigated and documented for lessons to be learnt by the future generations which are going to handle such mega events. A day is not too distant when India may stake its bid to host even the Olympics.

Let's now take a look at each component of these factors responsible for the greatest mess ever reported by the media. There were delays and slippages right from the inception. The setting up of CWG Organizing Committee was itself delayed by nine months! If Dr. Manmohan Singh's Government and his fire-fighting team which did a good job by repairing the damages before the inauguration of the games, are serious about a fair and comprehensive investigation not only into the corruption aspect but also mismanagement etc., then the

probe should begin with the disclosure of the CWG contract signed in November 2003. This host city contract (HCC) between Commonwealth Games Federation, Indian Olympic Association (IOC), CWGOC (a society formed later), Union Government and Delhi Government must be treated as the starting point of the probe.

The probe should also pinpoint the reasons for ignoring the alarm raised by the CAG which truly acted as a whistle-blower. In its July 2009 Report, the CAG had called for not only a new form of governance for such mega-projects but also specified action for major components of the project. It for instance, recommended: "The bottlenecks for the Games Village Project should be addressed on top priority through better co-ordination within and across Governments."

Had the Governments acted on the report's findings and recommendations, the slippages, cave-ins, hygiene and public display of ineptitude would have certainly been avoided. The incalculable harm to Indian export prospects and Brand India would have been minimized to a great extent. That the Government did not act adequately on CAG report is evident from the subsequent developments including a CVC's preliminary report in July 2010 that raised stink over tenders and construction work.

CVC said: "Almost all the organizations executing works for Common Wealth Games have considered inadmissible factors to jack-up the reasonable price to justify award of work at quoted rates citing urgent/ emergent circumstances. Despite higher rates poor site management, delays and quality compromises have been observed." Referring to poor quality of work and

fabrication of test records to show high strength of civil structures, CVC noted "Third Party Quality Assurance Agency also failed to point out major failure of concrete samples and preparation of forged testing records."

These words of the CVC must be based on *prima facie* evidence of fudging and manipulations. A mountain of taxpayers' money has been spent on this mega event. A major chunk of this fund has been siphoned off and perhaps laundered out of India. If our Income Tax investigation comes out with a finding that a part of this fund has been piped to some tax havens, one should not be surprised. Let's take a journey through the maze of fund allocations and cost-overruns.

All those who are keen to see the truth coming out of this mess should ensure that the witch-hunt against Mr. Kalmadi and company should not distract public attention from the fact the Government had originally allowed IOA in May 2003 to bid for CWG-2010, an expenditure of Rs. 296 crore. The budget has been revised several times. CAG last year estimated the expenditure on the games venue and operational preparedness and associated city infrastructure at Rs. 12,888 crore. CAG has also doubted about the prospects of CWG turning out to be a revenue neutral project as was envisaged. And this premonition of the CAG seems to have come true if one goes by the reckless distribution of complimentary tickets and also half-empty stadia. Going by the various media reports it appears that India has spent about Rs. 15,000 Cr on this mega event. The sheer size of the money involved indeed calls for an in-depth and sincere probe into the entire gamut of issues.

Let's hope the findings and conclusions of the various probes compiled into one report are different from what we have seen coming out in case of similar project fiascos in the past. Let's also hope that the lessons learnt from these investigations are also different from the *chalta hai* style. Above all, our probes must answer the questions as to whether India should attempt similar events in the future, and can we

afford similar level of financial profligacy coupled with widescale corruption. The final report of the Government should also come out with what steps Government proposes to take to recoup the bruised 'Brand India'.

■ ■ ■

ART MART - IT'S TIME FOR POLICY MAKERS TO GET 'SMART'[5]

Although the Union Finance Minister, Mr. Pranab Mukherjee, has already detailed the various measures taken by the UPA Government to take action against tax evaders generating black money and also those who have hoarded their illicit funds in tax havens but the black money issue continues to exhibit its

5. Published in www.taxindiaonline.com, TIOL–COB(WEB)–264, 3 November, 2011.

sticky character stubbornly. The public debate does not appear to have lost any momentum. Only last week, BJP leader L.K. Advani demanded a 'White Paper' on India's wealth in tax havens, and also the names of account holders being investigated. The latest news heard in the corridors of power is that India has received a fresh list of names from the French Government, and our Income Tax (Investigation) is busy ... to what extent the Government will succeed in bringing back the illicit funds from tax havens is at present a matter of pure speculation with neither capital nor gains promised!

But what Government may do in the short-run is to identify the key sectors which handsomely contribute to the parallel economy. Although a study has been commissioned by the North Block to quantify the size of black money economy in India but what needs to be done

to reform some of the well known sectors, which hugely engender *'kala dhan'*, is not being deliberated upon in a concerted manner.

One of the least known sectors which is believed to be providing effective shelter to a good number of 'carriers' of the parallel economy is the 'ART MART' in India. True, the Indian art market barely constitutes a dot on the global art landscape having a turnover of USD 24 billion with about Rs. 700 Crore-size but going by more than 20% growth rate it may swell into a well Rs. 2000 Crore market in the coming years. The growing market-size may further surprise the policy makers as well as the *pundits* of the art market if one believes that the present dismal conditions of the stock market and the real estate may fuel the growth of the alternative art market in the coming months. The global trend is that whenever the bourses have shown propensity to collapse, and the real estate market showing signs of 'depression', investors tend to turn towards alternative investments.

Given the fact that many bankers, portfolio managers and others from the organised sectors have begun to spoon out advisories to high net-worth individuals to invest in art funds, this calls for detailed regulatory norms to protect the investors' money as well as to infuse transparency in the functioning of the art funds. True, SEBI recently stated that it may soon come out with detailed guidelines on alternative investments but such talks have been in the air for quite some time. The present conditions in the economy indeed represent the right time for India to put healthy regulatory standards in place so that the art funds do not die even before they mature, and emerge as a reliable, return-promising alternative source of investments like in many European countries, China and the USA. It is truly too early to think in terms of an art exchange but whatever investments are pouring from a few lakhs investors who understand this segment of the market, must be protected from fly-by-night operators and dubious schemes. Policy-

makers need to remind themselves about the not-so-old stories of plantation companies which had vanished in the thin air after mobilising thousands of crores from poor investors. Besides, regulation right

from the fledgling stage is more desirable to prevent insider trading, monopolisation and policing against unfair trade practices.

If we look beyond the geographical boundaries of India, China has, in recent years, emerged as a key Art Mart at the global-level. It has dethroned the USA and grabbed the *numero uno* slot in terms of accounting for about one-third of the global investments in the Fine Art sales. Its Beijing Imperial City Art Trading Centre has grown into one of the most happening places in China. This Centre also functions as auction houses, galleries and museums. The Fine Art sales here were to the tune of USD 3.5 billion last year. If we go by the art mart in totality, Chinese market is about to reach USD 10 billion.

Experts in the market say that with the Sotheby's and Christie's being aggressive on India, the art market is bound to grow at a rapid pace. The Indian investors, who are looking for long-term returns, may have a bright future if their purchases made in the past are put on display at the UK auction houses to fetch globally competitive prices. Huge returns would further invigorate the domestic market in India. In fact, the Indian diaspora has been quite aggressive in investing in art market. At one point of time it was described as 'overheated' in the recent past, thanks to the NRIs' funds.

No doubt, there is huge potential for systematic and systemic growth of this market, with many art galleries playing critical role in educating art lovers. But it is also ironically true that the taxmen have a point when they see a major part of this market as an instrument to channelise or launder illicit funds. This is also a conduit to 'wash' black into white. As long as an opaque system exists with little transparency about the price,

art market would continue to be seen as a conduit for laundering black money which is speculated to be about 30% of the total market size. If it is so, it would not be a bad idea to levy VAT on sale of art pieces so that there is proper audit of books of sellers and purchasers. This would be besides the capital gains tax arising from sale of artworks held as capital assets for some years. The potential for revenue apart, what is to be done urgently is to burn the opaque layer of this market so that at least the spectre of black money is denied an attractive counter for smooth transactions. Let's hope our policymakers take note of the unmistakable structural changes shaping up this nascent market in India so that it could be groomed within the regulatory framework, and the same could contribute to the exchequer's health as well.

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THE TALE OF 'LIQUORED' BLACK MONEY ECONOMY OF INDIA[6]

The global floodlight continues to be focused on the issues of recalcitrant tax havens and black money generation, poisoning the fragile bricks of global

6. Published in www.taxindiaonline.com, TIOL–COB(WEB)–266, 17 November, 2011.

financial architecture. Although the Indian Finance Minister has outlined several steps taken, to make a dent into money-laundering and black money generation but very few brave hearts may tend to believe that any of these measures taken by India would succeed either in bringing back the lost wealth hoarded in tax havens or reduce the quantum of black money generation. The North Block has been honest enough to admit that they have no proven records to indicate what the size of our

parallel economy is! Thus, as many as six different institutions have been assigned the job of estimating our parallel economy to a credible extent. A good number of studies or articles published so far have only cosmetically or broadly listed out the number of sectors which continue to richly contribute to the national black money kitty.

One of the sectors, which I would like to touch today with some guesstimated statistics, gathered from key players of outstanding repute in the economy, is the liquor industry. Liquor, an organic compound, is truly a rich 'liquid' for our black money economy. Although alcohol is being consumed for millennia, but disparate state policies followed by different States in India, unmistakably bleed the State Exchequers and hugely generates black money, pocketed by a well-knit chain of distillers, transporters, distributors and retailers. Since a good number of politicians patronize the existing licensing/taxing policies, one may not find much change in the fundamentals of the state levy of excise duty on liquor since 1947. In some of the States and Union Territories, if there is minimal involvement of politicians, the untaxed money is pocketed by active agents of the State who are also on the pay-roll of the Government-owned agencies.

Let's begin with the National Capital. Retailing of liquor is done through the four State-owned corporations - Tourism Trade Development Corporation, Delhi State Industrial Development Corporation, Delhi State Civil Supplies Corporation and Delhi Consumer Cooperative Welfare Society Ltd. These corporations run about 300 outlets across Delhi (L-2,) and about 100 retail outlets (L-52) are given to Private Individuals. The size of the IMFL (Whisky, Scotch whisky, Rum, Gin, Vodka, Brandy and Tequila) market is estimated at 10 Million cases (750 ml × 12 = 1 case) and average monthly sale is over 8 lakh cases in Delhi. The size of the Beer market is estimated at

9 million cases (650 ml × 12 = 1 case) and the Wine market is estimated at 50000 cases per annum.

What are the formalities to sell liquor in Delhi? The manufacturing companies have to register their brands (IMFL, Wine and Beer) through their licensed distributors with the State Excise Department on annual basis, and the licensed distributors bring in the stock after getting excise permit from the Excise Department on payment of duty or vend fee. The stocks are stored in bonded warehouses, again licensed, and then supplied to four State-owned corporations who run the selling outlets.

In order to push the sale of liquor, beer and wines from these outlets, the company sales executives bribe the large population of outlet managers/salesmen. The bribe ranges from Rs. 200 to Rs. 400 per case. Rs. 200 is paid generally in the case of cheaper whiskies, vodka and gin where retail price of bottles is below Rs. 200 for 375 ml bottle. The monthly sale of cheaper IMFL in the state owned retail outlets is estimated to be close to Two Lakh cases. Nearly 60% of the brands sold in Delhi through state owned outlets in this segment have to pay the push money per case on a weekly/fortnightly/monthly basis to each retail outlet salesmen. The estimated cash outgo for sales promoters is about Rs. 2.4 Crore.

Similarly, the push money per case of IMFL like Royal Stag, McDowell, Aristocrat retailed at Rs. 200 to Rs. 350 per bottle have to pay Rs. 300 to 450 per case to Sales Incharge/ Counter Salesmen. The average monthly sale of brands in this segment is THREE Lakh cases per month, and the estimated push money is about Rs. Seven Crore plus. The push money on premium whisky/vodka brands is very high, Rs. 500 to Rs. 800 per case and the sale of these premium whisky and vodka brands in Delhi per month is 25000 cases and the estimated

push money to sales in-charge and counter sales man is Rs. 1.25 to Rs. 2.00 Cr per month. The push money in the case of scotch whisky and single malt whisky is over Rs. 1000 to Rs. 2000 per case. The average monthly sale of expensive scotch whisky, single malt whisky is over 6000 cases, and not even a single bottle is sold from retail outlet unless the brand owner/ distributor pays the push money. The estimate of push money on scotch whisky and malt whisky is Rs. 60 lakhs to Rs. 1.25 Crore per month. Thus, the total push money collected in cash every month from liquor companies or their distributor is between Rs. 12 Crore to Rs 14 Crore.

The push money on Beer is less when compared to IMFL and the average amount is Rs. 60 to Rs. 120 per case which translates into Rs. 3.60 Crores to Rs 5.00 Crores per month, on an average sale of 600,000 cases per month during April to September period. The sale of Beer is more from April to September, and during October to March is 200,000 to 300,000 cases per month.

The cash generated by these outlets is over Rs. 20 Crore per month, which translates into Rs. 240 to Rs. 250 Crores per annum. The push money goes from the counter salesmen and retail in-charge to higher ups to ensure no person is transferred to different department. The amount of Rs. 250 Crores plus is pocketed by a small population of privileged salesmen who invest them in benami properties like DDA shops, Malls and houses in posh colonies.

This is indeed a small story about black money generation through corrupt practices in a small state. A Delhi-like module is followed by the States like Tamil Nadu and Kerala where the volume of liquor and beer sales is about SIX times of Delhi in Tamil Nadu and three times more in Kerala. In these two States also, state-owned corporations run the retail outlets where push money principle

works with optimal efficiency. In others words, if it is Rs. 250 Crore cash generation in Delhi, it should be more than Rs. 1000 Crore in Tamil Nadu and about Rs. 600 Crore in Kerala.

The story does not end here. Another cash generation method in Delhi is from non-duty paid liquor (mostly cheap brands). The non-duty paid liquors are sent by trucks without valid export permit of state excise where the unit is having distillery or bottling unit and without import permit of Delhi Excise. These goods enter in trucks (mostly goods are clubbed with food grains/ vegetables/packaged drinking water and other essential commodities into Delhi) and are off-loaded in the warehouses of distributors who distribute them along with duty paid stock to retail outlets. The distillery owner, transporter, distributor, sales in-charge and counter salesman of retail outlets share the sales proceeds of non-duty paid liquor 40% to distillery owner, 5% to transporter, 10% to distributor and 45% to retail outlet sales in-charge and counter salesmen. The average sale of non duty paid liquor in Delhi is 3000 to 5000 cases per day and average realization per case is Rs. 1960 to Rs. 2400. This generates about Rs. 1 Crore per day, and thus it amounts to about Rs. 300 Crore black money. A similar trend is followed in many other States.

Insiders in this industry guesstimate that if one goes by the unglamorous figure of Rs. 500 Crore cash in Delhi, the All-India figure should be in the region of Rs. 30,000 Crore per annum. If these figures are any indicator of major pillars of the parallel economy in India, then the Finance Minister, Mr. Pranab Mukherjee, also knows that if any dent is to be made to the black money generation, he will have to convince the Empowered Committee of State Finance Ministers to undertake a major reform of their liquor licensing policy. Ideally, there should be a model framework to tax liquor and also retail it. All States should follow the model

legislation and administrative framework, not only to garner extra revenue but also to eliminate the fattening outlets of black money generation hurting the economy. For instance, Delhi Government can earn more than Rs. 500 Crore by either renting out shelf-space of retail outlets or by following the Chandigarh or Haryana model which does not promote 'push money syndrome'.

Given the fact that India is likely to wrap up its Free Trade Agreement with EU which is the major producer of liquor worldwide, it would soon put pressure on New Delhi to reduce duty and push their own products in one of world's major guzzlers of foreign whiskey. It is high time the domestic distillers are prepared for future competition as the Central Government may not be able to protect many of them from cut-throat competition, and also reform their sales to such an extent that it does not provide oxygen to the black money economy!

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IF SWITZERLAND IS TAX HAVEN, INDIA IS BECOMING GOLD SMUGGLERS HAVEN[7]

So, here comes the 'Golden Era' for the gold smuggling syndicates, hibernating for a long time, or experimenting with many Information and Communication Technology products for a premium. With the Ministry of Finance notifying a 50% import duty hike besides an increase in the Central Excise duty, for the oft-repeated objective to reduce Current Account Deficit (CAD), whether it would really help blunt the fangs of deficit is certainly not certain but what is certain is that smuggling of the yellow metal would simply take a giant leap in the coming months. Only a couple of days back, the Chennai DRI sleuths stumbled upon a new *modus operandi* - smuggling

through courier. The consignment was worth Rs. 3.8 Crore. The sender was unknown and so was the recipient. But the precious consignment, which was air-routed to India, used to disappear even before reaching the customs area. Given the fact that it takes time to collect actionable intelligence, one can safely presume that only after five or six such consignments must have escaped undetected, the seventh one was caught. If such a *modus operandi* was tried at Chennai airport, the senders must be trying the same through various other airports. By the time the internal alert circular reaches more than a dozen international airports, a close to 100 such courier consignments must have paved its way into the jewellery market in India. Mind it, this is when the customs is not aware of it. If some of the customs officials get involved in 'true facilitation of the trade' there is no way the Ministry of Finance can even guesstimate the quantum of illegal trade in gold coming into the country.

In simple words, our policy makers are destined to witness interesting and innovative cat and mice game between the customs and the gold syndicates. In Bollywood style, some of our intelligence sleuths would be shadowing the agents of smuggling syndicates and may be cracking down when their consignments land in India either concealed in genuine machinery imports or electronic goods or other consumer goods. One should take a lesson from the case booked by the Mumbai DRI, which had, based on intelligence, found the precious metal stored in imported hydraulic pumps. In other words, it is going to be a battle of wits and improvised *modus operandi*. This is besides the methods resorted to by carriers hired by such syndicates. Readers are aware that on an average each international airport customs has been making seizure of gold coins, gold bars and jewellery worth a few crores per week. A sudden spurt in its illegal trading appears to be being matched by smuggling of foreign currency out of India. Since funds generated out of sales of such consignments must reach outbound destinations abroad, a good number of sleepy foreign currency carriers have become active, and they have been using

not only the air and sea routes but also land routes.

7. Published in www.taxindiaonline.com, TIOL–COB(WEB)–328, 24 January, 2013.

But going by the sheer size of volume involved in the illegal trade, it may be presumed that the entire finance is certainly not being managed through the *hawala* or outright smuggling of FC. If a clue is picked up from various international studies, the deposits in the vaults of Swiss Banks, owned by Indians, have significantly gone down. A part of such fund-withdrawals is believed to be being utilised for funding the purchase of gold bricks in Dubai, and the same being smuggled into India. A few international trade experts are also believed to be assisting the core strategists of the illegal trade, and thus, they have been making use some of Free Trade Agreements (FTAs) and Preferential Trade Agreements. For instance, Indo-Thai FTA has been identified as the one being grossly abused for import of gold.

What is most surprising is the fact that although the Ministry of Finance is worried over the swelling CAD deficits and has also alerted the Ministry of Commerce about the abuse of value-addition norms laid down for import of gold items from Thailand but no change has hitherto been proposed in the FTA. Besides, there are at least six different export promotion schemes under which gold exporters have been importing gold today. And most of them have stinking chinks, which in turn make bigger holes in our Forex kitty. But no step has been initiated to rationalise them or reduce the number of schemes to one or two. It is well known that a major chunk of such imports is diverted into the open market for local sale, and inferior quality jewellery is exported to meet the export obligations. The recent RBI Working Paper is an

eye-opener for the policy makers provided they are keen to open their eyes to the stark truth about the DECLINING percentage of value-addition in the volume of jewellery being exported from India.

Let's now take a look at some more startling dimensions of this issue - If Switzerland is a tax haven, India is going to be a gold smugglers' haven. If another 'Dawood' emerges on the scene, the full credit may be accounted by the rising premium in the illegal trade of gold. Unlike the Dawood-days when the Customs, *albeit* ill-equipped, had daredevils like Daya Shankar and the powers to arrest them, today's Customs has no powers to arrest and will have to wait to see how many 'Daya Shankars' emerge on the scene! A huge legal tragedy struck the indirect tax administration when the Supreme Court of India in the case of *Om Prakash v. Union of India*[8] held that the offences under the Customs Act and the Central Excise Act are non-cognizable and also bailable. The Apex Court ruled that both Section 9A of the Central Excise Act and Section 104(4) of the Customs Act, 1962, provide that notwithstanding anything in the Code of Criminal Procedure, offences under both the Acts would be non-cognizable. And if the person arrested opts for bail, he has to be released on bail as per the provisions of the Acts.

8. 2011-TIOL-95-SC-CX-LB : (2011) 14 SCC 1 : AIR 2012 SC 545.

With the Gold Control Act gone, and the Customs being fully disarmed with its biting teeth, no prize to be given to guess - how a smuggler is to be treated if caught by the DRI or any other Customs field formation? No doubt, the Customs has detected huge consignments of gold illegally imported through containers or in baggage, and has also arrested the smugglers or carriers but the offenders have been let off as the law makes

such offences non-cognizable and also bailable. This is so when even pick-pocketing is not a bailable offence.

In this backdrop, since Mr. Chidambaram has taken a well-calculated risk to give an impetus to gold smuggling, he is also required to take a similar risk of again arming the customs officers with the power to arrest in case of certain class of offences. As suggested in this article earlier, the CBEC may categorise the offences under Customs and Central Excise and make them bailable and non-bailable in certain cases like outright gold smuggling and clandestine removal of goods or abuse of Cenvat Credit. This has become a dire need of the hour, and the CBEC Chairman and the Member (Customs) need to revisit the last year Finance Bill proposal and fine-tune the same before they present the same to the Finance Minister for inserting them in the current year Finance Bill. To recall the history, even Mr. Pranab Mukherjee was convinced of the need to arm the Customs with the power to arrest but his heart strangely went through a 'volte-face' or was ill-advised to drop the proposal at the time of seeking Lok Sabha nod. But given the horrifying spectre of unrestricted smuggling of gold, which is indeed being relished by the World Gold Council and the Swiss Bank selling gold, as legally or illegally, their favourite Indian market has been pushing their sales up, the Finance Minister will have to take his brethren in the House into confidence to once again revisit the legal provisions and 'gift' the power to arrest to the Customs to make a dent into smuggling of gold.

Although while speaking to the media persons, the Secretary, Department of Economic Affairs, sounded confident that the duty hike would dampen the rising demand for gold and thus would contain the CAD, the ground realities tend to project his optimism standing without legs. Even the Gold Deposit Scheme, which he appeared to be hugely banking on, may not produce the desired results in its present format. There is no tangible reason for any household to give away its gold reserves to any bank for a meagre interest benefits. The Finance Minister needs to make this scheme more attractive if

he wants the scheme to be even reasonably successful unlike the 1999 episode. For instance, he may tax-exempt the interest earned on such deposits. To reach out to large number of households or opulent Hindu temples, the banks would be required to designate more branches under this scheme and a huge marketing campaign would be entailed to educate the families before they make up their minds to part with their most precious asset. This is also the right time to revisit the old proposal of 1992 when a Gold Bank was proposed to be created. Such a bank can be armed with the power to regulate and incentivise the gold deposits in the country. Similarly, it

may be made mandatory for the jewellery exporters to source certain percentage of their import needs from the domestic banks operating Gold Deposit Schemes. This would rescue the banks from sitting over piles of gold reserves and their working capital getting stuck in it. In a nutshell, unless many more parallel policy decisions are taken to develop innovative tools, merely hiking import duty would certainly not help the larger cause of reducing demand for gold in India, and in turn, containing the soaring CAD deficit graph.

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THE 'BLACK' HAS IT ALL[9]

The Great Indian (now Global!) festivals are around the corner. To begin with, it is going to be *Dussehra* this week-end, to be followed by *Diwali*, Christmas and New Year, apart from some of the local *pujas* in certain geographical pockets in India. Festive Season is, traditionally speaking, enthusiastically awaited by the business in India. But not this time! The much sought-after DEMAND CURVE has 'curved' to a baffling degree. The forlorn sentiment continues to reign

supreme. All sorts of surveys conducted among the CEOs, industrialists, new breed of entrepreneurs and SME-riders have contributed to the contagious mood in the economy. With no immediate hope of revival for the global economy (China is expected to contract more than what was projected earlier), the India was pinning its hopes on the forthcoming string of festivals and the marriage season when the consumers and the households change the gear into '*phook dalo*' mode for their savings. Historically, most Indians spend about half of their annual earnings in four months of a year, and that great mood-changing month is right here. But given the lingering pall of gloom over the global economy and the hand-withdrawing mode of the RBI, most consumers do not appear to be too keen to break free with their tightly zipped wallets.

To persuade them to go for buying of consumer durables, the Ministry of Finance was recently seen convincing the Public Sector Banks to dispense cheaper loans for items like motorcycles and scooters. If the PSBs toe the MoF line, the Finance Minister, Mr. P Chidambaram, also promised to pump in additional capital in the obliging banks. Since the Finance Minister had denied some sort of fiscal stimuli to the industry because of his own gnawing fiscal deficits, any effort to spur the rapidly-shrinking graph of demand was a welcome move. But such a sector-specific stimulus is not without a corresponding hazard. Once cheaper loans are provided to a particular sector, many sectors experiencing tall piles of inventories and collapsing under their weight, may seek policy intervention from the Government. Although the outgoing Government may be

9. Published in www.taxindiaonline.com, TIOL–COB(WEB)–365, 10 October, 2013.

too delighted to do so but the RBI does not appear to be in any obliging mood notwithstanding a change in the hot seat recently.

In this backdrop, what has come as a spirit-splitting forecast from the International Monetary Fund (IMF) for Mr. Chidambaram is that if he fails to curb his spending amid high inflation, India may be heading for only 3.8% growth rate in the current fiscal. This is the sharpest cut ever projected by any international body for India. Only in July, most of the forecasts had conservatively pegged the growth to 5.6%. In fact, it was H2, which Mr. P. Chidambaram was awaiting to see a gradual recovery of the economy. But if we look at the IMF forecast, our North Block forecast appears to be diagonally opposite and a bit excessively optimistic. And what compelled the IMF to so ruthlessly minimise its forecast is again India's poor track record of maintaining the credibility of fiscal deficit target. Given the unrealistic budget estimates for revenue collections, it is unlikely that Mr. P. Chidambaram will be reaching even closer to his targets unfolded in the Budget 2013. Some of his schemes like VCES, which is secretly hoped to mobilise not less than five-digit revenue, may turn into a nightmare unless it is liberally expanded and its scope widened.

In this background, what may earn some 'cooling effect' for the Finance Minister are the forthcoming polls in the States, followed by the Parliamentary elections. The Election Commission has already notified dates for Assembly polls in five States. As soon as the EC will be through with it, it would be gearing up for the Lok Sabha Polls. It is a documented fact that polls are terrifically expensive affair in India. Our politicians spend more than their counterparts in the USA. For instance, the American politicians spent close to Rs. 8000 Crore during the last Presidential elections. But in India, this figure can be conservatively more than Rs. 10,000 Crore minus the spendings in the State polls, which are no less costly. Although the EC and the Central Government and the State Governments may officially spend only about Rs. 2000 Crore, the unofficial spending to buy votes is expected to be about

80% of the total spendings. So, the total spendings for the polls lined up in the coming months cannot be less than Rs. 12000 Crore. If such a sum is going to be spent, it may prove to be a 'boon' for Mr. P. Chidambaram, who is trying hard to convince the Government-owned banks to dole out cheaper loans.

What may support the extravagant spending theory is the recent study done by the Association for Democratic Reforms (ADR). The Study has given a finding that apart from a 'chequered criminal record' most MLAs in the five States going to polls are *Crorepatis*. As many as 69% of Delhi MLAs hail from the *Crorepati* Club. Rajasthan has 46 MLAs and MP has 38 from this notional club. The Study analysed all 607 winning candidates of 2008 State Polls and found that as high as 43 % are members of the *Crorepati* club. Apart from the wealth, as much as 43% of MLAs in Delhi have criminal cases pending against

them. Contrary to public perception, BJP tops the tally of MLAs with pending criminal charges with 46%; followed by Congress with 38%. If such a 'loser' trend continues, political *pundits* believe that Congress may not hope for yet another repeat of victory in Delhi!

Although all such legal and illegal spendings may give a boost to the demand in the economy but what may be seen as a setback for the Green Lobby in the country is the Apex Court's recent decision on the issue of paper trail for each vote cast through the Electronic Voting Machines (EVMs). Readers may recall that our Election Commission had completely switched to EVMs for casting votes since 2004. But there were allegations from some political quarters that there are chances of manipulation of the machines. To put such allegations at rest, the Supreme Court held that[10] the people's faith should not be allowed to be dented, and the EC must

introduce an audit trail for each vote cast. Thus, it was ruled that the Union Government will provide funds and such a paper trail option will be introduced in the forthcoming general elections next year. Given the fact that India has about 80 Crore eligible voters, such a decision of the Apex Court may further spur the spending in the economy, and that is another matter that it would further give a dent to the Exchequer, which is finding it so difficult to cut expenditure.

In a nutshell, the height of ironies is that the purse of expenditure can be a PROBLEM if it is at the cost of the Exchequer, and also a Solution if it is coming from the consumers in an economy. On the one hand, the IMF wants our Finance Minister to cut expenditure to meet his fiscal deficit target, and on the other hand, the Finance Minister is willing to incentivise the banks provided they provide cheaper loans for buying consumer items so that the demand stuck in a quicksand is spurred out. In this backdrop, the only ray of hope is going to be our black money economy, which is expected to contribute richly in the coming months, and may provide 'shops' for the ill-gotten money generated out of deals like the ones done by Madam Radia as alleged by the CBI in its latest affidavit to the Apex Court. In this context, it may be said that the 'Black' has it all!

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INDIA'S ECONOMIC GROWTH STORY - THE TALE OF ILLICIT FUND HEMORRHAGE[11]

One of the key concerns for the Union Finance Minister, Mr. P. Chidambaram, in the recent months, has been the 'thorny' management of Current Account Deficit (CAD). To contain the galloping horse that our CAD is, the Finance Minister

embarked on a two-pronged strategy of attracting FDI at 'any cost' and 'almost corking' the forex-devouring import of the yellow metal. Although the Finance Minister knew it pretty well that having raised the Tariff Wall he may have to relive the gold smuggling days of the 70s and 80s but if one goes by the latest Global Financial Integrity (GFI) Report, it may appear that the Finance Minister had realistic 'hunches' about the huge import and export mispricing. With gold jewellery being a key contributor to our export proceeds kitty, the Finance Minister probably suspected that the import of gold has been a robust tunnel for illicit flows of capital out of India. And as soon as the Finance Minister raised the bar of import duty, the import has 'dried up' in a few months, and so has the exports. But one salubrious impact has been the eminent reduction in the CAD.

Before we discuss more of India's case let's first take a look at some of the key findings of the GFI's first comprehensive report on illicit fund flows from developing countries:

- Crime, Corruption and Tax Evasion drained USD 947 billion from Developing Countries in 2011 - up by 13.7% from 2010;
- About USD 6 trillion was stolen from Developing Countries between 2002 and 2011;
- China, Russia, Mexico, Malaysia & India — in descending Order — are biggest Exporters of illicit capital over the decade;
- China and Russia top the table with USD 1008 billion and USD 881 billion respectively;
- India lost as much as USD 344 billion in the past one

decade;

BRICS countries account for almost 45% of total illicit fund flows;

Asia accounts for 39.6 percent of total illicit outflows;

Developing Europe (21.5 percent) and the Western Hemisphere (19.6 percent) contribute almost equally to total illicit outflows.

While releasing the Report the GFI President Raymond Baker said, "Anonymous shell companies, tax haven secrecy, and trade-based money laundering techniques drained nearly a trillion dollars from the world's poorest in 2011, at a time when rich and poor nations alike are struggling to spur economic growth. While global momentum has been building over the past year to curtail this problem, more must be done. This study should serve as a wake-up call to world leaders: the time to act is now."

Interestingly, the USD 946.7 billion that flowed illicitly out of developing countries in 2011 was about 10 times the USD 93.8 billion of net Official Development Assistance (ODA) that was received by 150 developing countries

that year. This means that for every USD 1 in development assistance going into a developing country, roughly USD 10 of capital were lost via illicit outflows.

What is worth noting is that these estimates do not include trade mis-invoicing in services, *hawala* transactions, and dealings conducted in bulk cash. This also means that much of the proceeds of drug trafficking, human smuggling, and other criminal activities, which are often settled in cash, are not included in these estimates as per the authors of the Report.

How did India Lose?

In the case of India, the Study found that while the link between the growth and broad capital flight was statistically insignificant for the period as a whole (1948-2008), there was strong evidence that the much faster rates of economic growth following India's economic liberalization in 1991 stimulated more capital flight. Economic expansion provided more opportunities to generate and transmit more illicit capital given the lack of effective governance apparatus.

Hence, the GFI case studies show that the empirical link between economic growth and capital flight or illicit flows is mixed, suggesting that the relationship between growth and capital flight is complex. An expanding economy can stimulate growth in the underground economy by offering more opportunities to make money (through, for example, a larger number of government contracts, which can be subject to bribes and kickbacks like in India). Alternatively, faster economic growth can foster more investor confidence, leading to a reduction in capital flight.

However, the Study finds that real GDP growth is positively and significantly related to import mis-invoicing, in that growth by itself will drive rather than curtail mis-invoicing if overall governance does not improve. Such a result was found by the case study on India.

Author: Such a finding is indeed a valuable tip for the Customs preventive formations, which need to focus more on commercial frauds and mis-invoicing of imports in India. As per the DRI's Annual Report, its sleuths had detected that undervaluation had accounted for as much as 25% of total commercial fraud in 2011-12, and the same came down to 6% in 2012-13.

Similarly, it is a precious insight for the Directorate of Transfer Pricing in the CBDT, which focuses on shifting of profit out of India through the trade route. Although

TP adjustments to the tune of Rs. 70000 Crore have been made so far and it is also likely to touch about one lakh crore in the current fiscal but much more needs to be done to effectively stop the flight of capital out of India.

Besides the tax administration doing its bit it is equally important that the RBI tightens its norms and watchdog apparatus as a good chunk of funds are

going out in some sort of masqueraded form. A good number of domestic companies which have been investing overseas by taking over shell companies, need to be watched more closely. So far India seems to be the case of losing more capital than it has been receiving in the form of FDI inflows. Although a good number of investments through some of the tax havens may appear to be bringing in foreign capital but over the years they take away more capital out of India.

Corruption is of course one of the main culprits in the case of India. If one prepares a tally of scams, the sums involved or speculated to be siphoned off could be to the tune of hundreds of billions of rupees. Similarly, mega tax evasion cases are another key contributor to the global trend of illicit fund flows out of the developing countries.

Some of the Gobally accepted Remedies to the Present Trend is that:

the Developing Countries need to reform their Customs apparatus and trade agreements to reduce the abuse of trade mispricing: India has signed as many as 58 Customs Cooperation Agreements but it does not seem to be reaping any dividend out of them. Like our 88 DTAAs - many of which provide provisions for exchange of tax and banking information, but not much meaningful information is received, the Customs Cooperation Agreements are also not very useful for

India so far unless there are active exchange of trade information.

MNCs must be legally compelled to declare their country-to-country sales, profits and taxes: Thanks to the G-20 initiatives the OECD has taken some initiatives for reform of international taxation but it has a long way to go before the MNCs comply with such a practice. The G-20 also needs to fix the responsibility of rich countries, which cannot escape the blame for the two-way traffic of illicit financial flows in the global financial markets. G-8 and G-20 must also help developing countries in their efforts to trace and recover their stolen money.

Strict enforcement of Prevention of Money Laundering Act, 2002: Although India is one of the first countries to pass such a legislation and also to join the Financial Action Task Force (FATF) but no significant dent has been made to the interests of the money-laundering community. As per OECD's latest Study released yesterday, 27 of its 34 Members are either non-compliant or only 'partially compliant' with the FATF recommendations on transparency of corporate ownership information. Such a tool is key to tackling the issue of phantom companies in the global economy. All rich countries need to follow the UK initiative to create public registry of corporate ownership information;

- Anti-Bribery Convention: The UN as well as the OECD have floated such conventions and a good number of developing countries have signed them like the rich countries in the case of OECD Convention but no concerted onslaught has been launched against the dragon of corruption. As long as corruption in government contracts remains, a

major chunk of illicit fund flows problem cannot be mitigated. India has also signed the UN Protocol but how compliant is India can be 'measured' from the truckload of scams reported in the recent years.

In a nutshell, India has in the recent years witnessed a lot of political and judicial dust being raised over the issue of huge Indian wealth being parked in tax havens but nothing appears to be happening on the ground. The status quo exists and continues unabated. The communities of tax evaders, money launderers and scamsters continue to have a good time by richly contributing to the global statistics culled by the former IMF economists spending sleepless nights over the trends of movement of illicit funds to tax havens. No doubt, India has seen robust economic growth in the past one decade but it has also lost a robust sum of USD 344 billion during this period. Although how much India contributed to the 2011 kitty of USD one trillion of illicit funds, is not very clear but given the fact that India has not succeeded much in preventing the outward flight of capital and also the fact that its official watchdog has recorded huge outflow of capital in 2011, India cannot be construed as a laggard. In this backdrop, it would be a serious challenge for the New Central Government in 2014 to do something meaningful and effective on the ground in the coming years!

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BLACK MONEY - POLICY NEEDED TO DENT INTO 'TINY MACHINES' OF TAX EVASION[12]

India today confronts not only serious economic woes like galloping unemployment; declining disposable income; nerve-wracking fiscal and trade deficits; soaring domestic borrowings; poor manufacturing growth and devilish influence of black money but also awfully

disturbing political turpitude. That is how we often find politicians with criminal antecedents scoring over principled citizenry within the body polity. It is certainly not rare to see a good number of politicians facing criminal charges get accommodated in the either Central Council of Ministers or State Council of Ministers. True, this is largely because of the 'politics of accommodation' that many of our national political parties prefer to practice to acquire executive powers. Such a practice is universally practised at the cost of public interests.

12. Published in www.taxindiaonline.com, TIOL–COB(WEB)–411, 28 August, 2014.

In this background, in response to a Public Interest Litigation (PIL) the Constitution Bench of the Supreme Court of India yesterday[13] came out with a detailed order whereby it stopped itself short of detailing the limitation of the Prime Minister or Chief Ministers in selecting Ministers for their Councils of Ministers and hoped that they would not abuse the Constitutional Trust reposed in them for selecting Ministers minus criminal charges. Although the doctrine of constitutional trust prevents the judiciary from laying down disqualification conditions for selecting a Minister but the Apex Court clearly hammered the twin components that constitute the Doctrine of Constitutional Trust. And they are the principles of good governance and canons of constitutional morality. These two concepts coupled with the doctrine of implied limitation lay down the boundaries for a constitutional functionary like the Prime Minister to choose his colleagues having integrity and purity of service orientation.

In this backdrop, the Bench recalled the memorable words of Dr. Rajendra Prasad uttered on 26 November 1949:

"Whatever the Constitution may or may not provide, the welfare

of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. Our Constitution has provision in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them."

Our First President was so precise in his prophetic observation if we look at the on-going investigation in the Coal Scam; Spectrum Scam, land allotment scam and black money scam. In fact, credit goes to the present crop of politicians who have proven Dr. Rajendra Prasad so correct when he said - "... a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, ..."

In a nutshell, what India today lacks in is nothing but men of character and integrity who take decisions only *pro bono publico*! But corruption at high places and criminalisation of politics have rudely corroded the legitimacy of our collective ethos and frustrated the aspirations of the citizens. Systemic corruption perpetuating black money economy and sponsored criminalisation have eaten

13. *Manoj Narula v. Union of India*, 2014-TIOL-70-SC-MISC-CB.

into the vitals of the fundamental core of our elective democracy i.e. constitutional governance.

In this backdrop, I would like to examine how corrupt

system destroys rule of law and breeds non-compliance with tax laws legislated by our low-currency politicians occupying high places in the Government.

In response to my article titled *"Money ... Black is beautiful!"*, one of my reader commented - "What about the domestic black money." And he highlighted the following points:

(A) Real Estate - there is huge gap in the actual price *vis-a-vis* transaction
price - in most of the places the difference could be manifold;

Author: It is commonly known that the real estate transactions constitute the CORE of the black economy. It is widely estimated that the real estate sector accounts for a little more than 10% of the about two trillion dollar GDP and about one-third of this 10% is generally accounted by the cash component. In other words, I am sure, the various Studies on Black Money submitted to the North Block must have indicated this in the range of Rs. Seven Lakh Crores. Given this quantum of cash transactions, one may estimate the magnitude of tax evasion to the Exchequer. Although such grim statistics are available with the Government but even the Modi Sarkar has not taken the initiative to translate the Real Estate Regulator Bill into an Act. India badly needs such a Regulator to introduce a much-needed regime of good governance in this sector which could bring relief not only to a home buyer but also a taxpayer by honestly contributing to the Consolidated Fund of India.

Another area where a Regulator can play significant role is the lease agreement market. Nowadays a good number of corporate or even high income earners enter into lease agreement for small amounts and a major part is paid in cash which goes unaccounted. Such a practice is now Pan India in nature.

(B) In all the showrooms in the markets - big cities,

small cities, towns and
even villages, their daily sales transactions range from few lakhs to few crores
and they are either not paying any tax or paying just a fraction - they maintain no
books of accounts, nor sale invoices. I know many in my city - who do not know
- what is income tax but they own many properties as they are flush with cash
and the only place to splurge such money is to buy either gold/silver or
immovable property. Should there be not a "composition scheme" for income tax
on such traders and shopkeepers.

Author: What TIOL reader has stated is every day truth which not only the common man but even our taxman is witness to it. All sorts of showrooms have come up not only in the cities but even smaller towns and they do brisk business but our taxmen fail to match their briskness in collecting their dues. This gives

rise to the general perception that they escape from the taxnet by greasing the palm of the eye-balls of the tax department i.e their field officials who are expected to report to their bosses and initiate action. Even a small measure initiated for tax deduction at source in case of gold transactions was resisted and later diluted under pressure from the gold lobby by the UPA Government. Whether a similar measure will be initiated by the present regime is quite unpredictable if one goes by the hues of the supportive constituencies of the NDA Government. In this backdrop, the CBDT may take a leaf from suggestions like introducing a 'Composition Scheme' for small traders etc.

(C) Marriage homes and farms have nowadays been mushrooming

everywhere. They do not pay service tax as they are not registered. Double
***dhamaka* for them -** no service tax nor income tax! Many of them are smart
enough to charge service tax, collect but never deposit the same in government
account;

Author: This segment of business which earlier used to be seasonal has become all-season with the middle class celebrating anniversaries, birthday parties and social get-togethers and corporates hiring them for colourful evenings for their own employees as part of their HR exercise. Even in smaller cities, such places or palaces have become a good source of business. But they are largely fly-by-night operators. They keep changing their names and never register with the Service Tax Department. In fact, such a modus operandi also 'enriches' the Service Tax Inspectors who are expected to keep an eye on such trends and initiate preventive measures. So far as large corporates are concerned, if they evade service tax, they can be booked through the audit mode but this genre of tax evaders can only be caught through physical verification. Let's hope after the implementation of Cadre Review the CBEC is able to focus on prevention of tax evasion even by small players who richly contribute to the generation of black money.

(D) Then you have the private schools from kindergarten to higher
levels - many of them are pure commercial - they charge huge fees and pay
little to their staff: No PF, no TDS and no income tax on income. I have seen how
my neighbourhood schools have grown from one room play school to a medical
college besides few senior secondary schools - the director/ promoter/*malik* have
progressed to 1000 square meter houses with a fleet of big cars but they pay a

pittance as income tax.

Author: Education has indeed graduated into a money spinner. We do not need to analyse why the Wipro Chief is going to pump in his hard-earned huge wealth into a well known Group of companies which exports education services to many countries. Even play schools and other tent-based primary schools have been making huge money. They often ask for cash payments in addition to gigantic fees for admission in even primary classes. All of them have parallel

trusts in which they take contributions from parents seeking admission and such trusts spend a major component of their collections on lavish life-style of their promoters. A good number of such schools let out their premises for social events or corporate parties in the evening or the weekend and make extra fast bucks which are never accounted for. It is time now to take a hard look at their abilities to contribute to the black money economy. They have emerged as the powerful tiny machines to generate unaccounted money and they get away by masquerading as charitable bodies! Worse, the common practice of having a complex relationship between the Trusts which along run schools, and modern profit-making companies which create a facade of providing certain services to such Trusts and suck away their revenue on various grounds.

Such instances of tax evasion are in thousands and our tax administration seriously needs to devise ways and means to make a dent into them before their pervasive culture catches on with honest taxpayers who feel naturally disadvantaged and discouraged. No amount of publicity or plain talks will persuade them for higher compliance unless such tiny millions of tax evaders are countervailed if not for the quantum of taxes that may be

collected from them but for their pernicious 'Domino Effect' on other taxpayers in the economy. Let's hope our policy makers quit their habits of overlooking such a large plate of tax evasion and come up with some meaningful measures to tap them.

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5

Economic Link between Black Money and Corruption

Chapter 5 ***"Economic Link between Black Money and Corruption"*** *deals with an inevitable relationship or rather the reason behind the generation of black money. This Chapter would take my readers through the journey of specific episodes to expose the micro-constituents of this unbreakable bond between corruption and black money. For this objective, Chapter - 5 has dealt with several critical issues like the growing trend of Indian Inc bribing foreign officials for getting their business done, the rot of corruption prevalent in the Revenue institutions, and of course the revolutionary episode of Lokpal bill.*

The first article of this Chapter ***"Bribery of foreign public officials by Indian corporate: India needs to develop effective machinery"*** *is set in the year 2008 with three articles back to back mapping the growing trend as how the Indian Inc is replicating the home grown bribing strategy abroad by greasing the palms of the foreign government officials for pushing their business horizons. This Article exposes the sheer lack of laws in our set up as opposed to the developed jurisdictions. This Chapter while acknowledges the overseas success of the Indian Inc, but it also directly addresses an uncomfortable fact that how propensity to spread business overseas at any cost has fuelled more corruption and illicit means. The next few articles address these less talked about faces of corruption and black money of the Indian Inc and the lessons to be learnt from the international measures to tighten them up.*

The article ***"Corruption in Income Tax, Central Excise: What fails preventive instruments of 'Agreed List' and 'ODI'!"*** *brings out the inside story of corruption so engrained in the institution of revenue departments and how the deformed system has allowed this corruption to flourish. To enunciate this situation, I have exposed the failure of the twin*

measures i.e., "Officers of Doubtful Integrity" and the "Agreed List" - adopted both by CBDT and CBEC for countering corrupt officials. This Article would be an eye opener for many who are not yet aware of the dynamics working behind the curtains. While the triple nexus of politicians - corporate - journalists is not something new, however, this nexus has got a new partner i.e., the PR agencies. The article ***"The sleazy world of Politico-Corporate-Journo-PR Agency Nexus - A heady configuration, indeed!"*** *would help readers to understand this development in the backdrop of the Nira Radia tapes controversy.*

Since the theme of Chapter-5 is linkage between corruption and black money, and this would have remained incomplete, without the autopsy of the LOKPAL Bill saga. The article ***"Jan Lokpal Bill - Ignoring 'Demand Side' of Corruption at own peril!"*** *was set in April, 2011 when there was nation-wide*

hysteria and over-exuberance to combat corruption, however, divorced from the ground realities. Under such circumstances, this Article flags the imminent cracks in the Jan Lokpal Bill which was aiming to combat corruption at the cost of demolishing the golden principle of "separation of powers". While I totally support a robust Lokpal Bill, but one cannot turn a blind eye towards the imminent risks in treating a single legislation as a panacea to the problem of corruption and black money.

Chapter-5 is further punctuated with complex issues like the investigation of Conman Hasan Ali and the hedonistic approach of UPA Government against Baba Ram Dev which was a brutal assault on the attempts of any civil society member to combat corruption. Readers would find the Article ***"A Hilarious Classification of Corruption - Also Laden With Truth!"*** *quite amusing but it also exposes the sad state of our institution hidden in the uncodified protocol of Nazrana, Sukrana, Mehnatana, Jabrana, and finally, Milkar Churana syndrome.*

Chapter 5 draws towards its end but not before re-visiting the issue of bribing of foreign Government officials by the Indian Inc to show how the Government still remains in a state of slumber over these years towards this new modus operandi of crony capitalism. Chapter-5 concludes in August, 2012 when the CBDT published the

confidential Black Money Report trying to show what actually this report means. I hope readers would be in accord with my suggestion made in the last article of this Chapter for constitution of a dedicated federal black money prevention regulator, as opposed to this present fragmented and ill-prepared approach. I hope my readers after having completed Chapter-5 would be in a better position to appreciate how corruption and black money are intertwined and how one is perpetuating the other.

BRIBERY OF FOREIGN PUBLIC OFFICIALS BY INDIAN CORPORATE: INDIA NEEDS TO DEVELOP EFFECTIVE MACHINERY[1]

Corruption in public life is one subject which never loses its lustre. You think of any scam, and corruption either political, fiscal or economic is bound to be the root cause of all such scams. Take the case of latest Customs duty scam in which a large number of industrial houses managed to get permits as non-scheduled operators, and imported aircraft without paying any duty. True, some of them would be genuine operators but what lends it an odour of a scam is the sheer number of such permits issued by the DGCA. Has the DGCA issued such permits after doing a scientific study of the future traffic and the business in non-scheduled flight segment? Is there enough demand for chartered flights to be offered by such a large number of operators? Is there any sort of nexus between the importers and the politicos? If a proper study of the 'Log Book' of these aircraft is done, I am sure more dreaded facts, concealed under the 'deodorants' of general passenger statistics, may come out!

1. Published in www.taxindiaonline.com, TIOL–COB(WEB)–091, 10 July, 2008.

If we go by the latest Global Corruption Report prepared by

the Transparency International, India as a nation is losing ground on corruption front. We have slipped a couple of notches as compared to our earlier position. The Report clearly talks about how badly this virus of corruption hurts the poor and underprivileged more. It also hurts India's interest as an attractive destination for foreign capital and business.

However, I do not intend to go deeper into just one case having scam-potential or corruption in the domestic arena. I want to draw the attention of our leading corporate houses and the Union Government to an issue which can be highly sensitive to the image of the country in future. And it is the need of the hour for putting in place a comprehensive legislation and regulation to curb instances of foreign bribery by Indian corporate and business persons!

Going by the fact that the Indian large corporate houses have brought in bags of laurels to the Indian economy by taking over dozens of billion-dollar foreign companies in the recent years, and many more takeovers of global giants would come by in future, what is required to be done by India as a healthy economy is to closely study the global trend of bribery of foreign public officials. Given the complex nature of international business transactions and the involvement of all sorts of agents, consultants and subcontracting parties in such mega deals, bribery often becomes an integral part of the transactions at different levels, either to secure the mandatory sanctions or to switch sides to support such deals.

If India goes by some of the recent years instances like Xerox, whereby Indian public officials were bribed for large-scale sanctions and inflated price of goods. Similarly, Indian corporates which have been expanding their business empire overseas need to be watched closely and dissuaded through legislation and enforcement from indulging in bribery or unethical practices to secure business orders.

Ethics is the soul of modern business practices. Worldwide, significant emphasis is being put on healthy and correct corporate and business practices. With competition

becoming more cut-throat, a temptation to resort to short-cut methods to win in the race is very natural and predictable. Business-stress is perhaps the worst kind of stress which finds no mention in the medical science lexicon. But to keep them on ethical track, the onus is on the Government of India to put effective machinery in place so that the fear of being getting caught back home always travels with such business entities whereby they travel or do business.

Unfortunately, our Anti-Corruption Law has not been updated for many years. The need of the hour is to go for a modern anti-bribery laws and also join hands with international bodies which promote anti-bribery conventions. This has become more important with the fact that a large number of foreign

nationals have begun to work in the country and also outside the country as employees of Indian corporates. In cases of bribery of foreign public officials what emerges as a major challenge is the instance of multiple jurisdictions. In such cases, domestic laws often fail to deliver much and enforcement agencies tend to develop cold feet.

Therefore, India should more actively work with agencies like EU, UN and OECD which have elaborate anti-corruption conventions and guidelines for mutual legal assistance. To curb such practices, a committed country needs to involve its taxation, foreign trade, embassies and other agencies to keep a close watch. A close cooperation with overseas agencies in investigation and prosecution can alone be effective in conviction of offenders. In fact, the law should be so prompt that if need be, a joint investigative team could be quickly formed as soon as any instance of bribery of foreign public officials is reported.

In fact there are instances where many countries allow deduction for bribery expenses to corporates. Indian tax

statutes should be very clear to detect such expenses clothed in modern nomenclature of transactions and make it a disincentive. In this background, the role of audit would become more significant, and the role of Ministry of Corporate Affairs more heightened. Let's us act in time and save the Indian economy from any embarrassment in future.

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AMERICAN MNCs BRIBING INDIAN PUBLIC OFFICIALS - DO WE HAVE ANY STATISTICS ON INDIAN MNCs DOING THE SAME?[2]

Corruption is an insidious and parasitic phenomenon. In many ways, its viruses are more dangerous than all the known viruses in the medical lexicon which cause diseases like Swine Flu and Dengue. Once it infects a socio-economic, political or administrative organ of an organised system, it brazenly ensures its own rapid and cancerous growth. Some of its pernicious features are -it is anti-poor as it eats away anti-poverty and developmental funds; it works against good governance; it distorts democratic processes and competitive conditions; it militates against economic development of a country, and overall, it pulverises the social and moral fabrics of a nation. All these pernicious features of corruption are well known to every citizen in India but we as a nation often fail ourselves by paying virtually no attention to it. We do report about a new study done by an NGO like Transparency International, and also rue having slipped a couple of notches down but do not care a damn when it comes to combating it. Since we do not care for it, as the maxim goes, even our Government or the

2. Published in www.taxindiaonline.com, TIOL–COB(WEB)–164, 3 December, 2009.

Parliament does not do anything beyond discussing some fringe statistics generated by some foreign economies.

Let's take the example of what was disclosed by the Minister of State for Personnel, Mr. Prithviraj Chavan, in Lok Sabha yesterday. In a written reply to the House, the Minister stated that the IndianAmbassador in the USA has informed the Government that several references regarding illegal payments to the officials in India have been made in the US report on the Foreign Corrupt Practices Act (FCPA) and Anti-corruption Enforcement for the second half of 2008 and early part of 2009. The Minister also disclosed the names of some of the American MNCs who bribed Indian Public Officials through their Indian subsidiaries (see the table).

Name of the US Companies	**Name of Indian subsidiary companies**
(*i*) M/s Westinghouse Air Brake Technologies Corporation (Webtec)	M/s Pioneer Friction Ltd
(*ii*) M/s York International Corporation	M/s York India
(*iii*) M/s Dow Chemicals Corporation	M/s DE - Nocil Corp. protection Ltd
(*iv*) M/s Pride International Inc.	M/s Pride Foramer
(*v*) M/s Richard Morlok and Mario Covino	Not indicated

The Minister further reported that from the said US report, it can be inferred that the officials belong to the Ministry of Railways, Ministry of Defence, Department of Agriculture & Cooperation, Department of Revenue and Government of Maharashtra. The steps taken by the CVC, CBI and other agencies were also explained which, all of us probably know, are only to meet the 'paper requirement' of our system rather than to ampute the 'infected patch'. A full-fledged debate on

issues like corruption is a rare phenomenon even in our Parliament. We as a rapidly growing economy and the largest democracy with glorious past of moral and ethical value-system, rarely sit together and 'eat' our brains to put a solid and effective administrative and legal framework in place to combat corruption.

One of the modern dimensions of corruption which is intrinsically associated with a rising economic power like India is the instance of bribery of foreign public officials to get lucrative contracts or businesses. Like the American and EU transnational companies, Indian corporates have also been spreading their wings rapidly to various continents in a big way. A close look at the FDI figures may reveal that India has emerged as an aggressive FDI investor for both the developed and the underdeveloped economies. Hordes of Indian corporates have been invading lucrative overseas destinations, either through mergers and acquisitions or outright purchases to sustain high growth rates, to acquire modern technology and knowledge, to attain economy of scale or to piggyride international brands to build their own brands.

According to RBI's statistics, which excludes investments by individuals and banks, the total FDI outflow has grown by 30% to USD 17.5 billion in 2007-08. Last fiscal, the actual outward FDI in JVs and wholly owned subsidiaries, amounted to about USD 16 billion. In addition to it, the RBI further okayed foreign investments worth USD 22 billion during 2008-09. During the first quarter in the current fiscal, the RBI has approved as many as 918 overseas investment proposals amounting to USD 2700 million, despite a crippling economic meltdown worldwide. A major chunk of these foreign investments by India are accounted by economies like the USA, Singapore, Mauritius, the UK and Cyprus. While addressing the American audiences in Washington, the Indian Commerce Minister, Mr. Anand Sharma, on June 17 this year, said that Indian companies have created as many as three lakh

jobs in the USA and also contributed USD 105 billion to the US Economy during 2004 to 2007.

These details clearly script an inspiring story for every Indian to feel proud of the success of Indian MNCs. However, India as an international law-abiding country, and also as a keen recipient of good governance practices, should not shut its eyes to some of the inherent risks involved in rapid-expansion of global business empire by a profit-driven entity. If our MNCs also succumb to some of the common vices which afflict the American MNCs in India to bribe public officials, what is the mechanism to deal with them. In short, what India needs to do is to legislate an explicit Foreign Bribery Act along the models of many developed countries. If the Indian MNCs are destined to rule the global markets in the coming decades, Government of India needs to show quick vision to put a strong legal framework in place to combat any instance of bribery of any kind. India may like to comply with the OECD Anti-Bribery Conventions or the UN Convention Against Corruption.

Besides these measures, since there is a close nexus between bribery and taxation, India also needs to expressly incorporate certain provisions in its futuristic Direct Taxes Code to disallow deductibility of bribes clothed in modern and respectable nomenclature given to financial transactions. Although Explanation to Section 37 of the Income Tax Act does talk about disallowance of an expenditure incurred for the purpose which is prohibited by law but what is required to be

inserted in the Direct Taxes Code is an explicit provision which arms the taxmen to remove the veil to detect the actual colour of the transactions which can be incurred to secure lucrative deals. Given that the outsourcing has become a fad even for various governmental activities, resorting to bribery to secure a contract from the main contractor who has been outsourced a sensitive work of the Government cannot be ruled out, and there is no express provision to make disallowance to innovative and improvised nomenclature of such transactions in our I-T Act.

Some of the developed economies which subscribe to either the UN or the OECD Anti-Bribery Conventions, have amended their Internal Revenue Code or Act and expressly disallow many types of commissions which are euphemistically used to mean bribery.

Secondly, India should also strive to incorporate anti-bribery norms in its exchange of information programmes under anti money laundering and other legislations. The objective should be to share information to uncover sensitive crimes like money-laundering and bribery and tax evasion. Joint investigation by relevant authorities may uncover the true colour of a transaction, and modern economies need to move a few inches away from the traditional framework and deliberate on incorporating sleek transactions undertaken in violation of other laws within the purview of the exchange of information programmes.

Genuine foreign investors look for level-playing field and healthy competitive business environment. This enabling environment gets skewed by prevalence of routine corruption. Rooting out corruption can increase foreign investment many fold. As a historical guardian of ethical values in life, our elected Government needs to choose the path which brings laurels to the nation rather than brickbats in terms of going down by a few ranks in terms of global ranking of corruption-free economies. December 9 is going to be observed as Anti-Corruption Day globally, and Government of India needs to renew its pledge to take meaningful steps to root out corruption rather than merely pay historical lip-service to it. The UPA Government also needs to improve the statistics of its various anti-corruption agencies which look dismal by all standards. Let's take a look at the figures disclosed in Lok Sabha yesterday.

During the last three years i.e. 2006, 2007, 2008 and 2009 (upto 30.10.2009), CBI has registered 88 cases against All India Services Officers including IAS, IPS, IFS (Forests) as per details below:

Year	***No. of cases registered***

2006	65
2007	12
2008	4
2009 (upto 30.10.2009)	7

The figures in the table unfortunately indicate waning commitment of the UPA Government to take action against the agents of corruption. With bagful of scams being reported everyday, registering a case against merely half a dozen top officials clearly indicate the deep-seated malaise in our system. There are too many loopholes which provide escape routes to those who are instrumental in perpetuating the institution of politico-bureaucratic corruption. It is high time the top honchos in Dr. Manmohan Singh Government think of some out of box initiatives to make a serious dent into the ever-growing cancer of corruption which has emerged as the most powerful enemy for the institutions of democracy.

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INDIAN CORPORATE BRIBING FOREIGN PUBLIC OFFICIALS: A FEW OECD TIPS FOR INDIAN TAXMEN[3]

With more and more Indian companies preferring to do business in foreign countries, the chances of bribery to foreign public officials cannot be ruled out and therefore, Dr. Manmohan Singh's Government specifically needs to legislate and declare such an act as a criminal offence in India. Keeping in mind the cutthroat competition in the global market and also the fact that in some of the developed economies, the demon of corruption is more deep-seated and disarmingly friendly, falling prey to the temptations of bribery for easy and quick business cannot be ruled out.

Today, I would like to draw the attention of my readers towards the latest event of OECD coming out with a Bribery

Awareness Handbook for Tax Examiners. But first, a brief history of its 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention came into force on February 15, 1999. Bribery of domestic public officials is a crime in most countries. Prior to this Convention, however, the bribery of foreign public officials was not a crime under the legislation of many countries. The OECD Convention therefore represents an important step in the sincere international effort to criminalise bribery and minimise rampant corruption in world economies.

In 1996, the recommendation on the Tax Deductibility of Bribes to Foreign Public Officials in International Business Transactions was adopted by OECD Member-Countries. It sent a clear message that bribery would no longer be treated as a business expense (India has already done it vide Explanation to Section 37 of the I-T Act). Building on the 1996 recommendation and on the experience in its implementation, on May 25, 2009, the Recommendation on Tax

3. Published in www.taxindiaonline.com, TIOL–COB(WEB)–167, 24 December, 2009.

Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions was adopted. It put the onus on countries to explicitly prohibit the tax deductibility of bribes to foreign public officials and promote better co-operation between tax authorities and law enforcement agencies both at home and abroad to counter corruption.

The handbook, first released in 2001, provides practical guidance to help taxmen identify suspicious payments which may be bribes so that the denial of deductibility can be enforced, and bribe payments detected and reported to the appropriate domestic law enforcement authorities.

Having seen the growing pernicious impact of

bribery to public officials across the world, the OECD has revised the handbook tailored for taxmen and also recommended:

prohibiting tax deductibility of all bribes or expenditures incurred in furtherance of corrupt conduct in contravention of the criminal law or any other laws of the Party to the Anti-Bribery Convention;

that denial of tax deductibility is not contingent on the opening of an investigation by the law enforcement authorities or of court proceedings;

that Member countries and other Parties to the OECD Anti-Bribery Convention consider to include in their bilateral tax treaties, the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention, which allows "the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g. to combat money laundering, corruption, terrorism financing)".

Let's now take a look at some of the practical techniques suggested by the OECD Handbook for tax examiners, Inspectors and investigators to detect or at least suspect instances of bribery from accounts of an assessee. They are as follows:

Transfer of funds through a spurious business: Even Indian tax authorities, including Customs and Central Excise besides the Income Tax, often come across instances of bogus companies utilised by large corporates to conduit funds for various purposes, including bribery. I recall one instance where Mumbai Central Excise officials had landed in Surat while investigating an export fraud case and found huge cash withdrawal to the tune of Rs. 400 Crore.

Invoicing the client for an inflated amount as compared to the actual market price: It is a well-understood

technique by all Readers.

Indirect payments to public officials: In this case, law firms / consulting firms act as mere channel to bribe public officials whereas it is shown as legal expenses in the books.

Professional services: Professional firms loading fees over and above their normal billing is a ploy, widely deployed by the business community even in India.

Travel and entertainment expenses: This point need not be elaborated upon;

Indicators of fraud or bribery: Fictitious employees: Satyam Computer is the latest widely-reported example. Even Delhi Municipal Corporation reporting 'ghost' employees is another example which invites the attention of anti-corruption authorities;

Books and records: It is a common practice in India that many corporates keen to avail huge loans from banks keep two or three sets of books and records. It is true that ITAT may not see much ills in this practice in so far as taxing bogus income is concerned (See *Prime Focus Ltd. v. ACIT),* but such instances to cheat financial institutions should be reported to other enforcement authorities or may be looked deeper to see whether any other *malafide* purposes are being served.

Conduct of taxpayer: Failure to answer pertinent questions; repeated cancellations of appointments, or refusal to provide records;

Mandatory reporting of commissions paid and similar payments:

Paying commission beautifully conceals the acts of bribery;

Information from other government agencies: While

examining the records, tax official should also seek information from other Government agencies.

Information available from tax treaty partners: It is important that tax officials should seek relevant information concerning specific corporate cases from their treaty partners.

Interviews: Interviews to detect fraud as well as bribes should always be held with the persons having knowledge concerning the total financial picture and history of the person or entity being examined, such as the CEO, CFO, and officials who serve on audit committees.

These are some of the key techniques which Indian tax officials can also utilise to detect fraud and bribery dimension in books of accounts of those corporates that have got thick presence in multiple countries, and where a major

4. 2009-TIOL-797-ITAT-MUM.

chunk of their revenue is accounted by international transactions. Although there is no specific law in India to treat it as a criminal offence but I hope there are certain provisions in the IPC which may partly take care of such offences till India legislates on this issue. However, what is more important is the heightened awareness of tax officials about modern techniques and tools to identify some of the heads of expenses where clues relating to bribery could be buried deep inside. Let's hope Indian tax officials do not let down India, a rising economy and an OECD observer country by ignoring the global practice of modern audit and other non-invasive techniques to unravel instances of fraud and bribery.

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CORRUPTION IN INCOME TAX, CENTRAL EXCISE:

WHAT FAILS PREVENTIVE INSTRUMENTS OF 'AGREED LIST' AND 'ODI'[5]

"Nothing moves without money"! For many of TIOL readers these words may sound familiar earful! Right, this is what the Supreme Court of India recently commented on the growing corruption particularly in the income tax, sales tax and central excise departments. The Bench of Justice Markandeya Katju and Justice T.S. Thakur appeared so exasperated by the growing 'sensex' of corruption in the country that it went to the extent of suggesting that the Government may explore the possibility of legalising corruption so that poor, hapless citizens may be saved from negotiating the tariff of corruption! In the same sarcastic breath, the Bench also noted that "Poor government officials, we can't blame them also because of the growing inflation."

These observations by the Apex Court did make national headlines which showed that although corruption has got fully integrated into our regular life-style but the *vox populi* at large detests it and does like talking about it if a scathing remark is made by any responsible institution like the Supreme Court. In other words, no matter how obvious or call it 'transparent' the demon of corruption may become in our public life, it would never lose its inherent news value. In this case, at the receiving end were the Revenue Departments. Some of the observations of the Bench also appeared to be based on public perception about corruption in Revenue field formations. True, public perception is one of the benchmarks to fathom the depth of corruption in any department. Take the case of recent news about some of our Chief Justices who were allegedly called corrupt. Whether such allegations stick to an institution/ Department is a debatable issue but it does alter public perception.

5. Published in www.taxindiaonline.com, TIOL–COB(WEB)–209, 14 October, 2010.

Let's now go straight to some of the official measures which are in place for long, to countervail forces of corruption within the system. These measures are not to charge-sheet or prosecute but to neutralise those officers who fall short of being booked for corrupt practices. They are widely known as 'ODI' (Officers of Doubtful Integrity) and the 'Agreed List'. These two are time-tested instruments to tackle wise and intelligent agents of malpractices who understand the system very well and also develop the unenviable knack to exploit its frailties. How to counter them is the million-dollar question. Since both the time-tested measures have begun to fall short of the 'benchmark efficiency' required to tackle such elements in any Government Department, the public perception about corruption particularly in the Revenue Departments has become much wider and adversarial.

Both the measures, in the past, have yielded the desired fruits, and that is why they continue to be in force. But their effectiveness has increasingly been blunted because of the blatant abuse by the top layers in the Revenue field formations. Ever since values like morality, honesty, loyalty, commitment and righteousness gave greater space to money, chicanery and malafides, a good number of officers minus impeccability of reputation have reached the top layer of the hierarchial ladder in both the Revenue Boards and their field formations. Once such elements put on the jackets of captain, their first victim is bound to be good officers who are seen as undesirable bumpers on their roads to unjust enrichment. This is what has been happening at large-scale. I am in the know of certain recent instances where not only publicly-perceived but also widely known honest officers were recommended by a Chief Commissioner in Northern India, to be put on the 'Agreed List'. Although they had a providential escape but hundreds of such officers often prove to be luckless and land up on this unpleasant list.

Let's first discuss what is 'Agreed List'? The onus lies on senior officers like Commissioners and Chief Commissioners of the Revenue field formations to prepare a list of all such officers who have shown pronounced propensity to corruption. These lists are sent to the CVO of the Department who sits with the representatives of the Central Bureau of Investigation (CBI), and both jointly agree on the names of such officers and compile the final list. One distinguishing feature of the list is that both the agencies - the CVO and the CBI - have nothing concrete to take action against these 'agreed' names. Therefore, they agree to keep them under watch. As soon as such a list is prepared what our present system does is to keep them under vigil generally for one year which may be extended up to the maximum of three years. Next comes the decision to transfer them to non-sensitive posts. This way the Revenue Boards 'defer' the problem to next year rather than finding a long-term solution!

Let's now take a critical look at why both these instruments have begun to produce meagre results. First, almost 40-50% of the names which figure in the 'Agreed Lists' are picked up out of personal vendetta, professional jealousy and

refusal to bow to the present kowtow culture enforced by the senior officers. Secondly, when they zero down on such elements for their known tendency to malpractices, they are immediately shunted out to non-lucrative posts. This way the top management deprives the anti-corruption agencies of opportunities to catch them red-handed. Ideally, such elements should be categorised on a scale based on their intensity of attraction to malpractices and then transfer some of them, depending on the feasibility and adequacy of manpower of anti-corruption agencies, to sensitive posts. Once they embrace illegal money, they should be easily caught as they are already under watch. But it never happens because of the 'Doctrine of Deferment' followed by the Boards. Is it not ironical that when

such elements are identified and put on an 'Agreed List' after much deliberations, why should anti-corruption agencies gift them a chance to lie low and after a year when they are removed from the list, they get back their lucrative postings and make money while not being under any 'organised watch'.

Let's now also discuss another scenario which should throw light on the declining effectiveness of the present system. Hundreds of revenue officials of virtually all ranks have been booked in the past few years by the CBI. Have CBI and the CVOs of the CBDT and the CBEC ever made any attempt to study how many of these red-handed caught cases actually ever figured in the 'Agreed Lists' in the past? Is there any nexus or a clear-cut pattern between booked cases and the 'agreed names'? My guess is that most of red-handed-caught cases were never on the 'Agreed Lists'! Why? Because of the sycophancy-loving top layer! Those officers who make a good deal of illegitimate money, they often take care of their Chief Commissioners and Members in terms of expensive 'protocols'. Because of their financial ability to please seniors they are never recommended to be put on the 'Agreed Lists'. But they do run out of their good luck and fall prey to CBI traps at some stage. This is where their long journey of corruption comes to an end. A few of such fallen heroes do witness phoenix-like rise and spring back into the system to do what they are generally good at doing! Thus runs the cyclic phenomenon of corruption at the cost of 'Agreed Lists' and the 'ODI'.

Flouting laid down guidelines which are to be complied with before any name is put on the 'Agreed List' is a common ill of the present system. This becomes little more obvious if we go by the latest decision of the Delhi High Court in the case of *Union of India v. D N Kar*[6]. Mr. Kar is an IRS officer who was put on the 'Agreed List' by the CBDT. When he came to know about it after a few years, he filed an application under the RTI Act for knowing the reasons for such a decision. Although the CBDT guidelines of 1991 state that the reasons have to be recorded for such an act but it was not disclosed and

the CIC, finally,

6. *Union of India v. D N Kar*, 2010-TIOL-708-HC-Del–Service : 2010 (259) ELT 349 (Del).

directed the CBDT to do so. The CBDT preferred an appeal in the Delhi High Court which has now directed the Board to disclose the reasons to the applicant. Whatever the truth may be, whether it was an attempt to victimise the officer or otherwise, the mere fact that the officer has gone public with his petition to know the reasons and has now pursued the case upto the level of High Court, clearly indicates that distortions and irregularities have certainly become the dominant character of the present system.

Let's hope that the Finance Minister who has been advising against litigation against own officers and also directing the Boards to take action against corruption may direct the CBI and the CVOs to make their system of choosing names more rule-based and record-oriented so that subjectivity which has come to dominate and distort the two good instruments to check corruption or dissuade borderline cases do regain its lost efficiency. If our Revenue Boards are indeed keen to regain their lost glory, they do need to first amend their administrative behaviour and make it more fair, transparent and rule-based.

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LET'S KILL 'FRIENDLY' AGENTS OF CORRUPTION AND NOT 'IMPECCABILITY OF INTEGRITY' IN PUBLIC LIFE[7]

For those who are a part of the media, a bad news makes a good copy, and a good news is rarely welcome. Thus, the words like scam, scandal, fraud, financial defalcation and corruption indeed bring big smiles for the media. What may be treated as

the icing on the cake is the prefix like political, corporate and financial. Thus, even all pervasive corruption in our society, becomes spicy and hedonistic to write and talk about. This is what the entire nation has been experiencing in the past few months. Like seasonal monsoon, all sorts of scams have of late been raining in relation to various sectors of the economy. Latest to join the ranks of CWG Scam, 2G Spectrum Scam, Adarsh Housing Society Scam, CVC Appointment scandal, Press-Corporate-Govrernment nexus scam and land allotment scam is the Housing Finance Scam in which eight top bankers of the ranks of CMD, MD and CEO have been arrested by the CBI yesterday. Although media persons have no control over such events and may relish writing about them as they make good copy but as a common citizen it hurts where it really pains.

Apart from the financial dimensions of all these scams, the biggest concern for any society in any country is the utter loss of moral fibers running through the vital spheres of public life. The custodians of public money, the role models for the school children and the political leaders who have been chosen to enrich the

7. Published in www.taxindiaonline.com, TIOL–COB(WEB)–215, 25 November, 2010.

depository of public trust, have all let down the entire nation, not only in the eyes of the faceless but powerful common man (Bihar polls results are the latest example) but also the global communities who believed that India is no longer a badland for FDI parking in legitimate sectors. There has been a huge disappointment all across the society. The periodic floods of scams, in addition to regular quota of corruption cases, have indeed altered the mindset of the common man who now believes that fair means are not enough to earn fair amount of comforts in life. Such an altered and now, almost-cemented view of the *vox populi* represents the biggest loss ever suffered

in the P & L Account of any nation in any period of history.

Let's now move to some of the latest specific examples which seem to have helped alter common man, including government employees, views more than the financial losses inflicted on the exchequer. While talking about rather defending the appointment of Central Vigilance Commissioner, the first law officer of the Government of India, the Attorney General, told the Apex Court of India that the 'impeccable integrity' is not an eligibility criterion for the selection of the CVC. Even if it is presumed that the Attorney General put up such an argument under some duress, how can anybody who is a role model for thousands of legal counsels for various government departments across the country, weave such argument which pulverises the moral fabrics running through the entire realm of political governance in the country. 'Impeccability of integrity of reputation' should ideally be not made a criterion for selection of even a peon in the government service rather it should be tacitly enforced for selection of every public servant.This is one criterion which gets demeaned and devalued once it is expressly written as a part of eligibility conditions. In other words, once it is expressly worded, there goes a presumption that impeccability of integrity is an endangered characteristic. Even if the impeccability of integrity has suffered severe blow in public administration, an official admission of the same emboldens and encourages the corrupt and the dubious to earn it as an 'enviable title' for one's selection to a post which officially guarantees a clean chit to the misdeeds done in the past.

When our Atorney General embraced such an argument to defend the decision of his employer (the Union Government), he indeed forgot that what a powerful vitamin booster he injected into the spirit of the rising population of the corrupt in the Government. His line of defence may become a ubiquitous plea which may be taken by the corrupt for several years to come. When impeccable integrity cannot be a criterion for the selection of the CVC whose primary job is to shield officials from the tempting vulnerability of corrupt practices, how can

he do justice to his job. Did our Attorney General try to say that even if a dubious or a corrupt official dons the mantle of the CVC he can be reckoned as a preventive force for the corrupts in the Government? Perhaps not, but the AG's convoluted line of defence looks fragilely defenceless. His oneliner of defence

has done much greater damage to the institution of CVC than even the appointment of Mr. P. J. Thomas which was largely seen as dubious and the people at large could have given him the benefit of doubt. But after what the AG said and the subsequential uttering of the Apex Court has completely washed away the shades of doubt in the public mind. And the only honourable door left open for Mr. Thomas if he listens to his conscience, is to make a hasty exit from the *Satarkta Bhawan***.** If he does so, he would not only succeed in salvaging some self-esteem but would also do some good to the dignity of the institution getting increasingly bruised.

Another interesting observation which this Article would like to make is about the damage most 'inactive honest' persons in public life often do to the system. Anybody who holds a post of responsibility in any government department, does damage to the system and public trust by becoming dishonest. But the damage done by such souls is often much less in impact than the damage done by 'inactive and sleepy honest' in any system. How and why? The general principle followed for choosing the top man to head any department or Government is to identify the honest soul. When the top post is 'gifted' to such a soul, a huge opportunity is transferred with such a 'gift'. Such opportunities are good enough to make a long-lasting impact on the overall system or the realm of governance. An active and honest person can change the fate of millions of disadvantaged and underprivileged in any society because he holds the all powerful top post. But a 'sleepy honest' top man makes the entire generation to forfeit opportunities to change their life. His inactivity at the top

causes greater damage to public faith and the system itself which can be seen in the case of 2G Spectrum Scam. Mr. A Raja has been accused of robbing the exchequer but even Dr. Manmohan Singh, who is an epitome of fine human qualities and intellect, preferred to remain honest to inaction at the top. This not only emboldened the agents of dubious activities in government departments but also robbed the Government of public confidence to give a clean administration to the nation.

If one looks closer home in the revenue department, there is no paucity of such souls who are honest but sleepy and prone to inaction. When such souls hold key policy-making and also administrative posts, their silence or indecisiveness indeed does greater damage to both the cause of the exchequer and also the interests of the trade and industry. When one is assigned the job to dispose off files and take decisions but the honest soul looks for shelter in inaction, he evidently allows the files to pile up and decelerate the pace of the working of a public department. Piling up of files helps none except the honest soul who perhaps looks to ride of the horse of promotion on the strength of no action and honesty. Whether such persons are undesirable in public service is indeed a debatable issue and must be left open for the Readers to decide.

In nutshell, although no society can wish away or obliterate the demon of corruption from its roots but no society at the same time accepts it as a *fait accompli.* All efforts must be made by all institutions (not only the judiciary which is also a victim of this demon), civil societies, NGOs, informal groups of people and above all, the agencies created for this job, to contain the presence of this demon in public life. Corking them in 'bottles' / cans and 'pidiliting' them in government files would not help lessen their crooked presence but to consistently exposing them and then repairing the system of accountability would do better for any society. Let's hope after going through an avalanche of scams, the UPA Government takes some concrete steps to repair the tattered health of accountability in

our political and financial governance systems. Let's also hope that the Fourth Estate doyens also wake up to the growing rot within the media sector which needs urgent cleaning up.

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THE SLEAZY WORLD OF POLITICO-CORPORATE-JOURNO-PR AGENCY NEXUS - A HEADY CONFIGURATION, INDEED[8]

In the past two weeks a frightening volume of phone-tapping transcripts and other documents have come out in the public domain. The world wide web (www) never had it so good in the past if we take into account the leaks originating from WikiLeaks. These are related to a host of controversies - they are related to dubious methods of foreign diplomacy; military outrages; the dark side of political leaders; revenue loss to the exchequer; tangible role of lobbyists in allocation of Cabinet berths; corrupt politicos; canny bureaucrats making capital post-retirement and journos putting on clothes of power brokers. The most novel and transparent find of all these controversies in India is the politico-corporate-PR agency-journo nexus. By all standards, it is perhaps the deadliest combination, which can work together against the world of ethics, guidelines, rules and finally public interests in any economy. The only other combination which may looker deadlier than this combine, is if we include the judiciary to it.

But, fortunately for the common man of India, the roots of our judiciary are still strong enough to ward off the 'viral effect' of sleaze, scams and monies. Although many of us may take a cynical view that no institution is left in the Indian democracy, which may claim immunity to the powerful virus of corruption, but the fact remains that our top judiciary is largely immune to the explicit effects of sleaze. Flabbergasted and awed by the degree the 'pollution' in today's world of governance and the eerie influence certain nexuses command over the democratic institutions in the country, a Division Bench of the Supreme Court two days back observed that *" ...*

pollution is quite mind-boggling."

8. Published in www.taxindiaonline.com, TIOL–COB(WEB)–216, 2 December, 2010.

Let's leave aside the comments of the judiciary for the time being, and focus on the new entrants to the sleazy world of political scams and 'money matters'. There is nothing new when any scam involving politicos and *'brown sahibs'* leapfrogs out of the closet, as they have always owned the IPRs like copyrights and trade marks to command the footprints of all scams world over. But, unfortunately, the technology-driven modern economy has forced them to share their 'IPRs' with other entities like the Fourth Estate (the media) and also lobbyists roaming around in the corridors of power in the coat of PR agencies.

Journos acting as power brokers may be new to the *vox populi* but is certainly devoid of novelty at least for the politicos, corporate czars and media Mughals. The only marked difference is the 'democratisation' of this niche segment of 'business'! In olden days, this premium tag was available only for those journos who used to cover the political parties forming the Government of the day. Since such senior scribes used to command influence over key political heavyweights, they were indeed highly useful for the promoters of the media houses. Since those were the days of licence -permit Raj, these journos used to broke deals largely for their own employers but sometimes also for corporate houses friendly with these newspaper czars. Corporate houses used to generally appoint and use their own employees as lobbyists. Then came a new phase of making use of the rising power of the media. Thus, they used to identify handful of senior journos for grabbing licences and other benefits from the Government by using their individual goodwill with the power that be and also their pens writing either favourable

stories or against their corporate rivals.

With the rapid rise in the stock exchange culture the influence of economic journos also swelled commensurately. A good number of economic writers began to humour corporate houses for certain favours. Initially, the favours used to be in terms of certain shares of the company distributed in the press conferences (recall the IPOs days in India) but later it started coming thick in the form of foreign junkets and other 'favours'. Although it was all known to all Editors and the Management of the media houses but none cried foul or made any effort to put a full-stop to the growing corrupting effect of gifts. Even the Press Council of India did not utter much about such a culture shaping up like at a big *banyan* tree.

Then came the days of telecom boom. A large number of economic journos overnight became telecom specialists. They switched their 'beat' and started climbing the ladder of proximity to aggressive promoters of telcos during Pandit Sukhram days. Although credit goes to his tenure for the present telecom revolution in the country but it was not without a fair share of scams (I had the opportunity to break them for a Pink Daily) in allocation of licences. In other words, the history of telecom revolution is rooted in policy scams right from its

inception. If we have a fresh bout of scam involving journos, telecom companies and politicos today, it does owe a lot to its history. No other sector than the telecom has done the greatest damage to the credibility of the media sector. The stakes are so high and brutal in this sector that it needs icons like only Mahatma Gandhi, to stand like a wall to all temptations. Thus goes the story of TV and Newspaper journos falling prey to the irresistibility of the telecom carrots.

Let's now move to the other entrant to the power-brokering space. PR Agencies have been in existence for many decades

now. But this sector scaled new highs only when a couple of players like Niira Radia took charge of its future direction and added the much-demanded layer of 'policy lobbying' to its basket of activities. Being a trained or perhaps born PR expert Ms. Radia made a heady blend by mixing up *thoda sa* political aphrodisiac, corporate lucre and glibness of the journos to run her fief of 'pulverising PR'. Going by the large array of names being exposed by the Income Tax audio tapes, her intoxicating success is indeed written colourfully on all the walls.

Now, the major issues before the Government and the elders of the media sector are that how to execute the repair job. With the judiciary fuming about the extent of pollution and the tangible harm being done to democratic institutions like Parliament and the Executive, the twin jobs must be carried out in right earnest. For the Government, it has become almost mandatory now to come out with a detailed law to regulate the lobbying sector which is not a legal activity so far in the economy. Given the reality that lobbying and elements like Niira Radia cannot be wished away, it is necessary to regulate such entities masquerading as PR Agencies today and let them furnish various types of details of their activities and expenditure to some agency like in the USA or other European countries rather than leaving them to put on all sorts of elusive clothes and keep damaging the realm of righteous governance.

Similarly, the elders in the media sector do need to come out with detailed watch mechanism, perhaps in collaboration with the Press Council of India, to safeguard the *Izzat* of the Indian Press. Errants if proven so, must be taken to task, and media promoters must refrain from protecting them or they should also face the music in some form. Although some of the distinguished journos have been trying to grill some of the accused which is certainly a healthy exercise in public eye but the seriousness is missing in order to earn back the lost faith of the viewers / readers. Let's hope the present churning process finally leads to tangible soul-searching, and some concrete measures are born to protect the delicate credibility of media sector. Let's also hope the Government does not step in to stem

the rot through a new law which may gag the freedom of the Press and may prove counter-productive. Ideally, the UPA Government should be focussing on ensuring early resignation of the CVC which seems to be doing

much greater damage to the image of the Prime Minister, Dr. Manmohan Singh and harming the reputation of the institution of CVC.

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'RECONSTRUCTION' OF BOFORS SCAM - A BALLOON TO CHEER OPPOSITION BUT NOT COMMON MAN[9]

Once it was overheard in the corridors of power that political or financial scams die a natural death after the demise of the accused or scamsters. It may be true for many of the big scams like billion-dollar securities scam, Jain Hawala Diary scandal etc. which slithered their ways into the graveyard with the death of many of the accused. But this rule apparently has many exceptions in India. And Bofors scam is one of them. This is one hot and 'intaxicating' issue which is like a wine bottle - getting better and better with the age! Most of the key accused in this case have lost their earthy existence except for the handsome, lanky and Sicily-born Chartered Accountant Ottavio Quattrocchi who spent almost 25 years in India, representing M/s Snamprogetti. Because of his proximity with the Gandhi Family and Italian antecedents, he was accused of being instrumental in the Bofors scam and also accused of grabbing a major share in the Bofors booty. He is at present 'exiled' in Argentina with his passport impounded by the local authorities. Though the CBI initially made some efforts for his extradition but later gave up apparently allegedly under political pressure. Whatever the truth is, but it is a well known fact that the always well-suited Italian businessman (he

strongly believed in the saying 'clothes make a man') no longer figures in the CBI's list of wanted persons and even the 12-year-old Interpol Red Corner Notice issued against him has been revoked.

In nutshell, there is nothing left in this case, with the investigation hitting against the wall. But Bofors as a metaphor for corruption having its origin allegedly in the Mrs 'G' Family (although Delhi High Court had bailed out Rajiv Gandhi in this case) has a lot of gas left for the politicos in the country. And the latest cause of action is the Income Tax Appellate Tribunal's decision in the case of Win Chadha who was represented by his son Hersh W Chadha for the additions made by the Income Tax Assessing Officer. Before we go deeper into the decision, let's take a look at how our Opposition parties have reacted to it, and the NDA finding huge 'ammo value' in it to fire at the Congress-led Government. By all standards the 2G Spectrum Scam is the mother of all scams in the country which involves hundreds of corporate entities and politicians of all hues but it seems to have been 'grandfathered' by the Opposition which have quickly switched the boat to ride the Bofors-ship! The scams in the recent past have had much deeper impact on public funds but Bofors is one 'lovely'

9. Published in www.taxindiaonline.com, TIOL–COB(WEB)–221, 6 January, 2011.

expression which everyone and anyone in the business of politics loves to comment upon.

There are far more serious issues which confront our economy, the society and the governance system which need collective efforts to find a long-term solution but our Opposition prefers politically hot *masala* rather the issues impacting the life of the common man. Our Opposition seems to have drifted miles away from their forefathers who used to play constructive role through the institution of Parliament. Instead they have embraced the literal connotation of the word

‘opposition’ and do oppose everything which the ruling party does. This is not to say that the ruling parties are playing the game of politics by the rule. They are no less culpable in pulverising everything which was seen as decent and principled in the domain of politics.

Anyway what we have is what we deserve. Let’s move to the ITAT decision which has triggered a political avalanche in the country, and the Congress Party seems to be on the backfoot to meekly guard their wickets. There is, plainly speaking, nothing new in this order. Even after reading this more than 90-page order, no new fact or material was found which was not known to the people or the investigating agencies or the courts. The entire order is based on culling of facts gathered over a period of two decades by the various probing entities, including the JPC. If any credit is to be given to the AO, it should be for putting all the facts together in a story-telling script. The AO made addition in the hands of deceased Win Chadha for the undisclosed commission allegedly received by him in the form of kickbacks from the Swedish arms supplier M/s Bofors. Though there was no tangible material to substantiate such an addition but the AO relied on all sorts of mountains of alleged facts given in the CBI Charge-sheet, including the newspaper clippings.

The Tribunal has upheld additions in the hands of the assessee on the basis of concepts such asestimation of facts, probable normal human conduct, the surrounding circumstances, the preponderance of probabilities and the legal propositions except tangible evidence admissible as per the Indian Evidence Act. While distinguishing that the materials required for criminal proceedings are of a different genre, what is available in the public domain in the form of JPC report, the documents and information gathered between the two sovereign States (India and Sweden) through the diplomatic channels and the newspaper clippings would suffice to evolve the paradigm of estimation of facts for sustaining additions to the income returned by the assessee.

The Tribunal has gone to the extent of commenting on

some of the entities which have nothing to do with the assessment of late Win Chadha. Let's read what the Tribunal has to say about Ottavio Quattrocchi and others: "Though the Department has proceeded against the assessee, no action seems to have been taken against either Services or Ottavio Quattrocci and other related entities, by the

Income Tax Department. Bofors admittedly paid the amounts to the assessee, AE Services, Quotrocci and other entities. It's liability for withholding tax is built in. Mr. Ottavio Quatrocci was living in India for a considerable time. The issue about his tax residence status should have been verified ... Revenue should have carefully examined the issues about their taxability and their having PE in India and appropriate proceedings should have been undertaken to assess and recover taxes. There exists a serious issue apropos Bofors for not having deducted withholding tax i.e. TDS, from such payments to the assessee/ Svenska, AE Services, Quottrocci. To enforce the rule of law, these steps were desirable to bring all the relevant income tax violations to a logical end by the Income Tax Department. Inaction in this regard may lead to a non-existent undesirable and detrimental notion that India is a soft state and one can meddle with its tax laws with impunity."

While answering the question - whether the income tax re-assessment against Mr. 'Q' will have a leg to stand on after so many decades in time-barred cases, the Order observes that the Apex Court can exercise its extraordinary powers under Article 142 of the Constitution to order issuance of notice under section 148. In fact there is an instance in the case of *Green World Corporation*[10] in which the Supreme Court of India has done so, and it may be repeated in this case. So far as the powers of the Apex Court are concerned it is truly there but whether such extraordinary powers should be exercised in a case which has already been heard by the Apex Court in the form of criminal

proceedings, and whether Apex Court should invoke its unfettered powers for such a dead case surviving only on the strength of circumstantial materials, is a subject more suited to the realm of speculation.

Let's leave it to the discretion of the Apex Court which may have to confront the issues of this case after half a decade and focus on the pertinent issues relevant for today. By raking up and squandering away the valuable energy and resources India of today will not gain anything except some political mileage to a couple of Opposition parties. But what would suffer most are the issues close to the heart of the common man like the price rise, socio-economic development and tax reforms like the GST. Let it be a reminder for our Opposition that the common man may be common but his understanding of issues is terrifically uncommon and extraordinary. If any long-term political capital is to be realised, let the Opposition focus on positive agenda in the right earnest. Let's hope good sense prevails on them, and we are back to the growth agenda which is more desirable and realistic an issue to be debated about.

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10. *Commissioner of Income Tax, Shimla v. Greenworld Corporation, Parwanoo*, 2009-TIOL-69-SC-IT : (2009) 7 SCC 69.

HASAN ALI CASE: IS IT GOING TO BE SAME OLE STORY?[11]

Let's go straight to the central theme of this article - Who is Hasan Ali? There can be essentially two introductions to this unfolding enigma. First, for the novice, he is a scrap dealer-turned-money launderer-turned-frontman for anybody and everybody who has got black money or ill-gotten funds to be

parked outside India, not necessarily in tax havens! In other words, he belongs to that genre of service providers (if one is allowed to call them so!) who command premium demand among the corrupt politicos, babus, businessmen and also corporates (India is as per latest Asia-Pacific Survey, ranked fourth most corrupt nation like Cambodia and Philippines). TIOL readers have read about the tales of many of such 'account-lenders' or frontmen or *hawala* dealers in the past. Our investigating agencies are too familiar with the traits of such operators in the international markets. Readers are also familiar with the end result of all such high-pitched probes. Anyway, Hasan Ali is one such frontman who lost his job and also the market for having reached the zenith of his illegal 'transactions' sector.

Going by the facts in the public domain, his story may be 'reconstructed' with some elements of inaccuracy. Let's recall what the Finance Minister, Mr. Pranab Mukherjee, had stated while addressing a Press Conference on black money about two months back. Mr. Mukherjee had said that the income tax authorities which had raided Ali's premises in Pune had laid their hands on a photocopy of his Swiss Bank account. But when the Swiss authorities were confronted with this piece of paper, it was found to be fake and forged. Thus, our overseas probe hit the wall and did not get anything from the Swiss to proceed further. Now the million-dollar question is - Why will a man, who has allegedly got USD 8 billion worth of funds parked abroad, keep a forged Swiss Bank account paper in his premises? Does it serve any meaningful purpose? Was he aware that the taxmen were going to search his premises and he would have an opportunity to put them on a wrong trail? Or, was it a piece of paper forged only to impress those suspecting clients who were not fully convinced about his ability to manage their illicit funds abroad? If these options are given to me like the CBSE's Multiple Choice Questions in Class X and XII exams, I would break the nib of my pen for the last choice!

Going by the sixth sense which most scribes develop after covering fiscal crimes over a period of time, it appears that

Hasan Ali, a desperado for money and success in life, might have joined the not-so-subtle syndicates of *hawala* dealers in the country. With little acumen and elbow grease, Ali managed to earn a foothold in the right circles of politicians who were flush with cash but did not know how to manage and where to keep them safely. This is where Ali's

11. Published in www.taxindiaonline.com, TIOL–COB(WEB)–233, 31 March, 2011.

overseas *hawala* counterparts must have come to his aid with the forged Swiss Bank account papers. These papers might have helped him to win over suspecting or half-convinced clientele. Having done his job honestly for the dishonest, he might have earned tonnes of goodwill and market-friendly credibility. His over-satisfied clientele might have introduced him to film-stars, corrupt bureaucrats, middle-level businessmen and then corporates. In the process, he might have bumped into some other players like Kashinath Tapuriah who had better skills, fund management dexterity and elegance of a corporate frontman. All these spurred him into large games and he might have managed a few thousand crores of ill-gotten money (India accounts for the largest chunk of black money parked in tax havens).

But, by no stretch of imagination, he can be credited to have earned so much of income that our Income Tax Department should issue a demand notice of Rs 50,000 Crore! All such figures are bunkum! We have seen such figures in the cases of Bofors, Harshad Mehta, Ketan Parikh, Jain *Hawala* Diary, Telgi scam and other cases. All such gigantic-looking demands often melt down to pittance for the exchequer at the end. Anyway, only the future course of investigation may be able to throw some light on these aspects of revenue.

Meanwhile, let's go to Ali's second introduction - the name

Hasan Ali represents all that is bad and stinking about our democracy, public administration and also the financial systems. And this is what has evidently irked our Supreme Court Judges who have been sustaining the throat-choking pressure on the Government and the investigating agencies. The sealed cover Status Report furnished by the Enforcement Directorate two days back must have further added fuel to the fire of their anger. That is why the Bench insisted on knowing the other names and what has the Government done to bring them to book. Poor Gopal Subramanium has no answer to all these questions except making more promises for better probe outputs through the next status report.

Some of Ali's utterances apparently before the ED's sleuths are nothing but the reiteration of the oft-reported maladies of participatory notes for making huge investments in our stock markets, the notorious Mauritius-routed funds and OCBs and the creation of post box companies for bringing back the illicit funds. There appears to be an element of truth in such utterances. But what is surprising is that no names of our large corporate have come out so far - Is it a case of lack of interest on part of the print and electronic media to publish their names for the 'obvious reasons' or they do not figure at all? There cannot be a scam minus a corporate name in this country. All of us know that our politicos are corrupt. Our bureaucracy is corrupt enough not to net the corrupt! Our traders and businessmen who deal in cash are black money hoarders. But what about our companies which are regulated by the provisions of the Companies Act and the SEBI Act. Ali's story clearly tells us that Satyam was not a stand alone case.

There are hundreds of large corporates who must have made good use of Ali's skills and international reach to funnel their unaccounted funds or even dirty funds into the country through the stock markets.

Keeping in mind the serious dimensions of this case and

also the quantum of black money stashed away in tax havens, the Union Government indeed needs to take some immediate steps to regain the confidence of the common man. And the first step should be what has been suggested by the Apex Court - to set up a Special Investigation Team (SIT). Experts from various enforcement agencies should be handpicked and given complete freedom to probe it, and their progress should be closely monitored by the Apex Court. Secondly, the Ministry of Finance should not delay in withdrawing the notorious CBDT Circular No. 789 which helps fraudsters misusing the Mauritius route. The CBDT needs to do more, and the Enforcement Directorate deserves support from other agencies to make it a multi-faceted probe. But, if one goes by the past, and the end results of all mega probes, not much should be expected out of Ali's case. But, for me, since the Apex Court has been at pains to come out with insightful observations on the black money issue, there is going to be some results for us to see. Let's hope and wish our Apex Court succeeds and also spurs our elected Government into action!

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JAN LOKPAL BILL - IGNORING 'DEMAND SIDE' OF CORRUPTION AT OWN PERIL[12]

The political, the judicial and many other important corridors across the country are abuzz with high-pitched talks relating to the success of Anna Hazare's fast-unto-death campaign and the Jan Lokpal Bill tailored by his team of civil rights activists. What guarantees his *Satyagraha* an important place in the modern history of India are the two most distinctive features. First, this happens to be the shortest battle ever fought on the strength of *satyagraha*, and won within 96 hours! Second, this was the first mini internet-driven public outcry in India against the Gordian issue of corruption. If a closer peep is taken into the first part, it may appear that there would not have been a more opportune time to choose for the launch of Anna's campaign. Although corruption is a glamour-less and well-ingrained issue in our society and most of us have

also fine-tuned our mindsets to accept its malign presence in our day to day life but the iron was indeed hot enough not to be hammered. The moral-strength index of the Central Government had ebbed so low on account of a series of motley scams in the recent months that it would not have escaped even the common brain of the civil rights movement. And that is how Anna's fast-unto-death campaign which was

12. Published in www.taxindiaonline.com, TIOL–COB(WEB)–235, 14 April, 2011.

earlier designed to be launched in Mumbai, was finally shifted to *Jantar Mantar* in Delhi. And truly, the *'Mantar'* (the magic) of public outrage against corruption worked faster than the 'Jasmine Revolution' experienced by the *vox populi* in the Arab World.

Anyway, let's move straight to the set of goals and the instrumentalities being recommended for the never-ending Armageddon against the evil of corruption. Unhappy with the text of the Lokpal Bill proposed by the Central Government, the civil rights activists have framed their own bill known as Jan Lok Pal Bill. This Bill seeks to set up a body whichshall have power to investigate, prosecute and in case of Vigilance enquiry, even punish a public servant and a Minister for acts of corruption, mal-administration and even delay in action. In case of prosecution it would be conducted in special courts of Jan-Lokpal. This body would be responsible for its action to nobody except to the public at large and a Jan Lokpal can be removed only by a Bench of FIVE Judges of the Supreme Court of India. All CVOs of Government and the Anti-Corruption wing of CBI would report to Jan-Lokpal who would be, in nutshell, the '*Super Babu'*.

What sort of problems such a super sleuth body may brew for the existing democratic legal framework? Some of them would be as follows:

• Our visionary Constitution-makers, after protracted debates for three years between 1947 to 1950, had opted for the Parliamentary form of democracy on which our foundation of nationhood rests. It is another issue that the aura of our Parliament has significantly waned over the years because of the declining hours of productive and healthy debate on issues of national importance but this certainly does not mean that the Parliamentary system itself is marred by inherent flaws. In over 60 years, India has rather richly contributed to the overall paradigm of parliamentary system as the most viable and effective form of democracy. The Parliament where people of this country send their elected representatives is undoubtedly the supreme body and has the undivided rights to seek accountability of not only the Executive and the Judiciary but all such institutions which may be created in any form in the country, as it is truly accountable to the people of Republic of India.

  But the proposed Jan Lokpal does not seem to be giving due respect to the Parliament which it commands. It intends to be a body outside the parliamentary control mechanism which must not be allowed, no matter how sacrosanct is the single objective to fight against corruption as it will necessarily weaken other institutions of democracy. Merely to create a new super-regulator, there cannot be a trade-off between the institutional keeper of the people's interests and the legal ***magnum opus*** that our written

  Constitution is. Under no circumstances, the Jan Lokpal should be allowed to be outside the purview of the parliamentary control.

There appears to be a glaring oversight on part of the framers of the Jan Lokpal Bill. Their goal is noble but they seem to have got carried away by the intensity of the virtues of

the goal. What they intend to create is a *'Super Duper Babu'* who can be removed only by the Five-Member Bench of the Supreme Court. Thus, at the peril of well-evolved principles of public administration, what seems to have been proposed is the judicial supervision of an administrative body. Such a proposal does militate against the basic framework of democracy.

The Bill proposes that the Prime Minister would be bound by the advice of the Jan Lokpal in matters of sanction of prosecution and award of penalties to Government servants. In other words, the Prime Minister will not be bound by the collective wisdom of his Cabinet but will have to comply with the advice of the Jan Lokpal. This certainly does not augur well for a well-heeled system India has evolved over the decades whereby collective wisdom of the Council of Ministers represents the common interests but in this case, one set of public interests advocated by the Cabinet would be pitted against the other set of public interests championed by the Jan Lokpal.

In the case of the selection of the Jan Lokpal, there appears to be a lopsided representation of the judiciary in the Selection Committee. Far too many representatives from the judiciary reflect perhaps the 'reasoned bias' against the politicians. And in the bargain, our legislatures have been outrightly bypassed except for the Lok Sabha Speaker and the Vice-President. Merely because our politicians in general are bad and dishonest, this does not mean that all of them are bad and 'optical fibre' of moral turpitude. A good number of them are not only good citizens and driven by public interests but also proven efficient and seasoned administrators. Our legislative members must be given due and fair representation in the selection committee for appointment of the Jan Lokpal.

In nutshell, the present Draft of the Bill reeks of strong bias against the Indian Parliament which should not be allowed

to be subverted at any cost. I would like to recommend the following changes in the Bill:

(a) Have a clear vision as to what you want Jan Lokpal to do - Investigate, Prosecute or award punishment. These three functions have to be performed by separate bodies to ensure that Jan Lokpal doesn't become a medicine worse than the cure. Ideally, it should only be an investigating body with freedom to investigate and submit its report to another independent body for further action. The principles of separation of power

and functions are well-ingrained in the texts of Hindu Mythology - there is a creator (Brahma); there is a keeper (Vishnu) and there is a destroyer (Lord Shiva). All three have different functions and powers to execute them. If all these functions and concomitant powers are vested in one God, there would perhaps be an imbalance in the Nature. Thus, separation of power and functions does work well.

The second independent body should sanction prosecution in a court of law or award punishment in a vigilance case. The CVC with little more teeth can do this function. Government being the appointing authority should be bound by the advice of the CVC and have power to seek review of the advice of the CVC at least once by sending the advice back to the CVC. However, in case of CVC sticking to its advice, it should be binding on the Government. The CVC should only advice if an officer is to be prosecuted, awarded minor penalty or major penalty.

The quantum of penalty in a vigilance case should be exclusively in the domain of the Government.

Both the bodies Jan Lokpal and CVC should be accountable

to the Parliament, and their removal by impeachment by simple majority should be made possible. Incidentally, Parliament in India has not used its impeachment powers against the Judges even in cases where it should have done so. The history is witness to the fact that the impeachment is not an easy procedure and has not been misused by Parliament at all.

Removal of Jan Lokpal by a Bench of Supreme Court should also be provided so that there are checks and balances in the system and Jan-Lokpal does not go berserk.

Appointing Committee should have appropriate representation from the Legislature that too from both the ruling and the Opposition parties.

Qualification for Jan Lokpal needs to be better defined. Winning a foreign award like Magsaysay or having "demonstrated resolve to fight corruption" say by street protests cannot be a qualification to hold an important administrative post. Incidentally, Gandhiji was not considered worthy of highest foreign award i.e. Nobel Prize so we better trust ourselves rather than '*phoren* awards'.

(h) It would be much better if the law on Jan Lokpal defines corruption in more precise terms, say in grant of national resources (refer to 2G spectrum, iron ore smuggling case by Reddy brothers), award of government contract (refer to CWG scam), award of Government Land (refer to Adarsh Co-op scam). Big cases involving loss to public exchequer of more than say

Rs. 20 crores is where it should be spending its institutional resources on. Vigilance enquiries would be a sheer waste of energy for Jan-Lokpal.

Let's not be naive enough to believe that the activist NGOs, the media and the judiciary-combineshould be

perceived as a panacea or a clear-cut substitute to our politicians to tackle the problem of issues like corruption. None of these bodies are less corrupt than our politicians nor do they go through the grind of ballot-box. This would indeed be a much better idea if this Bill which intends to tackle the 'supply side' of the corruption issue also focuses on the 'demand side' and takes corporate and NGOs within its ambit to comprehensively tackle it. If the demand side is ignored, there are strong chances that this new law may also get derailed or meet its Waterloo sooner than one may expect it to be. Let's hope before the Joint Committee headed by the most balanced 'seasoned head' in the Government Mr. Pranab Mukherjee comes out with its final draft, all these concerns explained above are fully addressed.

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HAVE ILLS OF BLACK MONEY AND CORRUPTION REALLY ABATED? IF NOT, THERE IS NO GROUND TO WITHDRAW PHONE-TAPPING POWERS OF CBDT[13]

Black money is the mother of many ills in all the economies across the world. Greater the volume of black money, more serious are the ills afflicting the political system, financial markets, corporate governance, process of tendering for large contracts, corruption in bureaucracy and massive corruption in the private sector which no body talks about. In India, as elsewhere, black money is closely linked with corruption and national security. The entire Nation has of late been discussing about illicit money and the Indian wealth parked in tax havens. The highest judicial forum is seized of this issue after a PIL was filed. With some of India's Double Taxation Avoidance Treaty (DTAA) partners gifting sensitive information about Indians parking funds abroad to the Ministry of Finance, the UPA Government has also been reeling under pressure from various quarters to bring the guilty to book. Thanks to the boiling cauldron, Gandhians like Anna Hazare and other civil rights activists recently came out in the open, and a Joint Committee

was notified by the Government to draft a new anti-corruption law in the form of Jan Lokpal Bill.

In this backdrop, let's go to the important issue of phone-tapping which is being seriously debated in the various power corridors of the Central Government. There are a few agencies which have been authorised to tap phones for specific intelligence and suspected offences. The three agencies which do so

13. Published in www.taxindiaonline.com, TIOL–COB(WEB)–236, 21April, 2011.

for national security purposes, are the RAW, the IB and the CBI. In fact, CBI does so for many other purposes as well, including keeping a tab on various sorts of rackets. The Enforcement Directorate does so to prevent money-laundering and *hawala* trading. The DRI does so to keep track of narco trade from across the border, to prevent smuggling of certain items and to keep track of high-value commercial frauds. However, their focus is on offences relating to only Customs and NDPS Acts. The CEIB is a freelancer or call them an 'All-Rounder'! Since their mandate is a typical case of *khichari*, they do all sorts of intelligence-gathering. Then comes the Income Tax which keeps track of tax evasion and black money generation. Besides Income Tax, there is no other agency which has been mandated to keep an eagle's eye on the parallel economy.

Let's now go back to 2006 when the phone-tapping powers were also given to the Income Tax (Intelligence). And the credit for such a foresighted decision goes to the then Finance Minister, Mr. P Chidambaram, who had seen the trend of huge black money generation in the economy and parking the same abroad by the corporate honchos, businessmen, exporters,

bureaucrats and his brethren politicians. Mr. P Chidambaram realised that black money has serious national security implications and powers were necessarily to be given to the CBDT to fight this hydra-headed monster.

What also may have proven perspicuous for Mr. P. Chidambaram was perhaps the weird trend of consistently increasing doses of liberalisation of tax laws and simplification of procedures for greater compliance not being coupled with tough action against tax offenders. Worldwide, tax crimes are taken seriously, particularly in the economies where tax laws have been simplified, and taxpayers' services are IT-enabled. Let's take the case of the USA which arm-twisted the UBS Bank of Switzerland to disclose even personal data about offshore banking by the US taxpayers. Although the Article 13 of the Swiss Constitution vows to prevent such invasions on privacy but it could not do much as it has already disclosed personal data relating to 4400 US expats having accounts with the UBS. Contrary to the global trend, Mr. P. Chidambaram must have seen that even serious tax crimes are not taken seriously in India. Because of the quaint laws and attitudinal issues, there is hardly any case of successful prosecution of tax offenders. Mr. P. Chidambaram perhaps foresaw the serious implications of the weak legal framework and implementation and decided to vest phone-tapping powers to the income tax Department also so that some sort of check could be kept on black money generation.

Another reason which might have guided him in taking such a decision was perhaps the lack of informer-recruiting powers with the revenue intelligence agencies unlike the ones which are engaged in protecting the national security. The Cabinet Secretariat has unlimited and unaudited funds in its Secret Service

Fund (SSF) which assists it in recruiting informers on

permanent basis. But only a meagre sum is allocated to SSF of either the DRI or the Income Tax which also do not have powers to recruit informers. At best they can reward them. But given the present practice of giving reward in the most irregular and disincentivising fashion, except for professional informers, not many come forward to share intelligence with them.

Under such circumstances, phone-tapping was perhaps the only and also the most reliable source left with the CBDT to keep track of tax evaders. And, thus, the CBDT got such powers. In fact, it has used these powers quite professionally and discreetly. Had they not done it, Indian taxpayers would never have come to know about the 2G Scam and the Hasan Ali case. Ms. Radia's case where her conversations were recorded with a leading industrialist, and many other names also cropped up, this is indeed another pointer to the fact that such powers should remain with the CBDT. None of the big names appearing in those recorded conversations have come out clean so far. But, there is no denying the fact that the right to privacy has been desecrated. Sufficient safeguard measures are required to be put in place so that some of the basic constitutional rights are not diluted in the unavoidable trade-off with other necessities of a modern state.

If protecting right to privacy is the objective of the Committee set up by the Prime Minister and headed by the Cabinet Secretary, Mr. K. M. Chandrsekhar, it would be myopic and a historic blunder if the powers of the Income tax to tap phones is withdrawn. The ideal approach would be to streamline the procedure which would prevent all leaks. Given the fact that it has not yet been proven that the leaks took place from the CBDT, it would be unreasonable and against the long term national interest to withdraw such facility on the basis of gossip or inter-service rivalry or jealousy.

If the Union Government is really serious about any sort of meaningful reforms in the law and procedures for phone-

tapping, let there be an integrated state-of-the-art centre where officials from all these agencies could sit together in the same premises and share the vital inputs with each other to make optimal use of the entire exercise. This way, a fool-proof system of no-leakage can be put in place for all the agencies. In today's environment, one agency shares the tapes with others, and if others leak the same, the original agency comes under the scanner of suspicion. And this is what seems to be happening in the case of Income tax.

I hope that since the ball has now been thrown into the court of the Home Minister who as the earlier Finance Minister decided to vest such powers in the income tax, an objective and foresighted 360 degree view will be taken of the issues before any decision is taken. Since the menace of black money has not

abated nor has corruption in the country, it is essential that the tax department retains such powers with the caveat that appropriate and stringent safeguards should also be put in place so that the balance is kept between the need to check tax evasion and its concomitant ills including national security and the citizen's fundamental right to privacy.

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CORRUPTION AND BLACK MONEY - THE TWO SOUL-EATING ILLS OF INDIA - DO WE HAVE A RIGHT TO HOPE?[14]

Black MONEY continues to be the flavour of the month. Till the midnight of June 4 when a 'harmless' (*a la* Home Minister's clarification yesterday) attempt was made by the *lathi*-wielding Delhi Police cops to evict Baba Ramdev and his 40,000 supporters out of Ramlila Ground which later turned ugly with a barrage of accusations made against the Union

Government, the black money and corruption issues constituted the eye of the storm in the form of swelling public opinion. As soon as it was telecast almost-live how mercilessly Delhi Police l*athi*-charged the hapless rural audiences, including senior citizens, women and children, the spotlight shifted from the ills of the economy to fundamental right to protest peacefully. Commentators, political analysts, governance jingoists and trained political mouth-pieces of war-cry grabbed the centre-stage in the media and other public platforms and apparently succeeded in trivialising the serious issues into political conspiracy of the BJP and its allies to de-stabilise the Central Government. The de-spirited Opposition which has for long been groping in the dark for substantive issues sprang into action with the Government's citizen-unfriendly reaction to the assembly of hunger-strikers.

Evicting common men with the power of *lathi* was indeed a fatal political miscalculation by the Congress Party. Without getting into the nitty-gritty of what Mr. Chidambaram said yesterday regarding the permission to hold *yoga* camp but Baba protested against corruption and black money, the fact remains that the Congress Party showed no vision nor even 0.0001% of patience it claims to have inherited from its forefathers like Mahatma Gandhi, Sardar Patel and Nehru. And the party built so much of pressure on the Central Government that it also got blinded to the basics of governance - you cannot be heartless to the very same citizenry which elected you and vested powers of sovereignty in you. You cannot ignore the memory of barbaric killings of Indians by the white rulers in *Jalianwallah* Park in the very recent history of India. With the large network of information and communication channels penetrating almost 97% of the citizenry, no Government in today's world can afford to stagger from the path of

14. Published in www.taxindiaonline.com, TIOL–COB(WEB)–243, 9 June, 2011.

justice and due honour to the basic rights guaranteed by the Constitution. The days are gone when police firing at one place used to be reported meekly or by 'managed' media houses in such a fashion that an unmanageable crowd of people locked horns with the Police even if things were otherwise, and several were killed. When every shade of governance is on camera today, all political parties need to remember that they cannot afford the luxury of experiencing the hedonistic traces of authoritarianism. The *vox populi* is often said to have short memory but I would like to disagree with it. Indians have very sharp memory irrespective of their educational, socio-economic and other backgrounds. It is only that the people in general get guided by the 'cultured thoughtsof forgiveness'**.** Forgiving is a sign of strength and power. And such lessons have come from our glorious civilisation. Although the common man does possess such powers but we as a Nation have failed to transfer such traits to the agents of governance.

Anyway, let's bring the main issues into the spotlight. Corruption and black money are no longer the cause and effect in our society. If corruption is the cause and the black money is the effect, a studied perusal of these phenomenon may reveal that quite often black money is the cause which corrupts the chieftains of the system. These two have unfortunately got integrated into an organic whole in our country, and that is why most of the measures taken in isolation to tackle black money have failed to produce the desired results.

Similarly, corruption cannot be restricted to certain pockets alone as the power of black money is so all-pervasive that it has permeated virtually every sphere of not only our administration but also our society. Thus, these issues should not be viewed purely from the perspective of legislation and economic policy tools. They are too deeply ingrained in our society and in some of our common social, economic and political behaviours. We feel more aghast in the case of public administration because it is more rampant and conspicuous by its presence. Secondly, we tend to see the existence of public administration for public good, and once it errs we quietly

grease the palm to get our work done but it does add amber to general anger which remains latent for years. It comes out on occasions like the one prevailing today.

There is no less corruption in the private sector. For getting big contracts from a corporate or an agency for a product, the tale of bribery is no less pedestrian. When it comes to paying rent in cash we hardly insist on paying by cheque. Too many *benami* and undeclared houses on rent result in huge volume of black money generation. The common man is indeed responsible for lending a spur to the parallel economy but it has no choice. The system which is in place to curb such a practice is incompetent or prefers to turn a Nelson's eye to such sectors. When it comes to buying a DDA flat, as much as 50% of the market price is demanded and also paid in cash. Who does not know about it? But our

political masters and the bureaucracy take shelter under meaningless jurisdictions to let the ills survive and fatten. There are innumerable examples which establish that corruption and black money cannot be contained fully merely by legislation and policy tools. The society at large does need to find social solutions to such economic behaviour.

Meanwhile, the Central Government does need to adopt a two-pronged strategy to tackle these issues. First, it should concentrate on aggressive ways and means to bring back the huge wealth parked in tax haven. Secondly, it should also evolve policy tools to curb practices which feed the demon of corruption and black money. For the first, the Centre needs to take significant steps which are to be seen as tangible measures. I guess the time is ripe for the Government to come out with an innovative Amnesty Scheme to get some part of the money parked abroad. Any delay would inevitably help the account-holders to divert their funds into shell companies. A quick incentive to bring back such funds is the only way which

can produce some results in the short-run. Since the judiciary, the civil rights activists and the corporates are in favour of bringing the tax haven funds back to India, an Amnesty Scheme notwithstanding many of its proven side-effects, is the only way the Government can garner some funds.

Secondly, a time has come for tightening the tax arrear recovery laws. There are too many demands pending for years in the case of both the Revenue Boards. The long-pending tax arrears are huge, and the assessees have diverted their wealth and property so that they could not be attached. A good number of assessee have become untraceable. The CBDT has rightly set up a panel to evolve tools to deal with these issues. The CBEC also needs to focus on tax arrears but not the recent and the live cases which are yet to be decided even by the first appellate forum. The recovery laws do need to be tightened but with the necessary bulwarks against its misuse.

Although the Central Government has commissioned fresh studies on the quantum of black money, which may be of some ornamental value to some reports and policy papers, but the fact remains that the parallel economy has crossed the half-way-mark of our trillion dollar economy, and we as a Nation need to wake up and focus on evolution of mechanism before revolution takes over. The demon of corruption must be crushed with its fangs but for that, we need a Himalayan political will power which is apparently lacking today. Let's hope that in the days to come the pace-gathering civil rights movement produces the much-needed respite every citizen of India deserves from the soul-eating ills of our society and the political system.

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A HILARIOUS CLASSIFICATION OF CORRUPTION - ALSO LADEN WITH TRUTH[15]

Even as the fire ignited by Anna continues to flare up in the precincts of the Indian Parliament notwithstanding the Herculean efforts being made by the floor managers to douse the same, there seems to be literally no shade of 'Anna Effect' in the majestic corridors of North Block. Take the latest case of CBEC Chief Commissioners' promotion-cum-posting order. Although the Board showed unparalleled alacrity in clearing the file, the day it received the same with ACC approval but the Order is learnt to be stuck allegedly because of some powerful Chief Commissioners who are keen to grab sensitive posts in Delhi and Mumbai. The fact that the file has not been cleared even after 72 hours, is indicative of the characteristic illness of our system. This episode is indeed an indicator to the fact that how difficult it is going to be for the supercop *Jan Lokpal* to address all the forms of corruption by resorting to punitive instruments. In other words, *Jan Lokpal*, in all likelihood, may not prove to be the panacea to all forms of corruption as being peddled by its votaries.

Anyway, today, while attemping an anatomy of corruption, I would like to share a hilarious taxonomy of corruption which is truly laden with truth (inputs received from many friends, including a couple in the Government Department). In the *Nawabi Urdu lingo*, the classification reads as *Nazrana, Sukrana, Mehnatana, Jabrana*, and finally, *Milkar Churana*!

Nazrana, Sukrana and Mehnatana are the pedestrian genres of corruption which are all pervasive, and the Trade dealing with Government necessarily factors them in their costs of doing business. Often, the Trade would not complain about these forms of corruption even if the economy, as a result, becomes less competitive. *Nazrana* is a kind of gift which a *Rajdoot* (Ambassador) used to carry when he visited a neighbouring kingdom. It was a gift, a token of respect, even if given grudgingly. In not only the Indian history but also the European, such a gift had a social sanction and was within the affordable limits. Similarly, when a senior officer takes charge in any department with which Trade has to regularly deal with, the Trade calls on the officer and presents a *Nazrana*. It serves

twin purposes - one, it shows respect for the officer, and two, it gives opportunity to the trade representative to explore the possibility of collusive corruption in future. It's like testing the waters before 'fishing'!.

Sukrana is the second variety of 'innocuous' form of corruption which is best illustrated by the conduct of the Trade when an officer, be it factory Inspector or an Excise Inspector, visits factory and gives a satisfactory report. No abuse of power or display of nuisance value - a rare event - prods the taxpayer to offer a

15. Published in www.taxindiaonline.com, TIOL–COB(WEB)–256, 8 September, 2011.

gift to say thanks. A kind of *sukriya*! Officers do look for *sukrana* and the Trade obliges – no issues!

The third variety of affordable corruption is *Mehnatana*. Here the officer puts in extra effort to ensure that the legitimate work of the citizen or trade gets done. Something like an Inspector traveling 20 kilometres in a bus to inspect factory stuffing at an odd hour. Trade is often willing to oblige and consider such obligations as *Mehnatana* of the Inspector. All these forms of corruption to some extent have social sanction, and therefore, dealing with them like a criminal offence may not be a pragmatic option. Any offence taken to a criminal court would mean that all the rules of adversarial justice system come into play. The corrupt officer, though Trade, would not call him so, would have to be considered innocent till proven guilty, and the onus of bringing clinching evidence would be on the prosecution. A very tall order, given the reality of its pervasive nature, unwillingness of the Trade in India to give evidence and social sanction it has received.

Corruption of such nature can better be dealt with by

the following methods:

Simplification of procedure to reduce discretionary power of the officer: Once the discretionary power is reduced, arbitrariness in decision-making concomitantly gets reduced. Make the rules simpler, transparent and easy to comply with, and corruption would certainly abet. An average citizen should find it easy to comply with rules.

Reduce the interaction point with officers: Each point of interaction is an opportunity for the trade to offer a bribe and for officer to expect or demand a bribe. Self-assessment of imports is a good example of reducing interaction points to control corruption. In fact, simplification of procedures and use of technology are two known methods of reducing interaction point.

Use technology: Technology has power to reduce interaction and speed up the system. E-filing of income tax returns, EDI system for assessment of imports and exports have all contributed to reduction of corruption. The trend needs to continue and senior officers in Government who are often technology-averse need to learn technology if they want to make meaningful contribution towards reducing corruption.

Use the power of transfer: Transfer to a non-sensitive assignment is a punishment for officers keen to collect nazrana and sukranana. As the corruption of this class is not easy to establish, it is desirable that officers regarding whom negative feedback pours in, be rotated to send a clear signal.

(E) Ensure reply: This is a simple but elegant solution to fight corruption which every senior officer can implement in his office. Every letter received must be acknowledged given a tracking number and replied to in a

time bound manner. This would enhance credibility of the system and would keep the lower functionaries in a check.

Unfortunately, team Anna has been so focused on punitive vigilance that their solution may overload the system to a grinding halt. Another collateral damage would be low morale due to trial by media leading to extreme caution in decision-making - a phenomenon which kills growth. Maharashtra Government is plagued with indecision post Adarsh scam.

Now, let's turn our eyeballs to more serious variety of corruption - *Jabrana and MilkarChurana. Jabarana* is essentially exploitative corruption. Using discretionary powers, including delaying tactics, the officer extorts money from common man and trade. As the work is likely to suffer, only a few actually come forward to complain against. The poor and the powerless for whom a government servant is *mai-baap* suffer them the most and are helpless. Faulting or assessing the culpability of the bribe giver would cause double jeopardy to the helpless in such cases. There should be a mechanism, simple to enforce which allows for speedy action in such situations. Maybe a system where after the work is done on payment of bribe, a complaint can be filed that the work was done only after bribe was paid. Collateral and circumstantial evidence should be considered enough to punish the extortionist in such case, though lightly. It may sound paradoxical but only light punishments are easy to enforce and quick to impose. The money should be recovered from the officer's salary who delayed the decision making or raised frivolous query and paid to the complainant. Here it would be useful to make such punishments a non-vigilance case to avoid long litigation and procedural rigour associated with the vigilance enquiry. The psychological and social impact of even a deduction of five hundred rupees from an officer would be tremendous. Services Guarantee Act of some of states have these provisions but implementation continues to be a challenge as these events get converted into a vigilance case bringing in procedural rigour. Converting these low level

extortion corruption to vigilance or criminal offence is a surefire recipe for failure. Our overloaded courts simply would not be able to handle these cases leading to a systemic failure. Team Anna needs to understand this reality, and accordingly sober down their expectations from the system which is facing all-around rot.

The last and the most dangerous of all kinds of corruption is *MilkarChurana*. A cooperative enterprise in corruption! Collusion is the key in this kind of corruption. This kind of corruption is best exemplified by 2G Scam and CWG scam. In 2G scam, spectrum – a scarce resource - was discretionarily allocated for a fat consideration. The telecom companies expected to rake in moolah from

the planned enterprise and the Minister raked in 'profits' to allow the enterprise to come up. In case of CWG scam, government contracts were allotted at inflated prices making room for fat kick-backs. This kind of corruption needs procedural transparency as well as punitive action. Example must be made of a few high and mighty, which is rightly being done. This is where Jan Lokpal would be extremely useful and should be focused. These would be the cases - difficult to investigate and all kinds of pressure would come up on the investigating officers. Jan Lokpal therefore needs operational independence to withstand pressure and act swiftly. The challenge is enormous as this large-scale collusive corruption is the fountain-head of electoral funding. Jan Lokpal would do a yeoman service to the Nation by making only a dozen of such cases a year rather than focusing on extortion of Rs 100 at a traffic signal by a *sepoy*. One size doesn't fit all. Team Anna should re-examine the hydra-headed monster of corruption and search for solution for each of the heads individually rather than resorting to the 'umbrella' approach. Let's hope the Team Anna and also our Parliamentarians manage to reach out to the bottom of the bottomless fountain called corruption!

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INTERNATIONAL BUSINESS - BRIBERY OF FOREIGN PUBLIC OFFICIALS - *CHALATA HAI* APPROACH CONTINUES FOR INDIA[16]

Business and Bribery are predictably the two sides of the same coin like the politics and corruption. It would definitively be wrong to treat the two inseparable bed-fellows as stranger to each other. Although the bribery is no less a sensitive issue for the transactions between the two private sector entities but it puts on the clothes of criminality and serious offence when it is practiced in business deals with government agencies. Depending on the complicity of the ranks of government officials, the quantum of bribery varies. If it is a defence deal, it can be as huge as a Bofors-infamous Howitzer canon! A similar size of bribery has of late been detected in the infrastructure sector projects, particularly under the PPP model. In every such instance of big bribery case, there are two parties involved - the bribe-takers (the Government officials) and the bribe-givers (mega corporates/foreign companies) involved in striking a mega purchase or allotment or permit or licence deal. So far as public servants are concerned, there are laws to deal with them. And, as regards the foreign companies, if they are from OECD countries or the USA or Canada, they are likely to be prosecuted under laws against bribery of foreign public officials in their own countries.

With the global economy entering into the fifth year of slowdown cycle, there has been a subtle shift in the approach of most economies towards a global convention against bribery. The G-20 has launched Anti-Bribery Action Plan (the

16. Published in www.taxindiaonline.com, TIOL–COB(WEB)–299, 5 July, 2012.

UN has already a widely signed similar convention) and most emerging economies have become sensitive to this global

malady. The OECD's Anti-Bribery Convention has become almost 13-year old. India, which had signed UN Convention Against Corruption in 2005, has finally ratified the same and introduced the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, 2011. How many years it would take to convert this Bill into a law is *de hors* the ambit of speculation as no amount of studies can indicate a realistic time-frame for passing a Bill, and even if a Bill is passed by both the Houses of the Parliament, the last and crucial leg is notifying the same - *a laBenami* Transactions Bill!

Anyway, what is important here is the fact that the UPA-II, notwithstanding the ocean of corruption charges leveled against it, has introduced the Bill proposing incarceration between six months to seven years for bribing foreign public officials by the Indian business. Going by the global trend, such a law is the need of the hour. Given the fact that India would soon be one of the frontline economies with a large number of Indian MNCs in the world, it was important to scare the 'trained hands' of the Indian companies not to explore 'pocket-filling space' outside India, for securing business deals. Since there has been no specific law to deal with such offences, a good number of companies must be claiming deduction under the Income tax Act, or may be camouflaging the same as other kind of expenditure for 'buying' business abroad.

Apart from the acts of omission and commission by the Indian corporate operating dozens of offices overseas, India has been slack even in creating a Central Registry, which could gather information from various law enforcement agencies relating to cases of bribery by foreign companies. For instance, the CBI recently booked a Switzerland company, which had hired the services of some influential brokers to buy out government officials preparing the documents for blacklisting the same for wrong-doing. Such instances are many, and they should ideally be compiled and officially shared with the countries to which the wrongdoers hail from. But such an

exercise is not a structured policy of the Government, which may be sharing such inputs either on demand or in a piecemeal fashion with the foreign counterparts.

Let's now move far away from the home turf. Interestingly, it is not India alone or other emerging economies, which can be seen lax in tackling foreign bribery issues but OECD and other developed economies have also not been able to inspire much confidence worldwide. Since 1999 when the OECD had put in place its Anti-Bribery Convention, only 298 companies and individuals have been booked for foreign bribery till March 2011. Such a statistics works out to barely two dozen cases per year by dozens of countries. Only about 66 of these individuals have gone to jail - only for a few week in many cases. The OECD Working Group on Bribery now seems to be pinning its high hope on 300 on-

going investigations across its member countries. Poor records apart, the efforts made by the OECD cannot be seen through the minimalist prism. It has been regularly reviewing the implementation of Peer Group recommendations and also undertaking awareness campaign against bribery, which distorts markets and spoils good governance. Bribery is indeed the biggest enemy of fair market competition, which has become more fierce in the slowdown-hit global economy.

In the latest report released by the OECD, it has reviewed the anti-bribery laws of various European and Asian economies. For instance, it has patted the back of Switzerland's Office of the Attorney-General for having confiscated 163 million Swiss francs in relation to bribery of foreign public officials. The Working Group has also welcomed the record fine and compensation ordered in Switzerland against Alstom under the criminal code provisions on bribery of foreign public officials. However, the Group has expressed concern over the lack of a systematic approach allowing for the exclusion of

companies convicted from public procurement or official development assistance contracts.

In the case of Asia's leading economy, Japan, the Working Group has expressed disappointment. It notes that Japan has obtained convictions for foreign bribery in just two cases since the foreign bribery offence came into force in Japan in 1999. Of particular import is the second case, which involved substantial bribe payments in relation to a major infrastructure project financed in part by official development assistance (ODA) from Japan. This case resulted in convictions of four persons, including the representative of a foreign subsidiary, and the company itself, which was also delisted for two years from ODA-funded contracting. Nevertheless, a figure of two offences evidently suggests that Japan has not been seriously enforcing its foreign bribery offence laws.

In the case of Germany, the Working Group has noted that its enforcement has increased steadily and resulted in a significant number of prosecutions and sanctions imposed in foreign bribery-related cases against individuals. The Working Group is particularly happy with Germany's recent enforcement efforts against legal persons since 2007. It also welcomes legislative measures and jurisprudence resulting in increased reporting of suspicions of foreign bribery by tax auditors. The report underlines the ambiguity surrounding facilitation payments and the Working Group hence recommends that Germany review its policy on this implicit exception. The report also notes that Germany's increased enforcement was also enabled by its commendable level of international cooperation with other Parties to the Convention.

Although the current statistics may not look inspiring today but in the years to come, the global movement against bribery of foreign public officials is certainly going to be a force to be reckoned with. And, I wish India does not lag behind in riding this global drive. It is more desirable for the Ministry of Corporate Affairs to involve some of the Institutions like cost accountancy and

chartered accountancy to educate their professionals about the good business practices and the role of ethics in business. They should be encouraged to report suspected cases detected during tax audits. An All-India awareness campaign to educate not only professionals but also private sector employees about the various 'tool kit' available against detection of foreign bribery cases and also domestic cases should be devised. The ambit of Whistle Blowers' Act should be expanded to include the private sector wrong-doing, which has an implication not only for the exchequer's kitty but also the aura of fair competition in the market.

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INDIA NEEDS SINGLE REGULATOR TO WIN OVER SIAMESE TWIN -BLACK MONEY AND CORRUPTION[17]

The Monsoon Session of Parliament has so far been tumultuous because of the issues of corruption and black money, which are like Siamese twin. Anna and his team staged *dharna* at *Jantar Mantar* as a curtain-raiser for the protests in the making. The issues raised by Anna were followed up by Baba Ramdev and many other civil society faces. Although Baba was expected to reveal some strategy on how to bring back the black money vaulted in tax havens, but it seems consensus eluded his team of strategists or, his strategists got lost in the *Bhul-Bhulaiya* of complex international laws. Meanwhile, the Ministry of Finance, which has a new pilot in the cockpit, has put in the public domain the hitherto confidential Black Money Report tailored by the Panel headed by the CBDT Chairman. And this Panel has clearly noted that there is no global consensus or law to declare tax evasion a criminal offence. Thus there is no easy instrument to recover black money kept in tax havens. The only option available at present is the UN Convention Against Corruption and Mutual Legal Assistance Treaties or through specific recovery

provisions in tax treaties. In other words, if Baba or Anna or any other civil society activist expects the Government to bring back the lost wealth as per a deadline set by them, it would be like asking the Government to do the impossible, which no law permits.

Let's now move to the key highlights of this exhaustive report. Like others, this Panel has also recommended certain strategies to tackle the issue of black money: a) prevention of generation of black money; b) Discouraging use of black money; c) Detection of black money; d) Effective Investigation and adjudication; and e) other steps. Under the head 'Preventing generation of black money' if one was expecting some brilliant recommendations then disappointment is perhaps guaranteed as this Panel has listed out all those steps, which have already been taken or are in the making by the various arms of the Government. However, it has noted that there is virtually no oversight in the private sector except for large

17. Published in www.taxindiaonline.com, TIOL–COB(WEB)–305, 16 August, 2012.

companies. But the system of professional audit can also be ineffective in large companies as demonstrated by the Satyam case. Therefore, it has called for doing away with the DUAL audit under the Companies and Income Tax laws, and the Union Government may consider setting up a Regulator to empanel auditors in different grades and randomly assign them to the private sector firms with mandatory rotation and maximum tenure of two years. It has also called for a dedicated training centre for all law enforcement agencies dealing with financial offences.

The Committee has also regretted that at present, there is no agency in the country, which has a complete database of NPOs. CBDT has the largest database about this sector. There may be information with other agencies such as MHA and

CEIB. It is desirable that CBDT be assigned the role of a centralized agency with which every NPO would require to be registered and would be allotted a unique number. This would be in line with the decision taken by the Government in the light of possible misuse of the sector in undesirable activities. There are suggestions made by the NPO Sector Assessment Committee, an Inter-ministerial body, which should be accepted and the office of DGIT (Exemption) appropriately strengthened in terms of manpower, infrastructure and capacity building.

To Disincentivise use of Black Money it has recommended that,

Government may consider amending existing laws (The Coinage Act 2011, The Reserve Bank of India Act 1934, FEMA, IPC, Cr PC, etc.), or enacting a new law, for regulating the possession and transportation of cash, particularly putting a limitation on cash holdings for private use, and including provisions for confiscation of cash held beyond prescribed limits. This would address the concerns expressed by various courts, and also the Election Commission of India for reducing the influence of money power during elections;

To reduce the element of black money in transactions relating to immovable properties, provision for NOC should be introduced in the Income Tax law with safeguards to reduce administrative complications and increased ease of compliance, so that an appropriate and uniform database is also set up, and a proper national-level regulation is put in place. The new system should be computer driven with minimal interface between the tax authorities and the tax-payer, and enforced by a dedicated unit within the investigative machinery of the Income Tax Department on the basis of pre-determined parameters and standard operating procedures. The electronically generated NOC, within a specified period, would also act as a tax clearance certificate;

The Accounting Standard No.7 should be modified by the ICAI to be made applicable to real estate developers also. AS-7 and AS-9 should be notified under the Income Tax Act, 1961;

There is no uniformity in the matter of levy of agricultural income tax among states. Agriculture generates around 14 per cent of the country's GDP. Giving credit to agricultural income for income tax purposes without verification of claim allows an avenue for bringing black money into the financial system as agricultural income. State governments may consider levy of agricultural income tax with facility for computerized processing and selective verification. This will on the one hand enhance revenues of state governments, and on the other hand prevent laundering of black money in the garb of agricultural income.

On the Detection Front it has called for,

A cap on the number of accounts that can be introduced by a single person, the number of accounts that can be maintained in the same branch by any entity and alerts about same address being used for opening accounts in different names;

The Ministry of Corporate Affairs, which already has a centralized database of all companies, may examine placing a cap on the number of companies operating from the same premises and number of companies in which a person can become director;

Government may hike customs duties, as also graded wealth tax, on gold and jewellery to discourage investments in unproductive assets. The taxation structure on bullion and jewellery, including VAT / Sales Tax should be harmonized;

Income Tax Department, which has a large database of financial transactions, should immediately set up the Directorate of Risk Management for proper data mining

and risk analysis. The third-party reporting mechanism of the Income Tax Department should be made computer-driven and cover most high-value transactions in the financial sector;

FIU-IND may be empowered by law to receive reports (similar to other reports submitted to FIU-IND) on all international fund-transfers through the Indian financial system. The FIUs of Australia and Canada are already mandated to receive such reports;

Foreign entities - banks, financial institutions, fund transfer entities, etc. -have set up businesses in India. It has been found that Indian tax residents have been having substantial monetary transactions through these entities

or with their branches abroad. Some countries have implemented laws to make it obligatory to furnish information of all transactions undertaken abroad. India may also insist on entities operating in India to report all global transactions above a threshold limit. For this purpose, appropriate law, rules or contractual / licensing arrangement with these entities may be framed and implemented;

DRI maintains constant interaction with its Customs Overseas Intelligence Network (COIN) offices to share intelligence and information through Diplomatic channels on the suspected import / export transactions to establish cases of mis-declaration, which are intricately linked with tax evasion and money laundering. The scope and reach of COIN offices should be further expanded and strengthened. Customs officers should be stationed in major trading partner countries to liaise with customs authorities of those countries and cause verifications of suspicious trade transactions;

Institutions of the Lok Pal and Lokayukta may be put in

place at the earliest, in the centre and states, respectively, to expedite investigations into cases of corruption and bring the guilty to justice.

The concept of beneficial ownership as introduced in the PMLA may also be incorporated in the Income Tax Act while dealing with the provisions of bogus share capital. It is defined as under "beneficial owner shall mean the natural person who ultimately owns or controls a client and/or the persons on whose behalf a transaction is being conducted, and includes a person who exercises ultimate effective control over a juridical person".

For Effective Investigation and Adjudication, the Panel has recommended that,

Government must consider ways to mitigate the manpower shortage issues which are seriously hampering the functioning of various agencies particularly the CBDT and CBEC. Further, both Boards have submitted proposals for restructuring of their respective field formations. These need to be taken up and implemented on a fast track basis to show the Government's resolve to tackle the issue of black money;

With the emergence of complex legal matrix, infraction of one law invariably leads to infraction of another. Inter-agency coordination is critical in the fight against black money. There is a need to evolve an effective coordination mechanism that identifies the laws violated, the law violators, and a permanent joint mechanism to investigate all such cases. Some developed countries have an approach of joint task force and de-confliction programs to deal with this issue. It is time we study how this

approach and program functions, adapt it to Indian conditions and implement it.

- Intelligence sharing is one of the most critical areas for effective law enforcement. For this purpose, there should be a platform for more effective sharing of intelligence / information between central and state agencies.
  Black Money Committee Report, 2012;
- Effective battle against black money cannot be ensured unless the judicial machinery to deal with it is specialized and the trial of offences is expeditious and punishments exemplary. The legal support to various law enforcement agencies should be enhanced. All financial offences should be tried through fast track special courts. The Ministry of Law should take up this issue on priority and make arrangements for setting up fast-track courts all over the country in a time-bound manner. Judicial officers may be provided inputs as required in technical aspects of economic offences.

As stated above, this is indeed a very exhaustive report, which has touched virtually all the aspects of black money and corruption. At certain places it has given out-of-box recommendations, which may work. But the bottomline is - Black money and corruption are central to all socio-economic and political activities in our system, and they can be contained only through a well-coordinated efficient SINGLE REGULATOR. In other words, there can be many new laws, and the existing laws may be lent more muscles but again, to ensure efficacious implementation and coordination between a large matrix of enforcement agencies, there is a need for a dedicated Regulator with a command chain. Like the NIA, let there be a Black Money Preventive Bureau, which could

coordinate with the State Governments; their tax agencies; Central Government revenue agencies; overseas outfits of various intelligence agencies, tax audit regulator, and the diplomatic channels. If India is serious about reducing the share of shadow economy to a significant extent, such a job cannot be done merely by the CBDT and its arms. It has to be a National Agency with multiple cells keeping on eye on the need for fresh policy initiatives, technological upgradation; sharing of intelligence; coordination among law enforcement agencies; proper investigation, and speedy adjudication. It may sound humungous job but it does require efforts of such a magnitude. Only then Anna and Baba Ramdev may hope for some recovery efforts of the huge wealth parked in tax havens.

Meanwhile, all democratic-minded forces need to join their hands together to sustain the pressure on the Government and the Parliament so that the positive efforts do not slacken. Never mind, even if their protests become 'endemic' as stated by the Hon'ble President. Endemicity is a good sign of sustained pressure, which alone can help realise the goal of public good. After all, it is what

Mahatma effectively used against the British, who used to quite often feel helpless, and their best reaction used to be to arrest Gandhi and others. This way Mahatma had won *purna swaraj* for India, which does require the second round of *swaraj* from the demon of Siamese Twin, eating away the vitals of our economy as well as the society!

■ ■ ■

6 *Paradis*

Fisscaux and India's Policy Response

Chapter 6 ***"paradis fisscaux and India's Policy Response"***

is the longest chapter of this book. It had to be as it deals with issues like multiple aspects of tax havens emanating from either domestic or international level, policy response of the Indian Government, intricacies of DTAAs, India's international diplomacy and its position vis-à-vis the international agreements, etc. While the Government has more or less refrained from getting face to face with the uncomfortable aspects of tax havens, this Chapter does exactly the opposite. At the domestic turf, Chapter-6 addresses several churning and burning subjects like the institutionalized corruption of our bureaucracy, civil society's struggle for Lokpal Bill, the intertwined relationship between black money and electioneering and the need for regulating betting activities. At the end of this Chapter, I hope my readers would be able to draw their respective conclusions on two main issues i.e., how much distance India has covered since 2009 to 2014 in terms of combating tax havens and whether the approach adopted by the Government towards these fiscal paradises can be understood as sincere or escapist.

*The first article "**Indian slush money in tax havens: Will Finance Minister continue to shy away from taking the issue head-on?**" opens in the year 2009 when UPA - II was re-elected to power, and the Finance Bill, 2009 was almost completed. But the Government continued to shy away from facing the situation of tax havens and did not make any relevant changes in the Finance Bill. I have strongly put forth the argument as why mere signing of DTAAs serves no purpose, unless the provisions are modified to remove our disability to act against the tax havens. This article also criticizes the rudimentary approach of the UPA-II Government which instead of choosing the mechanism of "Advanced Pricing Agreements" opted for an archaic idea of "disputes resolution panel" for addressing the Transfer Pricing disputes.*

*Chapter 6 demystifies concepts like Controlled Foreign Corporation legislation and its relevance in the Indian context and questions why the Government has failed to revoke the controversial CBDT Circular-789 despite it has bled the revenue since long, courtesy ill-practices like round tripping and treaty shopping. The article **"Foreign posts for Revenue Boards - Does FM really think it's a luxury for Indian economy?"** dives into the murky waters of foreign postings of both the Revenue Boards and shows how vested interests have defeated the objective of having these overseas*

positions reducing them to mere luxury destinations. This article also raises a rarely discussed issue i.e., what check mechanism India has to ensure that the

Overseas Direct Investment by the Indian Inc are not being routed to tax havens. Through this Chapter, I have strongly appealed to Government for why India needs its own tax amnesty scheme for tapping funds lost to these tax havens.

*The article "**India rewarded with full-membership of FATF but serious challenge lies ahead for our enforcement agencies!**" records the historic entry of India into the membership of Financial Action Task Force and explains what exactly it means for us. In this article, I have also explained why parking of funds in tax havens is no longer a mere economic problem, when there are evidences of these funds being used for 'Proliferation Financing' and funding terrorist activities.*

Why the India-Mauritius DTAA is not getting amended, although it has long outlived its 29 years old archaic structure? When other countries have smartly restructured their DTAAs vis-à-vis Mauritius, what is holding back the UPA Government? When would the politicians end their escapist approach in handling an issue as serious as black money? The article ***"Confronting cross-border tax evaders - No Amendment in Indo-Mauritius tax treaty - Whose interests does it serve?"*** *raises some of these uncomfortable but unavoidable questions.*

Going ahead, Chapter-6 provides specific recommendations on how to restore the illusive cleanliness into our bureaucratic set-up and especially the electoral system, where black money has become as inevitable as constitutional DNA. Readers would get to know what democracy cess is and how it can be a good step towards cleaning up the election funding. However, the million dollar question is - whether the Government is willing to undertake a surgical reform, when political

*parties are the beneficiaries of this Crooked System? After having closely studied the issue of corruption and black money I have observed that even corruption works on the economic principle of demand-supply and unless, this phenomenon is understood, no solution to curb black money would hold for long. This is what I have explained in the article "**Lokpal Bill: A healthy tug-of-war for 'electrons of Power'!**"*

*Thereafter, Chapter 6 deals with a subject which has always been in existence in our society but we have deliberately kept it under the wraps. Yes, it is gambling and betting. The article "**Legalising Betting & Gaming: Let it be a part of National Security Paradigm**" conspicuously brings out this issue and argues why we need to tame this necessary evil through legislative amendments instead of banning it per-se. Readers may agree or disagree with my views, but they would certainly look at the subject of betting from a different perspective.*

*Chapter 6 in the article "**Investigation into Black Money in Foreign Bank Accounts: Is there any Room for hatchet job?**" tries to see whether the change of guard at the North Block has brought in any change with respect to our approach towards combating black money. In other words, whether the Modi Government has adopted an aggressive international diplomacy with the Swiss authorities for obtaining information on the list of Indian names (holding accounts in Swiss banks) for launching prosecution.*

*This article witnesses a landmark event when in October, 2014, 51 tax jurisdictions signed a Multilateral Competent Authority Agreement which was a major step towards the much-awaited **Automatic Exchange of Information** regime in the coming years.*

*Chapter 6 ends on the event of Budget 2015 when the Hon'ble Finance Minister declared that a new legislation to curb black money would be passed, which is known as Undisclosed Foreign Income and Assets (Imposition of New Tax) Bill, 2015. The article "**Finance***

Minister needs to guard against counter-productive aspects of Black Money Measures" and "Black Money - Does India really need a New Law?" *are first articles of its kind which analyse the flip side of the proposed legislations, precisely the potential misuse of this law. While the entire media is going gung-ho over the new black money law, the last article of Chapter 6 raises the fundamental question i.e., whether we need yet another law or whether the present laws could have been suitably amended to sharpen our combat against the black money. The article specifically highlights the jurisdictional clashes and administrative infirmities that may arise out of this new proposed legislation.*

Chapter 6 summarizes the position that the success in combat against black money and tax havens lies in international conventions and agreements and for this India needs to shed its politically motivated inertia and shortsightedness. India has to initiate aggressive international diplomacy for acquiring a meaningful position in the international arena and not remain as a mere mute signatory. While passing new legislations shows good intentions, but what we need to do is to plug the loopholes of the system and not keep on legislating more and more fancy laws. Only then, we can expect to compel these tax havens and recover the nation's lost wealth.

INDIAN SLUSH MONEY IN TAX HAVENS: WILL FINANCE MINISTER CONTINUE TO SHY AWAY FROM TAKING THE ISSUE HEAD-ON?[1]

The Budget-making well-oiled machinery has already entered into the last leg of compilation for the Finance Bill, 2009. In the next 96 hours they may lock the excessively speculated secret piece of document. But, interestingly, there has been no talk of any legislative measure to bring back the Indian slush money parked in tax havens. During the polls, it was billed as one of the hottest issues. Though it got the attention the issue always deserved, from the BJP, but the Congress Party always pooh-poohed the idea of a national

debate. And thus, most experts dubbed the issue as merely an 'electoral fodder' for the Indian polity.

True, going by the nonchalant and 'sinisterly-composed' response to the issue even after the UPA coming into power, one may tend to realistically presume that the issue of Indian slush money parked in offshore financial centres

1. Published in www.taxindiaonline.com, TIOL–COB(WEB)–141, 25 June, 2009.

has become dead. But for the detailed affidavit filed in response to the PIL in the Apex Court, it would not be fair to say that the UPA Government has wittingly been silent on the issue. The Government has promptly acted on the LGT Bank list provided by the German Authorities. That is another issue that the recovery of any revenue from them stands slender chances, and may not inspire the tax authorities to sweat out in this hot season for additional bout of evidence to pin them down.

So far as cooperation from governments of tax havens is concerned, India may not expect much unless an initiative is taken now to amend the relevant provisions of Double Taxation Avoidance Agreements (DTAAs). Early this week, the Swiss Ambassador in New Delhi was quoted for possible support that may come from Switzerland-based bankers if India makes specific request for exchange of tax information. Though it may sound a little inspiring for policy makers but they should not turn a blind eye to the observations made in the latest Parliamentary Report on stock scams where it has been stated by the Government that all their endeavours to obtain information about Ketan Parikh's Swiss Bank accounts met with a stony wall. The Swiss Government and their Justice Department simply declined to reveal any information unless some serious crime or other charges are leveled against the

accused.

Notwithstanding the multiple examples of setbacks for India in the past, it is important that the UPA Government should not forfeit the prevailing golden opportunity being sponsored by the OECD internationally. After the concerted attack on tax havens by G-20 and then G-7, a large number of tax havens and offshore financial centres have adopted the OECD standards for transparency and tax information exchange scheme. Many of them, including Switzerland, have begun to amend their tax treaties and adopt the OECD standards. Surprisingly refreshing has been the statement of the Switzerland President who recently hammered the point that it is not only the number of 12 tax treaties as ordained by the OECD Scheme but the quality of information exchanged that matters more for a better financial environment worldwide.

Such a statement coming from the head of a tax haven which was playing truant at the G-20 Summit is indeed a mega change in their policy and international outlook towards the issue of tax evasion. And this is what needs to be encashed by India. Ideally speaking, the Finance Minister should lay down the roadmap or come out with a White Paper on whatever unpolished information is available with him. He should also inform the Parliament about his Government's approach towards recovery of slush money and putting in a pragmatic legislative framework in place.

Ideally, the Finance Minister should order a review of all those DTAA's which have even remote nexus with tax havens. Besides taking initiatives to amend the relevant Articles for detailed exchange of quality tax information,

India should also list out countries which have characteristics of a tax haven in the making. A timely and futuristic list of such tax jurisdictions may help our policy makers in deciding the content of DTAAs in future.

For instance, Ghana is one of the African countries which has fast been developing into an offshore financial centre under the tutelage of a London-based MNC banking company. It is reported that a tax haven status for Ghana may promise bonanza for its citizens but it may also gobble up mineral wealth in West Africa. Its proximity to mineral rich countries like Sierra Leone, Guinea and Nigeria may help sustain its offshore financial centre status.

There are many such offshore financial centres worldwide which may grow into mature tax havens in the coming years but India should not sign DTAAs with them unless its studies support such a decision. Signing a DTAA should not be a mundane affair. It should be based on research and rich diplomatic inputs. India being the most promising future engine of global growth, its fiscal strategists do need to base their decisions on proper research and legal scissors to cut the cobweb that may impede the recovery process for the tax evaded. Let's hope the political veteran, Mr. Pranab Mukherjee, will not overlook the opportunity being bestowed on him by the present chapter of global financial history. If he does, he would do it at his own cost - the history would not forgive but forget him.

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FINANCE MINISTER DOES IT - INDIA CAN NOW SIGN TIEA's WITH TAX HAVENS; CBDT ANCHORS FOR SAFE HARBOUR IN PLACE OF APA[2]

The Budget fever seems to be over within 72 hours of the presentation of the most sought-after fiscal documents. If one is asked to summarise the reactions to the budget proposals, it would indeed be an uphill task. However, if one minuses the reactions of the semi-informed and the *vox populi*, it would perhaps become a pleasant job to sum up the reactions of the informed segment. If we exclude the general fodder meant for common taxpayers which is generally measured in terms of

quantum of relief, this Budget is predominantly a Direct Tax Budget. A large number of legislative amendments have been proposed. And once they sail through the choppy waters of parliamentary approval, they would square up the impact of a large number of High Court and Supreme Court decisions. However, this article does not intend to focus on those proposals which TIOL Editorial and its readers have commented upon at length and certainly deserve kudos for keeping the large audiences well-informed about the hidden nuances of the Finance Bill, 2009.

2. Published in www.taxindiaonline.com, TIOL–COB(WEB)–143, 9 July, 2009.

One area which has been least reported and barely commented upon is that of foreign taxation. And one most important Section for this purpose in the IT Act is that of Section 90. But before we delve deeper into this Section being recast in the Budget let this article first ask you a simple question - Why is it that India has no Double Taxation Avoidance Agreement (DTAA) with Hong Kong? It is a common knowledge that India has signed more than 75 DTAAs with all sorts of economies, including some obscure ones. Then what has prevented it from having a similar treaty with Honk Kong which is by all means one of the key trading partners for India. We have DTAAs with all those countries which encircle Hong Kong but no such fiscal arrangement with this gateway to China! And the reason lies in the fact that Hong Kong is a part of China after the Britishers bequeathed it after many decades. Interestingly, Hong Kong despite being a part of China has a DTAA with China but India does not have one!

And it is partly because our IT Act does not permit an agreement with territories which are not sovereign governments *per se*. Thus, the Section 90 has now been recast to allow Government to enter into agreement with non-

sovereign territories. This will allow India to go for a DTAA with Hong Kong but due precautions must be taken not to make the mistake which India committed in the case of Mauritius and Singapore.

Readers may also recall Mr. P. Chidambaram has inserted a new Section 90A in the IT Act vide Finance Act, 2006. But this was only for limited purpose engagement with trade associations. And that is how India has an agreement with a Trade Association in Taiwan.

Anyway, the recast Section 90 is now going to enable India to sign OECD-promoted Tax Information Exchange Agreements (TIEAs) with tax havens for sharing tax information, including banking inputs. India can now identify all those tax havens which are popular among Indian tax evaders and enter into TIEAs for critical inputs. And some of these could be Cayman Islands, Monaco, Jersey and St. Kitts, etc. Such exchange of information pacts may help India in retrieving a part of its lost treasure-trove to tax havens and that could be in billions.

Another area where *Dada* (the Finance Minister) has proposed some changes is a new area of legal battles involving transfer pricing (TP). Transfer pricing between Associated Enterprises belonging to multinational groups poses problems for the tax administrations all over the world. Reduction of profits in a high tax jurisdiction is one of the motives for setting such transfer prices by the MNCs. To counter such moves, tax administrations in most developed economies have come up with Transfer Pricing legislations casting various obligations on the companies and also laying down the rules for determining the appropriate price. The standard used is easy to understand. The price set is to be compared

and, if necessary, replaced by the Arm's Length Price (ALP), the price at which a comparable unconnected entity would have made the transaction.

In India also, TP regulations were introduced in the year 2001 and transfer pricing adjustments started from March 2005. However, despite the deceptive simplicity of the proposition, transfer pricing is not an exact science and like in other countries that have introduced TP legislations, in India too there has been a plethora of litigation relating to such adjustments. Some of them related to procedural issues, some related to the interpretation of terms used in the Indian legislation, and most of the disputes relate to the factual issues of actually determining the right comparables and determining the right transfer price.

It is heartening to note that the Finance Minister has at least taken cognizance of the fact that there are disputes, and that they need speedy resolution. The question is whether the suggested solutions are adequate?

Taxpayers have been clamouring for the introduction of a system adopted in other countries known as APAs (Advance Pricing Arrangements).

APA was originally developed in Japan and then adopted successfully by the USA, and most of the countries have now adopted TP legislations, China included. An APA is an arrangement that determines in advance of transactions, an appropriate set of criteria for the determination of transfer pricing for international transactions over a period of 3 to 5 years. It is initiated by the taxpayer and involves negotiation between the taxpayer and a team of specialists from the tax authorities. Such APAs avoid lengthy and expensive litigations that are required to settle the extremely fact-intensive TP disputes freeing the manpower to pursue other cases of investigation.

For some strange reasons though, all the pleas for introduction of an appropriate system suitable for the Indian conditions have fallen on arrogant or call them deaf ears! It is common knowledge that the field formations actually dealing with TP issues also favoured APAs. In the current Budget too, the suggestion has been ignored. Instead what has been

proposed is the high sounding 'Dispute resolution panel' consisting of three Commissioners of Income tax who may not necessarily be experts on the subject. This system looks like an old and jaded 'idea' in a new clothe! This mirrors the old draft assessment scheme under the old section 144B which was introduced in 1975 and discarded in 1984. Although, it is better than nothing, it is unlikely that TP disputes will be resolved any time soon.

The Government must, however, be complimented for accepting another proposal relating to Safe Harbour. Transfer pricing documentation and compliance can be quite costly for small and medium sized enterprises. To mitigate hardship to such entities, many countries have adopted Safe Harbour rules whereby ease of compliance can be ensured. Such rules may take different

forms. For example, a range of profits may be prescribed and entities will know in advance if they fall within the stated range. The CBDT has been empowered to specify the rules, and it has to be seen as to what form the safe harbour rules ultimately takes. At this stage, it would be indeed safe not to comment on the details to be pieced together.

In fact, it would be ideal if India goes for APA system not only for income tax but also for Customs valuation related disputes. Given the number of heavy duty cases involving MNCs and their transactions with AEs, APA would go a long way in lending a few comforting words to FDI investors overseas and India can emerge as a potential magnet for capital to park itself in emerging areas of business in India. Let's hope our fiscal juggernauts realise it sooner than we could make a guess!

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TAX EVASION BY DOMESTIC CO's THROUGH

OFFSHORE ENTITIES: ISN'T INDIA READY FOR CFC REGULATIONS?[3]

Although the issue of Indian slush money parked in tax havens has not completely become out of fashion, but the number of questions raised in the Indian Parliament has significantly dwindled to an unnoticeable digit. However, what may succeed in keeping the issue alive in the coming months is the statement of the Prime Minister in the Lok Sabha that an array of actions against tax evaders and the black money economy has been included as a part of the UPA Government's 100-day agenda. Now the issue is - what could be the possible instruments to curb the propensity of Indian businessmen or bureaucrats or even the politicians to park their slush money in offshore vaults? Is the Prime Minister hinting at a series of actions emerging from the conventional set of sticks used by the tax authorities? Or, he has a combination of some old and some new tricks under his hat? So far there is no indication about what sort of measures are likely to be deployed to unearth the mountains of black money, and also stop the same from being routed to low-tax jurisdictions or other offshore tax havens.

If one tries hard to consider the possibility of any legislative change, the only window that appears to be opening in the near future is the new Income Tax Code. The Finance Minister, Mr. Pranab Mukherjee, has talked about this new I-T Code in his Budget Speech and later, on more than one occasion that this new code would be uploaded on the official website very soon. Since none knows even about the basic contours of the mandate given to the Committee within CBDT which has worked on this new code, it is unlikely that the Prime Minister

3. Published in www.taxindiaonline.com, TIOL–COB(WEB)–147, 6 August, 2009.

has been hinting at this Code. After culling together the inputs

gathered from various sources the only conclusion I could draw is that this new IT Code is going to be a debatably simpler version of the present IT Act, 1961. If we trim the cobweb of impressions gathered by various expert groups, it appears that the only work the CBDT Panel has done is to repackage the present Act in terms of lesser number of Chapters and perhaps substantially reduced sets of Sections, sub-sections, clauses, sub-clauses and Explanations. Let's wait for the final uploading rather than speculate on what is in store, and save our thoughts for other possible and futuristic legislative measures.

One such measure which may sound realistic and futuristic for India is the possibility of introducing the Controlled Foreign Corporation (CFC) legislation. Although many experts feel that there is a remote possibility of even entertaining any thought about such legislation, I feel that time has come for India to commence entertaining such thoughts, and organising debates in informed segments over this issue. Given the fact that our policy makers strongly believe that the Indian corporates and businessmen account for a major chunk of Indian slush money parked in Switzerland or other tax havens, one of the effective instruments required to curb tax evasion or avoidance could be the CFC legislation. The objective of global financial architecture of setting up multiple offshore companies or subsidiaries or step down-subsidiaries of a large domestic company is well understood by tax authorities worldwide. Such offshore entities help in transferring profits from one entity to another in low-tax jurisdiction and avoid paying taxes in their resident economies.

That is how the CFC Regulations were brought to the statute book, for the first time in 1962 by the US tax authorities. For the UK, it took more than 24 years to adopt CFC Regulations in 1984. Nowadays, it has become a time-tested and trusted regulation to plug in loopholes in revenue leakage. That is how many Asian countries have already gone for it. Indonesia is the latest one to adopt it. But, what is CFC?

A CFC is a legal 'person' that exists in one tax jurisdiction

but is controlled largely by taxpayers of a different jurisdictions. Such an entity is often used to manipulate profits earned in high-tax jurisdiction by transferring the same to low-tax jurisdiction. The CFC laws are used to curb tax evasion through the use of offshore companies. Many governments require taxpayers to declare their interests and pay taxes on them. For instance, a CFC entity is one in which American shareholders own more than 50% stake, by value or vote.

Now, the pertinent question is whether India is ready for such a legislation? If we go six years back to dig out Dr. Kelkar Committee Report on Direct Taxes, the working group on non-resident taxation set up pursuant to Dr. Kelkar's report had strongly recommended for introduction of CFC legislation in India. At that point of time it would have been perhaps a little hasty measure but, going by the

steadily rising outward remittances from India, it would be tough to find a dissent to such a proposal now. The trend of takeovers, acquisitions, setting up of subsidiaries etc. which started taking strong root in early 2003, has indeed become one of the most sterling features of success for India Inc. The appetite for taking over foreign business entities and finding a reputed foothold for the Indian brands of goods and services appears to be insatiable for many more years to come. Hardly any day goes by without the news of an Indian company going for acquisition of a reputed overseas concern/brand. Even when the global financial market has been in a state of tatters in the past one year, the RBI statistics shows that during the first half of 2008-09, about 2,000 proposals amounting to USD 8.94 billion were cleared for investments abroad, as against 1,049 proposals amounting to USD 11.39 billion during the corresponding period last year. In the year 2006 itself, Indian corporates had raised USD 19 billion from international markets for funding overseas acquisitions. In the past three years, India has substantially liberalised its FEMA regime for

overseas investments and acquisitions by Indian companies.

The *latest figures of RBI upto March 31, 2009*[4], clearly show that there has been no let up in the appetite for overseas investments by the India Inc. It is an unmistakable signal for the mandarins in the North Block to quickly put together their acts, and think in terms of either the CFC legislation or any other equally efficacious instrument before they diagnose a major hole in their tax kitty. It is certainly not unlikely that our domestic companies which have built big brands internationally and also operate several offshore entities, would not use their controlled foreign corporations to transfer their Indian profits to avoid paying higher taxes. It is high time Dr. Singh's Government sets up another Panel to consider a few measures like enacting CFC laws or anti-tax avoidance rules etc. before the damage is done.

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FOREIGN POSTS FOR REVENUE BOARDS - DOES FINANCE MINISTER REALLY THINK IT'S A LUXURY FOR INDIAN ECONOMY?[5]

Indian economy stands tall amidst the global economic pulverisation. After China, India has shown the tale-tell marks of robustness of its fundamentals. The Indian private sector has shown the right kind of aggression in spreading its wings across many continents. There is hardly a day which goes without the news that an Indian company has taken over a leading international brand in some part of the world. Thanks to the right kind of blending of policies, Indian economy has recovered from slowdown faster than even our political masters had dreamt about. Thanks to its positive long-term outlook, a huge number of expatriates

www.rbi.org.

Published in www.taxindiaonline.com, TIOL–COB(WEB)–170, 14 January, 2010.

have been queuing up for employment in India. And lakhs of them have been working in the various sectors of the economy. In a nutshell, one may say that India has shown the right propensity to become a mega economic power in about a decade.

However, if we look at our bureaucracy which is a policy delivery machinery, it is yet to see a let up in its craze for foreign posting. Traditionally, the Government had created overseas posts in limited segments like diplomacy, intelligence-gathering, tourism and trade and development. Although the diplomacy-related posts were largely meant for the IFS officers but the IAS used to flex its muscles and grab most of the key posts of ambassadors. Other posts like tourism promotion, trade and development were almost reserved for the IAS cadre, of course, with some exceptions. Intelligence-gathering posts used to go to either the IPS or officers from various other Central Services and feeder cadres.

Unfortunately, the Government of India never undertook any systematic studies to know the actual requirement of overseas posts *vis-a-vis* the economy. Most of the posts were created out of foreign policy exigencies or it was national security driven. When the era of liberalisation began in early '90s, the trade and commerce gradually grew in importance at the cost of polity and politics-driven foreign diplomacy. Surprisingly, the same trend continues even after almost two decades of the process of economic change overtaking other aspects of the policy making in the government. The Government of India has never set up any expert panel or a Group of Ministers (GoM) to review the existing system and find out what sorts of overseas posts be created to keep an eye on the changing contours of cross-border transactions and man the changing faces of the diplomacy.

India has laboriously been working on an attractive FDI framework. But this speaks of only FDI inflows. What about the FDI outflows? Has the Finance Minister or any other Cabinet Minister ever looked at the outward remittances of the national wealth? Have our policy makers developed a

mechanism to know whether the foreign investments being sanctioned by the RBI, almost in a routine manner, are actually genuine investments? A huge number of Indian companies have been buying out overseas companies, getting into JVs and setting up branches. And for all these transactions, RBI has been sanctioning funds in billions of dollars.

Let's take at look at the statistics. Last fiscal, the actual outward FDI in JVs and wholly owned subsidiaries, amounted to about USD 16 billion. In addition to it, the RBI further okayed foreign investments worth USD 22 billion during 2008-09. During the first quarter in the current fiscal, the RBI has approved as many as 918 overseas investment proposals amounting to USD 2700 million, despite a crippling economic meltdown worldwide. A major chunk of these

foreign investments by India are accounted by economies like the USA, Singapore, Mauritius, the UK and Cyprus.

Now the million-dollar question is - Does the Government of India have any statistics about what percentage of these billion dollars investments is bogus? Can Ministry of Finance rule out bogus investments with aplomb? Do we really know that all our investments are in genuine companies only? Or, some of them have deliberately been made in junk companies, only to route out funds from India for 'other purposes'? Even if 10% of the total investments are found to be in bogus and loss-making companies, can CBDT work out the magnitude of the deductions which are being claimed in their ITRs, and then inform the FM about how much genuine revenue the exchequer has lost.

Has the Finance Minister and his top officials in both the Revenue Boards ever applied their mind to the sensitive issues like the one being debated? It is a common practice in both the Revenue Boards to deploy their major manpower to prevent petty frauds or paltry deductions in ITRs but there is no fool-

proof mechanism to know whether the future of the Indian economy is actually being robbed? Let's take the case of CBDT which keeps issuing instructions and directions to field formations to undertake scrutiny of cases declaring losses or excess deductions in thousands or lakhs of rupees but the Board has never done any comprehensive study of what sorts of bogus deductions being claimed by those who later report about losses being imported from their overseas takeovers or foreign investments going awry. This is not to say that all our investments overseas are bad but only to point out the lack of preparedness or the mechanism to keep an eye on cross-border transactions. Even if one such mega investment turns out to be bogus that would be worth hundreds of crores of revenue for the exchequer.

In this background, what should the Government do in terms of creating overseas posts? A simple answer is that it should grow out of 'penny wise and pound foolish' approach. It should create as many as 12 overseas posts for the CBDT officials who can be posted to all sensitive destinations where the Indian funds have been channelised in the past 10 years. India has so far created only two posts for CBDT officials - Singapore and Mauritius. The creation of these two posts has indeed been too late. The damage has already been done from both the countries. But let's follow the never-too-late principle and create 10 more posts in countries like UAE, Thailand, South Africa, Brazil, a couple of EU countries, the USA and also London. Once India has these trained senior IRS officers in these places they can at least send valuable million-dollars Alerts and inputs to the Board which can in turn intimate the AOs about some of the bogus investments which may be claimed as deductions.

Similarly, the CBEC which mans the Customs, should also have 10 more overseas posts in all those countries which have signed FTA or Comprehensive

Economic Cooperation Agreements with India. The Finance Minister should take the initiative to put a clear-cut policy in place with the approval of the Union Cabinet that whenever India signs an FTA, one COIN post for Customs Overseas Intelligence Network (COIN) should automatically be created in the Indian embassy. We should not wait for a big fraud to be detected and then decide to put our own man there. Let's have an aggressive proactive policy.

The CBEC has at present eight COIN posts worldwide. But, unfortunately, there is no transparent policy in place to choose the best officers who can be the face of the Indian Customs before the international communities. Whenever some of these COIN posts fall vacant, depending on the persons manning the Revenue Secretary's Office or the Board, the selection procedures are manipulated to suit the consensus. And this has always created bad blood among the officers. Whimsical criteria have always prompted aspirants to throw all norms of conduct of a civil servant to the wind and pull up all possible political and bureaucratic strings to influence the system whether at the level of Member (Customs), the Chairman, the Revenue Secretary or the Finance Minister. I fail to understand why should any system encourage such a culture of selection which brings undesired pressure on it?

Let's take the example of the on-going selection for three posts - New York, Brussels and Singapore - all three are plum posts. Although the Board had set up a Panel of three 'wise men' but they are now alleged to have done no justice to the cause. They have followed their own 'purposeful' guidelines and chosen officers of their own choice. Latest is that the CBEC has circulated a letter among all the Members to recommend one name from their own sections in the Board. It is also learnt that the Revenue Secretary is also keen to finalise the list before he retires on January 31. Some of the officers have also questioned the age-old practice of selecting a Tamil officer for the Singapore post. They argue that going by the logic followed by the Board to post only a Tamil officer in Singapore as Tamil population is sizeable there, the Board should not post any

Maratha or a Bengali or a North Indian officer to Chennai as they would also suffer from the same linguistic handicaps!

Apart from the mess the changing selection procedure creates every time a COIN post falls vacant, India also needs a mechanism to utilise the skills, technical knowhow and the specialised knowledge when an officer comes back after his overseas stint. We should also create an institution like the Americans who have the Office of International Affairs where all officers, cutting across the departments, report back after coming back home and remain attached to it for a year. During this period they pass on the skills acquired and required for manning a particular post to their successors.

Let's hope the Finance Minister and the top policy makers in North Block spare some time and take a hard look at the changing needs of the economy and

do justice to the greater cause of the economy rather than looking at overseas posts as mere opportunities for paid junkets.

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DEAR FINANCE MINISTER, LET BUDGET 2010 UNVEIL TAX AMNESTY SCHEME TO TAP OFFSHORE FUNDS TO OVERCOME SWELLING FISCAL DEFICITS[6]

India's fiscal deficit has leapfrogged to near 8%, and the budget makers are genuinely worried over the flip side of the swelling deficit figures. Some of the key budget makers are learnt to have advised the Finance Minister to commence the inevitable process of phasing out of the Economic Stimulus Packages announced last fiscal. True, some of them do feel that the process of recovery is only half-way, and any attempt to jack up the central excise duty or service tax rate may prove to

be premature and de-stabilising for the economy. So far as this article is concerned, the half-recovery school of thought is certainly more realistic and practical. There are many sectors apart from the manufacturing which continue to show unmistakable signs of vulnerability to the vagaries of market conditions. It is certainly not the right time to go for a policy which may promise the short-term capital gains in terms of buoyancy in the revenue collections but may countervail the pace of the accelerating economic growth recovery cycle. Going by the prognosis of economists worldwide, the full recovery may be possible by 2010-end.

In this backdrop what are the options available to the Finance Minister who is predictably under pressure to contain the soaring fiscal deficit and also to allocate greater resources for welfare and development sectors in the coming budget. The two options which I think, available to the Finance Minister are:

to selectively hike the Central Excise duty on only those sectors which have shown the robust growth rate like the automobile and partially hike the service tax rate across the board; and

to work on a two-fold tax amnesty scheme - a) Offshore Fund Disclosure Scheme, and b) Domestic Disclosure Scheme.

True, such amnesty schemes are worldwide perceived as an incentivised scheme for tax dodgers. Such schemes also invite disturbing criticism from the political Opposition in any economy. Votaries of ethics in tax governance may also voice strong opposition to such a scheme. But the ground realities are such that no economy functions without its flip side - the parallel economy. It is an evil the Treasury in every country has to learn to live with. However, when an

6. Published in www.taxindiaonline.com, TIOL–COB(WEB)–172, 28 January, 2010.

opportune time comes, the Treasury should not miss it in the name of ethics and should assail it, strategically, to extract a few pounds of flesh to buttress the capital requirements of the economy.

The global economy was never so acutely starved of funds. A large number of financial skyscrapers have collapsed like a pack of cards in the past two years. For revival of the economy, every country needs an extra bout of capital. The traditional source for extra ounce of funds has been the fiscal instrument in the hands of the elected government. But the current crisis does not give such an option to any government across the world. Then, what is the alternate source?

The national wealth parked in tax havens is certainly a legitimate source for all economies, in need of funds. If we look at the series of high-profile G-20 meetings last year, and the consequential measures to crackdown on non-compliant tax havens, it lends legitimacy to all such schemes which may be designed to bring back offshore funds home. Italy has done it successfully and garnered as much as 95 billion euro. So encouraged, felt the Italian Government that it has extended the scheme from December 15 to March 31, 2010, and hopes to mop up another 30 billion Euros. The HMRC in the UK has also come out with a similar scheme.

If we look at all these tax amnesty schemes one may find that on the one hand, the G-20 has built up the pressure on tax havens to comply with the OECD-framed internationally agreed tax standards and, on the other hand, the developed economies have offered the tax dodgers a leeway to shell out certain percentage of their unaccounted offshore funds and get away with the same. Thankfully, a large number of major tax havens have complied with the OECD standards, and their banks have become more cooperative and transparent in sharing vital information about their account holders (See chart of tax compliant tax havens).

2010 happens to be the right year for India as well, to make hay while the sun has been shining across the world. The

Ministry of Finance has collected certain data from the German revenue authorities revealing names of Indians having bank accounts in Liechtenstein. The Swiss Government has also relaxed its banking secrecy laws. Going by the various studies available in the public domain, as much as USD one trillion has been parked by Indians in various tax havens. True, such an astronomical figure is disputed but let's presume that even half of such guesstimated figure is true, Mr. Pranab Mukherjee may think of mopping up a part of the offshore funds by announcing a simple and innovative tax amnesty scheme for the fiscal 2010-11.

It is indeed the right time to announce an Offshore Disclosure Scheme with a simple rider like normal tax rate plus 10% penalty. No questions to be asked post-disclosure. This will be a golden chance for lakhs of Indians to clean their historic tax irregularities and help shore up the fund requirement of the

government. Rather than criticising the tendency to illegally park funds in tax havens, India should try to bring a part of such funds back home so that it could perk up our growth cycle rather than helping out unknown economies. The Indian economy has appreciably opened up, and there has been huge FDI outflow in the recent years. A part of such outflow must have been parked in tax havens, awaiting an opportunity to travel back to India.

Similarly, there is no harm in offering another Domestic Disclosure Scheme to garner the much-needed revenue for the deficit-riding exchequer. The focus this time unlike the previous schemes, should be to make it simpler and not too penalising. It would first make a dent into the parallel economy and would help bridge the widening revenue deficit. More than that, such a scheme would help the Government in postponing harsh fiscal decisions which may arrest the recovery process

half-way. Let's hope our policy makers and the Finance Minister could muster enough political courage to make a capital out of the present anti-tax haven global environment and do not miss the opportunity to get out of the sluggish growth cycle.

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INDO-MAURITIUS DTAA - ROUND-TRIPPING - SHOULD INDIA CONTINUE TO TRIP UP?[7]

The infamous Circular No. 789 of the CBDT has once again bounced back to the centre-stage of the media glare. Readers may recall that this Circular is all about giving capital gains tax benefits to FIIs and other companies which are issued residency certificate by the Mauritian Government. In the context of Indo-Mauritius tax treaty, this Circular was challenged long back in 2002 which gave birth to the *Azadi Bachao* decision[8] of the Supreme Court. Although India has been trying to infuse anti-abuse provisions in its DTAA with Mauritius for the past four years but it has not made tangible progress because of the obvious resistance from Mauritius.

But what surprises most in India is the inscrutable delay in the withdrawal of this Circular if the Government of India is convinced of the frequent examples of treaty shopping and round-tripping arising out of its tax treaty with Mauritius. What brings this issue again in focus is the latest decision of the Advance Ruling Authority in the case of E-Trade Mauritius Ltd (ETM). In this case the AAR has gone by the *Azadi Bachao* decision and held that despite the ETM being a probable conduit for an American holding company which could probably be the ultimate 'beneficial owner' of the share purchase deal of an Indian company, it is

[7] Published in www.taxindiaonline.com, TIOL–COB(WEB)–180, 25 March, 2010.

[8] *Union of India v. Azadi Bachao Andolan*, 2003-TII-02-SC-INTL : (2004) 10 SCC 1.

not liable to capital gains in India if one goes by the CBDT Circular No. 682 and 789. In other words, what the Authority has done is to approve the treaty-shopping and the use of conduit for avoiding capital gains tax in India. As per the existing scheme of things and particularly in view of the extant circulars, this was perhaps the only option the Authority had and there are more than adequate hints in the Authority's ruling.

Many experts and senior officials in the Income Tax Department also feel that a time has come for India to withdraw this controversial Circular which is binding on the officers as per the settled laws, and they cannot go beyond the text and spirit of the Circular to make detailed investigation into specific details of a case. For instance, in the ETM case, the Revenue Department repeatedly harped on the point that it was not ETM which had made capital gains but its American holding company which has been the final beneficiary of such gains. And thus it abuses the spirit of the tax treaty which should not be allowed to continue any more.

Let me bring to your notice the feedback we received after we uploaded our analysis on ETM ruling. One of the readers wrote to us: "... *While the concern for conduit companies could be philosophically right, we need to face realities of life. Did India negotiate a DTAA with Mauritius on the basis that it was great industralized nation? The country was of strategic importance and hence concessions were granted to the nation in the DTAA."*

This feedback coming from our erudite reader clearly portrays the large-scale and deep-seated communication gaps across many segments in the economy. India is certainly not against any Mauritian availing the tax benefits under the tax treaty. As rightly pointed out by the reader, Mauritius is a nation of strategic importance to India and perhaps that is why the tax benefits were agreed upon in the treaty. The objection of the tax administration is against the treaty-shopping by non-

Mauritians who have been abusing the trust reposed by India while granting this benefit. Certain concessions like no capital gains have been provided to a citizen or a company of Mauritius and not to treaty-shoppers from the USA or the EU nations or to Indians masquerading as foreign investors.

Let's now move away from the controversial Circular and focus on what has been done so far by India, in order to iron out the distortions in the Treaty. It seems that India has been trying to include certain clauses to prevent treaty shopping and round-tripping of investments through the Mauritius route. Such clauses have been incorporated in the Indo-Singapore treaty, and similar ones can be infused in the Mauritian treaty as well. India does not want a blanket withdrawal of capital gains tax in this case. It intends to extend it only to genuine Mauritius companies and not to ones from the USA or elsewhere who just use some letter boxes in Mauritius.

Indian tax officials have been visiting Port Louis, the Mauritian Capital, at regular interval. More than a dozen trips have been made without any tangible gains by way of persuading the Mauritius side or making them agree to prevent abuse. Even as India continues to struggle, China has succeeded in compelling Mauritius to agree to a protocol under which capital gains arising in Mauritius on the sale of Chinese assets are subjected to a 10% tax rate in China under certain circumstances. It is worth recalling that Indonesia had taken an extreme view on harmful tax practices arising out of its treaty with Mauritius. It had given a notice of termination in 2004 and declined to hold dialogue.

True, India should not get 'hyper' on this issue for many reasons. Given the fact that there are several lakhs Indians in Mauritius, and the fact that we have signed an FTA only a couple of years back, we should continue to hold meaningful dialogue to prevent abuse of the treaty. One of the steps which

can be unilaterally taken is to either wisely amend the relevant Circulars or to withdraw them all together.

Readers may recall that Government of India has already proposed *anti abuse provisions in the Direct Taxes Code Bill, 2009*. Given the fact that the Direct Taxes Code is slated to be put in place only from April 1, 2011, there is sufficient notice for the Mauritian Government to come forward and suitably amend the treaty to minimise its abuse.

But the fundamental question one may ask is - why did India allow such glaring distortions in its treaty with Mauritius, right in the beginning? Was it to attract FDI through the Mauritius route? If it was so, why cannot the Government be transparent and honest about it by admitting this fact? Indeed, what is of much greater and utmost importance is the need for a comprehensive and pragmatic FDI Policy in India. Frequent changes and selective sector caps would not help if India is serious about attracting overseas capital. The global reality about tax havens and investment funds is that if one closely looks at the organic and physical characteristics of FDI, it may appear more like WATER! Water is a level-finder. You pour a glass of water on the floor and just see how water finds its own path and has the necessary propensity to gush towards the low-lying level first and move forward only after levelling that low-lying spot.

Similarly, if one looks at the international movement of capital it has the tendency to move first to those countries which offer low corporate tax rate and minimal barriers. In other words, capital finds its own route and prefers destinations which put up least barriers and less painful fiscal regime. And that is why we see different economies competing among themselves to attract FDI. China has been able to attract more than USD 120 billion FDI only because of its consistent policy of allowing them into the exports sector, lower tax rate and minimal procedural hassles. India has been losing on the quantum of FDI only

because of uncertainty, high corporate tax rate, adhocism in policy, sectoral restrictions and more importantly procedural complexities. The best FDI-friendly economy is the one which promises reasonably good returns with no cap on exit.

No doubt, India needs huge overseas investment but it calls for a well-deliberated national policy whether we should or can afford to leave gaping holes in our tax treaties in order to attract FDI or we should have sound tax subsidy schemes instead to lure investment funds on a long-term basis. No doubt, some experts may see a lot of merit in short-term gains by allowing treaty-shopping but it would always be more desirable in the much changed post-economic meltdown global economy to opt for attaining the status of a stable and competitive investment destination on the global map of FIIs, VCFs, sovereign funds and other funds with the necessary dimension of transparency. However, this is possible only by way of a widely discussed and deliberated FDI Policy which must treat DTAAs as indivisible part of its core in attracting FDI inflows. Till then, let's enjoy the FDI exotica in piece-meal and the fresh round of public outcry on the Indo-Mauritius tax treaty!

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INDIA REWARDED WITH FULL-MEMBERSHIP OF FATF BUT SERIOUS CHALLENGE LIES AHEAD FOR OUR ENFORCEMENT AGENCIES[9]

The latest round of G-20 Summit has just concluded at Toronto. What has emerged out of the wide-ranging deliberations is the consensus on one point that the global financial system continues to be fragile and vulnerable. The UN has also called for guarding against further slide in the environment for investments, and has also asked for a major overhaul of the global financial and trade machineries. The OECD's latest report has also shown serious contraction in the thriving Merger & Acquisition (M&A) Sector which had scaled the height of USD 1.7 trillion in 2007. Although some

countries favoured imposition of a tax on flow of capital / investments, most nations, including India, opposed it tooth and nail on the ground that the economic recovery does need the cushion of free flow of funds for investments, and capital inflows have not become toxic for the major part of the global economy.

True, capital inflow continues to be scarce and is welcome by most emerging countries like India but it also calls for major scaled-up enforcement of 40+9 recommendations of the Financial Action Task Force (FATF) to manage its toxic side. India, unlike many other European and North American countries, is more vulnerable to terror strike. Global financing of terrorist activities has become

9. Published in www.taxindiaonline.com, TIOL–COB(WEB)–194, 1 July, 2010.

more sophisticated and stealthy which calls for more alert system to detect them. Even our stock markets are not immune to 'tricky' and toxic investments by global entities involved in funding terror and criminal activities worldwide.

One good news which indeed came as a surprise for India last week is the grant of full-fledged membership to FATF, an inter-governmental body, responsible for setting global standards on anti-money laundering (AML) and combating the financing of terrorism (CFT). A joint FATF / Asia Pacific Group Mutual Evaluation Team visited India in November-December, 2009 for on-site assessment of India's compliance with the 40+9 Recommendations of FATF. Although India expected that it may take some more follow-up action to earn the full-time membership of this prestigious organisation but having seen the legal framework and the number of agencies working together to detect laundered money and prevent funding of terror organisation, the Evaluation Committee

presented a persuasive report at the plenary session of the FATF last week at Amsterdam which granted full-fledged membership to India.

With India logging all-round developments in various legal, human and economic spheres, such recognitions and faster entry into many more global bodies is going to be a routine event. But it also calls for more concerted action on part of our policy makers and enforcement agencies like Enforcement Directorate, Financial Intelligence Unit, DRI, Income Tax (Investigation), CBI, CEIB and others to show better results and help protect more transparent financial system. Unlike other economies, India faces serious challenge from drug trafficking, smuggling and swindling of government money. Corruption is indeed a rich source of illicit proceeds which are laundered out of India and then pumped into the economy through some post-box companies registered in tax havens. Our banking sector does face greater Money Laundering (ML) risk in the areas of private banking and foreign exchange. The horse race case detected in Pune by the Income Tax sleuths is just one such example. IPL could be another where too many layers of overseas bodies are involvied in picking up equity in IPL companies. But the most serious one is the funding of terror outfits and naxal organisations in the country. This is where India needs assistance of FATF to break their financial backbones.

Another area where India needs to train its gun is the Special Economic Zone (SEZ). Since Government promises minimal regulation of these free trade zones, it obviously becomes an attractive destination for illicit actors. There are as many as 3000 free trade zones worldwide, and documented evidence indicates that lax regulations and lack of transparency often invite non-state actors to make use of such zones. There are several international studies on how free trade zones are used for money laundering and terrorist financing purposes. A couple of cases booked by DRI in the case of *Noida SEZ* is just an eye-opener to the growing instances of money-laundering.

What also calls for more guarded policy and high-alert system in India is the fact that many of its neighbours like Pakistan, Nepal, Sri Lanka and Myanmar, have been identified by the FATF as jurisdictions having AML / CFT deficiencies. Although they have given written commitments to overcome these laxities in their compliance with FATF recommendations but going by the political character of these countries, it is difficult to believe that they would be able to overcome them in near future. In other words, these countries do not have the necessary legal and political wherewithal to help FATF members like India to track down terror funding or drug money sources. Thus, India cannot expect active cooperation from these neighbours in cracking down on terror outfits.

Another area which calls for close attention is what is known as 'Proliferation Financing'. There are many countries which have secret aspirations to become nuclear weapon states. North Korea is just one and well known for its desperation. Pakistan is another one which has been secretly pursuing such nuclear and biological weapon programmes. There are many organisations which hire the services of innocuous-looking business entities to import engineering or other items which may help in their illegitimate pursuits.

Proliferation financing facilitates the movement of proliferation-sensitive items which may contribute to global instability if weapons of mass destruction (WMD) are developed and deployed. There are multiple reports which indicate that proliferators operate globally and mask their acquisitions as legal trade. They use global commerce, for example by operating in free-trade zones, where their nefarious shipments may escape scrutiny. India fulfills both the conditions -being a nuclear state and has hundreds of free trade zones - to attract proliferators.

India is more vulnerable to non-state actors and proliferators because of strong presence of the informal and parallel financial system called *hawala* transactions. *Hawala*

dealers work for abnormal profits and would not mind assisting such elements, sometimes even knowingly. Let's hope our sleuths really make use of the global intelligence which is now going to be made available to it through the FATF and help protect our own banking system and the international financial system. Future economic growth will largely hinge on flawless and robustness of financial system an economy can build. And there is no short-cut or a substitute to such a system if India hopes to achieve the two-digit economic growth in the coming years. If we leave aside the future for the time being, let's congratulate Mr. Pranab Mukherjee for the international recognition India has earned by showing impressive compliance with high international standards set by FATF.

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INDIAN WEALTH IN TAX HAVENS' VAULTS: DO DTAA PROVISIONS REALLY STOP GOVERNMENT FROM DISCLOSING NAMES OF TAX EVADERS?[10]

It is universally believed that what is good for the Government in power is generally good for the people and the nation at large. But this arguably does not seem to be the case here if one goes by the observations of the Apex Court in the on-going PIL against the stashing away of Indian wealth in the vaults of tax havens. While hearing the case yesterday, the Bench of Justice B. Sudershan Reddy and Justice S.S. Nijjar, expressed displeasure over the Government's reluctance in coming forward with full information on black money deposited by Indians in foreign banks. The Bench noted that it is a theft of national wealth and amounted to 'plunder' of the nation.

For any elected Government which cares for self-respect and carries the strength of high morality index, the Apex Court

observations are certainly not short of indictment. The Supreme Court seems resolutely determined to lock horns with the Government over the issue of alleged loss of national wealth. Going by the arguments of the Solicitor General and the Bench, it may appear that a huge hiatus exists between the perception of the Bench and the approach of the Government in handling the entire gamut of black money issues.

The Solicitor General, Mr. Gopal Subramanium, has been consistently harping on the provision of the Double Taxation Avoidance Treaties coming in the way of disclosing the names of those Indians who figure in the list provided by the German tax authorities. Let's now see how serious is the gap in the understanding of the issue between the Government and the Bench when the Apex Court observed that *"It is a pure and simple theft of the national money. We are talking about mind-boggling crime. We are not on the niceties of various treaties"*.

From the Apex Court's observations it is clear that the way our judiciary has been looking at this issue is miles away from the approach the Government has exhibited so far. Even last week when the Apex Court asked for what prevented the Government from disclosing the names of the Indians handed over by the German authorities, the Solicitor General sought adjournment to seek direction from the Government. Although the Government has filed an affidavit disclosing names of 26 Indians who had deposited black money in LTG Bank in Liechtenstein, the Bench and the appellants who have filed the PIL, fear that the Government has furnished only curtailed information to the court. *"This is all the information you have or you have something more?"*, asked the Bench yesterday.

From the legal tug-of-war it appears that the Government has been avoidably secretive and reclusive. Every time it is asked to bring the facts before

10. Published in www.taxindiaonline.com, TIOL–COB(WEB)–223, 20 January, 2011.

the court, it states that its hands are tied by the provisions of the DTAA. Even the Prime Minister, Dr. Manmohan Singh, yesterday said that the Government cannot disclose the names of the offenders as it is under obligation not to do so. But is it so true? Do the provisions of a DTAA really prevent authorities from producing the same before a court of law? Do they also prevent India from disclosing the information obtained from the contracting state from a third party relating to a third party tax haven? Let's refer to the India-Germany DTAA, and go straight to Article 26 which facilitates exchange of information between the two countries:

> ***"Article 26 - EXCHANGE OF INFORMATION***
>
> *The competent authorities of the Contracting States shall exchange such Information as is necessary for carrying out the provisions of this Agreement. Any information received 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) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. 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.*
>
> *In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:*
>
> *to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;*
>
> *to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;*
>
> *to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (order public)."*

Let's put emphasis on *"... They may disclose the information in public court proceedings or in judicial decisions."* What does it mean? Does it mean that there is no curb on sharing of such information with the courts? When, once such information becomes a part of judicial decisions, does any Government really need to make the same public independently? What purpose will that serve? It is for the Readers to interpret.

Secondly, Readers may recall that what was handed over to the Indian tax authorities by the Germans in March 2009 was a document which was purchased by the German authorities from a former LTG bank employee who had, obviously illegally, obtained the data relating to account holders and sold the same to the German authorities besides the UK, France and Italy at premium

prices. Since the German authorities noticed some Indian names in the list they decided to share the same with India. It was an information obtained from a third party relating to another country which is a tax haven, and Germany was merely an information channel for India. Whether such information is also covered as per the provisions of various DTAAs India has signed? This is again an issue open to International Taxation experts to ponder over!

With the Apex Court insisting on knowing the full dimension of the information available with the Government and the steps being contemplated or taken to bring back the wealth 'plundered' it is high time for the UPA Government to come out with a 'White Paper' on this issue and shy away from pooh-poohing it as it appears to be putting the Government more in the dock than the tax evaders. India has signed a few Tax Information Exchange Agreements (TIEAs) with a few tax havens like Cayman Islands and Bahamas and has also taken steps to amend the controversial DTAAs to facilitate flow of banking information, and these steps are indeed laudable. But more than a conservative approach to exhibit its seriousness to

the issue seems to be doing more harm to its image and also resulting in widespread doubts about its intention. True, here comes the good news that a Swiss Parliamentary Committee has given its nod the revised DTAA which would now require the formal stamping of the Swiss Parliament before Indian tax authorities could gain access to the Swiss Banks' secretive vaults. A good number of positive steps have been taken in this direction but a holistic approach has glaringly been missing in this case. Whether India needs to go for some legislative changes or more needs to be done on the international front to bring back the lost wealth, what is required to earn the confidence of the people at large is the setting up of a comprehensive Task Force consisting of Government officials and also experts from outside the Govt to work on a detailed and realistic roadmap. Anything short of it would not convince the Judiciary about its seriousness to recover the lost wealth speculated to be in the range of more than ONE TRILLION DOLLAR! Whether it is so or not, the fact remains that the common man strongly believes that the tax evaders have stashed away huge national wealth in various tax havens, and the UPA Government has not been doing good enough!

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BLACK MONEY GENERATION AND WEALTH LOST TO TAX HAVENS: DEAR FINANCE MINISTER, NATION WANTS YOU TO DO MORE SPADEWORK[11]

Generation of black money has traditionally been a staid and not-too-pressing issue for our political masters and their loyal civil servants who make, amend,

11. Published in www.taxindiaonline.com, TIOL–COB(WEB)–224, 27 January, 2011.

reconstruct and obliterate national policies. But, for a change, it

has become a burning national issue, thanks to the 'Lordships'! In response to the conscience-pricking comments made during the hearings of the on-going PIL, the Prime Minister, Dr. Manmohan Singh, during the course of a Cabinet meeting, urged the Finance Minister to clear the cobweb of doubts in the mind of common citizens about the steps taken so far by the Government. Wow! Quick came the announcement about the Press Conference. And it did take place with the media lapping it up with all sorts of questions but not the ones which were directly related to the issue being heard by the Apex Court. The PIL filed by the three distinguished citizens is not about black money generation and the counter-measures designed and put in place by the Government. It is about the national Wealth lost to the tax havens in the past, and what steps have been taken by the Government to recover the same, particularly when it has got certain specific names of tax evaders. Secondly, the Apex Court had asked - What is wrong in disclosing the names of such evaders when the issue is not limited to mere tax evasion but also crime! These key issues unfortunately went unanswered while the Finance Minister did an honest job of detailing various policy armours designed by his government to curb black money.

Although one of the scribes did ask him a question about the amendment in the Indo-Mauritius tax treaty but the growing culture of no-homework before attending a Press Conference in the modern media world did not enable him to ask the Hon'ble Finance Minister about his Government's intention to withdraw the most controversial Circular No. 789. When India has sought amendment in several paras of various Articles in the India-Mauritius DTAA, and it is also a fact that Mauritius has been unmistakably reluctant to toe the line suggested, what stops India from withdrawing the revenue-bleeding Circular No. 789 of 2000. It is widely known fact that this Circular was not issued in response to a Mauritian demarche. It was largely a unilateral creation of the political masters of the day. Since it was a unilateral move to clarify the issue of tax residency for FIIs, and the fact that there has been

an acute realisation among the policymakers that it was certainly not a foresighted decision, why can't the present Government withdraw the same?

While talking about the creation of certain number of overseas posts (known as ITOUs - Income Tax Overseas Units) the Finance Minister also referred to two officers being posted in Mauritius and Singapore for collection of vital information which may assist AOs in their assessment proceedings. What assistance one may expect from them when our own clarifications open the floodgates for abuse of the treaty - globally known as 'Treaty-shopping'. No matter how valuable is the information collected by the officer posted there, it may not be of much consequence unless the irritants in the existing provisions of the DTAA are ironed out. If the information coming from the Port Louis-based officer has proved to be critical, the Finance Minister could have perhaps made a

general statement that our decision to post an officer in Mauritius has helped India in tracking down 'treaty abuses' worth Rs. ... Crores!

How effective is going to be India's decision to create ITOUs needs reassuring statement from the Finance Minister. As reported by TII earlier, eight more overseas posts have been created. Undoubtedly, such posts are *prima facie* required to be created if India's Transfer Pricing provisions and exchange of information agreements have to succeed. But merely creating certain posts may not yield the desired results. In fact, it would not be wrong to say that while creating these posts, the competent authorities have overlooked the glaring instances of 'duplication'! How? Ideally, the North Block should have pondered over the possibility of creating an integrated and homogenous overseas revenue intelligence network by taking into account the certain number of posts created for the Customs intelligence. From the CBEC side, there are EIGHT

such posts in key countries in Europe, Asia and North America. There are Customs officers posted in New York, London, Brussels, Moscow, Dubai, Singapore, Hong Kong and Kathmandu. In addition, there is one Customs officer posted at Geneva with the WTO. Let's now see the list of new posts created for the CBDT - the USA, the UK, the Netherlands, France, Germany, UAE, Japan and Cyprus. These are in addition to Singapore and Mauritius. There are at least four duplications here. Had North Block planners worked on an integrated overseas network common for both the Revenue Boards, the same number of posts would have covered much wider geography than what it does today. What was required to be done was to give the selected candidates three months intensive training about the types of jobs one would be required to carry out for the purposes of Customs and the income tax. Every average income tax officer does understand the technical features of the work done by the Customs. So does a Customs officer. All they required to do was to create a combined module of training for the revenue purposes along with the diplomatic inputs provided by the MEA. This could have certainly helped India rationalise its resources earmarked for such an assignment and also avoid duplication.

Anyway, let's now move to what the Finance Minister referred to as FIVE-PRONGED strategy adopted to curb the menace of illicit funds.

(1) Joining Global Crusade Against 'Black Money': India becoming Vice Chair of the Peer Review Group of the Global Forum on Transparency and Exchange of Information for Tax purposes does not indeed make India a crusader. We do have live examples of what may constitute a 'crusade'. A simple reference is required to be made to what the Obama Administration has done to UBS and other banks in various tax havens. It has also come out with a new tax law which imposes severe penalty for tax evaders routing their income to tax havens. We have examples like Germany and UK which have truly launched a crusade against tax evaders and

recovered huge revenue. It would indeed be too naive to say that by becoming a Member of Financial Action Task Force and the Task Force on Financial Integrity and Economic Development, India's stature has risen to the level of a black money crusader. All such memberships are institutional arrangements towards sharing information but acting on them requires a different set of political priorities which should be clearly spelt out by the UPA Government.

Creating an appropriate legislative framework: On this front, multiple efforts may be seen but no concrete step has been taken to design a web of legislative tools to curb generation of black money and ensure recovery of untaxed wealth vaulted in some tax havens. True, a significant step has been taken after G-20 Summit in 2009 to amend the DTAAs but obtaining information is just the first step towards zeroing in on possible tax evaders. Substantiating evasion in such cases and then recovering taxes require many more legislative legs to walk across to success. All the steps enumerated by the Finance Minister like TIEAs, PMLA, TP provisions etc. are not adequate for successful recovery of the lost wealth. Criminal aspect of tax evasion calls for a hard look at the entire platter of legislative tools available to the taxmen.

Setting up institutions for dealing with Illicit Funds: Steps taken so far to create a network of ITOUs is indeed a laudable decision. However, key to success is the consolidation and integration of networks to produce the desired results in time-sensitive paradigm. The existing setup in CBDT and the creation of dedicated exchange of information unit will not suffice. A dedicated R&D unit would be required to identify the loopholes in the

DTAAs so that they could be plugged in. A close watch and study of legislative measures being taken in other economies would help. A sharp eye on the changing business contours of MNCs and the complex architecture of financial transactions may help detect cases like Vodafone.

Developing systems for implementation: Some of the steps suggested by the Finance Minister are indeed commendable. But a scientifically-prepared HR database is the need of the hour. The CBDT needs to list out qualities required in officers for this specific type of assessment and investigation. Merely posting officers who had done some stints either with the FT & TR and Directorates of TP and International Taxation would not be enough. There could be hundreds of other officers in the field who may be more suitable for this sort of job. The Board simply needs to transparently develop parameters to achieve this goal. Strengthening TP Audit is fine but the quality of DRP orders needs greater attention of the Board (a detailed piece may follow later on this issue). Handling mega revenue cases before various courts of law calls for better vision and

sincerity which appears to be glaringly lacking today. There are hundreds of TP and International Taxation cases, which call for in-depth study by policy makers, and also a hardened approach to defend the Revenue.

(5) Imparting skills to the manpower for effective action: A lot more needs to be done on the front of preparing manpower for detection of frauds in cross-border transactions. Merely training a few dozens officers overseas will not do. A long-term strategy to create suitable infrastructure at NADT with quality faculty would help more. If need be, some foreign faculty can be

hired for periodic training sessions. The Board can even use the huge wealth of retired officers who can be of great help to the cause of Revenue.

No doubt, the Finance Minister has been transparent about telling the nation about all the steps the Government has taken so far. But it is a clear case where a lot more needs to be done if black money generation is to be minimised if not wiped off and lost wealth can be recovered even partly. The Apex Court is scheduled to hear this case today, and the first question the Government is going to be confronted with is why can't it disclose the names of the tax evaders? Seeking shelter under DTAAs is not enough in such cases. The Nation needs to know more, and it is indeed a piquant situation for the Government. Let's wait and see how it develops the precincts of the Apex Court.

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CONFRONTING CROSS-BORDER TAX EVADERS - NO AMENDMENT IN INDO-MAURITIUS TAX TREATY - WHOSE INTERESTS DOES IT SERVE?[12]

With the Bhartiya Janata Party, the Left and now, many Congress leaders twittering their views (Of course, after the Prince of the country's oldest political party did it, first!) on the much talked-about black money generation and the recovery of India's 'plundered' wealth vaulted in tax havens, the corruption-beleaguered UPA Government continues to be on the defensive. No doubt, unmindful of the monumental pressure from the twin forces of the Opposition and the Judiciary, the North Block thoughtfully continues to do what it is good at doing! - either amending the existing Double Taxation Avoidance Agreements (DTAAs) or completely substituting some of them as they have become partly redundant or signing OECD-approved Tax Information Exchange Agreements (TIEAs) with those tax havens which have no DTAA with India or sending Exchange of Information

(EoI) requests to some of the much-maligned jurisdictions for certain specific information required for investigation into alleged tax evasion cases. One of such agreements was signed yesterday between

12. Published in www.taxindiaonline.com, TIOL–COB(WEB)–225, 3 February, 2011.

India and Norway. The 25-year-old DTAA which had become partly 'obsolete' for the prevailing architecture of international business and financial practices, is now going to be substituted by a brand-new DTAA with many new provisions for the Insurance PE, TP cases under the MAP, Exchange of Information etc.

So far so good for the Government! But what surprises most Indians and also global audiences closely watching the tectonic shift in the global tax treaties horizon after the G-20 Summit in London in 2009, followed by the sustained drive against the tax havens by the OECD Global Forum, is the fact that the Government of India continues to turn a Nelson's eye to the most controversial and harmful DTAA it has with Mauritius. Worldwide, about 300 TIEAs have been signed in less than 18 months by all sorts of tax jurisdictions, including tax havens, but some of the widely abused DTAAs cushioning the act of treaty-shopping have not been touched yet. India has also, if we go by the Finance Minister's statement at his 'Black Money' Press Conference the other day in the national capital, identified 65 DTAAs for amendment but there are no clear-cut utterances whether Mauritius also figures in this list. Although the Finance Minister was last year heard saying that India has taken up the issue with the Mauritian Government but nothing concrete has so far come out of it!

If some of our DTAAs are to be shortlisted for priority round of amendments by applying the simple yardstick of one's age, and 20-year is kept as a benchmark, even then Indo-

Mauritius DTAA figures close to the top of the tally. It was signed decades back in late 1982 and notified in December, 1983. This makes it 29-year-old 'obsolete fiscal skeleton' which calls for immediate 'reconstruction'! Although India and Mauritius had signed an MoU in 2002 to moderate the rising decibel of criticism against the abuse of the tax treaty by agreeing to exchange of information, but it has presumably not worked very well because of many inherent limitations in the fiscal laws of Mauritius. True, it is not known how many EoI requests were sent by India, and how many of them were promptly responded to by the Mauritius Revenue Authority (MRA), nor any attempt was ever made by the UPA Government to come out with any such statistics, but if one closely peruses the latest Peer Review Report of the OECD on the prevailing legal and regulatory framework in Mauritius, one may tend to get some sharp insights into it. Besides, what continues to obfuscate the Nation is the fact that on the one hand, the UPA Government sees lack of meaningful provisions in the DTAA to make a dent into the tax havens for obtaining bank information relating to Indian tax evaders, on the other hand, when it is not obligated to keep some of controversial CBDT Circulars live and kicking, it has not shown any inclination to withdraw the infamous Circular No. 789. This Circular does not allow the Income Tax Assessing Officers to question the tax residency certificates issued to treaty-shoppers making mountains of capital gains in the Indian bourses. If TIOL readers are keen to take a peep into the quantum of tax foregone in this case, then let's believe that about 50 per cent of FIIs'

investments into our capital markets is routed through Mauritius. Besides capital gains, there are other incomes like dividend and interest where India is disadvantaged *vis-a-vis* Mauritius as per the existing treaty. By a conservative estimate, Indian exchequer loses more than Rs. 3000 Crore revenue

annually.

In fact, China had also faced a similar kind of abuse of its treaty with Mauritius. But it arm-twisted Mauritius and amended its DTAA in such a fashion that it now collects capital gains tax if shares of Chinese companies are transacted between two non-residents in Mauritius. Indonesia is a rather extreme example when it found that treaty-shoppers routing funds through Mauritius had taken the 'abuse' to a new level. Having found that Mauritius did not cooperate with it in plugging the loopholes, Indonesia simply terminated its treaty with Mauritius. True, India should not take any extreme step but nothing stops it from preventing 'regular abuse' of its treaty. But, leave aside the question of plugging the loopholes in the treaty, our FIPB often overrules the Revenue's objections when certain funds are routed through Mauritius. There are innumerable examples where certain FDI proposals were initially put on hold on the ground that the names of actual investors coming through the Mauritius route were not clear but later the same proposals were approved without getting any meaningful information in response to it EoI requests.

Let's now go straight to this OECD Report, which is unique in its amplitude and constructive recommendations made for Mauritius which is under obligation to sign about a dozen TIEAs and also incorporate Article 26 in its 37 DTAAs for exchange of information framework within the existing agreements. Mauritian Government earns about USD 100 billion annually from the offshore activities of its companies known as Category 1 Global Business Licence (GBC1), GBC2, management companies and Trusts. It has about 10,000 GBC1s who are largely constituted by treaty shoppers. India, South Africa, the UK and the USA are its main trading partners where these GBC1s largely operate and make their billions in their bourses.

While looking at the performance of EoI Cell of Mauritius the Peer Review team of the OECD found that although it has the provisions of automatic exchange of information in its DTAAs with India, Oman and Pakistan, and even bank

information can be exchanged in principle but bank-related EoI requests are not carried out in practice. In recent years its International Taxation Unit received a little more than 200 EoI requests but it only partially answered them for lack of information available with the Mauritius Revenue Authority (MRA). Interestingly, on receiving EoI request, it has a practice of seeking information from the taxpayer itself and if it does not get the information, it does not respond to the request. Although Mauritius has legal provisions for prosecution but there is not a single case of prosecution in its history so far. If an EoI request is about some banking information, it has a convoluted system of writing to the Financial

Services Commission which if provides information, the same may be made available to a treaty partner.

In a nutshell, the OECD Team found that although Mauritius has rapidly built up many legal and regulatory institutions in the past five years but they do not work satisfactorily enough to assist treaty partners in any meaningful investigation into tax evasion cases. Worse, the Report underlines that MRA has no enforcement experience albeit it has put tax laws in place. It has also suggested that it needs to upgrade its EoI agreements with all treaty partners so that bank information could also be exchanged. In a nutshell, Mauritius needs to do a lot to meet the benchmarks of transparency set by the OECD.

Similarly, India needs to do a lot to identify Mauritius-like treaties and iron out the irritants which promote opacity in cross-border transactions besides making a dent into the revenue kitty. The time has indeed globally changed which calls for a paradigm shift in political thinking to promote transparency in international business practices. The traditional political mindset of Indian power establishment along the line of ethnic and cultural bonding may not go long way now. The

issues like national security and exchequer's interests are too supreme to be sacrificed for the cause of a friendly nation. Such trade-off has become a 'commodity' of a bygone era, and the UPA Government needs to come out clean on this issue if it wants its citizens to believe that it has been doing enough to tackle the issue of slush money going out of the country to tax havens!

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NOT TALL CLAIMS, 'TALL' MEASURES REQUIRED TO TACKLE BLACK MONEY AND TAX HAVEN ISSUES[13]

The tale of black money and tax havens continues to mesmerise the hitherto inactive civil society activists, intellectuals, policy-makers and also the judiciary. Though many in the know of things may not find much to sustain their interest in the continuing debate as nothing seems to be 'effectively moving' to yield tangible results but for the lesser mortals, a lot has been happening to keep the issue at the centre stage. Only yesterday, a National Seminar on Black Money was organised by the Foundation for Peace, Harmony and Good Governance at India Habitat Centre. A good number of former judges, bureaucrats, academicians and activists spoke on a wide range of issues in relation to corruption, black money generation, tax havens and possible measures to bring back India's lost treasure-trove parked in tax havens. Some of the speakers like the Chairman of Law Commission of India, Justice P. V. Reddi, advocated 'hardened policy stick' to create an environment of 'fear psychosis' to curb

13. Published in www.taxindiaonline.com, TIOL–COB(WEB)–240, 19 May, 2011.

generation of black money. Some of them touched upon the

historically known sources of generation of black money. For instance, high stamp duty results in massive cash transactions in real estate. A few called for strong institutional mechanism to curb the generation of black money.

Though there was a galaxy of seasoned speakers with varied backgrounds at the seminar but it seems no politician was either invited or perhaps agreed to take a stand on such a sensitive issue. The only speaker who represented the fiscal fraternity was the CBDT Chairman. True, he did not have anything new to share with the Foundation except repeating the information which has already be uttered by the Finance Minister at various fora in the past few months. The Chairman made a tall claim that in the past 22 months, the Income Tax Department has unearthed black money worth Rs. 30,000 Crore! This figure is a great suspect. No break-up of this mammoth-looking figure was provided. What are the major components of this figure - the surrendered amount by assessees or is it the value of all the assets seized during search operations? Does it also include disputable Survey figures? Those who are into tax litigation from either side would perhaps differ from the Chairman if one goes by the dismal ultimate success rate of search and seizure cases at various fora of judiciary. This may partly be due to the attitude of the judiciary itself. What is being billed as black money today, may ultimately turn out to be declared / returned or white money after a case is decided either by the Tribunal or the higher courts.

While talking about the income Tax (Investigation) achievement in the recent past, the Chairman also claimed that such an achievement clearly shows that the Department has gone after not only small people but also ‘big people’. He may not be 100% incorrect in his observation as Income tax Department has indeed made quite a few good cases against big politicians, big businessmen and also top state bureaucrats. But if one goes by what the Supreme Court commented while hearing the 2G Scam case, two days back, that when the Income Tax had taped Neira Radia’s conversations way back in

2008 and had got unmistakable smell of 2G Scam, why did it 'sleep over' the intelligence for so long. There is indeed a lot of merit in this observation of the Apex Court which needs to pursue this line to fix the accountability.

While talking about the information relating to Liechtenstein accounts, gathered from the German tax authorities, the Chairman said that this information cannot even be shared with the Enforcement Directorate. And, the CBDT is now devising some ways to allow non-tax enforcement authorities to access this information. This is indeed a debatable issue. Why? First, the information relating to accounts in third party country is certainly not governed by India-Germany DTAA. There is nothing in Article 26 of the DTAA which prevents CBDT from sharing the intelligence with other law-enforcement agencies. If the purpose is to bring the offenders to book, no barrier is acceptable particularly

when the German authorities have themselves 'bought' that information from a law violator in Liechtenstein.

The Chairman also talked about identifying 14 tax jurisdictions with whom India has been negotiating Tax Information Exchange Agreements (TIEAs). And some of them are Bahamas, Bermuda and Isle of Man. Let's hope that India starts getting meaningful and actionable information from these island nations but a doubt would always hover as to what extent these islands are being used by the Indian black money juggernauts to park their funds. These islands generally attract rich and famous from Africa, Europe and North America. Then, black money owners would never directly go to these islands leaving a trace behind in India. They would first transport their moneys to an unsuspecting country and then to one of these financial centres through a circuitous route. So, these TIEAs may not help us make a serious dent into illicit money either going out or bringing the parked ones back to India in the short-run!

Since DTAAs and TIEAs can at best be only long-term measures to create what Justice Reddi described as 'fear-psychosis' among the taxpayers, India needs to look for short-term effective measures like the decision to ratify the UN Anti-Corruption Convention which will help India recover part of its lost wealth, etc. What seems to be outside the radar of our policy-makers at present is the area of emerging tax havens. At the one hand, old tax havens seem to be crumbling under the growing weight of G-20, but on the other hand, many new tax havens seem to arriving at the new horizon. Some of them are Albania, Ghana, Brunei and many more. India needs to keep them in mind and put either DTAAs or TIEAs in place so that right from beginning these low-tax jurisdictions are outside the radar of black money generators in the economy.

It is true that black money and tax havens cannot be either wished away or completely eradicated as long as there are sovereign nations following their own fiscal policies with different tax rates. Tax havens have a long history which dates back to ancient Greece - some of the Greek Islands were used as depositories by sea traders who wanted to avoid paying tax imposed by Athens on imported goods. Later, Switzerland, the oldest tax haven, followed by Liechtenstein, the second oldest tax haven, emerged on the scene of global wealth management. In other words, the history of tax havens does not favour the possibility of complete eradication. So, what is important for a country like India is to focus on positive tax policies with reasonable tax rates coupled with effective sticks so that the Tax:GDP ratio improves to a reasonable level. At present it is about 11%. The global theory goes like this - the lower the Tax: GDP ratio, the larger is the size of parallel economy. The Tax: GDP ratio is as high as 37% in Germany and 34% in the UK. So, the writing on the wall is very clear -India needs to jack up its Tax: GDP ratio which would mean a major dent into the black money aspect of the economy. Let's hope all the sincere efforts made by

the civil society activists, the judiciary and also the sincere souls among the taxmen succeed, and our battle against black money and corruption produces tangible results in the years to come!

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NOT COMFORTING STATEMENTS BUT CONCRETE ACTION REQUIRED TO PUT A LID ON BLACK MONEY

JINN[14]

The issues of black money, tax havens and corruption have, for the first time, grown in weight and scale to such a level that they have become a part of general gossip / *tete-a-tete* / conversation lexicon, at least among the *'Buddhijivi'* communities and the large population of civil servants. In the wake of the sustained 'typhoon' of scams India has witnessed in the past two years, we had Anna Hazare-led *satyagraha* against corruption. This led to constitution of a Joint Committee which has been drafting a new Lok Pal Bill to take the issue of corruption by horns. There is a set of legal activists who have got the Apex Court involved in fighting the menace of black money and tax havens. And the latest to join the growing bandwagon of activists against black money is Baba Ramdev who is scheduled to launch a 'National *Satyagraha*' on June 4. Embarrassed by the rising decibel against scams and black money, the Union Government is reported to have chosen the outgoing CBDT Acting Chairman as its messenger to pacify the rising blood-boiling point of Baba and his largely *yoga* disciples. Whether such efforts and elbow grease to placate forces at the grassroots-level will work or whether the voice of the *vox populi* which Baba claims to represent, will be heard in toto is to be seen in the coming weeks.

But what is of greater concern for the civil society is the 'thick-skinned' approach being shown by the most political parties to these issues of national concern. The voice of the Opposition which was dominated by the BJP, is rarely heard now when the awareness has begun to percolate down to the

grassroots. Given the thick presence of regional political parties at the national-level, and some of them being constituents of the ruling coalition, the lack of ideological coherence is quite understandable 'virtue' of these parties. Since most of them are local in character and setup, they are perhaps devoid of 'articulate tongues' which could take a stand on complex issues like black money generation and tax havens. So far as corruption is concerned, their stand of keeping mum or waiting for the issue to get 'mummified', is again understandable as they closely identify themselves with all possible dimensions of corruption.

The logic and the rationale which are good for the other political parties in India are equally good for the ruling coalition led by the Congress Party. So far as

14. Published in www.taxindiaonline.com, TIOL–COB(WEB)–241, 26 May, 2011.

the chemistry of political logic is concerned, it is understandable for not only the Opposition but also the Congress Party. However, the cold-blooded response or 'demonstrating-no-urgency' approach of the Union Government on these, say three or Three-in-One issue, is certainly a matter of national concern. When the Apex Court of India can be seen twisting the ears of the Union Government at regular intervals; the overseas media coverage of political and corporate scams hurting the 'Brand India', and the Indian civil society giving vent to its anger in various ways, it is certainly not fathomable as to how the Union Government demonstrates such a *'coooool'* temperament to the rising temperature of the civil society on these issues.

So far we have seen only two faces from the Union Cabinet speaking on these issues - the Prime Minister and the Finance Minister. And both have so far made only reassuring and comforting statements - no action! In fact, even on the

statement front, if we go by the Finance Minister's address to the 27th Annual Conference of the Income Tax Chief Commissioners and DGITs on Tuesday, Mr. Pranab Mukherjee may appear wanting in articulating the Government's concern for the black money in express terms. He did touch upon the illegal money and the funds financing terrorist organisations but did not urge the senior income tax Director Generals in unmistakable terms to come up with innovative administrative approach to unearth black money and curb flow of unaccounted money in tax havens. If black money and stashing of funds to low tax jurisdictions are to be curbed, it is the army of field officials who would ultimately be the doers, and not the policy-makers. Let's read the relevant *paras* of the Press Release of the Finance Minister's Speech:

> *" ... In the present scenario, where the whole world is facing the threat of terrorism, the funding of terrorism and its sources are of paramount interest to us. He said that the anti-national activities are funded through illegal sources of income. The identification, detection and movement of this money is essential to keep a tab on the anti-national and illegal activities, he added.*
>
> *Looking into the challenges posed by the generation of illegal income through various anti-national activities, Government has approved of setting- up a 'Directorate of Criminal Investigation' in the Income Tax Department. This Directorate will deal with tax crimes related to illegal activities. It will locate crimes or criminals by tracing the movement of money before, during and after a crime is committed. This new Directorate will also strengthen the ongoing efforts of the Department in dealing with issues of black money, said the Finance Minister ..."*

Let's now move to another significant event held in the National Capital last week where important faces of the civil society made some recommendations after a day-long deliberations on the issue of black money. Although some of the suggestions appear to be pedestrian and jewels of utopianism but some of them do deserve the attention of the UPA Government to act upon. These are as follows:

(1) **Accept that black economy is a threat to security of the country and its removal is more important rather than the current focus on revenue:**
There is some merit in this recommendation although it is not fully correct to say that the current focus on revenue generation is misplaced as revenue is the blood line for carrying out various developmental and social activities of the State. However, it is rightly put that black money is a threat to the national security. Given the fact that black money is funneled to various organisations indulging in anti-national activities or at least depriving the society at large of its share of resources which can be utilised for generating the public good. The economic security of a nation has got so inextricably woven with the political and military security that black money cannot be seen as a mere stand-alone malady which can be taken care of by administrative therapies. India does need to come up with some legislative, administrative and cultural tools as well to launch a full-throttle attack on this malaise, so closely identified with the demon of corruption in the country.

(2) **Discourage extortionary corruption - Need to identify extortionary corruption and to deal with it separately from collusive corruption:**
This is an important recommendation as corruption of different hues needs to be segregated, and different sets of took-kits need to be prescribed to treat them. Since corruption is one of the most visible forms of black money generation, it needs to be tackled head-on.

All bank lockers in India be frozen and assets released only after official scrutiny: Although this is not a very healthy suggestion but it can be partially implemented by

identifying suspicious cases on the basis of bank records. Merely because some (in thousands) are black-sheeps, all innocent locker-owners should not be penalised. However, a national drive by the Income Tax authorities may produce vital 'raw inputs' for proper assessment and leads for funds stashed away in tax havens. But it should not be done by orchestrating the same for political mileage as it may hurt public sentiment and may be construed as too intrusive to an individual's right to privacy.

Zero capital gains tax and 1% stamp duty on all real estate deals to encourage full value transactions: *Prima facie*, this recommendation looks outrageous from the Exchequer's perspective as real estate is one of the most buoyant sectors of the Indian economy which also attracts FDI. How much tax is collected from this sector needs to be studied by the CBDT before any conclusion can be drawn either in favour or against such a recommendation. Secondly, stamp duty is a local subject which would require harmony in decision of 30 States. Going by the on-going experience on the GST front, this sounds an uphill task but there is no harm in making an attempt if there is any political consensus on this issue.

Apart from these recommendations, another development which is worthy of attention is the reported news that the Mauritius has agreed to provide bank-related information to India if India seeks such information in relation to the 2G Scam investigation. If the FT&TR Division in the CBDT has indeed received such a confirmation, such a promise needs to be discounted, knowing the legal rigmarole on the Mauritius side. Mauritian Revenue can obtain any bank-related information only through a court of law, and it is a marathon procedure. Only steely will coupled with unflinching commitment may do the impossible task of providing banking info in a couple of cases. It is not realistic unless the Mauritian

laws are amended.

If the Government of India is convinced that Mauritius has actively been promoting treaty-shopping, and the Apex Court believes the other day statement of the CBI in the 2G Scam that some of the funds were routed through Mauritius, the Union Government should first withdraw CBDT Circular No. 789 which prohibits tax officials from examining the residency certificates granted by Mauritius. In a nutshell, the Union Government needs to show more concrete action and initiatives on the black money front if it wants the people in general to believe that our Government has been proactively working on a package of short-term and long-term measures. Let's hope something good comes out of the ongoing churning process the India is destined to go through!

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BLACK MONEY - LET'S HAVE IT AND USE IT FOR HAVE-NOTS[15]

Black Money is 'black' only by nomenclature. Otherwise, for some it is hueless, and for others, it assumes all the possible hues available in the rainbow. For a large swathe of population in India whether they are working in the public or Government or private sectors, black money is a largely motivational, titillating way of life. A good number of officials work hard or more efficiently only because they have a 'golden dream' which can be realised only by earning 'black money'. It is no longer an isolated island of black money earners who can be identified and brought to book. A large number of officials and also private sector executives who live amongst us are instrumental in generating huge quantum of black money either through legal or illegal ways and styles. So ingrained has become this sort of way of life in our society and also organised sector's functioning that a good number may not see life without the 'titillating black'!

Why do we think that no amount of law or policy tools or

fiscal measures would succeed in effectively demolishing the rising wall of black money which

15. Published in www.taxindiaonline.com, TIOL–COB(WEB)–244, 16 June, 2011.

has grown as much as guesstimated 70% of our trillion-dollar economy? The reasons are certainly not cloaked in secrecy. Every organised activity in our socio-economic and political sphere has become black-money driven. How will the decree of the Govt work for the moneyed business class or others when its own employees have not bothered to fully respond to its May 31 deadline to file their IPRs (Immovable Property Returns)! As per the latest count, as many as 450 IAS officers have reportedly not declared their assets so far. Why? Are they not scared of Departmental inquiry? Or, they are too confident of manipulating the *diktat* of the Government. Or, they have simply tried to buy time to transfer their assets either in the name of their distant family members or 'hired loyalists' for *benami* transfer! Who are they? Are they the ones who are posted in the States? It is believed that some of the IAS officers have sent letters to their respective CMs, stating that they would not file IPRs as it has not been the practice. The problem of corruption is more serious in the States. It is a Catch-22 situation for most IAS officers posted in States. If they truly declare their assets the CBI would be flooded with DA cases. If they do not, and probe reveals that they had more, this would amount to misdeclaration which is to be dealt with as per the CCRs.

If the privileged IAS officers who constitute the creamy layer of our bureaucracy and are often alleged to have amassed huge wealth or robbed the exchequer of its legitimate funds, cannot respond to the clarion call of the Government to come out clean in response to the rising din of civil rights activists, who else can? The IAS officers have always grabbed the

administratively and financially key posts in both the Central and the State Governments. They have edged out other All India and Central Services officers in reserving the posts with large purse to spend. When they cannot come out with the details of their property, what does it mean for the Govt? Is there an unmistakable message for the Union Cabinet? Even for those who have filed their returns, what follow-up action is being taken to match their returns with the declarations filed at the time of joining their services. Has Government thought of getting the returns scrutinised by an independent agency? The CVC cannot be one such agency in the light of the report that as many as five Under Secretaries have not filed their IPRs. Whoever does it, if a good job is done, a good number of officers would be exposed if the recent case of Income tax Department booking an IAS couple in a State is any indicator to go by!

The crux of the issue is that India badly needs to undertake the much-delayed massive administrative reforms if it is serious about preventing the creamy layer of the bureaucracy to rob the exchequer and aid the parallel economy by 'unloading' container-ful of ill-gotten money for earning more profits. If India's economic gains made in the past two decades are to be strengthened and shared with the have-nots, it is still not too late for our political masters to wriggle out of the sinister nexus with the *babus* who have become a powerful agent for the black money economy. Some of the steps of the administrative reforms could be

'de-reserving' the top posts of Additional Secretary and Secretaries in the Govenment Ministries for only 'merit' - no matter whether it comes from other services or the private sector. Only the efficient, competent and endowed with the leadership qualities should be entrusted with the task of leading the country, and not the pedigree which does not always work. For empanelment of Joint Secretaries, the work should be assigned to an independent body like UPSC so that neither the

Ministers nor the Secretaries handpick their own loyalists for extracting more 'titillating black' from the over-abused system of ours. If India has to succeed as a powerful modern economy, it must implement surgical administrative reforms which can take care of the twin problems of the corruption and the black money.

Let's now move to a much bigger ill of our system which does not only produce black money but also breeds corruption-sustaining criminality. Yes, I am referring to the influence of black money in our elections which is the foundation of our much-boasted participatory democracy. Notwithstanding brilliant Chief Election Commissioners who have taken all possible measures in their armour to curb the deleterious impact of the hydra-headed black money on our polls, but the more they have tried, the less they have succeeded. No doubt, the Election Commissioner will have some sort of statistics to generate different pointers towards clean polls but there has been no change in the perception of the people about the influence of corruption and black money in our polls. Whether we talk of last parliamentary polls or recent State Assembly polls, even though the quantum of cash seizure by the Income Tax Department has been impressive but this is believed to be a 'mere drop' in the ocean of ill-gotten funds being spent during polls.

True, electoral reforms aimed at correcting the crooked roots of these ills are oft-talked about solutions. But let's not get into what all can be done within the ambit of electoral reforms. I would like to draw the attention of TIOL readers towards a recent proposal tailored by the Income Tax (Investigation) wing which is the final output of many decades of empirical studies and experiences gathered about our electoral process. As per this proposal, the Special Provisions of Section 13A of the I-T Act should be deleted, and all political parties should be brought under the umbrella of Section 11 meant for charitable institutions. Since political parties do not do anything special to deserve Special Provisions, they should be treated as a charitable body and

allowed to create assets of public utility and render public services. Most politicians today try to 'milk' the exchequer for creating employment or setting up industries or creating assets of public use in their own constituencies, and in the bargain, indulge in all sorts of corruption. It would be ideal if their own political funds are utilised to create assets to influence their own voters it would be certainly more desirable.

Given the fact that all political parties today stand naked on the issue of declaring the source of political funds and contribution by industrial houses, and the fact that all of them lack in political will to implement sweeping electoral reforms to make poll process transparent and fairer, it is better for any society to let them make use of their opaque fund to create public assets, roads, drinking water pipelines, hand-pipes, better sanitation, health and educational assets so that the voters at the end could compare their work before they cast their votes. It would indeed be a healthy utilisation of black money lying with our political parties as the source of black money can never be dried up by any legislation. If our political parties work as a charity institution, they can rightly be assessed by the ITO or even be disallowed for certain expenses not spent in public interests. Let's experiment with some of these out-of-box ideas which just need to click to have a long-lasting impact for betterment of our system, the economy and the Indian society at large. The black money has indeed got both the powers - to sustain too many ills in our system and also to be inclusive by taking care of the have-nots of our economy.

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LOKPAL BILL: A HEALTHY TUG-OF-WAR FOR 'ELECTRONS OF POWER'[16]

The tug-of-war over the drafting of the Lokpal Bill continues between the Executive and the representatives of the civil society. After nine rounds of meeting the Joint Drafting Committee has certainly walked a few steps forward but the bickerings over several key points continue to intensify. On the one hand, the HRD Minister, Mr. Kapil Sibal, has accused the team led by Anna Hazare of running a parallel Goverment, and on the other, Anna has clearly stated that the Government is not at all keen to create a strong Lokpal. Such volleys of accusations and mud-slings would continue and are truly obvious as it is afterall an issue of giving away a few 'electrons' of hedonistic political power to an independent Ombudsman which is going to use the 'energy of those electrons' against the very same political class which is expected to 'give away'. Anna and his team should be wise enough to remain prepared for a long-drawn battle as it is after all a political struggle.

Even if the present political establishment, in its latest incapacitated *avatar*, agrees to or accepts some of the contours of the proposed watchdog authority, it should certainly not be taken as a war won! After the Cabinet approval, the real war would unfold in the Parliament House. Going by the 'Doctrine of reticence' which appears to be being clinically practised by all the national political parties, it seems a 'horror' story awaits the civil rights activists in the coming months. It

16. Published in www.taxindiaonline.com, TIOL–COB(WEB)–245, 23 June, 2011.

would be wiser for them to reconcile their differences with the weakest ever Executive in the post-Independence era and extract the maximum number of 'power electrons' with the pledge to roll over the same through both the Houses of the Parliament. Once such an authority is created, grabbing more power for the same if such a necessity is felt by the civil society in future, will not be difficult if similar sort of public opinion is

created. No perfect institution has ever been born out of any such struggle in the history of any political system. When both the bickering parties owe their allegiance to forces of democracy and people's power, where is the question of falling short of a dream-start for the proposed body. The future generations of India which have evidently lesser patience to open injustice, crony capitalism, nepotism and political favouritism, are certainly not going to take it lying down.

There are many examples which indicate a tectonic shift in the political behaviour of the common voters in India if we take a closer look at the quantum of money spent by political parties in the recent elections and the final verdict which surprised the participating political parties more than the analysts. If one goes by the number of cash seizures in Tamil Nadu and West Bengal, this would clearly indicate the volume of black money which went undetected. Voters were greeted not with folded hands but huge cash, liquor and TV sets but when the results were announced, it came as a bombshell for many political parties who had presumed that the Indian voters are a bunch of fools who can be bought by some 'dirty money'. If political parties take a lesson from such a voting behaviour, they may soon realise that black money earned through corrupt practices may not have enough 'face value' to buy clinching votes. Thus, the only lesson which would be left to be learnt, would be to focus on development, quality governance, reliable administrative agencies and fast-track justice delivery system if any political party wants to be voted into power.

Such a tectonic shift upsetting the fossilised political icebergs in fact started quite some time back when poor and illiterate voters in Bihar chased away Laloo Prasad Yadav and his bunch of politicians with criminal records. Since Nitish Kumar Government focused on nothing but only development and real political empowerment of the *vox populi*, he was voted into power. Similarly, the Left regime running through many decades was cut short in West Bengal only because the people have developed the art of political premonitions through many decades of experience, to judge a political party. Even if poor

voters accept money or liquor from a particular political party they know whom to vote for and do exercise their choice after deliberations. Thus, a time is not too distant when political parties would be realising the futility of earning black money and dissipating the same during elections. In other words, the demand side would act as an effective corrective instrument to neutralise the supply side of corruption and black money.

All these developments are indeed positive signs of maturing democracy of India. If we leave the problem of corruption in the hands of all the three organs of the State today, it would never be solved even to a reasonable extent. The real correction has to come from the people (the demand side of the corruption). It is good that Anna and his team have been focusing on the supply side of corruption but such a demon can only be effectively neutralised when our large voluntary sector coupled with the army of civil rights activists focus on the demand side as well. Unless both the forces of supply and demand are targeted together, the impact of only supply-side control may not be tangible for many years to come. Going by the projected destiny of the Indian economy which would be an economic superpower in less than 25 years, all democratic forces should work together to 'correct' the course of present powerful currents of mis-governance and also the buyers of their favours.

Let's now go straight to the bones of differences between the two parties which have been entrusted with the job of finalising the Draft Lokpal Bill. The UPA Government and their supporters like Mamata do not want the Prime Minister to come under the ambit of Lokpal. Let's presume that the Prime Minister is not under the Lokpal but our future Prime Ministers turn out to be authoritarian who may be instrumental in political abuse of our democratic institutions and constitutional powers. To execute such an abuse of any system, no matter how efficient a Prime Minister may be, he would need hands and systemic

support to carry them out. And as soon as such a task of abuse is transferred to the officials working in the Prime Minister's Office, the jurisdiction of the Lokpal would automatically extend to them, and also to other ministerial heavyweights on his side. If the Lokpal is able to exercise a good control over the top bureaucracy, the Prime Minister as a standalone abuser of the system may not succeed for long!

The second apple of discord has been the inclusion of higher judiciary. The real problem of India if one may refer to the judiciary is the collapse of the criminal justice system at the bottom and not at the top of the judicial system. So far, the top layer of the judiciary has been the face-saving institution of our democracy. Our Judges in the Supreme Court and most of the High Courts are above reproach and truly driven by public interests and justice-minded. The real problem is the rotten bricks at the bottom where most of heinous or other criminal cases go but criminals walk away by either 'purchasing' the magistrates or sub-judges or the cases are derailed by powerful agents of law who are expected to 'advocate' the cause of justice. The locusts of corruption have indeed eaten away the vitality of our criminal justice system which instills no fear in the mind of bad elements in the society who often put on *khadi* clothes to become representatives of the people. Thanks to the flaws in our electoral system, even a rapist or a murderer gets elected and cannot be disqualified until he is punished. There is where major reforms are required and our right-minded activists should focus on.

The third point of dispute has been regarding who all should be in the panel for selection of Lokpals. Here the UPA representatives are clearly at fault. If one goes by the recent CVC appointment scam, it may appear that the UPA Government has not at all learnt anything from the Supreme Court's observations and commentaries. The system of constituting a panel of Prime Minister, the Home Minister and the Leader of the Opposition has proven to be weak and

ineffective. The umbrella of representation of more independent forces should certainly be wider to include more from non-government institutions like Judiciary or even the Fourth Estate. Having CAG as one of the members is certainly not a bad idea. Although the CAG is handpicked by the Executive itself but given the recent trends and also the Constitutional status, the recently-appointed CAGs have proven to be independent-minded.

Although there are many more areas of discord but removal of Lokpal is an important aspect where the Government wants to stick to jaded and outdated system of Presidential reference. Since the practice of selection of President and Governors itself has lost its lustre as an effective system over the years it may not be better than a trap for the civil society activists to agree to such a suggestion. Given the fact that 'termites' of politics have eroded the neutral characteristics of these institutions, entrusting them with the task of making a reference to the judiciary on receiving complaints from the citizens would not be a desirable option at all. Here every citizen should have the right to move the Apex Court, and let the Supreme Court devise its own filters to dissuade frivolous complaints. Readers may recall the days of PIL-deluge. As soon as the Supreme Court came out with guidelines, including harsh penalty, bogus PIL cases evaporated into thin air even without much heat in the atmosphere. Therefore, a wiser choice must be exercised before any decision is taken in this regard.

I hope that a journey which began two years after the Administrative Reforms Commission set up in 1966 recommended the two-tier machinery of Lokpal at the Centre and Lokayukt at the State, ends up merging with its destination. Indian citizens have seen many drafts of Lokpal which never fructified, including the latest in 2008. Let's hope this time it is different provided the citizens manage to sustain pressure on both the elected representatives and also the self-elected faces of the civil society.

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TAX EVASION - TRADE MISPRICING - WILL AMENDMENTS IN PMLA SUCCEED IN CURBING ILLICIT OUTFLOW OF CAPITAL?[17]

Recently, not only Indian trade statisticians but also WTO trade data analysts were jolted out of their make-believe perception about the accuracy of data

17. Published in www.taxindiaonline.com, TIOL–COB(WEB)–272, 29 December, 2011.

collection by the Ministry of Commerce when the news broke out that even as the WTO data points to a downturn in global trade volume, India's exports have been galloping at more than 40% growth rate in the recent months! How? Where were India's goods and services heading for? Then came another googly! - a sizeable chunk of India's exports had some of the tax havens as final destinations! Unbelievable, indeed! But, if we leave aside the *naivete*, it should not surprise at least our policy makers who are aware of some of the World Bank and Global Financial Integrity (GFI)-sponsored studies. All these studies have followed the "Trade Mispricing" Model. Under this Model, a country's recorded imports to the rest of the world's export and the country's exports to rest of the world's imports are compared. Import values are fine-tuned for the cost of freight and insurance before they are compared to exports. The GFI's estimates of trade mispricing track illicit outflows resulting from export under-invoicing and import over-invoicing.

As per the GFI's studies, illegal capital flight from India between 1948 and 2008 was about USD 213 billion. The present value of this sum is about USD 460 billion, which was about 17% of India's GDP in 2008. Illegal capital flight grew at about 12%, and India lost about USD 16 billion per year between 2002-06. In post-reform era of 1991-2008, liberalisation and deregulation of trade regime stepped up the outflow of illicit funds from the Indian economy. And the key

drivers were the high net-worth individuals and the private sector, which shifted its deposits from developed countries to Offshore Financial Centres (OFCs). As per the GFI, the OFC deposits leapfrogged from 36% in 1995 to 54% in 2009 for the Indian entities. This goes to indicate why the CBDT Chairman-headed Committee on Black Money going to recommend introduction of Offshore Voluntary Disclosure Scheme.

Given the fact that by amending DTAAs and signing TIEAs India cannot achieve quick results, which has become a political compulsion for the present UPA Government, the only option for bringing back the lost capital, and also mop up some extra tax revenue, appears to be the Offshore Disclosure Scheme. This becomes more acutely realised if one goes by the pittance collected so far from some of account holders of the Geneva-based HSBC Bank and also the LGT Bank. If India has to bring back some substantial part of the illicit capital parked abroad, a Disclosure Scheme is perhaps the only quick result-promising short-term measure.

Let's once again go back to the GFI studies, which clearly establish a statistical correlation between large volumes of illicit outflows and deteriorating income distribution in India. Tax evasion, which is a major part of the parallel economy, is indisputably the key driver of India's illicit outflows. Such illegal flows cannot be curtailed unless exports valuation becomes more realistic and the Indian Customs fine-tunes its Risk Management parameters. At present, the entire focus of the Customs Department is on import valuation through Risk

Management System (RMS). Since exports bring forex, the widely prevalent attitude is that let's not look into the colour of the forex! In other words, neither RBI nor any law enforcement agencies go deeper into the forex kitty to see the colour! Thus, there has been a circular flow of illicit capital of the parallel economy.

The general prescription for curtailing illicit outflows is to

curtail trade mispricing, which is perhaps a political impossibility in India. No Government can afford to tighten the noose to curb trade mispricing. Rather, India has as many as 45 export promotion schemes to compensate such financial rogues. Curbing such a practice would require country-by-country reporting of sales, profits and taxes paid by MNCs. It requires automatic cross-border exchange of tax information, which Mr. Pranab Mukherjee has been harping on at various global fora. It also calls for harmonisation of predicate offences under anti-money laundering acts across all countries. It also requires confirmation of 'beneficial ownership' in all banking and securities accounts.

Keeping in mind such requirements, the Finance Minister on Tuesday introduced several substantive amendments in the Prevention of Money-laundering Act (PMLA) in the Lok Sabha. The highlights of the amendments proposed are:

introduce the concept of 'corresponding law' to link the provisions of Indian law with the laws of foreign countries and provide for transfer of the proceeds of the foreign predicate offence in any manner in India;

introduce the concept of 'reporting entity' to include therein a banking company, financial institution, intermediary or a person carrying on a designated business or profession;

enlarge the definition of offence of money-laundering to include therein the activities like concealment, acquisition, possession and use of proceeds of crime as criminal activities and remove existing limit of five lakh rupees of fine under the Act;

make provision for attachment and confiscation of the proceeds of crime even if there is no conviction so long as it is proved that offence of money-laundering has taken place and property in question is involved in money-laundering;

make the reporting entity, its designated directors on the Board and employees responsible for omissions or commissions in relation to the reporting obligations under Chapter IV of the Act;

provide that in any proceedings relating to proceeds of

crime under the aforesaid Act, unless the contrary is proved, it shall be presumed that such proceeds of crime is involved in money-laundering;

provide for appeal against the orders of the Appellate Tribunal directly to the Supreme Court;

provide for the process of transfer of the cases of Scheduled offence pending in a court, which had taken cognizance of the offence to the

Special Court for trial of offence of money-laundering and also provide that the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

Some of the changes proposed are of great significance and will go long way in making this Act highly effective. The one particular change relating to the 'beneficial ownership' is likely to hit the nail on the head of corporate houses, which float letter box companies abroad and launder capital out of India. Similarly, attachment of property even before the conviction is ordered is going to be a severe deterrent. The laws apart, it is equally important for the North Block to be more selective in picking up the right officers for staffing the Enforcement Directorate if it has to produce more tangible results in the coming days. Having power is one thing but implementing the same by keeping the ultimate objective in mind requires a lot of wisdom, restraint and empirical approach. Let's hope all these steps put together finally succeed in curbing the trade mispricing, money laundering and also the objective of bring back the lost treasure of India!

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COUNTERVAILING BLACK MONEY: LONG LIVE INDIAN DEMOCRACY MINUS CORRUPTOCRACY[18]

Black Money is 'black' like the burning Coalgate, sorry,

the coal, only by name. In reality, it is the most beautiful and sought-after lubricant for virtually all the institutions of the Indian political system. Its omnipresence, not restricted to only the business class and the politicians, adds to the omnipotence of an institution, perhaps democratic by character. So powerful have become the twin forces of black money and corruption that they have been holding India's governance system to ransom for the past two years. It is now widely accepted that there is no political governance system in India today. Skeletons of scams have been tumbling out of the UPA Government's cupboards at such a fascinating regularity that democracy watchers and the highest judiciary hardly find precious time to get bored with the mundane routine work. The impact of black money on the mind of our politicians has been so devastatingly captivating that a good number of them have begun to talk openly about the sweeping impact of black money on our electoral system. A leading Congress leader was reported to have admitted at a seminar that in his constituency one of the candidates spent about Rs. 15 – Rs. 20 Crore during the elections. One of the most handsome BJP MPs at the same seminar stated that every Parliamentarian begins his political career with a lie in relation to declaration of his assets and electoral expenditure.

18. Published in www.taxindiaonline.com, TIOL–COB(WEB)–306, 23 August, 2012.

Let's take a closer look at what has been the experience of our Election Commission, which enforces the expenditure control rules during the polls. As per its 2011 statistics, it seized as much as Rs. 120 Crores cash besides heroin worth Rs. 200 Crore, 2700 kg poppy husk; 223000 litres of local liquor, 4000 firearms and 10 lakh drug tablets. If we go by the global experience of success rate in prevention, which ranges between 6-8% maximum, the total quantity of all these items

must be mind-boggling. A simple watch on heavy financial transactions by specialised revenue agencies revealed that there were as many as 30000 domestic transactions and 9000 foreign transactions in relation to the five assembly polls held recently. The Election Commission guesstimated that about Rs. 3400 Crore was paid as bribe to voters. A part of the funds had come from tax havens as well. Another eye-opener for the Election Commission was the statistics that as many as 191 candidates in Punjab and Uttrakhand alone had no PAN card but had declared assets worth crores of rupees!

The tales of black money influence on our electoral system are certainly more gory than what has so far been written about. With the black money having this sort of octopus-like grip over our polling process, how can we expect a cleaner, bolder, public-spirited, transparent and efficient political governance from any political party? All the scams reported in the recent years are only symptomatic of the malady which ails the foundation of our political system today. We quite often get disturbed by the newspapers' screeching headlines exposing scams and frauds by various Governments either at the Centre or in the States, and generally tend to seek remedy for them. For instance, Raja was put behind the bar in the 2G Scam, and this cooled down the rising tempers of the civil society at large. But, we failed to reach out to the root of our system, which would go on 'producing' thousands of Rajas in the coming years unless we 'treat' the roots. Even public-spirited Anna and Ramdev failed to diagnose the larger cause. Instead of demanding cleaner and transparent electoral system they focussed on the creation of a behemoth - a *Lok Pal*, which would only address the corruption aspect of the malaise. But corruption and black money have in a way cause and effect relationship. Since our politicians need more money to win elections, they resort to tax evasion, corruption and frauds. If India is able to contain the influence of money on polls, to a large extent, it would automatically contain the problem of need-based corruption. A simpler and non-expensive electoral process would also attract educated, honest and public good-

spirited candidates from the poor and middle class of the society - a need of the hour, indeed! Thanks to the influence of money, liquor and muscle power on our electoral process today, public-spirited common citizens prefer non-participation in the most fundamental churning process of the world's largest participatory democracy.

The influence of black money on our poll process has been so much omnipresent that the latest Black Money Report prepared by the Panel headed by the CBDT Chairman notes that out of thousands of suggestions received,

electoral reforms, including state funding of elections, tops the tally; severe punishment for stashing away illicit money to tax haven is ranked second, and tighter monitoring of persons travelling frequently to tax havens is the third. In other words, as long as no reforms are undertaken for our ailing electoral system, all the legal measures initiated to curb black money generation or to contain corruption would come a cropper. Unless India decides in favour of state funding of elections on priority, the heady days lie ahead for naked dance of black money in 2014 general elections. Why? Like their counterparts in the USA, Indian politicians have also witnessed the impact of broadcasting and internet media to quickly reach out to their constituencies. The so-called independent Press has become a vehicle for the corrupt system to consolidate its constituencies. The demon of advertorial or paid news is here to stay and grow with each electoral event. Every candidate of some weight today wants to advertise on TV channels; radios, internet and through SMS. All these vehicles of publicity are hugely expensive, and would require massive funds from each political party to outadvertise the opponents. With the growing penetration of new mass media technology, our polls are going to be more expensive unless poll expenditure is regulated and funded by the States.

How much will it cost to the exchequer? If we leave aside the quantum of black or illicit money pumped into the electoral system, any sum in the vicinity of Rs 10,000 Crores may turn out to be adequate and decent enough to see through not only the general elections but also state and local polls. An Election Fund should be created, and all donors - individuals, corporates, trusts and firms -should be allowed to contribute to this pool and avail income tax deduction from their taxable total income. No political party should be allowed to receive any gift either in cash or in-kind, any donation of assets or any sort of contribution. For funding their own party activities they should be allowed to collect only party membership fee with an upper ceiling (one of the leading UP-based political parties collected Rs 200 Crore from donors - all in cash; not a single rupee by cheque). Oomph! What a slap on the face of the Doctrine of Accounting Standards followed by us. Their accounts should be regularly audited by auditors chosen by the Election Commission.

The next question is - Where will the money come from? Given that the India Inc. would be a key beneficiary of a good governance system, I agree with CII President Adi Godrej's idea of levying a 'Democracy Cess'. Given our experience of paying multiple cesses, no taxpayer would mind paying 1 or 2 per cent CESS for keeping our democracy hale and hearty. And such a cess can be imposed across the basket of direct and indirect taxes collected by the Centre as well as the States. Going by the magnitude of education cess collections, even 1% Democracy Cess would be a huge sum for the Election Commission to spend and also develop permanent arms to keep a watch on use of non-sanctioned money for election purposes.

Incidentally, there is already an Empowered Group of Ministers in the present Government, which has been deliberating on the issue of state funding of elections. I am told that the Ministry of Law is also ready with some constitutional

amendments for this purpose but all the political parties are yet to be consulted for their support in the House if a new bill is tabled in this regard. Given the fact that this issue has been hanging fire since 1998, most democracy watchers believe that it may not become a reality in the near future. If it is so, there is an element of realism in it as most political parties are flush with huge cash and unaccounted wealth along with a good number of leaders having a 'decent' criminal track records, which are required to win polls today. With such strength available to them, they might prefer commenting - *What an idea sirji*! But they would not buy the idea for the battles in the near future, and all reforms can wait for some more years!

In this background, the minimum the UPA Government should do is to amend the Representation of the People Act, 1951 and make it mandatory for all poll aspirants to make their income tax returns public for at least six assessment years. At present, thanks to the Supreme Court order, all contestants are required to declare their assets and bank balances. Beyond generating a few voices of WOW (Praful Patel increased his wealth by Rs. 42 Crore and Kamal Nath by Rs. 26 Crore between the two polls), such declarations do not serve any meaningful purpose. It is important for the common voters, who are now equipped with the power of the RTI Act, to closely scrutinise the tax returns of every contestant, keen to occupy a public office. Making tax returns public is certainly going to empower the lowest denominator of democratic forces in the country. The common man can do what even a specialised agency, a part of the corrupt system, cannot do against corrupt candidates.

India has taken a lot from the American capitalist culture. It is time now to take a leaf from their electoral system, which compels Presidential candidates to make their tax returns public. And what happens when they are made public can be measured from the discomfiture of the Republican candidate Mitt Romney. He has so far disclosed his tax return for just one assessment year, and his alleged tax avoidance ability and propensity to make good use of tax havens has been fully

exposed. His expensive tax planning has literally eaten into his political fortune. As per one latest polls, he has the support of only 35% Americans whereas a neat 40% are against him. Once he discloses his latest tax return, there would certainly be more screeching headlines. In other words, if India also makes it an inescapable condition for all contestants, if not the Parliament or the Executive or the judiciary, the most common soldiers of democracy would do the needful to expose the custodians of black money and their perhaps 'True lies'! Long Live Indian Democracy minus Corruptocracy!

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BLACK MONEY ISSUE GETS 'BLACK-EYE'! INCOME TAX INVESTIGATION BECOMES 'DISTRACTION' FOR CBDT?[19]

With the Indian economy losing its steam, the most 'steamy' issue of black money also seems to have been relegated to the back seat. Although it is anybody's guess that the role of black money has multiplied in the economy even if one discounts the corruption exposures by the *Aam Aadmi* Party patrons or the CAG, but the issue of black money has certainly lost its lustre. If the Finance Minister or the Opposition is not talking about it, it has clearly taken off the pressure from the CBDT, which has been doing its best against the tax evaders in the past three years. Such a conclusion may be inferred from the table of statistics about income tax raids furnished to the Parliament by the MoS for Finance, last week (See Table). The table of data evidently indicates to a soaring graph of Search & Seizure operations with the total number starting at 3454 in 2009-10 and registering a growth of about 47% in 2010-11 and then scaling the height of a record number of 5260 last fiscal.

Director General of Income Tax (Investigation)	No. of Search Warrants			
	2009-10	2010-11	2011-12	2012-13 (upto Sep. 30)
Ahmedabad	466	585	699	296
Bangalore	160	282	272	41
Bhopal	295	197	254	122
Chandigarh	241	390	406	146
Chennai	98	262	332	138
DGIT (Intelligence & Criminal Inv)	50	86	128	8
Hyderabad	139	180	207	81
Jaipur	181	152	152	58
Kochi	84	65	196	17
Kolkata	422	424	318	171
Lucknow	254	474	536	137

19. Published in www.taxindiaonline.com, TIOL–COB(WEB)–321, 6 December, 2012.

Director General of Income Tax (Investigation)	No. of Search Warrants			
	2009-10	2010-11	2011-12	2012-13 (upto Sep. 30)
Mumbai	334	736	758	28
New Delhi	276	606	590	199
Patna	159	72	165	24
Pune	295	341	247	74
Total	3454	4852	5260	1540

Readers may recall that in the past three years, the Opposition, the civil society and the media had kept the issue of black money on the front page on a sustained basis, and the then Finance Minister had become too sensitised about the issue. A good number of administrative and legislative

measures were initiated, and they might produce some tangible results in the coming years. But, with the elections coming closer, and the political uncertainties militating against the general ambience of strong governance and also the fact that the economy is showing signs of unwellness, the overall administrative enthusiasm has, statistically speaking, petered out. And such a statement can be made from the fact that as against the total of 5260 income tax raids last year, the total tally badly pales with 1540 operations till September 30 this year.

Experts say that there are innumerable reasons for this. First, whenever polls near the deadline, the income tax raids become selective and tend to be fewer, leaving space for rapid movement of cash to facilitate political parties. Although the Election Commission has created a cell for monitoring movement of cash during polls, and a few seizures are also made, but such seizures tend to be miniscule in percentage to the actual eye-popping numbers. Secondly, it may also appear to be a well-deliberated decision not to upset the India Inc. when the economy has been slowing down. If it is so, then it is a good news for the corporate world for at least one more year or a little more than one-and-half-year till the polls take place or the polls are preponed.

However, when TIOL spoke to some of the senior officers in the Investigation wing in a few cities, a revelation was made that their number of raids has tumbled down because of acute shortage of supporting hands. Besides, what aggravated their problem was the frequent strike-call by a section of the departmental officers which has not got promotion for many years. Overall, it is true that there has been a dearth of 'assisting hands' in the Department. The paucity has been more painful at the levels of SRTAs, TAs and Steno Grades where the shortage ranges between 26% to 87%. Even at the senior level, the Cadre Review has been overdue, and one

Additional CIT has been manning many charges, particularly in the States. It is learnt that their Cadre Review file has recently been reviewed by Mr. P. Chidambaram, and after a few changes it is on way to the DoP&T. But all such steps or initiatives certainly promise no solution in the short-run.

Another reason which was cited by the officers is the lack of 'original regular source'. Unlike the Customs where the DRI grooms its own network of informers, the Investigation Directorate of CBDT does not have the culture of 'grooming' informers and quickly rewarding them in case of successes. Secondly, since there is no special fund earmarked for this work, it becomes a handicap for the Income Tax to undertake many success-promising cases. In this background, they have to either depend on sundry informers providing some 'intelligence' or wait for a lead from other arms of the Department and then work on them.

Another handicap has been the over-reporting of some of the promising cases. For instance, the CBDT might have done something good in *Robert Wadhera* case but over-reporting by the media and the involvement of political parties leading to registration of FIR, which led to half-baked searches, killed the case from income tax perspective. Such an inference may be drawn from the timely lead it got in Reebok case. Although the media did make it a front page news for many weeks but the Income Tax Department got early lead and is learnt to have done a good job - let's wait for the final results.

Let's now go back to the table which speaks more about the ground reality in 2012. It is common knowledge that Mumbai accounts for as much 42% of the total direct tax collections. It means this is the city where the maximum number of income tax raids should take place, and it also happened in the past three years - 334 in 2009-10; 736 in 2010-11 and 758 in 2011-12. But the tally has strangely crashed to as ugly a number as 28 till September this year. Why? What has gone wrong? It is learnt that the political masters and the CBDT had their own designs about selecting certain candidates for the top post in Mumbai. Strangely, the

post of DG (Investigation) remained vacant for many months, and the regular charge became additional. A good number of officers doing good job were moved out. Besides the manpower aspect, there has to be more to it than meets the eye! How come a number be allowed to nosedive from 758 to 28 in six months? There appears to be a deeper 'reason' for this. But let's leave this to be probed either by a Member of the Parliament or an RTI activist.

If a politics-driven eyeball looks at the table, there might be some more revealing inferences. For instance, the highest number of search & seizure operations in 2012-13 has taken place so far in Gujarat. And Gujarat is a BJP-ruled state. Given the facts that the State is going to polls, and many more raids have been taking place in the past two months, it might end up accounting for more raids than any city or state in the country. Similarly, as many as 122 raids have taken place in the Bhopal region which handles search & seizure in Madhya Pradesh and

Chhatisgarh - both are BJP-ruled States. Although I do not believe that there can be any operation designed along party lines but Nitish Kumar-ruled Bihar may look lucky with only 24 operations - down by 165 last year.

Interestingly, the CBDT in reply to a CAG query had stated in January 2006 that the income tax raids are not for collecting revenue but to act as a deterrence against concealment of income. Such a reply was given when the CAG had referred to the rising costs of search and seizure operations *vis a vis* declining receipts attributable to such raids. It had stated that the income tax raids foster voluntary compliance. If the Board was really serious about the content of its letter, what has gone wrong now? There is no more requirement of preventive action or deterrence? Has the voluntary compliance really reached a stage where the investigation wings' actions can be scaled down? Is it really a well thought out plan not to give more hands to the Investigation so that lesser operations are

conducted?

Indeed, there can be many more pertinent and uncosy questions for the CBDT, which has acquired more power for criminal investigation last year. Readers may recall that the Directorate of Intelligence was empowered with the authority for criminal investigation and many more functionalities were added to keep an eye on cross-border transactions, money-laundering and proceeds of corruption. In 2010-11 this Directorate handled as many as 86 cases, and the number went up to 128 last year. But in the current year it has tumbled down to mere EIGHT so far. Does it mean that the black money or slush money is no longer travelling across our border? Has the intelligence initially imported from France and Germany really dried up? Or, this Directorate has hit against a wall in many of the cases investigated by it? Whatever could be the reasons, the ultimate truth is that the most potent weapon of the CBDT has only gathered multiple layers of 'rust' in this fiscal, and even officers, a few victimised by political conspirators, are not too keen to risk their peaceful career! And it is shockingly happening at a time when the Revenue authorities in many developed economies have been chasing tax evaders and slapping them with criminal charges. In our case, it is rarely criminal but the current state of negligence to the investigative arm of the CBDT may be perceived by the common man as no less 'criminal'!

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LEGALISING BETTING AND GAMING: LET IT BE A PART OF NATIONAL SECURITY PARADIGM[20]

The curtain over the IPL tournament has come down but there seems to be no blanket to douse the fire ignited by the spot and match fixing scandals. The scandalous 'inferno' has been so 'sporting' that it has dragged under its arms not only the bookies, the bettors, the underworld shadowy kingpins, the umpires, the

20. Published in www.taxindiaonline.com, TIOL–COB(WEB)–346, 30 May, 2013.

sports managers and the cricket players but also charming CEOs / owners, known for their suaveness-tinged mannerism. Even as the pressure mounts over the BCCI Chief to step down on the charge of alleged involvement of his son-in-law, most of us have forgotten that the morality is a case of lost 'baggage' for the 'travellers' living off the public life in today's modern India! Going by the recent episodes of scandals, one may say that the sports lovers across the country are in a state of shock but the ground reality has always been more shocking - most keen watchers of sports say that the corruption in our sports has always been reflective of the cancer eating away the vitals of our political system. With more and more politicians and corporate profiteers taking over the sports bodies, the problem simply got aggravated in recent years.

In response to the match-fixing scandals, the Union Government has lost no time in rushing to the law-drafting table to come out with an independent legislation. As reported, the Attorney General opined that the solution does not lie in amending the IPC, and a separate law may be more desirable. Such an opinion further spurred the Ministry of Law to wrap up the First Draft of the new legislation prescribing three-year punishment for spot and match-fixing. More details of this Draft will be known in the coming days but such a response appears to be geared more towards treating the symptoms rather than the disease itself.

So, what is the disease? The moorings of this disease are rooted in the history of preventive legislation. Since the Britishers had no allegiance towards the mythical tale of *Yudhisthira* losing his kingdom and his wife on a few rolls of dice, their major concern was certainly not the loss of a source of entertainment through betting and gambling in public houses but the law and order. Thus was enacted the Public

Gambling Act, 1867 - barely seven years after the IPC was codified in 1860, and the Indian High Court Act was enacted in 1861. The British satraps were more worried about a robust law and order and a prosperous regime for themselves. The wheels of history continued to roll even after the Independence but no whisper of legalising betting and gambling was heard notwithstanding the palpable changes taking place in the socio-economic conditions in the country. Many Governments occupied the seat of power at *Raisina Hills* and also the capitals of States but none ever thought of legalising betting and gambling. Although officially, their major concern was that such acts are addictive and may destroy many families but the reality seems to be that they had no study to indicate how much of ill-gotten money was involved in this trade, and how much of sin tax they might have been able to collect. Had addiction been one of the key planks of their concern, no State Government should have licensed sale of liquor through government outlets. Since liquor is a necessary evil, which co-exists in a civilised society, it was permitted to be vended through private and government shops. But, when it came to legalising betting and gambling, it was construed as sacrilegious. Thus continued to grow in volume

and extra-territorial influence the illegal trade in betting, spot and match fixing by the shadowy underworld operating with remote control through a large network of agents and bookies. So, what is the solution?

To find the solution, there cannot be two opinions about legalising betting, to begin with. A simple glance at some of the rudimentary studies done by various private bodies indicate a robust economics to collect the sin tax if betting is truly seen as a sin! Given the fact that betting and gambling is a subject of State List as per the Doctrine of Separation of Power enunciated by our Constitution, some of the States have legislated to regulate betting in a limited domain of horse-racing. For instance, only two days back, the Punjab

Government Cabinet approved the Draft Bill for betting activity in horse racing. It also gave its nod for online lottery system. Such legalised trade is believed to be worth Rs 100,000 Crore in the country. If the betting in sports like cricket is legalised, the size of this market is projected to be in the range of Rs. 3.5 lakh crore. If that is so, even if one-third of the total transactions is taken as profit, the Central Government alone would be garnering income tax of about Rs. 25000 Crore to Rs. 30000 Crore. Besides, the State Governments would be collecting the sin tax, depending on the tax rate. For instance, the States of Goa and Sikkim - the only two States to officially allow betting and gambling activities - levy 30% tax rate.

But legalising betting is certainly not as simple as State Governments coming out with their own legislations. The invasion of internet technology has changed the rule of the game. The turf has extended itself beyond the physical boundaries of Republic of India. Internet has been a boon particularly for gaming and betting activities, which ride the twin horses of information and money (laundering) to grow and spread its tentacles. This is what apparently attracted many underworld kingpins to bet their fortunes on the e-commerce of betting. Through remote control (communication), they have been able to entice Indian citizens to bet online notwithstanding certain restrictive provisions in the Information Technology Act as inserted in 2011. Internet poses serious challenge to any regulatory mechanism. Many developed economies have surrendered part of their sovereignty by succumbing to the power of internet. And online betting and gaming has become so competitive with many smaller nations like Malta, Gibraltar and Isle of Man treating gambling as an 'export of services' to earn revenue. Such cut-throat competition fuelled by smaller nations have forced large countries like the UK, France and Australia to reduce their sin tax rates to as low as 5% - a profit-based tax system so that 'trade operators' do not migrate to island nations.

In this background, rather than hurrying up a simple legislation to fix the criminal activity of match-fixing in sports,

the Union Government and all the States are required to think of a futuristic and comprehensive legislative solution

to regulate this rapidly growing trade. So, the first and most cumbersome problem, which may come to the surface, is the Constitutional Limitation. Betting and gambling is a part of Entry 34 of the State List. Does it mean that the Centre cannot do much in this case? Some legal experts have suggested that the Union Government can legislate on betting in sports vide Entry 42 of the Union List i.e. inter-state trade and commerce. Though such an idea may work to an extent but it would soon prove to be a legislative patchwork rather than a long-term solution. Since the betting and gambling is no longer confined to inter-state trade in today's broadcasting and satellite-dominated business space, any constitutional patchwork would not bear the desired fruits.

I would like to recommend that the Centre and the federating States should first go for a Constitutional Amendment Bill to shift betting and gambling from the State List to the List III (Concurrent List) like the proposed GST. After the Constitution is amended, the States should agree with the Centre for setting up a Betting & Gambling Regulator, which should be vested with the powers to licence operators by collecting hefty fees like the Spectrum Auction; and also the authority to levy profit-based *ad valorem* sin tax. The Regulator should licence certain number of gambling houses in each State, depending on various parameters, and should have its own personnel to conduct audit, assessment, and collection of tax. Such collection should fund its regulatory activities and the revenue collected should go to a common pool from where the same can be distributed among the States like the CST. The Regulator should also notify in advance the sporting events, which would be open for betting like Olympics. Some of the obnoxious newsy events like hanging of a terrorist *(*Afzal Guru episode) should be banned by the Regulator. Similarly, the

result of general elections is another mega event, which attract bettors in hordes. Since the polls are the foundation stone of our democratic system, it cannot be allowed to be treated at par with any sporting event for betting. However, some of the traditional or geographically local events like cockfights, which also involve betting in crores, can be notified as organised events and tax can be collected.

There are indeed several benefits of legalising betting in sports and also gaming online and offline both. But the biggest beneficiary would be India's National Security Paradigm. Given the fact that too many shady and shadowy operators are involved in this trade today, they are also suspected to be funding various terror outfits in many Republics. So, legalising it would be the first blow to such agents of terror. Secondly, their staple diet, the money laundered through this trade, can be effectively curbed with the help of technology and expertise acquired by the agencies like FIU. Thirdly, white-clothed corporate and other operators who have been making mountains of unaccounted money by fixing matches, can be brought under the regime of laws. Fourthly, such a Regulator can prescribe guidelines for sanitising sports players weeks before a tournament and for the entire period of tournament unlike today's late night champagne-induced

interactive sessions with Bollywood and Kollywood damsels-in-distress where they often compromise their integrity and agree to trade off for match-fixing. Huge revenue collection will be a bonus for the revenue-starved Government, and cleansing of sports would be an additional bout of bonus. Let's hope the Union Government sets up a Committee of jurists to provide a comprehensive solution to this issue before betting is legalised along with restricted gaming.

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THE BLACK MONEY CARAVAN CONTINUES ...[21]

Even at the height of electioneering 'generating' colourful *Oneliners* for the broadcasters the Supreme Court of India continues to be a giant news-maker. The issue of black money continues to be a tormentor for the outgoing UPA Government. The problem is more serious with the Solicitor General who has to seek directions from the 'Government-in-exit mode'! Ideally, the Apex Court or the public-spirited citizens should have themselves sought postponement of the hearing till the time the next government puts itself in the hot seat. Since the exiting Government will not be around to be held accountable, the situation demands that the critical decisions with respect to various facets of the black money issue may be allowed to be taken by the new Government. Anyway, as per the direction given by the Bench last week the Solicitor General on Tuesday submitted a sealed envelope containing names of 26 account holders of the LGT Bank to the court. The Solicitor General has left it to the Bench to decide whether to make the names public. And, with the hearing scheduled today, two significant announcements that may originate from this Bench are 1) the Nation will get to know all the 26 account holders, accused of stealing national wealth and keeping them secreted abroad in a tax haven, and 2) the selection of one of the former Supreme Court Judges who might be requested to head the Special Investigation Team (SIT) ordered by the Apex Court to probe into all such instances where the country has lost wealth to obscure tax havens. The SIT has been mandated by the Apex Court to supervise and monitor investigations being conducted by various agencies to bring back the undeclared assets parked overseas.

Even as the Supreme Court and the entire nation continues to focus on knowing the names of the foreign bank account holders, and our Finance Minister continues to struggle with the complex and nuanced REPY to his LETTER written to his Swiss counterpart who basically means nothing in terms of any tangible and meaningful information sharing with India, several European economies and the USA have made billions out of the information stolen from these mascots of tax havens. Some of them are UBS Bank, HSBC Bank, Credit

21. Published in www.taxindiaonline.com, TIOL–COB(WEB)–394, 1 May, 2014.

Suisse and LGT Bank. For instance, it was Germany which had bought the stolen LGT data from one of its computer cell staffers and then shared names of a good number of account holders with as many as a dozen economies. Although Germany paid for this information but keeping in mind its international obligations, it provided the information without costs to all its bilateral partners of DTAAs. And as per some German media reports, thanks to sustained campaign and pressure by the Federal Crime Bureau, over 25000 tax dodgers have surrendered to the authorities since 2010 and the German Exchequer has collected more than USD 4.8 billion in tax revenue. That is another issue that a good number of Left and Right politicians have been raising ethical issues and have also been making intermittent appeals to scrap the AMNESTY SCHEME.

It is public knowledge that from the same data which was also shared with France, the UK, Italy, Spain, Finland, Australia, Canada and the USA, every exchequer in these financial crisis hit economies gained and became richer except India. As per one report quoting LGT Bank data, 20 Finns had evaded huge tax in Finland and about 17 paid additional taxes to the tune of 10 million euros. It is learnt that Germany shared as many as 4500 names of account holders with many countries and all of them recovered taxes in billions from them.

Back to the home turf. As per various statements of the Finance Minister and also the content of the *White Paper on Black Money*[22] released by the UPA-II Government in May 2012, the CBDT has completed assessments / reassessments on information received from Germany and prosecution was launched in 17 cases. As soon as prosecution was initiated, these names became public without violating the spirit of Article 26 of the tax treaty. But what matters more is - how much tax has been collected from them? There is no concrete

data about it. However, a senior official said that the Revenue has slapped a penalty to the tune of Rs. 25 Crore on 18 account holders. In terms of hardcore money, the Exchequer has not gained anything except spending so far!!

Although India cannot be the UK and the USA, which have twisted the arms of the Swiss and the Liechtenstein Governments and got the details of their own citizens having accounts in their banks and recovered good amount of tax but the UPA Government should have tried to develop a political consensus on the UK-like Revenue Sharing Agreement with these tax havens. What is this model? The UK and the Swiss Governments entered into an administrative arrangement to share taxes on account of British citizens hiding money in Swiss banks. Such an agreement signed in 2011 has come into force late last year. And as per this agreement, the Swiss Government collects tax from the British taxpayers for the UK Treasury and in return, they are not forced to disclose their identities. In terms of retro tax charge, these account holders of Swiss Banks either pay one-off lump sum amount at the rate between 19 to 34% of the value of assets or disclose

22. http://www.taxindiainternational.com/pdfdocs/white_paper_black_money.pdf.

one's account and pay taxes as per the law. The tax charge on future income is to be subjected to a TDS rate between 27% to 48%.

Given the fact that even though India has got concrete information from France about some Indian account holders in Swiss banks and the same information has been shared with the Swiss counterpart but as expected, without arm-twisting, Swiss Government does not believe in sharing information. India has been making requests for exchanging information and even the Union Finance Minister has been writing to his counterpart but the Swiss are hardcore protectors of their secret bank account business and they have been shirking their

responsibilities by writing bland and meaningless letters to India. This is where the Apex Court or the Petitioners of the PIL should be coming out with some concrete suggestions. Aggressive fiscal diplomacy is the need of the hour, and one may expect such diplomacy from the next government provided there is a change in the guard.

Let's now move to the second piece of news coming from the Apex Court. This article will not be complete if this news is overlooked. As soon as Justice R.M. Lodha took over as the new CJI, he has called for an embargo on the prevailing ADJOURNMENT CULTURE which has led to pendency of as many as 66000 cases in the Apex Court. Blowing the lid over the bluff of seeking adjournment on frivolous grounds the CJI has promised to create a new post of Registrar (Adjournment) who will strictly scrutinise all prayers for adjournments. In days to come, only in highly genuine cases, the Supreme Court may grant adjournment. Some of the reasons can be sickness and bereavement. In other words, strict regulation of adjournment will certainly help the Supreme Court reduce its pendency but it would be desirable if it directs all the High Courts to follow the same practice.

What makes things worse in the High Courts can be measured from a recent case reported by TIOL, *CIT v. Pamela Ashish Mohile*.[23] In this block assessment case, the assessee raised the issue that no warrant of authorisation was issued against her. To enable the Revenue to produce the warrant before the Bench as many as EIGHT Adjournments were given but the Revenue kept on seeking more adjournments on the ground that the Department had undergone cadre-restructuring and, therefore, the documents were missing and more time was required to locate it.

Granting adjournment numbering two or three can be fair but failing to produce the necessary documents even after EIGHT adjournments amounts to gross injustice to the assessee. Such a culture needs to be curbed more strictly at the High Court-level and then such a culture must trickle down to the lower judiciary which is terribly overburdened with more

than three crore cases. If

23. 2014-TIOL-596-HC-MUM-IT.

rendering justice is to be a meaningful activity in the country, a lot of such bad practices have to be guillotined. Let's hope all these changes are triggered with a change in the mindset of the new leadership in every sphere of public life!!

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BLACK MONEY - INCOME TAX WEAPON OF SEARCH AND SEIZURE BECOMING STINGLESS[24]

I intend to discuss the most powerful and intrusive tool of Search & Seizure that the Income Tax Department possesses. In fact, in general public perception, the Income Tax Department is better known for its 'raids' on corporate houses or politicians, falling out of the 'good books' of the Government. Even if we leave aside the controversial 'use' of such powers by the government of the day, the purposive object of Search, Seizure and Surveys is to 'google' undisclosed income or assets and gather evidence which is otherwise not collectible by using other means. So, in other words, whether it is a Survey or a Search & Seizure, it is merely a tool to detect undeclared income or black money and is certainly not an end in itself. Such invasive powers contrary to the doctrine of privacy have been vested in the Department (and also upheld by various courts), is to achieve the larger goal of being an effective deterrent against tax evasion. In simple words, the power to search & seize is theoretically expected to act like a hanging sword which would in turn ensure voluntary compliance with the tax laws. So, it is very clear that it is not a direct tool for revenue augmentation.

With this background, a soul-searching attempt was

recently made at the Annual Conference of the CCITs & DGITs to study the effectiveness of the tool of Survey, Search & Seizure and also to find out how judiciously such a tool has so far been used by the Investigation Wing of the Department. As per the records, the last fiscal of 2013-14 witnessed 5300 Surveys**,** highest in the past four fiscals, that detected unreported income of as colossal a figure as Rs. 90390 Crore from a mere Rs 5894 Crore detected in 2010-11. Such a figure may be attributed to one particular Survey in Delhi which alone accounted for as much as Rs 71200 Crore. For search & seizure, the peak was seen in 2011-12 when as many 620 corporate groups were raided and more than Rs. 15000 Crore was surrendered under Section 132(4). During the last fiscal, about 570 Groups were searched and Rs. 10800 Crore of undisclosed income was detected.

In this backdrop let's take an eagle-like look at some of the findings of the introspective sessions of the revenue top brass:

- A large number of searches are conducted in those cases where a search had earlier taken place.

24. Published in www.taxindiaonline.com, TIOL–COB(WEB)–407, 31 July, 2014.

Author: This is an absolutely correct finding which goes to prove the growing ineffectiveness of the tool of Search & Seizure. When the objective is to be efficient deterrence to tax evasion, the glaring fact is that the earlier search operations had not deterred even the searched persons and they continued to entertain themselves by indulging in tax evasion. Therefore its impact on other taxpayers can be easily guesstimated. In too many cases, it is reliably learnt, the Department was forced to conduct raids at higher frequency. If that is the case, it certainly amounts to bad news for the fiscal policy makers who are pitted against hardened tax evaders entertaining no fear at all against tax evasion charges. But the larger question is - Do such statistics indicate that the Department has been conducting

only routine raids to generate dumb statistics? Or, there are too many flaws in the investigation and filing of appraisal reports post-search?

Let's move to other findings to find solutions to such questions.

- The final realisation of taxes in search cases did not constitute substantial
  portion of the overall tax mop-up, and therefore, the emphasis on voluntary
  admission of undisclosed income was misplaced.

Author: This is indeed yet another legitimate observation coming out of the process of *'manthan'* from inside! Although the CBDT does not maintain a separate head to keep track of revenue realised under this HEAD but knowledgeable sources indicate that it may not be even ONE PER CENT of the total revenue collected. If that is so, all the tall claims made at the time of carrying out search and seizure operations and the consequential surrender of income are at best hollow. There may be thousands of raids and surrender of undisclosed income in thousands of crores but only a paltry sum finally gets translated into tangible addition to the Consolidated Fund of India. This also reveals the malady of excessive stress on admission of undisclosed income during searches. A series of flaws can be pointed out in the Investigation of evidence and filing of unrealistic appraisal reports. Such a malady also tells us the tale of retraction of undisclosed income surrendered at the time of search in a huge number of cases.

- A large number of high-pitched assessments are done towards the end of
  time barring period without undertaking proper probe and without
  marshalling the evidence adequately.

Author: This happens to be yet another honest admission of the disease ailing the system. In a number of cases, particularly transfer pricing disputes, when the time barring inches closer, a state of panic prevails in the field formations and in most cases, the officers' end up making high-pitched assessments. And when

such demands are appealed against, they fall face down as they suffer acute dearth of 'legs' of evidence and materials on record. In case of petitions to higher judiciary, the High Courts do not spare them from serious indictment and there are also instances of costs being imposed (See a recent decision of Bombay High Court in

CIT v. Larsen & Toubro. Earlier the courts used to ignore the Board and the higher revenue officials but it can quite often be seen that some observations are made about them. For instance, in this latest decision, the High Court observed:

"Why higher officials do not have the courage to take bold decisions?"

- Large number of assessments made under Sections 158BD & 153C of the Income Tax Act, 1961 were quashed for failure to record reasons.

Author: Such a finding evidently indicates the sorry state of affairs in the Department where all the efforts made by a part of the Department are set off for the failure like not paying attention to record reasons. When it comes to the levy of penalty, the quality of work is often found to be woefully stinking and poor. In many cases when cases are transferred to Central Charge, such a decision has been quashed for either not giving an opportunity of being heard or not complying with the dictum of passing speaking orders.

There are many more reasons pointing towards the prevailing malady which calls for an immediate remedy in terms of a new approach. The focus must shift from targeting disclosure to producing deterrence value. Extra efforts and monitoring are required in penalty cases, followed by launching of prosecution. To suggest a roadmap, the CBDT has set up two Committees headed by DGITs but what is badly required is what the Bombay High Court has rightly suggested - *Top Revenue officers need to muster the required courage for bold*

decisions and timely action in case of dereliction of duty. This can be seen as half of the solution and the other half can be the recommendations from such committees. Let's hope the CBDT pans its attention to the eroding value of Search & Seizure tool which is globally seen as the most effective tool to sustain the fight against tax cheats.

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INVESTIGATION INTO BLACK MONEY IN FOREIGN BANK ACCOUNTS: IS THERE ANY ROOM FOR HATCHET JOB?[26]

Tax Evasion and Tax Avoidance are twin global issues confronting not only the global forums like OECD/G-20, United Nations and others but also individual countries. The problems are a little more serious for the developing and emerging economies as they need to generate more tax revenue to fuel growth in their economies and meet the social aspirations of their people. In a nutshell, there are two facets of the continuing war against tax evasion - one at the international level and the other at domestic level by each economy starved of resources. Before we come to the battle being fought by different institutions within India, here comes the news from Berlin about a major milestone attained by the Global Forum on Transparency and Exchange of Information for Tax Purposes. As many

2014-TIOL-1226-HC-MUM-IT.
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as 51 tax jurisdictions yesterday signed a Multilateral Competent Authority Agreement which will put into action the much-awaited Automatic Exchange of Information highway by September 2017 and others will follow suit by 2018. Although such an agreement may not help an information recipient country in handling past cases but it will certainly make the

world a smaller place for tax cheats. What further adds to the significance of this milestone is the agreement to expand the scope of information which will also include details of beneficial ownership of all legal entities. Information of this genre would empower tax authorities to fight their battle against multilayered entities devised to conceal the identity of actual beneficiaries of tax avoidance.

Let's now move to the domestic turf. In the past few days, the three places -the North Block, the Jhandewalan office of the Income Tax (Investigation) and the premises of the Supreme Court of India, have registered one of the highest footfalls. If we analyse the genesis of this mega event, one may go back to the pre-Diwali prayer of the Union of India whereby clarifications were sought from the Apex Court so that the Government is not compelled to share information obtained under the provisions of tax treaties. *Prima facie* there was *no difference between the stands taken by the UPA Government and the BJP Government* which had won elections by promising action in black money case as one of its major electoral planks. Given the fact that respecting confidentiality of information obtained under tax treaties cannot be presumed to be an unknown piece of provision for the Apex Court, making such a prayer, not different from the UPA-II, was no less than a 'trap' for the Finance Minister. What qualifies it as an embarrassing trap for the Modi *Sarkar* is the tall claim of action promised to the nation during the polls. Knowing the sensitivity of the issue, particularly for the Finance Minister, even if there are certain statutory impediments in disclosing the names obtained under the India-France Double Taxation Avoidance Agreement (DTAA), such a prayer was avoidable as it triggered high-decibel political controversy putting the Government on the defensive. Such a plea could also have been made by the Attorney General as part of his argument during the hearing of the case and the Bench would have certainly heeded to it. But filing an affidavit and demonstrating its reluctance to share names evidently invited the ire of the Bench which minced no words when it asked the Attorney General - why such a

protective umbrella for tax evaders having foreign bank accounts? Such an observation against the motive of the Government was quickly lapped up by many political parties and other critics and the end result is that the Modi Government suffered a serious trust-deficit in the eyes of the common man.

In other words, the Government fell victim to either wrong advice or poor/inadequate application of judicial mind by insiders. Mr. Arun Jaitley, a sharp lawyer himself, probably *leaned too much on bureaucratic shoulders* to handle this case. In normal times there would have been nothing wrong about such an official posturing but in the present high-voltage political ambience, the Modi

Sarkar is required to walk cautiously on the issue of black money. Mr. Jaitley should have known in advance that the Apex Court has closely been following the investigation in each case, and that is why it constituted the SIT which was approved in the very first Cabinet meeting of the Modi Government. Since the UPA Government had shown tell-tale signs of dilly-dallying on the issue of sharing details of investigation and the names obtained from the German and French Revenue, this had created a major trust deficit between the judiciary and the Executive. Since the UPA Government was not keen to share the names it had further triggered major suspicion in the mind of PIL-filers as well as the Bench. And that is why there was too much emphasis on the disclosure of names.

Let's go back to 2009 and 2011 when India obtained information from the German Revenue and the French respectively. The Germans had shared information about 12 Trusts having bank accounts in LGT Bank in Liechtenstein. There were 26 names of individuals. Nothing incriminating was found against eight of them. The investigation was completed and assessment orders were passed in 18 cases and prosecution was launched against 17 as one account holder had

expired. In other words, some recovery of taxes was made in these cases.

What about the French data which has kicked up such a hot row today? As against the general perception that such a data was offered to India by the French on its own, the real story is that when the French Minister of Finance had visited India to canvass support for her candidature for the post of Managing Director of the IMF in 2011, India had proactively bargained for this data. A little more than 600 names with details of bank accounts and transactions done for a period of about 18 months or so was obtained by India. Investigations were taken up in right earnest. Soon, there was a change in guard in North Block. Even as the probe had begun to gather momentum, a parallel pressure game commenced to 'aid' a few having live political nexus. How can one assist a foreign bank account holder in a case which was under judicial probe? It was indeed a tough situation for the political masters of the UPA Government.

In this backdrop, let's examine what are the options available to ‘assist’ one caught in such a pincer-like situation. Going by the common sense, one would allow the limited investigation to be completed. Why limited? Given the fact that the Swiss authorities had clearly rejected India's request for information in all these cases on the ground that the information about the bank account holders was a stolen document and the Swiss law of bank secrecy did not allow any assistance if it was violated in some manner. Faced with such constraints, 'incomplete' investigation was wrapped up and the assessment process took into account only limited transaction details shared by the French. Whatever demand was raised, I am sure, that must have been paid. So, where is the room for favour? One obvious room here is that the Department may not invoke the PENALTY provisions. And if there is no penalty, there can be NO PROSECUTION under Sections 276C and

277 of the Income Tax Act. And once there is no prosecution being launched by the Department, there is apparently NO NEED to share such information either with OTHER investigating agencies which may look into the source of such money parked abroad or with the Court as such cases may be bundled together as those where tax has been paid and the files closed. Whether such an option of official favour was really done should be properly investigated and monitored by the SIT. Ideally, the SIT should ask the CBDT to furnish a separate list of all such cases where the assessment orders were passed and tax was paid but *no penalty or prosecution was launched*.

Another key area which invites the attention of the SIT monitoring these cases is that whether merely because one was an NRI, one should be allowed to go scot-free by simply collecting taxes. There can be situations where one may be an NRI but the *situs* of income can be a corporate entity in India. In fact one may have multiple sources of income also and the entity in India can be one of the sources. Secondly, one may be simply a representative of a corporate entity. Although the bank account can be in the name of the representative but the money parked there actually belongs to the corporate entity in India. This aspect needs to be examined carefully and if there are violations, the information should be shared with the SEBI after launching prosecution. Such information would be useful from the perspective of provisions of Prevention of Money Laundering Act.

The decision of the SIT to make Enforcement Directorate as the nodal investigating agency is indeed appreciable as under money laundering provisions India being a Member of the FATF, can obtain assistance from its counterparts in many economies. The criminal aspect of all such accounts must be investigated properly otherwise, it would be a case of only half-justice done to the public interests. Given the fact that there would be no SIT for future cases, all such present cases being investigated should serve as a good example for tax evaders in future. Let's hope India finally gets to see some part of its stolen wealth finally brought back and taxes paid on

them!

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FINANCE MINISTER NEEDS TO GUARD AGAINST COUNTERPRODUCTIVE ASPECTS OF BLACK MONEY MEASURES[27]

The much-awaited full-fledged first budget of Mr. Arun Jaitley finally turned out to be a bundle of pleasant and not-so-pleasant surprises. But as the saying goes - there cannot be a budget which may please all! Anyway, let me start with some of the pleasant proposals. The first one is predictably the abolition of Wealth Tax Act, 1957. For too long Mr. Jaitley's predecessors made this Act wait

27. Published in www.taxindiaonline.com, TIOL–COB(WEB)–438, 5 March, 2015.

for the guillotine. Given the high cost of wealth tax collections, the piddly quantum and the awfully poor compliance index the ground was fertile enough for its scrapping for several years. All it required was an extra ounce of political courage with a little innovation to collect more in lieu of wealth tax. And Mr. Jaitley has succeeded with big smile on his face. The two per cent surcharge would certainly fetch him many times the revenue the wealth tax has been contributing to the kitty. This would also do away with avoidable litigation and opportunities for palm-greasing not only by the officials but also facilitators.

To please the heart of foreign investors, FIIs and even domestic large corporate, Mr. Jaitley decided to defer GAAR by another two years. GAAR is a certainty for the Indian tax system and it can only be pushed a few years away but cannot be wished away. The problem of tax avoidance has assumed demonic proportions and it warrants serious measures in our statute. Although experts may not see a direct nexus between

tax avoidance and black money but given the dominant role of cash even in corporate transactions (in recent times the Income Tax Department has seized huge unaccounted cash from premises of several corporates and there are also examples of corporates handing over cash *potli* to politicians involved in various scams) all such measures are urgently required to be put in place. Kudos to the Finance Minister for having taken a few measures to curb generation of black money. Some of them are - 1) In case of property purchase, no Advance can now be given more than Rs. 20,000/- in cash; 2) PAN to be quoted in every transaction exceeding Rs. one lakh; and 3) guidelines are going to be there to incentivise heavy payments through credit and debit cards and disincentives for cash payments.

Yet another surprise was Mr. Jaitley's vision statement with respect to a roadmap for reduction in corporate tax rate. Keen to help Indian Inc. overcome the un-competitiveness with respect to major ASEAN economies, the Finance Minister wants to scale down the tax rate from 30% to 25% over a period of four years. Such a time frame-based reform is also going to be concomitant with the indirect taxes reform in the form of Goods & Services Tax (GST). What seems to have weighed heavily in his mind is that if the distortions in the indirect taxes are going to be taken over by a new tax system, the direct taxes should match the progressive steps if it is reduced to a level which prevails in most economies. Such a vision needs to be appreciated but what may have earned greater faith in his vision could have been a symbolic reduction of one per cent from this year itself. Given the proven theory of communication that even a small positive action evokes greater belief than mere tall statement, Mr. Jaitley should not have forfeited this golden opportunity to further cement the trust of the taxpayers in his four-year-vision. What may have prevented him from doing so is the projected give-away of about Rs. 20,000/- Crore for each percentage reduction in corporate tax rate. But, such an amount could have been garnered by simply rationalising a few tax exemptions schemes. But what Mr. Jaitley stated was that since stability

in tax policy has been accepted by his Government as one of the key pillars of the tax system he just wanted to give advance notice to the beneficiaries of exemption. If that was indeed the intent of Mr. Jaitley he should have proposed SUNSET clauses for at least a few exemption provisions. This would have unmistakably given advance notice to the beneficiaries and also earned faith of the foreign investors and the India Inc. that the Modi Government is truly serious about reducing the corporate tax rate. What he may also have done is that the MAT rate should have been pruned a little to earn the faith of the corporate taxpayers that his Government is indeed serious about reviving the domestic investment curve by leaving more resources in the hands of job creators and also the much-needed assurance that the MAT is not going to head towards the general tax rate applicable to profit-making business entities. Such a decision would also have proven his Government's commitment to revive the 'choked' growth engine. But what may have once again stopped him from doing it were perhaps his precarious revenue position and the yet-to-be substantially-reduced subsidy burden.

Another unpleasant surprise was not the increase in the service tax rate from 12% to 14% but the subterfuge resorted to in the name of *Swachch Bharat* campaign to take the rate to 16%. If the intention of the Government was to prepare the economy for the GST roll-out next year a more transparent and bold statement on the floor of the House in relation to four per cent hike in the service tax rate would have been welcome more by the economy. In any case it is common knowledge that the GST rate is likely to fall between 23% to 25% and, in such a scenario, the services are going to bear the major part of the GST brunt. Whether the Modi Government spends on *Swachch Bharat* campaign or any another drive the tax collected from the four per cent hike in the service tax, no taxpayer was going to question that. And nothing was stopping Mr. Jaitley from announcing a budgetary provision for *Swachch Bharat* drive rather than infusing yet another

distortion in the tax system which would entail creation of a specific Accounting Head to keep a track of the collections. Worse, such a move was not expected from Mr. Jaitley particularly after his announcement relating to doing away with the Education Cess thorn. I find it strange that our politicians believe that the taxpayers are a bunch of naive *homo sapiens* and it is often simpler to collect more in the name of different nomenclature of taxes rather than one simple tax rate! Since the compliance-encouraging thoughts are never kept in mind while deciding a tax rate as projected collection figures often blur the long-term vision, most Finance Ministers go by the words of their advisors that more taxes should be collected by making references to more number of noble causes. They also believe that such a stratagem tends to trigger the supposed 'cause commitment gland' in the mind of taxpayers and it becomes easy to implement such taxes.

Anyway, what tends to indicate the less-than-stronger belief of the Government with respect to GST roll-out next year is the conspicuous absence of corresponding increase in the service tax exemption threshold. Given the oft-repeated proposal that the Centre has favoured an exemption limit of Rs. 25 lakh as against Rs. 10 lakh supported by the States for the GST regime, it would have been un-debatable policy move on part of Mr. Jaitley to hike the exemption limit to if not Rs. 25 lakh, at least Rs. 20 lakh, to demonstrate the intent of the Union Government about the proposed Rs 25 lakh limit. Besides sending a strong signal to the States that they would have to agree to a much higher limit than Rs 10 lakh, such an enhancement would have shown greater commitment of the Government towards lending a helping hand to start-ups and the entrepreneurial community in the economy. Quite often the Prime Minister and other Cabinet Ministers are reported to be supporting the entrepreneurial culture in the country which is so essential for expansion of economic activities in the

economy and not to mention the job creation by them. But nothing of that sort was done! But why? Let Mr. Jaitley make a statement about it.

This brings us to my favourite topic of Black Money. I am happy to give full marks to Mr. Jaitley who announced that the first and foremost pillar of his tax proposals is to effectively deal with the scourge of black money. I fully agree with him when he said that the problems of poverty and inequality cannot be overcome unless generation of black money is dealt with effectively. Black money is worldwide seen as the biggest enemy of poverty. It represents stolen and diverted resources of an economy which has poverty elimination as one of its key goals. The measures highlighted by him were much-needed and would certainly help our taxmen in their disadvantaged battle against money launderers, tax evaders and black money carriers. Before I discuss about each of the measures proposed I would like to disagree with the OFFICIAL view that all these measures would bring back every rupee of black money stashed abroad! Given the fact that the proposed new legislative will be prospective and the fact that the offence is going to be treated as criminal in nature, it cannot be helpful in dealing with the past cases. At best, they can have deterrence value for future generation of black money and attempts to take them out of the country. But what appears to me is that whenever a matrix of penal provisions are designed disproportionately in relation to the offence, such punishment module becomes counter-productive. Given the fact that there are many vices every civilization learns to live with, every economy survives and thrives with the presence of a parallel economy. Since every penny of black money is also generated out of legitimate as well illegitimate economic activity, a propensity not to pay tax or to pay less tax meets the basic canons of human nature. To deal with something which is universal and a part of basic instincts, putting a matrix of very harsh penal provisions such as 300% penalty, five to 10 years imprisonment and

attachment of property (equivalent in value of the foreign assets in India) may tend to derail the very objective for which that is being put in place.

Coming up with a fresh *Benami* Transactions (Prohibition) Bill and a new legislation on black money is welcome but the Finance Minister being an exponent of law himself needs to give a rethink about the flip side of the twin legislations. What will happen if such draconian provisions are made and concomitant powers are vested in the same set of institutions which had perpetuated the British legacy of 'INSPECTOR RAJ' for 44 years. Whatever India has achieved today is not because of 'strangulating measures' but because of the trust and liberal policy framework. The problem of Indian black money parked in tax havens which we are trying to deal with today has its origin only in the strangulating regime in the past. Of course, a lot of Indian funds have been laundered abroad post-liberalisation as well but let's remember it was done only because of lax policy framework and also the political sanction to the same. It is not that no law enforcement agencies pointed it out in the past. There is enough evidence that many revenue intelligence agencies had established such a trend of black money being laundered through trade mispricing but our political class preferred to play possum over it for quite a long time. Now that we have a new class of politicians with a different vision and commitment and also the keenness to curb black money generation and bring back the lost treasure from outside India, we are talking about some new legislative tool. But such tools are always like a double-edged sword. Mr. Jaitley needs to be doubly careful about vesting strangulating powers in institutions which are not mature enough and have tendency to abuse them. Most of our investigating institutions have the history of not respecting human rights and other legal rights in their enthusiasm to achieve the goals set by such legislations. In other words, the new legislation is a welcome step but I would like to whisper a word of caution to Mr. Jaitley so that all these well-intentioned measures do not run into disrepute before they achieve their goals through goals!

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BLACK MONEY - DOES INDIA REALLY NEED A NEW LAW?[28]

Even before Finance Minister Arun Jaitley presented his second budget, Indians having foreign bank accounts and assets, including immovable property, knew that some penal measures were going to be unveiled. And, thanks to the pressure maintained by the Civil Society through the Judiciary, including the Special Investigation Team (SIT), Mr. Jaitley committed in the House that his Government was working on a separate black money legislation (Revenue Secretary says Bill would be tabled in 10 days). He also uttered a few key

28. Published in www.taxindiaonline.com, TIOL–COB(WEB)–439, 12 March, 2015.

features of the proposed legislation coupled with a new *Benami* Transaction (Prohibition) Bill. Although Mr. Jaitley initially earned a few words of appreciation for showing extraordinary political courage but legal pundits and other domain experts have increasingly begun to express apprehensions about some of the proposed legislative provisions. A few have even gone to the extent of observing that India does not need such a stand alone legislation when the Income Tax Act is good enough to deal with such cases with a few amendments in certain provisions. Such a suggestion has come forth to avoid the problem of dual jurisdiction over the same offence which may lead to ticklish administrative infirmities.

Direct Tax experts feel that most of the measures which the proposed Black Money Bill is expected to contain are already there in the Income Tax Act. Some of them are 300% penalty, prosecution and imprisonment up to seven years. The only two distinguishing features proposed are that the offences relating

to unreported foreign income or assets are going to be predicate offence under the Prevention of Money Laundering Act (PMLA) and the period of imprisonment being enhanced to 10 years. Only for these two new features the country certainly does not need one more legislation which would further complicate the detection and investigation turf. Once such an offence becomes predicate, who would be investigating the cases pending before the Income Tax Investigation? - Is it going to be the Enforcement Directorate (ED)? Whether all black money cases are going to be handed over to the ED? Or, both would be probing the same. If the answer is both - it would result in too many coordination issues and even ego clashes - a glaring trait of our bureaucracy. If ED alone is going to probe into, where are the human resources and the expertise? A new staffing policy with a bias in favour of specific expertise would be required.

Anyway, more than the staffing issue what is important is that the proposed measures are aimed at achieving what the Double Taxation Avoidance Agreements (DTAAs) could not do for India. Given the 'skin' of confidentiality associated with the exchange of information under the DTAAs and also the fact that a tax evasion case in India is not an offence in a foreign jurisdiction, the proposed bill is expected to create a *SANGAM* (confluence) of black money and laundered money. Once a foreign account holder or an asset owner is accused of laundering black money, it would become a predicate offence and all those jurisdictions which are today members of Financial Action Task Force (FATF) would be under legal obligation to cooperate with India in joining the investigation to trace the 'dirty' money. And this is what the SIT wanted to achieve so that countries like Switzerland which is also a Member of the FATF could be forced to share full information about the HSBC Bank Account Holders obtained from the French Revenue authorities.

Yet another dimension the proposed amendments in the

FEMA, PMLA and also Customs Act intend to deal with is the growing and organised scam of trade mispricing. It is a globally established fact that international trade is the safest and most convenient vehicle to launder dirty money besides the taxes evaded. So far as India is concerned, as per the Global Financial Integrity (GFI) latest report on illicit flows, India has lost as much as Rs 28 lakh crore (USD 439 billion) between 2003 to 2012 through the route of trade mispricing. In 2012 alone India lost a huge sum of Rs six lakh crore. At one stage *hawala* used to be popular to launder dirty as well as non-dirty money outside India. But, given the large volume of such funds, exports and imports overvaluation has substituted all such channels for bringing in and sending out tainted money. To deal with such a trade-based channel which is highly sensitive and critical from the perspective of India's current account deficit (CAD) what is needed is the further tightening of the valuation rules rather than an independent legislation dealing with the same. Anyway, the Finance Bill 2015 has proposed an amendment in Section 132 in relation to false declaration and false documents under the Customs Act, 1962. In other words, such falsification of Customs papers is now going to be a predicate offence.

Let's now move from the epicentre of penalty and recovery to generation of black money. Although Mr. Jaitley talked about a new *Benami* Transaction Bill but the expression 'generation' has too many outlets. And unless all these outlets are plugged or remedied, generation would continue to multiply and such multiplication would continue to throw challenges for detection and investigation; followed by penalty and recovery. Unless a set of comprehensive policy measures is taken to curb at least the key 'wells' of black money generation such as real estate; wholesale / retail trading and fake invoices, the 'reproductive' syndrome of black money cannot be checked effectively. Worse, it is feared that since the proposed GST is not going to subsume the stamp duty on land registration, its high Revenue Neutral Rate may end up producing more black money. Therefore, rather than focusing more on recovery and

penalty, the Government should be thinking hard to curb generation of black money and greater accounting practices in the economy.

So far as the proposed *Benami* Transaction Bill goes, it has a long and interesting history - not very encouraging, to talk about. Based on a report from the Law Commission in 1973, the Parliament had enacted the *Benami* Act, 1988 which came into force on May 19, 1988. But this Act was never implemented because the Rules, so essential to offer a pair of legs, were never framed. But why? The official reasons are procedural infirmities. It was found that the Act had no provisions for vesting the confiscated property with the Central Government nor had any provisions for an appellate mechanism against the administrative action initiated. In this background, the UPA-II had piloted a new Bill in 2011 which was referred to the Standing Committee but since the

political commitment was missing, the Bill was relegated to the backbench and the same died with the dissolution of the Lok Sabha. Now, the Modi Government is keen to revive the same but a lot of due care is required to be taken. It would rather be ideal to throw that out in public domain for a fresh debate in the changed economic variables in the economy and then go for the same.

Although one may see many lacunae in the measures proposed by Mr Jaitley but the intent of the Government is required to be appreciated. I believe that the proposed legislation may do good to the greater cause of the nation but it would not help in recovering even a part of the lost wealth unless a sort of Amnesty or what the Revenue Secretary, Mr. Shaktikanta Das' is often heard referring to as a 'short time window' is provided for coming out clean. This would be the shortest and surest way to partly bring back funds parked in tax havens. The focus in tax matters should not be too much on

penal provisions which are reminiscent of 1970 era and a major part of the Indian funds parked outside India owes its origin to such an era. Therefore, it would be wiser on part of Mr. Jaitley to think holistically and put equal amount of focus on generation, conversion of black money, detection and penalty. Let's hope Mr. Jaitley succeeds in his controversial but necessary endeavours.

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BLACK MONEY BILL - COMPLIANCE WINDOW - IS IT A GAMBLE?[29]

On Tuesday, the Apex Court of India in the case of *Shreya Singhal*[30] struck down the provisions of Section 66A of the Information Technology Act, 2000 being violative of Article 19(1)(a) of the Constitution of India. The Supreme Court found sthat such a section was in direct conflict with the basic spirit and fundamental rights of the Constitution. Interestingly, the expressions in this Section were copied from Section 10(2)(a) of the UK Post Office (Amendment) Act, 1935 which made it an offence to send any indecent message through telephone. While hailing posting of dissent or any other comments online or through electronic communication as part of the freedom of speech and expression the two-judge Bench observed that "the expressions used in 66A are completely open-ended and undefined ... Incidentally, none of the expressions used in Section 66A are defined. Even "criminal intimidation" is not defined and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act."

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Shreya Singhal v. Union of India. 2015-TIOL-27-SC–Misc.

While quashing Section 66A the Bench further pointed out that "... every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression "persistently" is completely imprecise suppose a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no demarcating line conveyed by any of these expressions and that is what renders the Section unconstitutionally vague."

The expression "vague" has a close relationship with our tax laws. Going by the *Qutub Minar*-size of tax litigation cases on both sides - direct as well as indirect, a safe presumption can be made that the spectrum of vagueness is equally wide and large. If we look at it from the other side of the prism, if a tax law is vague and the expressions used in the statute are nebulous and undefined, it creates an ocean of uncertainty, unpredictability and instability. It often results in excesses and violates the doctrine of natural justice. In other words, any hiatus left in the drafting of a law attracts the application of 'void for vagueness' doctrine and it amounts to unreasonableness as the actual intent of the legislature is lost in the construction or reconstruction of legal provisions.

A similar vagueness was found in the latest Five-Member Bench decision of the CESTAT in the *M/s Larsen & Toubro Ltd* case [31] where the Bench stood divided (3:2) and held that Works Contracts are liable to Service Tax prior to 01.06.2007 under Commercial or Industrial Construction Service, Construction of Complex Service, or Erection, Commissioning or Installation Service. Similar vagueness is found in abundance when it comes to reopening of assessments under Section 147 in the case of Income Tax Act. In this context the Bombay High Court in the case of *M/s Hindustan Lever Ltd*[32] observed that for reassessment to stand on its own feet, the AO must record reasons which should be clear and unambiguous and not suffer from any vagueness.

This brings us to the latest Bill on Black Money tabled in the Parliament last week. Although income tax experts are of the view that the objectives this Bill seeks to achieve could have been realised by simply amending the I-T Act and by incorporating a few new provisions but the NDA Government has chosen to come up with a new independent law perhaps under political pressure to rebut charges of inaction and stupor. Going by the fine prints of the Bill it is found that it is a self-contained complete code to deal with the issue of foreign income and assets undeclared by the resident Indians. To what extent this law will succeed in recovering the black money stashed away in tax havens is not known rather it is too early to predict that as many rules and norms are yet to be drafted by the

M/s Larsen & Toubro Ltd. v. CST, Delhi. 2015-TIOL-527-CESTAT-Del–LB.
M/s Hindustan Lever Ltd v. ACIT, 2015-TIOL-527-CESTAT-Del–LB.

implementing agency - the Central Board of Direct Taxes (CBDT). Anyway, while wishing the Government good luck I would like to caution Mr. Jaitley on a few points. And one of the points is against the doctrine of vagueness.

If one reads the content of Chapter VI of the Bill which deals with the compliance window provided to tax evaders before the provisions of this Bill come into force, there are too many unanswered questions. First, it is not clear from the language of the Bill whether once a declarant comes to the specified authorities under the Bill to declare one's income or assets whether no question would be asked about the source of the income or assets or the authorities are going to grill the declarants. And if one admits illegal source there is no guarantee that such a case is not going to be referred to the Enforcement Directorate for initiating action against the Prevention of Money Laundering Act (PMLA).

Let's go to the Bill and analyse the

cross-heading - *"Declaration not admissible in evidence against declarant.*

67. Notwithstanding anything contained in any other law for the time being in force, nothing contained in any declaration made under section 59 shall be admissible in evidence against the declarant for the purpose of any proceeding relating to imposition of penalty, other than the penalty leviable under section 61, or for the purposes of prosecution under the Income-tax Act, 1957 or the Wealth-tax Act or the Foreign Exchange Management Act, 1999 or the Companies Act, 2013 or the Customs Act, 1962. (27 of 1957. 42 of 1999. 18 of 2013. 52 of 1962.)"

Like the most successful Voluntary Disclosure Income Scheme (VDIS) of 1997 which had also made similar promises, this Bill also commits the Government that no content of the declaration made by a declarant would be used against the tax evader under certain laws like FEMA, Companies Act, Wealth Tax Act and the Customs Act. But what is missing here are - the Central Excise Act, the PMLA and also the sales tax (VAT). Readers may recall that after the VDIS Scheme was over, some of the State Sales Tax authorities had raised demand on the basis of additional sales turnover declared by some traders and firms. Some lessons must be learnt from the past. Given the fact that too many declarants of such a scheme are likely to be manufacturer, exporter or trading exporter, they would be declaring their source of tax evaded income as manufacturing or trading and if the Central Excise Act is not listed as one of the Acts granting exemption, the content of their declarations may be used against potential declarants.

Secondly, the Bill is a little unfair to potential declarants as it states that there would be no refund if one ends up paying more tax than what one is required to pay as per one's declaration. As per the provisions of Sections 60 and 61, if taxes are paid as per declaration under Section 59, no refund is to be paid if one makes

mistake in computation. Since the Government is banking on voluntary disclosure and granting limited benefits like only immunity from prosecution, and collecting tax with penalty, if there is an error in computing the tax liability, the canons of natural justice demands that such excess should be refunded.

Anyway, what is more relevant at this stage for the Government is to make this Compliance Scheme a big success so that the Government will have some tangible revenue to showcase before the Parliament, the judiciary and above all the *vox populi*. To cajole prospective declarants it is important for the CBDT to come out with FAQ and a detailed 'Information Guide' exactly along the line of VDIS Scheme. Readers may recall that when the VDIS Scheme had at one point of time appeared to be heading for failure, the then Revenue Secretary, Mr. N. K. Singh, had panicked and then Mr. P. Chidambaram who was the then Finance Minister had issued detailed Information Bulletin to guide the potential declarants. In fact, too many clarifications were also issued to attract the fence sitters to this scheme. This time such an experience may leverage the CBDT to foresee the questions and different tricky situation in advance and should come out with FAQ when the Scheme is finally notified. No need to mention that the Finance Minister should earmark a special advertising budget to reach out to every possible tax evaders who own assets abroad. Some of the clarifications which may help could be in relation to the coverage of beneficiaries of the foreign assets and also the status of Trusts registered abroad. It is commonly known that huge funds are parked in tax havens by forming Trusts (a convenient Tax Shelter) and they should be wooed to come and declare provided a clarification is issued in this regard. Let's hope the big gamble of the NDA Government succeeds and the Exchequer gets enriched.

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7

Black Money and Indian Realpolitik

Chapter-7 ***"Black Money and Indian Realpolitik"*** *scrutinizes the stand adopted by the Governments at the Centre with different political ideologies and tries to understand how much meaningful actions have been taken so far for recovery of nation's lost wealth. The first article* ***"India's lost wealth in tax havens: A case of urging Netas to bring back their own funds!"*** *throws up shocking statistics which leads to the only logical conclusion that failure of the Government to act is substantially attributable to the vested interests of the politicians and the bureaucrats. The article lists several pending issues which have been kept in abeyance over years despite the loss caused to the nation.*

*The next article "****Bringing India's lost wealth from tax havens: Can BJP rise up to magnitude of the Task?****" was set in April, 2009 during the peak of general election campaigning. BJP under the leadership of Mr. L.K. Advani had constituted a four member task force which came out with its interim recommendations. This article cuts through these recommendations trying to understand its viability when pitted against the legal complexities of DTAAs and the sluggish international diplomacy adopted by India. As opposed to the sweeping statements of the political parties, I have recommended a* ***two pronged strategy*** *i.e., comprehensive legislation and an active international diplomacy to put the screws on tax havens like Switzerland. This Chapter draws a clear distinction between the need of nation-wide uprising against black money and overzealous unpragmatic recommendations made by our reverend spiritual masters. The most interesting article of this Chapter is "****White Paper on Black Money: FM talks of many BILLS but misses out on 'Political Will'!****". This article analyses the modus operandi of parking funds in tax havens in the backdrop of White Paper on Black Money released by the UPA- II Government in 2012.*

*Chapter 7 towards the end in February, 2015 records yet another sensational event when a fresh list of HSBC bank account holders was unearthed by the International Consortium of Investigative Journalists (ICIJ). The article "****Black Money Recovery - Amnesty for Offshore Funds! Not a Bad Idea!!"*** *argues precisely how under the present circumstances amnesty scheme for the offshore funds i.e., giving a last exit route to the black money hoarders is the best possible opportunity India has to recover some of its lost funds.*

To sum up, this chapter conveys the obvious message that while lot of noise has been created, governments have changed, yet the political willingness is far from what is required and expected. The Government is not so naive to be

unaware of the actual challenges. However, it is the vested interests of those who are supposed to act and recover the lost wealth of the nation keeps them in a state of inertia. Unless, the Indian Realpolitik overcomes this conflict of interests, we are far away from making any progress in our combat against black money.

INDIA'S LOST WEALTH IN TAX HAVENS: A CASE OF URGING *NETAS* TO BRING BACK THEIR OWN FUNDS[1]

The *US Government* case against the leading global wealth manager from Switzerland - the UBS - has literally opened a pandora's box of issues against offshore fund management. A multi-pronged global campaign against all prominent tax havens, numbering about 35, have been launched. It is being piloted by the Barack Obama Administration. The USA's three good friends in Europe - the UK, Germany and France - have also joined the anti-tax haven bandwagon. They have consistently been orchestrating support in favour of their campaign, and that is how opaque tax havens have become an agenda item for G-20 Summit scheduled to be held at London on April 3. An anti-tax haven bill moved by a Senator in the US Congress has received wide-ranging support from various quarters, including the US President. The EU Members have begun to make their choice public either in favour of tax havens or against them.

Although a large topography of the developed world is abuzz with many activities against tax havens, for the first time in the fiscal history of global economy, but nothing has been heard from the developing and underdeveloped countries,

including India. There are studies which reveal that the poor and developing countries have lost more than USD 6 trillion since early 1970 to tax havens, but there is no common voice coming from any poor or developing country either in Asia or Africa or South America. Strange! Isn't it?

If Readers look at India, only a few occasional and feeble voices were heard from certain 'islands' recently. After the news about the UBS agreeing to share secret data with the USA's Internal Revenue Service and also willing to pay fine of about USD 800 million, the CPM has been the only political party which has appealed to the UPA Government to furnish the details of Indians who have illegally stashed away funds in Swiss bank accounts to evade taxes. But predictably, no reply has come.

1. Published in www.taxindiaonline.com, TIOL–COB(WEB)–126, 12 March, 2009.

The only time a few statements were heard when one of the Ministers of States answered a few questions raised during the concluding days of the Parliament. The Minister vehemently denied that Indians own huge number of accounts in Swiss banks. He also said that there is no reliable data which may allow a peep into the quantum of Indian wealth being stashed away to tax havens.

But such statements are not correct. True, one may not find precise data correct to the extent of two decimal points but there are reliable studies by noted economists and multilateral agencies which do talk about Indian wealth being routed to various tax havens through legal as well as illegal channels like *hawala*.

Let's first look at the recent country report published by the USA State Department. This report states that as

per RBI's figures, about USD 43 billion worth of remittances were sent through official channels during 2007-08. And it indicates that about 40% of such remittances are sent out of India annually through illegal routes like *hawala*. If private figures are believed, it is about 75% of USD 43 billion that is sent out annually. The private estimate may sound equally credible, given the rapid movement of capital out of India due to globalisation process. A large number of companies from the private sector, high-profile executives, film stars, cricketers, defence brokers and, of course, our own politicians are generous patrons of these tax havens.

Let's now move a bit towards the history of wealth India is believed to have lost to tax havens since 1947. According to a study done by the Swiss Banking Association in 2006, India tops the chart of countries which have contributed to the rising revenue of Swiss banks. It states that Indians hold wealth as much USD 1.456 trillion. And the poor second country - Russia - accounts for as low as USD 470 billion (See the Chart for ranking).

JEWELS OF SWISS BANKS	
INDIA	USD 1456 billion
RUSSIA	USD 470 billion
U.K.	USD 390 billion
UKRAINE	USD 100 billion
CHINA	USD 96 billion

In the list of top five, the USA figures nowhere. It is perhaps because American rich and famous favour tax havens in the Caribbean's, Panama and British islands. But the fact remains that the Swiss figures do not tell us the complete story. In the past one decade many more island countries with beautiful beaches and blue waters have hard-earned the status of full-fledged tax haven and also quasi-haven like Mauritius. These new tax havens like Cyprus, Cayman

Island and Luxembourg have become highly popular among rich Indians. The status of Mauritius is well known as it has become the most litigated tax treaty of India.

India has tax treaties with some of these tax havens but the legal framework agreed upon at the time of signing them do not favour Indian exchequer at all. Rather, experts believe that they were worded in such a fashion that the money taken out of India was well protected there, and no leeway was left for the Indian authorities to undertake any comprehensive investigation even in future. As a result, despite several attempts by North Block, India has not been able to amend the Indo-Mauritius Tax Treaty which is believed to be actively promoting the cause of tax havens in more ways than what may appear to a common man in India.

Presently, India is heading for polls. But neither scribes nor civil rights groups ever ask these mainstream political parties about the efforts they have ever made to bring back our wealth vaulted in foreign lands. The general awareness about the Indian wealth being stored away in tax havens and the same being instrumental in jacking up per capital income of foreign countries, is so low that our politicians tend to take common voters for a ride. The fact that India has not done anything concrete to bring back the lost treasure-trove goes to prove that our politicians and a part of our bureaucracy are perhaps the major beneficiaries of the 'lost wealth'. In simple terms, a major chunk of this USD 1.4 trillion belongs to our political and bureaucratic class! And that is why India keeps on forfeiting whatever opportunities have come its way either in the past or in the recent months. Let's take the case of Liechtenstein episode (Read all 3 articles of Chapter - 2 - Flirtations with Liechtenstein - A Tax Haven). This was an opportunity which had come from Germany when it had found many Indian names in the list of account holders keeping their money in this tax haven.

How was the investigation scuttled? By simply handing

over the same to Income Tax (Inv) wing. In simple words, the only colour which our Government wants to lend to all offshore funds is that of black money - not laundered money or drug money or money generated by corruption or defence deal kickbacks? Instead of Enforcement Directorate which has the mandate to take the probe outside India, the case is simply consigned to Income Tax dust-gathering files as this arm of the CBDT has no means to swim in international waters of cooperation, and an investigation into income tax offence in India cannot be treated as an international crime in foreign lands. If an Indian investigating agency has to seek support even from the Swiss Government or judiciary, it can happen only when there is adequate or *prima facie* evidence, indicating international nature of the offence. Banking secrecy may evaporate if authorities in these tax havens are convinced that their banks are being used to fund terrorist activities or serious crimes or money laundering which are major crimes under their laws as well.

Enforcement Directorate has been entrusted with the job of investigation into money-laundering and Foreign Exchange Management Act. But our Anti-Money Laundering Act is yet to graduate to the level where India could become a full-fledged Member of the International Financial Action Task Force. The US State Department recent Report has noted that India recently passed the Prevention of Money Laundering (Amendment) Bill but suggested that legislative amendments should be brought in to further strengthen the provisions and make it in conformity with the Financial Action Task Force, an inter-governmental body that looks at making policies to fight against money laundering and terror financing.

"Given the number of terrorist attacks in India and the fact that in India hawala is directly linked to terrorist financing, India should prioritise cooperation with

international initiatives that provide increased transparency in alternative remittance systems," observes the report in its country report on India related to money laundering. The report underlines that the Mumbai terrorist attacks had further increased concerns about terror financing in India.

In other words, the possible nexus of terror financing and tax havens is also becoming increasingly obvious. No doubt, Government of India is committed to stamp out terror outfits and their octopus-like spreading networks of agents but India is yet to show its commitment towards hammering at the root of finance of these terror outfits, and bring back India's lost wealth from these tax havens unlike the USA and the Europeans. No concerted efforts are indeed expected from our politicians as it is a Catch-22 situation for them - they are being urged to bring back their own money? Can one do it? Yes, one can but only when one goes through the process of 'political purification'!

But our political class is perhaps miles away from that 'purification' process. And this process is not an outlandish exercise but only a set of hard times like the USA has been going through, and Americans have finally chosen a man who has fired the first salvo at the root of economics of most international crimes. Let's all wish good luck to Mr. Obama whose global campaign may perhaps engulf India as well in the coming months when we will have a new Government in place and may join the global drive against tax havens - a blot on global financial market and the norms for transparency in international transactions.

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BRINGING INDIA'S LOST WEALTH FROM TAX HAVENS: CAN BJP RISE UP TO MAGNITUDE OF THE TASK?[2]

The electioneering in India is half-way through today, with the nation participating in the second phase of voting

since early this morning. Although the

2. Published in www.taxindiaonline.com, TIOL–COB(WEB)–132, 23 April, 2009.

BJP and its prime ministerial candidate L.K. Advani have been, to some extent, successful in raising the dust over the controversy of India's huge slush money parked in tax havens, particularly Switzerland, but one may not be sure to what extent such an issue may weigh in the mind of even urban or enlightened voters in this polls. No doubt, the monies parked in tax havens have a direct connection with the poverty alleviation and other developmental programmes in India but how many of us really believe so? How many Indians are indeed aware of the sinister fall-out of flight of capital out of India. Not many, and that is where the BJP's efforts to sensitise the common man is laudable.

While addressing the media persons last week Mr. Advani also mentioned that one of the short-term goals of his anti-tax haven campaign is that the G-7 Summit is scheduled for April 25, and the UPA Government should do something to salvage out of the lost opportunity at G-20 London Summit. And he is undoubtedly correct. Dr. Manmohan Singh could not believe the writing on the wall against the tax havens before boarding the jumbo for London, and that is how he frittered away an opportunity to articulate the sentiments of India against the illicit flight of capital to some of the tax havens where governments exist only to safeguard the banking secrecy regulations hurting poor developing countries and helping tax dodgers from developed countries as well. Dr. Singh was not heard airing his views against tax havens nor did he talk about the Indian black or laundered money vaulted in Swiss Banks.

Similar is likely to be the fate of India's concern again as India has not done any preparation or drew any diplomatic contours to communicate its concern to top leadership of G-7

countries. This is despite the latest report coming from the Global Financial Integrity forum which has stated that in terms of illicit flight of capital, India ranks fifth out of 160 developing nations. It has estimated that India has suffered huge illicit flight of capital between 2002-06. And it averages between USD 22.7 billion to a high of USD 27.3 billion. In other words, India has lost about USD 125 billion in the past five years as per the scientific study of data captured from various sources like World Bank and IMF. But the glaring truth, common for all developing nations, is that authentic data indicating any sort of magnitude of illicit flight of capital across the borders is a scarce commodity. That basically means that the magnitude of wealth going out of India in the past five years has to be more than the one estimated by the GFI.

Interestingly, the GFI Study also indicates that the total illicit financial flows from developing countries to tax havens is to the tune of USD one trillion annually. And this is largely defined as proceeds from both illicit activities like corruption, embezzlement, criminal activities and the proceeds of licit business like over-invoicing of imports and under-invoicing of exports. True, *hawala* is a major channel outside the formal financial conduits in Asia. It richly contributes to the process of overseas movement of capital.

Anyway, let's go straight to the 'Interim Recommendations' of the four-member Task Force set up by the BJP. Though this task force has made a few valuable suggestions but the inherent fallacy it suffered was that first, it did not have any member having revenue background who could make some subtle suggestions for a practical solution to the issue. Secondly, it has talked about everything except the legal mechanism required to bring such money back into the country. May be it would like to talk about such issues in the final report.

But a quick glance at the interim recommendations may not inspire much confidence in most of its readers as they appear to be very general and superficial. The content of the report does not appear to be the handiwork of four intelligent and experienced persons who stand tall in their own domains. Though the goal before the Task Force was set very clear that the slush money from Swiss Banks must be brought back into India but the strategy suggested for the same does not seem to be matching the task set before them. Proving the offence and bringing the money back is going to be a huge task for any elected Government. Making a promise before the common man is a much easier task but acting on it would be too difficult and may require the Himalayan political will to do so.

The first requirement for any positive step in this direction would be to mull over a comprehensive legislation which would deem such funds parked outside India as illicit money. Since the colour of the financial transactions is not known, and the simple approach to pick up scrutiny of heavy transactions may not yield tangible results. A more institutional approach would be required to approach the issue at international level. India will have to first initiate talks with the shortlisted tax havens for not merely exchange of tax information but more concrete cooperation in terms of handing over the funds declared laundered or black money as per domestic laws. To put pressure on a seasoned tax haven like Switzerland, India may have to use some diplomatic sticks as well. Besides sustaining the issue at various global forums it needs to take a hard stand against the arms of such tax havens like their banks operating in India. For instance, the approval granted to the UBS and Credit Swiss to operate in India may be withdrawn or made conditional provided they are willing to share vital information with the Indian tax authorities and other enforcement agencies.

However, a few steps suggested by the Task Force are also important. It has called for building strong public

opinion. It can be a long-term goal and should not be overemphasised to miss the wood for the tree. Its second recommendation is that India should not be a silent spectator to G-20 meets. True, India should not be an onlooker at any sort of international forum as long as it is denied right to recover its own lost wealth.

The third step suggested by the Task Force is that India should immediately connect to the German authorities for the list of Indian names obtained from the database of LGT bank in Liechtenstein. Its fourth step is to make India look serious about undoing the banking secrecy regime. It should be a part of the diplomatic efforts at all forums.

The sixth step suggested by the task force is that India should appoint a Special Ambassador with adequate knowledge of tax havens and secret bank issues to work with the G-20 for framing India-friendly rules to unveil the secret banking and tax havens. For this job, the one name which comes to my mind is that of Mr. S.S. Khan who is at present CBDT Member. He possesses the uncanny skills to handle this subject tactfully, adroitly and ambidextrously. He is empirically intelligent, suave and industrious in his approach. Given an opportunity he can match the magnitude of the task set before him.

Let's hope if BJP turns out to be a key player in the widely expected another coalition government at the Centre, it remembers all the promises it has made in relation to bringing back the lost wealth of the nation and accords the seriousness to this job that it deserves. If it happens, a new history is going to be written for the modern Indian economy which aspires to be an economic superpower in the next few decades. The present time also happens to be historic as the global environment against tax havens is eminently adverse, and India can indeed manage some results for its efforts to be made.

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IS UPA GOVERNMENT REALLY SERIOUS ABOUT FINDING OUT SLUSH MONEY PARKED IN TAX HAVENS?[3]

The Indian slush money parked in tax havens has been renting the political air for quite some time now. The latest to add to the prevailing cacophony is the IPL Scam. It has been reported that there is no team owner in the IPL which has not received funds from overseas. And most overseas entities have been found to be residents of tax havens or low-tax jurisdictions. Going by the opaque characteristics of most of the consortiums which backed the successful bidders, it is suspected that the violation of Prevention of Money-Laundering Act could be aplenty. What about Income Tax? For any cross-border transactions of this nature, the I-T Act is the first to come into the picture. But thanks to the lack of a pronounced culture to investigate cross-border transactions the I-T Department has its own limitations. Even if it gets the desired support under the DTAA regime, it may not succeed in peeling off all the layers of the slush money if any, involved in this biggest sports extravaganza.

3. Published in www.taxindiaonline.com, TIOL–COB(WEB)–185, 29 April, 2010.

Whether our investigating agencies partly succeed or fully fail in their efforts to demystify the IPL Scam, one good thing which appears to be quietly happening is that the Union Government which used to go on back foot whenever any talk about tax havens and slush money was ever broached either by the Opposition or the media, has now been consistently coming forward to talk about the possible measures taken by the Government. Only last Tuesday, the MoS(R), Mr. S.S. Palanimanickam, told the

Rajya Sabha that the Investigation Directorate of CBDT has been directed to keep an eye on Indian tourists visiting the sun-soaked beautiful islands, globally known for their 'tax haven' tag! He said that the Income Tax Department has been keeping track of tourists' itineraries with the help of data collected from airlines and may even ask them to furnish details of their foreign visits during a financial year.

The Government has already indicated that it has initiated a process of reviewing all the DTAAs and identify the loopholes which may be exploited for parking black money abroad. In other words, if there are some DTAAs which do not talk about any convention or have an MoU for exchange of tax information based on specific queries from either of the contracting parties, an amendment is in the pipeline, of course, based on bilateral consent. India has last week notified certain 'specified territories' under Section 90. This may help our investigators to get information from them in future.

Readers may recall the follow-up action initiated by the OECD after the G-20 Summit in London early last year. After the global leaders tightened the screw on tax havens through their harshly-worded communique and threat to blacklist some of the non-cooperative tax havens, the OECD campaign for signing of tax information exchange agreements indeed picked up the pace and has already crossed 300 figure. Only a couple of months back the OECD had a meeting of the Peer Group of countries on this issue in New Delhi, and India's initiative has drawn commendation from the global forum. So, any effort to widen the scope of its DTAAs, India would certainly get support from the OECD. It is indeed high time that such an exercise is taken to the logical conclusion if any tangible results may be expected to be realised.

Readers may also recall the Liechtenstein episode where the Germany which had bought some confidential list of persons, who had parked slush money in the LTG

bank, had provided a list of Indian names to the Ministry of Finance. But nothing concrete seems to have come out of it so far. It is now learnt that the CBDT has decided to station officers of their own in certain critical cities for obtaining vital inputs so that their domestic investigations could proceed further.

It may be recalled that I have repeatedly been suggesting that a comprehensive study of the need for overseas posting of revenue sleuths must be undertaken before any *ad hoc* decision is taken to send a few officers abroad. Keeping in mind the growing trade linkages of India and the private sector's

attraction to certain economies where most of FDI outflow is heading for, the Ministry of Finance needs to project a clear-cut graph showing future creation of overseas posts. There are too many tax havens and it is not possible for the Government to create that many posts. It is important to station certain officers at critical points from where confidential inputs could be collected under that tax information exchange agreements, and India may succeed in taking present investigations to logical ends.

The IPL scam is only the latest, and many of its layers may require long-drawn investigations. With huge amount of FDI moving out of the country, it is important for India to keep track of its own wealth. And if any part of it is being parked outside, our revenue sleuths must be armed with the necessary information and legal authority to recover the same and punish the carriers. Most of our Ministers have been fond of talking about FDI inflows but there is not even a murmur about the FDI outflow which takes place in almost equal measure. It is important for the revenue sleuths to know where is the private sector fund flowing out and whether it is going into proper business or being dodged for tax havens. Harmful trends must

be identified, and solid measures must be put in place in much advance before all such outflows of FDI turn out to be a pipeline for parking funds abroad. Much of IPL funds may turn out to be a case of round-tripping as many of the holding companies are found to be Mauritius-based. Let's wish early waking up to our policy-makers so that India which is speculated to have lost about USD 1.5 trillion to tax havens in the past, does not lose more!

■ ■ ■

BLACK EYE TO BLACK MONEY: WILL 'SAFFRON HAMMER' WORK?[4]

It was around the same time in May and June, 2008 that the issue of black money and Indian wealth locked in tax havens had raised its head with meager public debate and virtually no TVR (TV Viewership Rating). At that point of time, any article on these issues in any form of media was a mere *passe* for most Readers. However, persistent follow-up by the media and some civil rights activists fortunately grabbed the attention of at least one of the national political parties which saw possibility of reaping political currency during the forthcoming Parliamentary elections. They set up a Task Force which came out with a 'White Paper' and tried to make it a political plank to some extent. The UPA-I led by the Congress Party did not take the issue very seriously except for answering some of the political allegations and then promising to take action if they were sent back into power for the second term.

4. Published in www.taxindiaonline.com, TIOL–COB(WEB)–242, 2 June, 2011.

However, the UPA-II was initially seen dilly-dallying on the urgency to take a clear stand on these issues of

national concern, and not any measure of substance was initiated to bring back the lost wealth of India vaulted in tax havens like Liechtenstein and Switzerland. The lukewarm approach evidently provoked some of the legal eagles who were almost through with their PIL-homework, and thus came the famous *Ram Jethmalani-sponsored PIL*[5] in the Supreme Court. Even as the Apex Court was seized of the vexatious issues, what apparently provided the much-needed impetus to metamorphose of these issues into a national movement of sort was a series of scams involving the high and mighty. Given the fact that corruption is always seen as the other side of the black money coin, it proved to be a catalyst for hardening the approach of the judiciary.

Then came the Anna Hazare-led movement against corruption and the national demand for drafting the long-pending Lok Pal Bill. With the fabrics of governance coming under constant hammering on account of corruption charges, the UPA-II had no choice but to accede to the demand of the civil rights activists. Even as a tug-of-war between the Government and the Anna's team continues to be reported, here comes not a political heavyweight but a *Yoga Guru* who resorted to the Gandhian tactics of attaining the 'critical mass' which could generate adequate pressure for breaking the resistance of the Government. Having seen the impact of Anna's candle-lit movement, the Government does not want to risk another 'mass uprising' on these embarrassing issues. Thus came the top-level decision to placate the Baba. Even our Prime Minister wrote a letter to Baba, urging him to desist from going on fast and promised the necessary action. Although some do see it as a knee-jerk reaction of the Government, not less than four Cabinet Ministers led by the Finance Minister was seen standing at the IGI Airport to greet *Baba* coming from Ujjain in a chartered flight. Before meeting *Baba*, the CBDT former Chairman and his battery of aides were seen making

arrangement for the talks and coordinating over walkie talkie in the New Customs House in Delhi. Overwhelmed by the unprecedented response from the Union Government *Baba's* emotion-quotient swelled and he did make some confusing statement on the proposed Lok Pal Bill which amounted to a *volte face* on the issue of bringing Prime Minister under the ambit of the new law. Anyway, *Baba* indeed appeared to be in full command of his senses soon enough to realise that his proposed fast from Saturday is a historic opportunity for him to grab not only the national but also international attention. Thus, he negatived some of the suggestions of the Government, and another initiative for second round of talks on Friday was taken.

Let's now go straight to *Baba* and his thoughts over the ticklish issues of tax havens and black money. No doubt, *Baba* deserves kudos for articulating or

5. *Ram Jethmalani v. Union of India*, 2011-TII-05-SC-INTL : (2011) 8 SCC 1.

giving an expression to the national concern through his *yoga-module* but his thoughts clearly indicate that his understanding of the legal complexities are woefully short of an empirical and realistic solution. It is true that *Baba* is not an expert on Constitutionalism and doctrine of international laws but most of his suggestions are also not even remotely connected to realism and empiricism.

For instance, *Baba* yesterday said that black money should be declared national assets and an ordinance should be promulgated to bring back the ill-gotten money stashed in tax havens. For the sake of making a statement it is fine, but what purpose will it serve by simply declaring the unknown quantity of black money as national asset. As even *Baba* will know that there is a very thin line between white money and black money

as proving any money as black money calls for a long protracted legal battle otherwise giving such a power in the hands of a Government to stamp any money as black would take away many other economic rights of a citizen. What will happen if excesses are committed in the name of seizing black money. Legislating without the safety bulwarks is bound to be counter-productive for any society. Had it been so easy and convenient to do it, there would have been many such examples in the history. Merely promulgating an ordinance would never succeed in bringing black money from tax havens. All jurisdictions beyond the geographical boundaries of India are governed by a matrix of very complicated laws which would come in conflict with any legislation passed by India in isolation.

Another suggestion which has come from *Baba* is to disrupt payment gateway servers which enable the corrupt to remit funds out of India. This is the most impractical and pedestrian suggestion one can make for any vibrant economy like India. When the economy has been increasingly getting integrated to the global financial architecture, how can any Government riding the tiger of 'Inclusive Growth' do something like disrupting payment gateways. So far as regular monitoring of such gateways is concerned, it is already being done by some of our specialised agencies like IFU and ED, and they have been highly successful in making quality cases. If *Baba* thinks that ill-gotten funds are transferred out to tax havens through payment gateways then it is nothing but a legless thought.

Baba has also called for withdrawal of high denomination currencies like Rs. 500 and Rs. 1000 to curb the generation of black money. His logic is that when 80 crore people in the country get only Rs. 20 a day for living, such high denomination currencies serve only the interests of the minority. Even if he is correct in his presumptions, does he think that the minority has no rights equal to the majority. He seems to be talking about the authoritarian regime of majority-ism. Propounding such an ideology is fraught with palpable hazards of a civil war in the society rather than finding a

solution to a fiscal problem. High denomination currencies do serve a definite economic need in every economy, and they should continue to exist. Merely because they also facilitate hoarding of black money

they do not become undesirable. If it is so, then to overcome the problem of traffic rules violations, all traffic lights should be uprooted across the cities!

But it is not only *Baba* who has made some unrealistic suggestions to tackle the problems of black money and tax havens but even the Ministry of Finance has shown similar propensity. For instance, the CBDT has recently notified setting up a new Directorate of Criminal (Investigation) which is nothing but duplication of multiple investigative agencies which exist in the country. Most of the works enlisted to be carried out by this Directorate are already being carried out by some of the agencies set up decades back. Therefore, what is the need of the hour is to adopt M&A approach to truncate the number of agencies and integrate some of them so that they achieve a shade of harmony in their working rather than create another zone of functional conflict for the existing agencies.

Notwithstanding the impractical dimension of various suggestions flying thick, what is of great import is that all these movements from non-political forces do serve the larger cause of a fight against the parallel economy and the flight of wealth across the border. *Yoga Gurus* like Baba Ramdev may not be able to provide a sound solution to complex economic ills but they do help in creating an environment of national churning process which may result in meaningful solutions to all these issues. Let's hope and also join the rising graph of 'thought-churning' process being sustained by both the Government and the agents of civil society so that the problems of black

money, corruption and transfer of illicit funds to tax havens are mitigated effectively to a reasonable extent.

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WHITE PAPER ON BLACK MONEY: FINANCE MINISTER TALKS OF MANY BILLS BUT MISSES OUT ON 'POLITICAL WILL'[6]

Exactly a day before the curtain over the Budget Session of the Parliament was to be brought down, the Finance Minister, Mr. Pranab Mukherjee, offered a fresh bout of ammunition to the Opposition parties by releasing the hurriedly tailored 'White Paper on Black Money'. The Opposition reacted exactly along the predictable and expected lines. The BJP likened it to *'bikini'* in terms of 'exposure index', and the Left left no stone unturned to convince the media persons that it was a "trite exercise devoid of any political will". If we leave aside the political fulminations, the underlying fact is that Mr. Mukherjee just wanted to redeem his promise made to the House. He knew that all the institutions, which have been assigned the study of estimation of the shadow economy, would require another six months, and his attempt to release the White Paper would

6. Published in www.taxindiaonline.com, TIOL–COB(WEB)–293, 24 May, 2012.

come under heavy fire. But it seems he was mentally geared up for all sorts of criticism and had decided to fulfill his promise to the Nation.

It is true that at close reading, one may not find any official insight to tackle the menace of black money in the economy but it is also valid that this compilation is not all that trash! It

has decorated certain paragraphs with unrevealed facts. For instance, it hints at receiving a list of 219 names of Indians from the French Revenue authorities, and the CBDT collected Rs. 181 Crore as tax from tax evasion of Rs. 565 Crore detected so far. Similarly, it also talks about the rising graph of effectiveness of the CBDT's Exchange of Information (EoI) Cell. It has so far received 12500 pieces of information regarding details of assets and payments received by Indian citizens in several countries including banking information have been obtained and are now under different stages of processing and investigation. And one mega case I am aware of, relates to a lady enterpreneur from Singapore. The CBDT has done a good job so far.

The White Paper also details how fruitful have been some of the official initiatives in curbing flight of Indian capital through the legal route. For instance, the Directorate of International Taxation has mopped up taxes to the tune of Rs. 48951 Crore from cross-border transactions in the past few years. Similarly, the Directorate of Transfer Pricing has detected mispricing of Rs. 67,768 Crore in the last two financial years (Rs. 44,531 Crore in the current financial year alone). This has effectively stopped transfer of equivalent amount of profits out of the country. Although such efforts have nothing to do with recovering the lost capital in the past but they clearly indicate that these Directorates have been effective in keeping a check on blatant manipulation of accounts and transfer of profits out of India through the banking channels.

For the first time, an official document has listed various *modus operandi* adopted to generate black money through legal routes. For instance, it refers to manipulation by way of International Transactions through Associate Enterprises: Inter-corporate transactions between the associate enterprises belonging to the same group or owned and controlled by the same set of parties may be arranged and manipulated in a way that leads to evasion of taxes. This can often be achieved by arrangements that shift taxable income to the low tax jurisdictions or tax havens, and may lead to accumulation of

black money earned from within India to another country.

External trade and Transfer Pricing: More than 60 per cent of global trade is carried out between associated enterprises of multinational enterprises (MNEs). Since allocation of costs and overheads and fixing of price of product or services are highly subjective, MNEs enjoy considerable discretion in allocating costs and prices to particular products or services and geographical jurisdictions. Such discretion enables them to transfer profit to no tax or low tax jurisdictions. Tax evasion through transfer pricing is largely invisible to the public and difficult and

expensive for tax officers to detect. Christian Aid estimates that developing countries may be losing over USD160 billion of tax revenues a year, primarily through transfer pricing strategies.

The least suspected non-profit sector has also been listed as one of the effective conduits for general of black money. Tax laws generally bestow certain privileges and incentives for promoting charitable activities. Misuse of such benefits and manipulations through entities claimed to be constituted for nonprofit motive are among possible sources of generation of black money. Such misuse has also been highlighted by the Financial Action Task Force (FATF).

The White Paper innocuously also talks about some foreign studies, indicating how the wealth of Indians parked in Swiss Banks has come down to Rs. 9225 Crore in 2010 from Rs. 23000 Crore in 2006. This has raised the question - Where did the money go? Although there is no straight answer to this question but it hints at various ways adopted by the Indians to route their black money back home. One of the methods used was Global Depository Receipts (GDRs). Others are the Participatory Notes, FDI,

mispricing of exports and *hawala.*

The White Paper reveals that in the recent past, instances have come to the notice of SEBI that the GDRs issued by some Indian companies, which are listed on the Luxembourg Stock Exchange, are used for manipulation of markets. On going through a 21 September 2011 order passed by SEBI, it can be seen that surprisingly mysterious 'initial investors' were found ready to invest in GDRs issued by companies which were either start-ups or having shares with very little trading and after two-three years sold the GDRs at deep discounts taking heavy losses. These instances suggest this as another possible route for reinvestment of black money.

There is plenty more to talk about in this Paper but it makes specific mention about enhancing the accountability of Auditors. Unlike many developed countries, Auditors in India have not been inspiringly accountable, resulting in frequent undermining of this important aspect. Apart from recent cases of distortionary corporate governance involving highly reputed firms, cases are detected regularly by the regulatory authorities where the Auditors have failed to point out gross violations and even blatant misrepresentations. In the absence of adequate effective provisions, the Auditors are hardly ever held accountable for these lapses. As a result, a very important regulatory tool is virtually losing its role in contributing towards greater compliance. There will be need in future to look into various aspects of the functioning and regulation of the role of Auditors and various other professionals verifying the declarations and statements made by firms and ensure that there are adequate safeguards and sufficient accountability of such professionals.

Among the possible measures to partly recover the lost wealth in the past is what I have been advocating for long. An offshore Fund Amnesty Scheme may help India like many European countries such as the UK, Italy and Germany, to recover part of the lost wealth. Through other legal means, it is simply impossible to even have a precise estimate of how much of such funds are parked in tax havens. Therefore, wisdom lies in recovering something by only granting immunity from prosecution. Let Indians having funds in tax havens disclose their wealth and pay 40% taxes with some penalty. When nothing is known about the source of such funds why should one waste administrative energy on criminal prosecution. All such energy should be saved for the present and future cases by strengthening out legislative and enforcement arms.

Yet another measure suggested by the White Paper is similar to the UK-model. The UK has entered into an agreement with Switzerland where the Swiss Government will collect taxes on behalf of the UK from the income of British account holders in Swiss Banks and as a trade-off, their identities will be protected. This is certainly a good idea to explore similar agreement with Switzerland. Germany and Austria have also gone for this option to raise funds from offshore accounts of their taxpayers.

In a nutshell, this White Paper of course does not reveal the size of the shadow economy but does talk about various sources of black funds, various legal routes to germinate them and a mini future roadmap. Although it acknowledges corruption as a major source of black money but talks about only a handful of BILLS like the Lokpal Bill, the Judicial Accountability Bill, the Whistle Blowers Bill etc. and misses out on the most important 'political will' to eradicate corruption and contain black money generation. Let's hope the UPA-II does so before it runs out of steam.

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ACHCHHE DIN ON TAX FRONT - LOT OF LEGWORK

REQUIRED[7]

For the Prime Minister, Mr. Narendra Modi, his journey to capture New Delhi began with black money as one of the key planks of his electoral war. He won the first round of war and assumed the hottest seat of power in India. The second round of war against black money commenced right in the first meeting of the Cabinet when it cleared the constitution of Special Investigation Team (SIT) on direction from the Apex Court. Afterwards Mr. Modi himself has taken up the issue of tax evasion during his bilateral talks with many heads of the States abroad and recently at G-20 Brisbane Summit. His Government yesterday completed six months and it was greeted with high-decibel protest on the second

7. Published in www.taxindiaonline.com, TIOL–COB(WEB)–424, 27 November, 2014.

day of the Winter Session of the Parliament on the issue of black money. The Opposition parties led by Congress and supported by SP, RJD, Trinamool Congress and AAP, asked for a debate on the issue of black money. TMC went to the extent of carrying umbrellas with slogan 'bring back black money' painted on them. They wanted the Prime Minister to make a statement on 'where is black money' which he had promised to recover once he comes into power.

Going by the spirit of democracy there is nothing wrong about such protests but our Opposition MPs also know for sure that it is 'Mission Impossible' for any country to recover the lost wealth in the prevailing international legal framework. Though some efforts may be made and fulminations may be demonstrated at key global summits but no global forum can promise and ensure a simple reversal of stolen wealth lost to tax

havens. That is another issue that some of the western economies resorted to arm-twisting and ear-slapping measures against politically weak tax havens and recovered a part of their lost revenue but no mechanism has so far been fully evolved which can enable any economy to recover the wealth parked in foreign banks by its own citizens. The OECD has worked hard to evolve some sort of framework for exchange of information and greater transparency in financial reporting but all these measures are going to promise only prospective benefits. The funds parked in the past in tax havens and foreign banks operating with a thick shell of secrecy are unlikely to be transferred back to the legitimate state-claimant even if the Governments of these tax havens promise to do so. Secondly, a major flight of such wealth from developing countries is believed to have taken the route of money laundering rather than tax frauds. One simple reason could be that the international borders were not so open and not much cross-border transaction used to take place in the past. In this background, finding evidence of money laundering or tax frauds relating to periods dating back to early 80s or 90s is simply impossible task for any investigating agency. Such difficulties are also going to write the chapter of failures for the SIT which may manage to nudge the internal agencies into action and better coordination but may not able to penetrate the thick wall of non-transparency and legal barriers outside India. Although the chances of SIT's success in bringing back black money are slimmer but the good news is that Switzerland, one of the key destinations for Indian black money, has last week signed the automatic exchange of information agreement and India can take advantage of the same for future cases.

Let's now turn to other taxation related issues and examine the initiatives taken by the Modi Government in its very first six months tenure. There is no denying of the fact that India badly needs capital - domestic or foreign -

to perk up the economy and ensure revival of *achcche din* promised by the BJP. To attract foreign investments the Government has hiked the sectoral cap for FDI in many sectors, including Defence. The FDI Policy has been streamlined to make way for foreign capital in many non-conventional sectors like Railways. To make

Insurance Sector more attractive the Government has already tabled an Amendment Bill in the Lok Sabha. Besides the policy fine-tuning, the Prime Minister himself has held closed door meetings with hundreds of global corporations in the USA, Japan and Australia. It is learnt that investment proposals worth USD 150 billion are lined up for India but most global investors are keeping an eye on the Second Generation Economic Reforms to be initiated through the Union Budget 2015.

One of the key reforms which not only the global investors but even the India Inc has been looking forward to is the implementation of the Goods and Services Tax (GST). Although the Finance Minister was earlier confident that he would be able to table the Constitution Amendment Bill in the Parliament on this issue but owing to prevailing differences with the States on many aspects of the GST, he seems to have developed cold feet. Even if we ignore the latest opposition coming from the central leadership of the Congress Party and others, many States' Finance Ministers have pretended to be ignorant about the intricacies of technical issues involved. One of them recently reportedly went to the extent of quoting 26% as the possible GST rate. Many States continue to be openly opposed to the idea of GST subsuming entry tax along with Octroi. Although the Union Government has repeated its commitment to compensate them in the event of any loss arising to any State but the consensus proves to be elusive. Secondly, the majority of States continues to favour exclusion of Petroleum products and liquor from GST Net. In this

background, meeting April 1, 2016 deadline as set by the Prime Minister appears to be a distant dream. One way out which appears to be weighing heavily in the mind of the Prime Minister is to politically capture as many States as possible before 2016 so that the majority of the BJP-ruled States may prevail over a few detractors and that is why one can see Mr. Modi lending personal weight to State Polls - whether it is J&K or Jharkhand.

Let's now move to two other key developments - the court verdict against the Revenue in high-pitched transfer pricing cases and the framing of GAAR Rules. Taking a cue from the *Vodafone TP*[8] case the Bombay High Court last week ruled against the Revenue in the case of *Shell India*[9] also. Reacting to this decision the Finance Minister at a Summit in New Delhi said that unsustainable tax demand is likely to scare away both foreign and domestic investors. What does he mean by such a comment? Is he saying that too many high-pitched demands were raised by the Tax Department during the previous political regime and the same were poorly monitored. Is he also indicating that his Government may not prefer an appeal against these decisions? If one goes by the Attorney General's reported view, his advise to the CBDT is not to file SLP in the Supreme Court. But is it

Vodafone India Services Pvt. Ltd. v. Union of India, 2014-TII-19-HC-Mum–TP.

Shell India Markets Pvt. Ltd. v. The Assistant Commissioner of Income Tax, 2014-TII-25-HC-Mum-TP.

going to be the common view applicable to all such cases like Shell India and many more which are yet to be decided on the similar law point? Although the AG's legal opinion carries huge weight but it is not binding in nature. Therefore, can it be said that what AG has advised is also the view of the political leadership? If yes, it would send a

very positive signal to all classes of investors. But before the Government decides so, to avoid allegations of favouritism by the Opposition, it needs to set up a panel of legal experts and take their views on paper for the posterity. Secondly, such a view of noted jurists can be made the basis for issuing an INSTRUCTION by the CBDT to all Assessing Officers that all cases initiated on similar law points may be withdrawn from whatever forum they might be pending. Such a decision will go a long way in assuring all investors that the Government means what it says about attracting investments. The focus should be on avoiding unnecessary litigation which promises neither revenue nor justice.

But if the political masters decide to file SLP in the Supreme Court, it would be construed as no let up in the penchant for litigation even by the Modi Government. Ideally, if the larger cause of investment and revival of the economy are going to be served, then the Modi Government should avoid fighting such poor cases where notional income holds the centrestage. Unnecessary litigation must be avoided and the Modi Government is required to take a call on the soaring mountain of arrears where more than 85% cases are irrecoverable. The Modi Government should set up a high-powered Commission of jurists or request the Law Commission to submit a Report on all such cases where arrears should be written off. Such a Report may be tabled in the Parliament and through voting, a decision can be taken rather than burdening the rickety tax recovery mechanism of the Tax Departments to continue with the 'Mission Impossible'! Unless timely political guts are displayed and all such piling-ups of historical wrongs in terms of poor arrears and useless prosecution cases are discarded, no substantial change in the method of tax administration can be attributed to Mr. Modi who is known for his out-of-box thinking and quick measures. It would be more desirable to utilise such

opportunities to bifurcate the cadres - one for the executive work and the other for adjudication of tax cases. Unless adjudicators are given the halo of freedom and fearlessness, the first appellate forum in the tax department would continue to perpetuate the culture of no justice and only confirmation of demand. This compels most taxpayers to choke the highest fact-finding forums of ITAT and CESTAT with more than one lakh cases each - their breathing pipes have hugely shrunk. And one of the consequences of such a system is that this leads to very high tax compliance costs which in turn militates against the indicators of 'Ease of Doing Business' in India.

This brings us to the issue of GAAR. Apart from the reality of tax evasion which fuels our parallel economy, what has climbed up on the scale of revenue leakage for the Exchequer is the problem of tax avoidance. Tax avoidance may be legal *per se* but it goes against the principles of good business ethics and the desirable behaviour of an honest taxpayer. Although no formal study like the western economies has been done in India as to what is the extent of revenue loss that may be attributed to tax avoidance but it may be guesstimated that since a major chunk of revenue to the Central Government comes from large corporate taxpayers (about 1100 LTUs), which barely suffer only about 22% incidence of taxation, the problem of tax avoidance has indeed grown manifold. In this backdrop, adopting GAAR - a common tool in most modern economies, does not call for serious political trappings. While going for more tax reforms it is important that the legitimate revenue fronts must be protected in the public interest and GAAR should be preponed from 2016 to 2015 and the Union Budget should make an announcement in this regard. As regards its possible misuse, minimum discretion should be allowed to not an individual tax official but a panel and necessary safeguards

should be in-built in the rules. Further liberalisation without putting necessary anti-avoidance measures in tax framework will go against the interests of the Government which is fighting tooth and nail to contain the recalcitrant fiscal deficit.

A major part of our fiscal deficit is the revenue deficit which is likely to be mammoth this fiscal in the light of less than projected economic growth rate and poor recovery performance against dead arrears. One factor which is responsible for the growing revenue deficit is the unfavourable balance of trade. Given that India has signed too many Free Trade Agreements (FTAs) without proper homework relating to the issue of value addition and also the country of origin, most of our FTAs are being misused by traders and MNCs. Given the loose value addition norms, they are prone to manipulation, taking a toll on the Customs duty collections. Since India cannot renege on them, it should try to tone up the value addition guidelines so that they are not abused. Unless some quick measures are taken in this regard, the dream of "Make in India" cannot be realised. Our manufacturing has suffered huge dent to its spine only because of long-term damage done by reckless imports and preferential trade agreements signed without projecting their impact in the long-run. It is true that six months is certainly not a long time for any Government to achieve reverberations of revival of such a large and diverse economy and signs of *achcche din* but such benefit of doubt may not last beyond the Budget 2015 - an outer goal-post for Mr. Modi who has to come out with some of his best reform ideas. I wish him good luck for the same!

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Chapter 7
Black Money and Indian Realpolitik
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BLACK MONEY RECOVERY - AMNESTY FOR OFFSHORE FUNDS! NOT A BAD IDEA!![10]

Arvind Kejriwal and the issue of Black Money are the two heroes of this week. Both stunned the Nation by bringing new 'realities' to the fore. As Arvind bagged the 'scary' number of 67 out of 70, the issue of black money also grabbed the headlines not for 'home coming' but for the plain act of name-disclosure. Although the Union Finance Minister and also the SIT Chief stated that a few names were common in the list shared by the French Revenue with India and the list unearthed by the International Consortium of Investigative Journalists (ICIJ) but a few fresh names had come to the fore. That is another issue that many named came forward to deny having any bank account(s) with the Geneva-based private banking division of the HSBC Bank. Interestingly, Arvind had disclosed some of these names a couple of years back but it was not clear whether it was just a surmise or a premonition or a piece of intelligence.

Anyway, the Ministry of Finance has got a few new names (how many? It's not clear as yet) but let's give credit to the Modi Government for having taken the initiative to hold dialogue with the French-Italian whistle-blower in Paris even before the ICIJ dug out the list of Indian account holders from the French Revenue. The CBDT officials were given the green signal to negotiate with Herve Falciani for sharing actionable information on Indian private wealth account holders. Although the deal was not sealed as the whistleblower insisted on 10% of the revenue collected from these account holders but the success is not too distant. Indian Revenue authorities are confident of snatching a deal and obtaining some information from him. If one goes by Falciani's reported statement that the present information in public domain is barely a 'tip of the iceberg', India may hope to receive some substantive piece of evidence to nail down tax dodgers in the days to come. But at this stage it can be said to be merely a 'healthy presumption' and no revenue!

If we go by the CBDT's official disclosure early this

week, out of 628 names received from the French authorities, 200 were found to be NRIs and assessment were completed in 128 cases and the total undisclosed income was found to be about Rs. 3150 Crore. About 60 prosecutions have been launched and the Income Tax Department hopes to wrap up assessments in all cases before they get time-barred by March-end. In other words, the total tax finally to be collected is not likely to be more than Rs. 1000 Crore or may be, Rs. 2000 Crore. It's a pittance if we go by the reported and guesstimated amount close to USD one trillion - all tax havens put together!

In this backdrop, what would be the most efficacious and smart policy measures which could yield some handsome 'revenue' to the Exchequer. It is

10. Published in www.taxindiaonline.com, TIOL–COB(WEB)–435, 12 February, 2015.

indeed a billion or a trillion dollar question! It is very clear that if India relies only on the strict tax treaty route to bring back even a part of the wealth of unknown magnitude, it would not work up to the satisfaction of either the judiciary or the civil society. The simple reason is that most tax treaties have been amended in the recent years and the amended provisions have just begun to come into operation (for instance the amended Swiss treaty became operational only in 2012). So far as other tax havens are concerned, India has entered into Tax Information Exchange Agreements in place of full-fledged tax treaty as these islanded jurisdictions are too small in size and the only service they can provide is to shelter the wealth of tax dodgers. All such new tools designed within the jurisprudence of international laws will work only prospectively whereas the money was shipped out in the 'antiquity'. That is why the Swiss authorities have been denying India the basic details of the names obtained from the French authorities.

So far as the current status goes, most of these high-profile tax havens have been 'pauperised' as a good number of account holders have shifted their funds to unknown destinations through handsomely-layered entities. The fact that the HSBC has lost its *numero uno* position as the world's largest bank in terms of assets in the past few years, it clearly indicates that the tax dodgers have once again succeeded in dodging the G-20 leaders and the taxmen of OECD and other jurisdictions. A good chunk of such funds are probably back home through a myriad route like diamond, gold and even shares and securities.

So if these legal tools are unlikely to be efficacious what is the solution? Rather than experimenting with new methods or later on blaming the SIT for not being successful in recovering the Indian funds from offshore centres, the Modi Government should also do what others in OECD area or even the USA have done to make handsome recovery. *And the best bet for India would be the tax dodgers themselves.* It is high time the Government rises above the thick walls of administrative ethics and the indirect discrimination against honest taxpayers and design an Amnesty Scheme only for offshore funds. The Government may take the Judiciary into confidence if the affidavit filed after VDIS Scheme of 1997 puts a spoke in its wheel and convince the Judiciary that India has never floated any Amnesty Scheme for Offshore Funds and this could be the first and the last before more legislative and administrative measures are taken to catch and penalise them.

Determination to impose penalty and even launch prosecution is welcome but to do so the primary requirement is to catch the tax cheats. If we depend only on foreign jurisdictions to be kind enough to tell us, it would not happen. Every government needs to be pragmatic and to fight tax evaders every administrative decision is fair in such a war. Since amnesty is not for domestic tax evaders no honest taxpayer should feel aggrieved. Such an amnesty scheme should be linked

to a particular Assessment Year like 2012 as a cut-off year. All cases falling beyond the cut-off years may be investigated as they are recent. However, taking a cue from all successful amnesty schemes implemented by many foreign tax jurisdictions like the USA, the UK, France, Germany, Greece, Italy and very recently Australia, the Indian Scheme should be designed with minimum penalty and no prosecution. Let the Indian tax dodgers bring back the lost trove of wealth which can be utilised for 'Make in India' Scheme or infrastructure development. In any case the Finance Minister will have to offer tax sops for his Government's innovative schemes and the revenue loss has to be set off in some manner. Therefore, such an Amnesty may do the job for the Finance Minister to contain his fiscal deficit.

What is likely to make such a scheme a runaway success is the swelling international pressure on tax havens to sign tax information exchange agreements and the vanishing act of bank secrecy in many jurisdictions. The days of tax havens are indeed numbered and such a fact is well accepted even by tax dodgers. Given the international commitment to implement Automatic Exchange of Information (once again reiterated at Istanbul by G-20 Forum yesterday) and rapid acceptance of the USA-sponsored FATCA whereby all financial institutions in even Third World countries are going to share information, the tax cheats are aware that they would not have any 'dark corner' on this earth to hide their tax evaded wealth. Thus this is perhaps the most opportune time for India to come up with an EXIT route for tax dodgers and let them avail certain benefits for bringing the funds back to India rather than allowing them to further abuse our legal business practices for laundering money. If India fails to provide a conduit for the cornered tax dodgers they would continue to indulge in trade

mispricing or *hawala* or other channels for laundering funds back home. Catching them while they violate a host of economic laws will be too scarce and too expensive in terms of administrative costs as well as opportunity costs. Therefore, if the Modi Government is serious about its commitment made to the voters during the general elections, it should not shy away from testing the waters of an Amnesty Scheme for Offshore Funds. Let's hope good sense prevails on most of the civil society veterans so that they do not rush to the precincts of judiciary to invoke the laws of equity which is, in any case, a stranger to taxation laws.

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8

The Judicial Saga and the SIT

Chapter 8 ***"The Judicial Saga and the SIT"*** *makes an incisive dive into the influence of increasing presence of judiciary in the entire episode of black money. This Chapter also gauges the contribution of the SIT and brings out the specific challenges, be it* ***political, institutional or legal*** *which SIT would have to overcome before it can make any meaningful difference. The first article of this Chapter "****Tax haven issue: India needs to review all DTAAs!****" opens in 2009 in the backdrop of two important events, first, tax amendments proposed by President Obama and secondly, the affidavit filed by the Indian Government before the Supreme Court in the landmark Ram Jethmalani PIL case. This article analyses how the existing provisions of DTAAs is obstruction in sharing of confidential information ultimately in prosecution of the alleged parties. The next article "****Black Money - SC harps on constitutional imperatives of governance - Civil Society makes more 'gains' than 'pains'****" exposes specific instances of failing executive making way for judiciary to step in with its ripping apart observations in the Ram Jethmalani case. Readers would appreciate that the interpretation given to Article 26 of DTAAs (confidentiality clause) in my previous articles turns out to be similar with the interpretation of the Apex Court in 2014.*

*Overall, Chapter-8 maps the interesting journey of face-off between the UPA-II Government and the Apex Court. The Chapter patently exposes how the Government failed to act and thereafter raised an outcry to cover its inertia either under the argument of doctrine of separation of powers or judicial activism. Columns like "**It's raining 'Black'!**" and "**Apex Court's ruling in black money case - Union Government's Review Petition is a loud cry for 'shrinking domain'!**" raises a pertinent question - what is the Judiciary expected to do when the Executive turns Nelson's eye towards the problem of black money? Going ahead in this Chapter, an interesting phenomenon unfolds i.e., how the functioning of SIT has contributed towards rejuvenation of the lost data sharing culture of the Indian investigating agencies. The article "**Black Money: The Indirect Tax side of the Coin!**" is a detailed analysis of the dual evils, first, the mis-invoicing practices adopted by Indian importers/exporters and secondly, the customs officers compromising with their line of duty. Can SIT do something about it? Readers would find out in this Chapter.*

*The article **"Should SIT really fritter awary its energy by focusing on recovery from tax havens?"** argues that why the SIT needs to focus more on the*

domestic turf to curb the generation of black money as opposed to wasting all its resources and efforts to recover the money lost to tax havens.

*The second last article of Chapter - 8 **"Black Money - Trade Mis-pricing -SIT needs to sensitise Indian Customs"** is yet another appeal to the Indian tax authorities to wake up to the issue of how trade mispricing has acquired a demonic shape in channeling black money out of India. The article brings out the exact modus-operandi of trade mispricing and suggests ways to our customs department on how to curb this trade based money laundering practices.*

*Chapter - 8 ends with the article **"Tax Evasion - Allegations Against HSBC India - A Clue For SIT"** at a time when the entire HSBC organisation is under fire from the global community for promoting lapses and being privy to black money transactions. Moreover, this article urges that when the Indian Government has failed in the past to extract any information from the Swiss authorities this is the best*

opportune time to turn the heat on HSBC India and the Swiss Government to provide vital information about the Indian account holders whose names were disclosed recently by the ICIJ.

Chapter-8 reflects that despite stiff resistance from the executive there has been some positive development post involvement of the Judiciary and SIT in this entire episode of black money. However, this Chapter aptly clarifies that unless the domestic turf is cured, merely fighting to recover lost money from tax havens does not hold a bright future.

MR. OBAMA, AMENDING TAX CODE CANNOT PREVAIL OVER ECONOMICS OF GLOBAL BUSINESS; TAX HAVEN ISSUE: INDIA NEEDS TO REVIEW ALL DTAAS[1]

The first week of May month, 2009 will always be remembered in the global fiscal history for two major events - one, the US President launched a crackdown on tax havens and decided to withdraw tax sops availed by the American companies for their international operations; and second, the Union Government of India, for the first time, went on record detailing the measures diligently taken and pursued to track down black money stashed away in tax havens. In response to a PIL filed before the Supreme Court, the Government filed an affidavit and disclosed certain vital 'tissues' of the entire DNA system of black money.

First, what the US President has been trying to do is to shore up the dwindling revenue of Federal Treasury after offering many bail-out packages. While reacting to Mr. Obama's proposal to amend the tax code to deny tax benefits to American companies having large matrix of international operations, one of our Readers wrote in our ''Message Board'':

"Without prejudice to my loyalty to my nation, I feel that what Obama is trying to do for his own country is not a bad one. In one way, his desire to curb

1. Published in www.taxindiaonline.com, TIOL–COB(WEB)–134, 7 May,

> *his country's companies availing tax concessions for getting jobs done on outsourcing basis and divert that money for promoting industrial developments within his own country cannot be viewed as anti-Indian. In fact our Government should also take similar steps to give incentives to our own Indian Cos. and even for FDI companies when they plan industrial and infrastructure developments within India so that our own sons and daughters and even grandsons and granddaughters can stay in India and earn good income. There is no need for running out foreign countries to earn foreign currencies. Our Indian economic policies of the yester-years promoting Indian industries and infrastructure still deserve to be adopted rather than going for Dollars. Let's be Indians with Indian money and live a happy Indian life ..."*

What one may smell from the comments of our Reader is very similar to the steps proposed by Mr. Obama. Both seem to be determined to overlook the irreversible change the global economy has undergone in the past one decade. And that is the world has become much more flatter for the global business. The global institutions like WTO have recorded tangible achievements by pulverising tariff as well as non-tariff barriers across the globe. Only some breathing period has been provided to the poor and developing countries to safeguard their own interests. The business which the city of Bangalore has bagged in the past 10 years is certainly not a gift from any American company which Mr. Obama appears to be thinking aloud! It is the irresistible force of economics that compelled the American domiciled or European domiciled companies to outsource a part of their operations to Indian outfits in Bangalore or elsewhere in the country. The economics of business in the cut-throat global competition has become so grim and dictating that the American companies having international operations

have no option but to minimise their cost in order to shore up their bottom lines and add value to the money invested by their shareholders across the globe.

Let's look at one of the possible scenarios as an aftermath of Mr. Obama's fiscal policy. Once tax concessions are withdrawn, a large number of small and mid-sized American companies would become uncompetitive and unviable to survive in the ruthless market. This may compel them to switch their entire operations to a nearby island country or a tax haven (low tax rate State) and continue with their operations. The same may apply to large MNCs which can perhaps prefer doing business with the USA from outside its territory and pay tax only to the extent of the business generated there. Given the fact that most American MNCs have set up branches and subsidiaries across 100 countries, winding up the same to avoid a jump in tax liability in the USA would make a bad economics. So, what may make a good economics is to move out of the USA! And if it happens what impact it would have on the employment generation goal of Mr. Obama could be an easy guess! A big question mark may stare straight in the face of White House strategists who appear to be relying too much on amendment in tax codes for correcting the course of global business! If

it is so, it will be short-sighted. For the city of Bangalore, it would at best be a short-term setback, and such decisions cannot be sustainable in the long-term. Evidently, protectionism in the past has not borne sweeter fruits!

LET's now move to the second issue where the Apex Court of India has ignored the plea of the Government counsels to dismiss the PIL, and did analyse the issue with a probing mind. Such an inference can be made from the observations that the Hon'ble Judges on the Bench who queried the Government counsel - why some of

the high-profile cases were not investigated under the Money Laundering (Prevention) Act? Why can't the Government initiate criminal investigation in cases where it has information that huge funds have traversed through our physical borders and the funds have been parked in offshore centres or foreign banks sans approval from any competent authorities.

Let's first see what the Government has stated in its affidavit:

on account of persistent follow up by the Central Government, the German Government, on 16th March 2009 informed that they were in a position to provide the information and the said information was made available to the Central Government on 18.3.2009. However, the said information was made available on the condition of strict confidentiality of contents under the Double Taxation Avoidance Agreement.

consequent to the information received from the German Authorities, the said information has been forwarded to various taxation authorities concerned for action as appropriate under the provisions of the Income Tax, 1961 and the Wealth Tax Act, 1957. Moreover, the said authorities have initiated the process of reopening the assessments under the Income Tax Act, 1961 and Wealth Tax Act, 1957.

Status of investigations / proceedings in the case of one Hasan Ali Khan and his alleged co-conspirator Kashinath Tapuria, in relation to alleged illicit deposits made by them in UBS Bank.

the said Hasan Ali Khan had not filed his tax returns for Assessment Years 2000-01 to 2006-07. On 5.1.2007, search under section 132 of the Income Tax Act, 1961 was conducted at the premises of Mr. Ali Khan in Pune and his associate Kashinath Tapuria. Pursuant to the search certain documents relating to UBS Bank were found which revealed that Mr. Ali Khan had access to sizeable amounts in the UBS Bank, and from the possession of Mr. Tapuria, documents revealing instruction notes issued by Mr. Ali Khan in December, 2006 from London to UBS Bank, directing transfer of funds from his account in

the bank.

the Income tax Department sought verification of the contents of the documents relating to the bank accounts of Mr. Ali Khan in UBS Bank from the Swiss Government. However, the same was denied by placing reliance upon Article 26 of the Double Taxation Avoidance Agreement. Further, in view of the fact that no criminal case was pending against Mr. Ali Khan, recourse could not be taken to the Mutual Legal Assistance

Treaty in Criminal Matters (between India and Swiss Government) and thus no headway could be made at that time.

- Moreover, the material discovered pursuant to the search, on being forwarded to the Enforcement Directorate, led to detection of account with the UBS Bank in the name of Mrs. Rheema Khan (Wife of Ali Khan) which was operated by Ali Khan and reportedly the last transaction was a sum of USD 61,031. Further, the Income Tax Department, on the basis of seized documents and other materials gathered during investigations, have raised total demand of Rs. 71848.59 Crore against the said Ali Khan, his wife, Rheema Khan and other associates.

From these facts revealed in the Affidavit what emerges and calls for urgent steps to be taken by the new Government which may be in place latest by first week of June this year are:

There is an acute need for a Task Force which could review the entire gamut of Double Taxation Avoidance Treaties, and focus on those countries which take shelter under the banking secrecy regulations to show overtures of non-cooperation in black money cases. India may insist on inserting a couple of Articles in the DTAA where the contracting states could be

agreement bound to share banking and other types of information;

There is a need to strengthen our legislation so that even a case like Hasan Ali Khan could be immediately pursued from criminal investigation angle rather than pure black money perspective. Funds being illegally taken out of the country need to be viewed more seriously particularly in the backdrop of the fact that the RBI has hugely liberalised foreign exchange regimes to promote business of Indian corporates overseas. Facilitation is welcome but facilitation without compliance is dangerous for any economy.

What further indicates towards the urgent need for a new legislation to tackle this tax haven problem is the fact that even after obtaining sensitive information about the Indians stashing away funds in tax havens like Liechtenstein, what we can do at best is to reopen their assessments under the I-T Act and Wealth Tax-Act. None knows how old are these cases and whether they would be time-barred from the viewpoint of these tax laws. Limitation is an integral code of tax laws, and it cannot be said that the re-opening of their assessments may fetch some revenue to the exchequer. More than the revenue, such instances of smuggling out Indian capital need to be viewed more stringently.

Lastly, India needs to quickly join the rank of OECD members as this would help it in providing persuasive force in cases where amendments may be initiated for DTAAs.

Let's hope what the BJP and the PIL have done to bring this issue to the centrestage of constant debate at the national level, the new Union Government takes it further and to a logical conclusion.

■ ■ ■

BLACK MONEY – SUPREME COURT HARPS ON CONSTITUTIONAL IMPERATIVES OF GOVERNANCE - CIVIL SOCIETY MAKES MORE 'GAINS' THAN 'PAINS'[2]

'Although the constitutional law experts and international taxation pundits may like to interpret the Supreme Court ruling in the case of *Ram Jethmalani v. Union of India*[3], in their own hyper- technical perspective but I would like to stick to the basics of common sense and the age-old principles of inescapable pains for tangible gains.'

To further simplify for the common readers, pains are the price which we pay in terms of the growing imbalance in the measure of democratic and constitutional space the three key organs of the Indian democracy occupy today. A good number of experts and editorials by newspapers have not welcomed this decision which has directed the Government to notify the constitution of a Special Investigation Team (SIT) headed by retired judges, and the High-Level Committee of top bureaucrats being made a part of it. The *prima facie* reason for not welcoming this ruling is the general perception that with this decision, the judiciary has taken a giant leap forward to occupy much greater space of the Executive which has been tasked with the administrative responsibility to carry out investigations into all the allegations of money-laundering, tax evasion and criminal transfer of funds to tax havens. Some of the editorials have gone to the extent of pointing out inefficiency and flaws in the working of our judiciary which takes years to dispense justice. But 'Two Wrongs' never make a 'Right'! Merely because there are many flaws in the working of our judicial system this does not give licence to the Executive to demonstrate laxity and flippancy in pursuing serious criminal matters of cross-border transactions of funds. And this is what the latest decision has found when it states:

> *" ... In the first instance, during the earlier phases of hearing before us, the attempts were clearly evasive, confused, or originating in the denial mode. It was only upon being repeatedly pressed by us did the Union of India begin to admit*

that indeed the investigation was proceeding very slowly. It also became clear to us that in fact the investigation had completely stalled, in as much as custodial interrogation of Hassan Ali Khan had not even been sought for, even though he was very much resident in India. Further, it also now appears that even though his passport had been impounded, he was able to secure another passport from the RPO in Patna, possibly with the help or aid of a politician."

In the same breath, the Bench notes:

"... The fact remains that the Union of India has struggled in conducting a proper investigation into the affairs of Hassan Ali Khan and the Tapurias. While some individuals, whose names have come to the adverse knowledge of the Union of India, through the more recent investigations, have been interrogated, many

Published in www.taxindiaonline.com, TIOL–COB(WEB)–247, 7 July, 2011.
Ram Jethmalani v. Union of India, 2011-TII-05-SC-INTL : (2011) 8 SCC 1.

more are yet to be investigated. This highly complex investigation has in fact just begun. It is still too early to conclude that the Union of India has indeed placed all the necessary machinery to conduct a proper investigation."

In this backdrop, if the judiciary has indeed stepped into the shoes of the Executive, only to uphold the infallible virtues of constitutional democracy, let's all welcome it. I strongly believe that it is a timely and desirably harsh reminder for the Executive to do serious rethink and that it must mend its ways to work in harmony with the constitutional imperatives which alone guarantee the fundamental rights to the citizenry. It can also be presumed that the self-restraint is one of the virtues of our judiciary, and it will certainly stop and move in reverse after marching a few steps forward in the 'space of the Executive' so that the bureaucratic leviathan does not collapse for having abused the rule of law to favour the

elite and the rich who have misdirected the state instrumentalities to lubricate only the forces of neo-capitalism which are barely educated to interpret the signs and the language of the market place.

Let's see what our learned Judges have observed on the growing volume of illicit funds locked in tax havens and how the market-dominated practice has contributed to it and also how the failures of modern states have been abetting them:

> *" ... the loosening of control over those mechanisms of transfers, guided by an extreme neo-liberal thirst to create a global market that is free of the friction of law and its enforcement, by nation-states, may have also contributed to an increase in the volume, extent and intensity of activities by criminal and terror networks across the globe ... on account of 'greed is good' culture that has been promoted by neo-liberal ideologues, many countries face the situation where the model of capitalism that the State is compelled to institute, and the markets it spawns, is predatory in nature. From mining mafias to political operators who, all too willingly, bend policies of the State to suit particular individuals or groups in the social and economic sphere, the raison d'etre for weakening the capacities and intent to enforce the laws is the lure of the lucre. Even as the State provides violent support to those who benefit from such predatory capitalism, often violating the human rights of its citizens, particularly it's poor, the market begins to function like a bureaucratic machine dominated by big business; and the State begins to function like the market, where everything is available for sale at a price."*

How contemptuous has become our Executive to the 'Rule of Law' can also be seen from the case of UBS Bank of Switzerland which is guesstimated to be the richest hoarder of global black money. In 2007, the Reserve Bank of India had obtained some "knowledge of the dubious character" of UBS Security India Private Limited, a branch of UBS, and consequently stopped this bank from

extending its business in India by refusing to approve its takeover of Standard Chartered Mutual Funds business in India. It was also claimed by the Petitioners in this case that the SEBI had alleged that UBS played a role in the stock market crash of 2004. The said UBS Bank had apparently applied for a retail banking

licence in India, which was approved in principle by RBI initially. In 2008, this licence was withheld on the ground that "investigation of its unsavoury role in the *Hassan Ali Khan* case was pending investigation in the Enforcement Directorate." However, it seems that the RBI reversed its decision in 2009, and no good reasons seem to be forthcoming for the reversal of the decision of 2008.

All these cases along with Hassan Ali and Kashinath Tapuria and his wife finally made it imperative for the Supreme Court to step into the domain of the Executive and uphold the constitutional imperatives of governance.

Let's now move from the ''Pains'' and talk about some of the most valuables ''Gains'' a common man has made out of this order. What even Anna Hazare and likes of Baba Ramdev could not achieve out of their civil rights struggle, have been achieved by the civil society in terms of acquiring the hitherto unknown and debatable ''Fundamental Right to Proper Governance''. Isn't it what all civil rights activists and votaries of constitutionalism have been aiming at? For the first time, the highest forum of judiciary has come out so openly and explained it in so many words what this Right to Proper Governance means. It has been obliquely compared to the sinews of Articles 14, 19 and 21 of the Constitution which are the most cherished rights for every Indian.

The second most prominent ''Gain'' which most transitional economies like India has registered is the unmistakable interpretation of Article 26 of the Double

Taxation Avoidance Agreement (DTAA) which is about the exchange of information between two contracting states. I am particularly more excited about this point because the interpretation given by the Apex Court is what I have been consistently holding on to. While interpreting the Article 26 of the India-Germany DTAA, the Ministry of Finance has been repeatedly making public statements that it proscribes the Government from disclosing the information relating to the bank account-holders in Liechtenstein. However, the Apex Court has now made it very clear that any information obtained by Germany from a third-party country and shared with India does not fall within the limitation of the Article 26 which is all about tax issues cropping up between the two countries. In fact, the Bench has further emphasised that the bar of secrecy does not apply to public court proceedings even in matters other than taxation. The Union of India has been consistently pleading before the Bench that even before the Supreme Court, the information obtained from Germany cannot be disclosed as it can be done only in court proceedings in tax matters.

No doubt, a good number of international taxation experts across the globe may not relish such an interpretation of Article 26, and may express an opinion that India may see such information drying up in future but the truth remains that the DTAAs drafted by bureaucrats and diplomats may sometimes miss the larger picture of legal imperatives of global governance which alone can sustain the faith of the have-nots and the citizenry at large. I believe that the constitutional

democracy of India has made more ‘Gains’ than ‘‘Pains’’ out of this landmark decision. And these ‘Gains’ can further be consolidated if our Executive quickly mends its ways and restores the faith of the poor and malnourished common man in the welfarist instruments of the State which should move miles away from becoming a market place in itself. Let’s also hope that all that ‘constitutional

space' which the Executive has lost to the judiciary because of its own wrongdoing (take another example of land-grabbing by the UP Government in the name of public interest) is 'vacated' for the Executive by the sane elements in our judiciary. It will certainly happen during the course of evolution of constitutional democracy, and all those imbalances which we see today would be remedied to a large extent!

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APEX COURT'S RULING IN BLACK MONEY CASE - UNION GOVERNMENT'S REVIEW PETITION IS A LOUD CRY FOR 'SHRINKING DOMAIN'[4]

The Central Government is evidently the most worried organ of the State in India today. The issues of black money and tax havens warehousing Indian wealth in their vaults have been a constant pain in its neck. What has indeed exacerbated the pain is the recent decision of the Supreme Court, delivered on July 4. So upset is the Ministry of Finance that it filed a 50-page Recall/ Modification Petition last week. And the major themes of the protest veer around the doctrine of separation of power, no judicial review of the treaties entered into by the Executive and no need for Special Investigation Team (SIT) as the Government has taken several measures to contain the generation of black money and also expedited the investigations into some of the most celebrated cases like *Hasan Ali* and *Kashinath Tapuriah*.

What irked the Union Government more was the court's observations that its counsel conceded some of the demands of the petitioners like the constitution of the SIT. This was clearly seen as the counsel going beyond the brief and the authority vested in him. When the Solicitor General who recently resigned, was asked about them he probably orally said that he did not offer concessions and

admissions when the issue of SIT was being ordered. Pleading that the Government counsel has not accepted the suggestion for SIT which was also not a part of the original writ petition, the Government has in its modification petition pleaded that the direction to set up the SIT is not binding on the Government and it should be expunged from the order.

4. Published in www.taxindiaonline.com, TIOL–COB(WEB)–249, 21 July, 2011.

The Union Government has also expressed serious reservations about the High-Level Committee (HLC) being subordinated to the SIT. Directing the Government to notify SIT is akin to the creation of a new institution which falls in the domain of the Executive, pleads the petition. It has also expressed its apprehension that since no time period is indicated in the Apex Court order about the black money cases to be covered, it is likely to jeopardise the working of the assessing officers in the income tax department. It may also bring even ordinary cases of FEMA violations under the SIT ambit.

It its petition, the Union of India has dwelt at length on the Doctrine of Separation of Power as ordained by the written Constitution of India. It has protested that the Judiciary has no power to dabble into the realm of economic policy-making of the Government which alone is accountable to the Parliament (the Legislature). It has pleaded that the courts cannot judicially review, examine and direct a particular policy be adopted. It is submitted that the jurisdiction of the court would only extend to review as to whether a policy, scheme, measure or regulation adopted by the Executive is relevant or appropriate to the powers exercisable by the Executive, and no further. It is

submitted that so long as the case falls within the zone of reasonableness, the court would not substitute their respective judgments for that of the Executive as regard these matters entrusted within their domain. It has reminded the Apex Court about the well accepted legal principle that actions and laws relating to economic activities should be viewed by a court with latitude allowing 'play in the joints'. It is also well settled principle that in utilities, taxes and economic regulations cases, there are reasons for judicial self-restraint.

So far so good. But, the million-dollar question is: What should Judiciary do when the Executive repeatedly fails to do justice to the economic rights of common citizens? It is also well accepted fact that unless economic justice is done to the interests of a common man, all other rights guaranteed by the Constitution merely become pedantic and academic in character. There are numerous examples where the Government has failed to do justice to the interests of honest taxpayers. No injustice can be more glaring than leaving a policy or legal hiatus in the system for the tax dodgers to escape with their ill-gotten wealth and cross over the fence to another country with impunity.

It is true that the various investigating arms of the Government have of late taken substantial steps to investigate some of the celebrated scams and cases of black money but the recent acceleration is indeed too late and less convincing as any political decision tomorrow to slow down the probe would nullify all the intermediate evidence collected so far. As per the Government's own affidavit, as many as 60 more names have come out after interrogating Hasan Ali and Tapuriah but to what extent the investigators would be able to do justice in such

cases if there is no SIT, can be anybody's guess. It is not that the Government is not capable of but it is only a case

of ‘trust-deficit’ based on precedents.

The Executive’s protest to some extent is legitimate when it talks about the encroachment on its realm by the Judiciary. Some of the problems which may crop up because of the omnibus direction to set up SIT, are genuine but they are not incurable. They can be taken care of by the SIT if a little modification is ordered by the Apex Court in its modification petition order. A judicial monitoring is perhaps the last instrument which has been invoked to ensure speedy investigation and justice in this case. Normally, in a healthy democracy, judicial monitoring is not desirable but when the State fails, this is perhaps the only answer the Judiciary can offer to sustain the semblance of rule of law in the society.

While talking about the various steps, the Government is learnt to have referred to a bundle of measures taken in the recent months. One of them is about the growing mispricing (transfer pricing) in cross-border transactions. It quotes the Global Financial Integrity’s report that about 78% of illicit fund outflows from any country is through the route of transfer pricing. In this context, the Government has pleaded that in the past one year alone, it has stopped as much as Rs. 22000 Crore from going out of India by invoking TP provisions of the Income Tax Act. In the past two years, the total figure is about Rs. 34000 Crore. However, there seems to be little truth in this tall claim if one goes by the decided TP cases in the past four years. Out of about 200 cases decided largely by the Tribunal and the High Court, only about 25 cases have gone in favour of the Revenue. Then, how does the CBDT justify these tall claims of thousands of crores? Is it not spacious to talk about stopping funds from going out?

While talking about its domain power to enter into treaties and agreements with other sovereign nations, the Central Government has claimed that the exercise of such powers is beyond the realm of judicial review. When the Apex Court had ruled in its favour in *Azadi Bachao*,[5] the

same judicial interpretation was widely welcome by the Government when the same judiciary is lending a new insight into some of the possible interpretations of various Articles of the tax treaties, it is not being welcomed! Pleading for expunging its observations about Article 26 of India-Germany DTAA, the Union Government has argued that the relevant Article prohibits disclosure of information to a third party and if at all, any disclosure can be made it should be only in tax matters. It totally disagrees with the Apex Court's observation that there is no bar of secrecy in the wordings of this Article. It seems our policy-makers not only wish to choose the wordings in the bilateral treaties but also regulate their interpretations which would have only chance takers in the legal world.

5. *Union of India v. Azadi Bachao Andolan and Shiva Kant Jha*, 2003-TII-02-SC-INTL : (2004) 10 SCC 1.

The fulminations of the Executive apart, what is going to be of huge interest now is that how does the Apex Court react to the Review Petition? If the Supreme Court rejects it with minor modifications what choice is left with the Governrment? Will the Executive follow the directions both in letters and spirit? Can a common man look forward to some interesting events in the coming months? Will the Executive go to the Legislature with a sob story for a comforting shoulder? How will the Legislature react in such a situation? Whatever happens, the close watchers of this case are going to see some historic balancing acts of the three organs of the Republic of India. The fourth organ -The Media - needs to be extra careful while reporting the future developments laced with sensitivity and delicacy. Let's hope all future developments augur well for the Indian democracy and the delicate equilibrium among the organs of the Republic!

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IT'S RAINING 'BLACK'[6]

The Indian electoral machinery is awash with cash (black money) and our Supreme Court is confronted with the ticklish issue of identifying the beneficiaries of black money kept in tax havens. So, the black continues to be the toast of the season. Even as I write this Column, the latest news comes from the USA which has approached the CBI through the INTERPOL to provisionally arrest a Congress Party MP from Andhra Pradesh for having allegedly 'consumed' a bribe of USD 18.5 million from an American Company in the grant of Titanium mining licence. As per the Reports, a US Court has sought the presence of the Congress MP for having not only taken the bribe but also laundered the same to some tax havens. The US Court has apparently obtained some vital piece of confession about such a nefarious deal from the accused company.

Let's now move to the latest figures of black money seizure - not very impressive but it is truly indicative of the magnitude of black money involvement in our polls. As per sources, in the past six weeks, the black money seizure reported to the Election Commission is in the range of Rs. 316 Crore. Out of this total, about 35% has been reported from Andhra Pradesh alone. As per one official, given the political splits Andhra Pradesh has undergone, the role of cash has suddenly multiplied to ensure 'white' political alliances in the State. Of course, cash without its eternal partner BOOZE will not be so 'intaxicating'! And it is proven by the seizure of 1.28 lakh litres of liquor. In some of the States where voters have to be 'drugged' to cast their votes in favour of a particular

6. Published in www.taxindiaonline.com, TIOL–COB(WEB)–393, 24 April, 2014.

political party, a good amount of synthetic drugs have also

been seized by the Election Commission.

Apart from what is happening on the political turf, a battle 'royale' is being fought tooth and nail against black money by a group of civil society members in the precincts of the Apex Court of India. In the on-going hearing in the case of *Ram Jethmalani v. Union of India*,[7] the Supreme Court on Tuesday came down heavily on the Government for misinterpreting its 2011 order to disclose the names of the Indian account holders in a Liechtenstein bank to the petitioners. While referring to the non-disclosure of names the Bench of Justice H.L. Dattu, Justice Ranjana P. Desai and Justice Madan B. Lokur told Solicitor General Mohan Parasaran, "*... This is nothing but gross contempt of this court's directions."*

Readers may recall what the Bench had ruled after the Centre took shelter under Article 26 of the Double Taxation Avoidance Treaty (DTAA) with Germany which had bought information from a former bank employee. Of course, this was a stolen data but it contained vital clue about the names of depositors of tax evaded money in the LGT Bank. Since the database had some Indian names, the German Revenue authorities had shared the same free-of-cost with India and as per the affidavit, the CBDT had initiated action against 26 Indian account holders. But the paltry number of 26 was a big suspect for the petitioners who had argued in favour of complete disclosure of the names. And while interpreting the Article 26 of the DTAA, the Bench had ruled that there was no bar on disclosure of names as per the provisions of the DTAA. The court directive on setting up of the SIT and continuing with the investigation by the various enforcement agencies was conveniently confused as a directive to share information with the petitioners only after the SIT Investigation was done. What makes the Government's intention further clearer on this issue is the plea of the Solicitor General - Without the SIT going into the details of information received from Germany, the account holders' names could

not have been divulged. This apparently provoked the ire of the Bench which has given time till coming Tuesday to do the needful and report the same at the next hearing on Wednesday.

Even as the CBDT will now be under self-imposed stress as the names disclosed may trigger some tiny and also large 'political volcanoes', the clouds of uncertainty and inevitable delays hover over the constitution of the SIT. With Justice Jeevan Reddy expressing his inability to take up the job on full time basis, the working of the SIT is yet to take off. And as per the latest direction of the Bench, the selection of the retired Judge who has to be senior to its second Member Justice M.B. Shah, has been left to all the parties concerned. A deeper look into the issues may reveal that the SIT is perhaps not a very efficacious

7. *Ram Jethmalani v. Union of India*, 2011-TII-05-SC-INTL : (2011) 8 SCC 1.

machinery to unearth black money. Given the delay of three years in constituting it and then banking on retired Judges to compel the enforcement agencies to coordinate their efforts to wrap up the investigation in all such cases, it would be a Herculean as well as nightmarish job. Ideally, the Supreme Court should have assigned the judicial monitoring job to a High Court which enjoys huge powers and commands respect and fear. Like in the case of Fodder Scam, monitoring of such sensitive cases where politicians and moneyed classes are involved, ideal and speedy solutions would have been to involve sitting judges of the High Court rather than retired judges who will have many limitations. Even today it is not late and the PIL petitioners may advise the Bench to withdraw the earlier order and let the High Court supervise the investigation.

Another interesting dimension in this case which may be inferred from the details provided to the Bench during the last hearing is that *Ram Jethmalani case*[8] is turning out to be a damp squib. The Solicitor General, Mr. Parasaran, apparently said that there were no billions of dollars deposited by Khan's alleged associate Kashinath Tapuria in Swiss banks. He referred to a Swiss government report saying most of the documents relied upon by the agencies were forged and that in reality, the deposits did not exceed USD 60,000. If that is so, the petitioners need to draw the attention of the Bench to the fact that how did the Income Tax Assessing Officers make additions of thousands of crores. Secondly, the demands raised were upheld at the first appellate authority. If two of the lower authorities have gone ahead with such huge tax liabilities against Hasan Ali, there should be some merit for at least a few hundred crores! As per Swiss Government Report, the documents seized from Tapuria were forged, then how did investigating agencies rely on them for charge-sheeting them?

Going by the Finance Minister's letter dated March 14, 2014 where Mr. Chidambaram has alleged lack of willingness to exchange information and cooperate with the Indian Revenue authorities it is a clear cut case of non-cooperation with India. Given the huge political and financial clout these Swiss Banks command over the Swiss Federal Government, India will never get any meaningful information from them about Indian account holders in their banks. The fact that the Swiss Report has admitted the presence of USD 60,000 in that specific account, it should have also shared the details of money moving out of that account to different tax havens. A financial trail may assist India in tracking down this dirty money but the Swiss are not known for properly understanding the language of etiquette-based diplomacy. India should not forget that they revealed everything the moment their ears were twisted by the US Revenue authorities. The UK and France did the same and they yielded. If India wants results from them, it needs to play its card very strongly and not too

8. *Ram Jethmalani v. Union of India,* 2011-TII-05-SC-INTL : (2011) 8 SCC 1.

diplomatically. Let's hope all the efforts of the civil society and the judiciary finally succeed in bringing back at least a part of India's lost treasure to the tune of USD one trillion!

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MONEY ... BLACK IS BEAUTIFUL[9]

For a significantly large size of the Indian economy, 'black is beautiful'! If we go by the various non-governmental studies and guesstimates, India's black economy is as large as close to USD one trillion! And the dominant 'currency' for our parallel economy is the untaxed money known as Black Money. In fact taxation is just one facet of it. It also becomes 'black' if it has moorings in illegality like bribery, organised crime, manipulation of invoice prices and many other illegitimate and unfair activities. Given the humongous size of the black economy, black money seems to be raining here. Nowadays it is so common for the Police to stop a vehicle on a random basis and find huge cash being transported not only by four-wheelers but even two-wheelers! Only yesterday, the security officials on Indo-Nepal border stopped two motorcycle riders and found as much as Rs. 30 lakh cash in their possession. What goes to indicate the 'raining' aspect of black money is the recent incident where an ordinary thief who was looking for some money to buy food and drink for himself, stumbled upon huge cash in the house of a Member of Parliament. Since the 'colour' of the money was 'black' even the economic or legal owner of the stolen money disowned it to avoid further inquiry into the source of such money.

Corruption is indeed a major 'supply-line' for our black economy. Some of the recent cases where a CMD of a Public Sector Bank was arrested on the alleged charges of demanding huge amount of bribery from a corporate goes to substantiate the premise that corruption is a major 'custodian' of our parallel economy. A more recent case is that of a Film Censor Board official who was booked for collecting 'his own share' from film producers. This further goes to prove the 'systemic and organised' character of corruption that swells the size of black money economy in the country. And once one collects a 'mountain' a foreign vault becomes an attractive destination. And to transport the same 'mountain' to such vaults one resorts to legal as well as illegal routes like taking the cash across the border on motorbike!

Now that the reference of foreign vaults has come into our discussion, let's go straight to what happened yesterday in the hallowed precincts of the Supreme Court of India. The Special Investigation Team (SIT) on Black Money, ordered by the Apex Court and constituted by the Modi Cabinet in its very first Cabinet

9. Published in www.taxindiaonline.com, TIOL–COB(WEB)–410, 21August, 2014.

Meeting, submitted its Interim Report to the court. And a three-judge Bench headed by Justice H.L. Dattu perused the sealed cover report and expressed satisfaction on the progress made to bring back the Indian money parked in foreign banks. Justice Dattu told the petitioner Mr. Ram Jethmalani that the Report was confidential but some progress has been made. The Bench directed the SIT to proceed with the task assigned to it and furnish its next progress report in two months.

Although the nature of the Report is strictly secret but officials in the know of various investigations being closely

monitored by the SIT say that although the probe is being done by the various enforcement agencies like in the past but the SIT has filled the vacuum of an effective coordinator of premium actionable intelligence available with them. In other words, as discussed in this article in the past, there is no dearth of intelligence with our enforcement agencies but given the water-tight jurisdictional limitation, they often feel shy of sharing their intelligence with other agencies which necessarily provides a leeway to tax evaders in making good their escape. Since the former Supreme Court judges preside over the SIT closed-door deliberations, most representatives of agencies looking into economic offences enthusiastically report about their progresses which in turn provide more clues to other agencies in bridging the gaps in their investigations. And thus, in dozens of cases the SIT has been able to zero in on major corporate *modus operandi* that produce black money and also lead to outflow of capital from India.

In a few cases it is learnt that the SIT came across money trails losing their traces after reaching the Mauritian shores. And the predictable reason was the lack of cooperation from the Mauritian Revenue Authorities notwithstanding the provisions of a Double Taxation Avoidance Agreement in place. But there is nothing new about it. It was expected to be a major stumbling block for the SIT probe. Although, under pressure from the G-20, most countries have agreed to automatic exchange of information in tax matters but implementing the same in practice is a different tale. Even before the SIT was ordered, the foreign taxation division of the CBDT had received 24000 pieces of information from various countries in the fiscal 2013-14. But for the lack of substantive evidence, most of such information has failed to do any good to the cause of Revenue. Since inception of the Exchange of Information Network in 2009, India has received information only from 16 tax jurisdictions, and a large number of tax treaty partners continue to ignore the requests sent by India.

Another major stumbling block which SIT is going to talk about in its report in future is the ‘under-utilisation’ of such information by the CBDT for lack of proper software,

hardware infrastructure and trained manpower. Although the CBDT has a lot of 'premium' data but unless they are bulk-processed to populate the PAN efficaciously, no meaningful action can be taken. Therefore, it is important that the SIT pays attention to such requirements of the Department as

well which would enable it to do its job more efficiently and in a time-bound manner.

Some of the observations of the SIT which warrant immediate attention from the policy-makers for taking the probe to logical end are relating to the need for amendments in laws like Prevention of Money Laundering Act(PMLA) and FEMA. For instance, let's presume a situation where the probe is completed but the accused fails to bring back its overseas wealth, what is to be done next? An amendment in the PMLA may enable the Enforcement Directorate to attach their Indian property which may have been bought out of tax paid money. Currently, the Enforcement Directorate can attach only such assets which have been acquired out of illicit funds.

Another area where the radar of the SIT needs to focus is the business of import and export. The Directorate of Revenue Intelligence has many studies to indicate the extent of over-invoicing of exports which facilitates incoming of illegal money parked abroad. In a good number of cases it has been noticed that the trick of over-invoicing of imports has been resorted to 'export' funds through legal route by paying higher customs duty. But the common practice has been the creation of letter box companies and the purchase of defunct companies overseas for which the RBI route is used to take forex out of India. If we move from legal route to illegal route, one pointer towards the stepped up activities can be the recent Report of the Money Laundering Reporting Office (MROS) of

Switzerland, which has come across suspicious activities relating to 'organised crime' in India. Although it has not disclosed the exact number of such cases but it has reported that there has been a rise in the number of Suspicious Activity Reports in 2013 as compared to 2012. Although Financial Intelligence Units of many countries figure in the list of the Swiss Government which sought information, India made no overture to obtain the relevant information from them - so much for the political commitment of the then UPA Government to dent the black money economy.

So far as routes to channelise illicit funds are concerned, there are dozens. But the million-dollar question before the SIT is how to compel the economic offenders under probe to bring back their foreign assets/ funds to India. To an extent the Article related to the exchange of information under respective DTAAs may help the SIT but for effective and tangible recovery of money parked abroad the SIT needs to work harder and dig out tangible pieces of evidence before it expects foreign tax jurisdictions to assist it in fixing the offenders and attaching their foreign bank accounts. Notwithstanding many safeguards being put in place by the OECD, there are even today many routes to take out funds from one tax haven to another and make the funds vanish into thin air through a complex network of investment vehicles. Let's wish the SIT much success in bringing

back even a part of the Indian black money which would do a world of good to our deficit-ridden government treasury!

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BLACK MONEY RECOVERY FROM TAX HAVENS - SIT MAY FAIL

BUT ...[10]

The high-decibel black money issue has raised multiple ticklish questions, including the one with regard to violation of Doctrine of Separation of Powers as guaranteed by our Constitution. With the Apex Court rejecting the plea of nondisclosure of names of foreign bank account holders on the ground of confidentiality clause as enshrined in virtually all Double Taxation Avoidance Agreements (DTAAs), and handing over the entire list of 628 names of Indians having accounts in HSBC Geneva to the Special Investigation Team (SIT) has come to be seen as an encroachment on the functions of the Executive by the Judiciary. Going by the terms and references of the SIT which has become the reporting body for all the intelligence agencies of the Government of India and also some of the regulators like the RBI and the SEBI, one may evidently see this as an act of usurpation of powers and functions of the Executive. What may further provide ammunition to critics of this development is the fact that the SIT is likely to create its own investigating cell within the ambit of Enforcement Directorate. In others words, this Cell is expected to collect the investigation inputs from all the agencies and share the critical inputs to Central as well as State agencies for either speeding up the probes or recovery proceedings.

Though one may find some merits in such a pedantic view taken by some constitutional jurists but the moot question is - What has led to such a situation. Can it be attributed to pure judicial activism? Perhaps, NOT! Going by the dust storms created over the issue of black money by virtually all political parties in the past few years and no action coming forth from the Government of the day, the public at large had begun to lose faith in the efficacy of our system and the legal framework created since Independence. This obviously ticked off or infuriated some of the public interest spirited citizens to knock at the door of the judiciary. And when the hearings commenced, the actual scenario of investigation into all sorts of high-profile specific cases started unfolding which further

added to the clouds of doubts over the intention of the Government. The approach of the Central Government which was initially evasive, then cagey about sharing information and finally ostrich-like when the judicial hammer began to hurt them. Resorting to dilly-dallying tactics, the UPA Government came close to the general elections and that passed the onus on the new winner in the polls. Since the winner which had talked aloud against black money, inherited

10. Published in www.taxindiaonline.com, TIOL–COB(WEB)–421, 6 November, 2014.

the same set of systemic arms, it has not been able to do much except listen to the limitations of the Government to do much on the issue of bringing back the black money. No doubt, for public consumption the Prime Minister did promise to recover the lost wealth of India during his Radio Talk named *'Mann ki Baat'* but his key strategists have perhaps not explained to him the serious road blocks limiting the scope of investigation into hundreds of cases.

Let's take the example of 628 persons having bank accounts in HSBC Geneva. Given the fact that the list of all these names was shared with India in 2011 but the Income Tax Department has been able to complete assessments in only about 60 cases, it clearly indicated to the Apex Court that the progress in investigation has been painfully slow and tardy. No doubt, if one goes by the number of days (over 1000 days), one may get the impression that the CBDT arms were simply playing possum over such a sensitive bunch of cases but in reality, they were pitted against severe limitations like they had no information about any amount against as many as 300 cases. Over 100 names were repeated in the list. Then even if some amounts were mentioned against certain names but no bank statement was provided at all. That left

no choice but to seek help from the Swiss Revenue which cited their limitations imposed by the Swiss laws and informed India that they cannot share information pertaining to period prior to April 1, 2011. This further created another layer of limitation as all the cases pertained to the Assessment Years 2005-06; 2006-07 and 2007-2008 as per the CBDT. In other words, no information could be obtained even after amending the DTAA with respect to exchange of information. Secondly, the Swiss also took shelter under the argument that no information can be provided if the primary source is a stolen data. In response to such a reply India argued that when the information has been provided by a sovereign country as per the provisions of the DTAA, how can it be treated as 'stolen data'. Even as such exchange of arguments continue, the quality of assessments done in a few dozen cases continued to suffer and may not stand the scrutiny in a court of law.

In this background, some efforts were made to source the information directly from HSBC Geneva but the same cited several handicaps. However, after the Income Tax obtained consent waiver in a few cases, some information was collected. It is learnt that the search and seizure operations were conducted along with Survey in about 150 cases but the final results were not found to be too encouraging. Then came the political pressure in a few cases and it is speculated that penalty was not imposed and therefore, no prosecution. Since many cases were taken to the Income Tax Settlement Commission after assessments, prosecution was ruled out. In only about two dozen cases the CBDT is contemplating prosecution option - this clearly indicates that the Department's investigation was poor and has probably nothing much tangible in hand to pursue prosecution.

Interestingly, launching prosecution and then doggedly pursuing the same to a logical end has not been the forte of the Income Tax Department. Why? Is CBDT not serious about creating deterrence value? YES. Given the ground realities at the first layer of the judiciary and also the hassle of visiting courts for more than a decade even after one may be transferred far away from the station of the cases being prosecuted and also the fact that the quality of assessment has gone down by several notches in the last one decade for several reasons, prosecution is certainly not an attractive activity in the Department. Since the edifice of assessment - the CORE activity of the Department - has almost collapsed and the world of scrutiny has merely become a paper tiger to scare the assessees, experts feel that there is not much substance in the prosecution launched by the Revenue.

Let's visit some statistics shared with us by the Mumbai Income Tax. As against about 8000 prosecution pending at various levels in the judiciary, as many as 5000 of them are accounted by Mumbai alone. And all these 5000 cases are pending for more than a decade. Worse, the pendency in Mumbai is at the Trial Court level only which means such cases have not travelled beyond even the first layer of the judiciary for several reasons. This clearly means that the 'STING' of the Revenue is gone.

Let's now quickly wade through the state of affairs relating to many other arms of the Revenue and law enforcement agencies. The overall performance of agencies like the DRI, Enforcement Directorate, DGCEI, CBI and many others have declined in the past one decade if one applies strict filters to analyse their effectiveness. The deterrence value of their independent actions have diminished largely because of their attitude to settle cases at their own level and also not to share information with other agencies. This allowed tax evaders to pay a paltry penalty and get away with possible tax liabilities under other tax laws like Central Excise, Service tax and VAT. Then came a phase of one-upmanship by some All India Services patrons who took politicians' consent to further

bifurcate some of the agencies trying to adopt a holistic approach to probes. And that is how FIU became an independent entity.

In a nutshell, I believe that even if there is some degree of encroachment on the functions of the Executive, the ever-expanding ambit of investigation into all sorts of tax fraud cases in the past few years will finally end up inculcating the culture of data sharing among all the intelligence agencies. Whether SIT finally manages to bring back a part of lost wealth to tax havens or not, one tangible benefit that may be derived by the revenue arms is the 'habit' of sharing sensitive information among all investigating agencies in the years to come and it would not only be an effective deterrent against tax evasion but also a countervailing force against the realm of corruption which often entices officers working independently with silos of critical information to settle them for personal

benefits. Let's hope even if India does not recover the illicit funds from foreign banks its investigating agencies grow mature and work together to prevent future tax frauds!

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BLACK MONEY: THE INDIRECT TAX SIDE OF THE COIN[11]

Although India had a date in Berlin on the 30th October but it failed to sign the Multilateral Competent Authority Agreement relating to Automatic Exchange of Information. Going by India's participation in all the G-20 Summits and repeated commitment to be an early adopter of such a global convention, it was indeed a big despair for all. And the reasons were the clouds of uncertainty

originating from the Supreme Court *diktat* to furnish the list of foreign account holders, received under the DTAA from France. No doubt, the Apex Court Bench was driven more by the contemptuous quality of investigation being conducted by the Income Tax (Investigation) and that is how it missed the significance of the global agreement, forcing the Modi Government to commit nothing until a shade of clarity is obtained from the court. Even though the Apex Court has not really erased the shade of doubts over this issue, the Prime Minister who is going to attend the G-20 Summit at Brisbane said in his pre-departure statement that the importance of global cooperation against black money will be a "key issue" he will highlight at this summit.

Even as the Prime Minister, Mr. Narendra Modi, is going to lend his support to the global mission against black money, the SIT set up by the Apex Court to provide direction to the probes is learnt to have taken a view that India should go for amendment in its tax treaties and insist on sharing of information obtained under such treaties with all the law enforcement agencies in the country. This is the only way the war against the black money can be won, believes the SIT.

Let's now explore the indirect tax dimensions of the black money imbroglio. So far I have focused on income tax side of the black money coin but evasion of indirect tax and international trade as a safe conduit for such funds to tax havens is perhaps least known in India. No doubt, the common understanding is that *hawala* and airport carriers are the major routes to take foreign currency out of India but legal trade, a victim of mispricing (under and over-valuation) is perhaps the biggest channel to divert funds to foreign bank accounts without RBI's permission. But before we discuss this aspect, yet another trend which has come to be noticed by the Customs, is the organised racket of filing forged bill of entry and submission of fake postal documents with the banks and bank officials, hand

in glove with them, quickly remitting payments to banks in Hong Kong and

11. Published in www.taxindiaonline.com, TIOL–COB(WEB)–422, 13 November, 2014.

Singapore. It is learnt that the Customs has come to detect many such cases where bankers have aided fraudsters in money laundering activities. Now, the question is - if the Customs has detected many such transactions, it goes without saying that dozens of such payments must also have gone undetected. It is learnt that the SIT has taken serious view of such money laundering from India. What is the solution? A mammoth exercise of forensic audit could be one solution as the problem does not lie at the Customs' end but the banks and the RBI is required to devise new preventive tools and harsh penalty for such bankers.

Yet another loophole which exists in our system is the business practice of sending advance payment in dollar for proposed import of goods or services. Since our agencies have no concrete methodology to keep track of goods or services imported against such payments, India is losing huge forex reserves and money is being laundered to tax havens. Yet another area which invites the attention of investigating agencies is the *modus operandi* of Indian firms/ exporters or companies setting up offices overseas and manipulating invoices issued to their own Group concerns.

Let me explain it by an example - Company X in Europe is approached by the Hong Kong branch office or PE of an exporter Y in India. If the deal is closed for an export worth USD 100, the goods are dispatched to the PE against an invoice of USD 120 and the PE raises the invoice to the European company for USD 100. Now the question is - where is the extra 20 dollars coming from? What is the source of such a payment? First, it is too difficult to establish a case of overvaluation of exports. Although the CBEC does have

exports valuations rules in place but they are 'used' only to make shoddy cases rather than to book fraudsters. Mis-declaration of export goods and overvaluation of exports are a well-fostered malady in our international trade matrix. The latest examples are the detection of huge quantity of prohibited Red Sander woods worth Rs. 25 Crore not from any remote ICD (Inland Container Depot) but Tughlakabad ICD, right in the heart of the National Capital. Obviously, the shipments of huge quantity of precious wood coming all the way from Southern States were 'designed' in connivance with the Customs. Interestingly, the case was not detected by the Delhi office of DRI but Lucknow DRI. It goes to indicate that the CBEC is aware of all the 'goings-on' at these ICDs but it prefers to turn Nelson's eye to it.

How such mispricing of trade is promoted by our system can be made out from the fact that junior officers at Delhi ICD are posted to the 'Import Shed' for three months which is often interpreted as an officially-sanctioned opportunity to make quick bucks and vacate the premium place for the next to do the same. No doubt, one may find this system quite socialistic and equality-promoting but the only demerit is that it is at the cost of the Exchequer. A good number of ICDs, CFSs and ports which handle huge percentage of our exports, have become active agents for tax havens by letting go overvalued, not only exports but also imports. If the SIT is looking for a long-term mechanism to plug the loopholes it may

have to analyse the Transfer Policy of the CBEC which is totally unscientific and makes no distinction between a good and a bad officer.

In this context it is equally pertinent to draw the attention of the SIT to the common practice of transferring Investigating Officer (IO) in big cases right in the middle of the probes. A good number of big and sensitive cases go awry because of mid-stream horse-changes. A well known

case is the coal scam being probed by the CBI. In other words, during the proceedings of adjudication, IOs should necessarily be retained. In cases of mispricing of trade, it is learnt that the SIT has called for time bound adjudication and speedy trial in case of prosecution being launched. In this context, Section 24 of the Customs Act, 1962 will require an amendment to reduce the period of adjudication. Sources also told us that the SIT has directed CBEC to select 15 top cases and wrap them up in a time bound manner. To avoid possibility of allegations being levelled against officers, the SIT has also suggested that all raids conducted by DGCEI and DRI should be video graphed. Similarly, all income tax raids should be video graphed. To curb mispricing the SIT has suggested that the CBEC may add one more article in the bill of entry or shipping bill form asking the trader to declare the global price of commodity either being exported or imported.

Let's move back to the DTAA turf. Mauritius emerges as the key jurisdiction which has been lavishly misused by not only the foreign investors to avoid paying taxes in India but also Indian companies to launder or park funds in tax havens. Some of the cases which have been brought to the notice of the SIT have clear linkage with Mauritius. One such case is that of DSQ Software case where Rs. 630 Crore is alleged to have vanished to unknown destinations through Mauritius route. Similarly, in case of Ketan Parekh, as much as Rs. 4100 Crore was remitted to Mauritius (only Rs. 880 Crore came back to India) and the rest was transferred to some destinations in the UK and Switzerland. The fact that Mauritius DTAA is notorious for treaty-shopping and also money-laundering by intelligent fraudsters from India the SIT may lend its weight to the CBDT initiative to seek amendments in the various Articles of the DTAA and also greater transparency in the exchange of information either on request or automatic. Let's hope even if the SIT does not

succeed in recovering much of funds parked abroad but proves to be a catalyst in achieving the long-pending amendments in some of the most misused DTAAs it would serve the interests of the nation for a long time.

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A FEW WORDS OF CAUTION FOR SIT ON BLACK MONEY[12]

Recently, the findings of a Study conducted by the Washington-based research and advisory organization "Global Financial Integrity (GFI)" stunned the tax jurisdictions across the globe. It revealed that illicit fund flows from developing and emerging economies are leapfrogging at 9.4% per year. In 2012 alone, the developing world lost close to USD one trillion. In the last one decade, the loss of scarce wealth of poor countries has been as Himalayan as USD six trillion. And India stands fourth in the list of nations that lost this wealth. And the question is - where did this money go? How was it conduited out of India? And the answer to the first question is - a bunch of tax havens or call them tax shelters which trace back their genesis to ancient Athens. When two per cent trade tax was levied by the then government, the traders began avoiding the city and conducted their business on the surrounding islands. And those Greek islands are believed to be the first generation tax havens. The 20th Century witnessed a mushroom growth in the number of tax shelters across the world. And they continue to sip a mouthful of red wine over the piles of hugely disproportionate wealth stolen from both poor as well as rich economies by artful tax cheats. And how do they do it? - GFI finding is that as high as 78% of such illicit fund flows are accounted by trade misinvoicing.

Keeping in mind these twin key findings let's go straight to the Supreme Court-constituted SIT on Black Money. The SIT

has been charged with a huge responsibility to ensure proper conduct of investigation in all those cases where allegations of unreported foreign bank accounts and conduiting of huge wealth to tax havens have been levelled. Apart from ensuring fair probe the SIT has also been tasked with the responsibility of repairing the institutional breakdowns in our law enforcement agencies besides recommending ways to bring back the lost treasure of the nation.

In this backdrop, I would like to offer a guided tour to TIOL readers to the Second Edition of *"On The Loom Of Time"*, an autobiographical memoir of former Chief Commissioner of Income Tax and a great exponent of law and socialistically democratic values, Mr. Shiva Kant Jha. In less than three years the septuagenarian author has revised his memoir by incorporating a great deal of fresh 'memories' to various chapters of topical interest, including the one on SIT on black money. Referring to the valuable experiences of the Patna High Court-monitored SIT on Fodder Scam, the author has weaved a bouquet of recommendations for the Supreme Court-ordered SIT to avoid pitfalls; what should be its goals; where to focus and not to take rest until institutional breakdowns are repaired and the legal loopholes are fully plugged.

12. Published in www.taxindiaonline.com, TIOL–COB(WEB)–428, 25 December, 2014.

While praising the Apex Court and also the Modi Government for its support to the SIT, the author fears that over the passage of time, the Apex Court's directions may be subjected to creative narrowing which would be unfortunate. He suggests that the reach of the Supreme Court's *diktat* should be read in the first part of the decision in the case of *Ram Jethmalani v. Union of India*.

[13] He wants the SIT to discover the deeds of Khans and Tapurias. His fear is that their wealth should not turn out to be camphor that could vanish in thin air. He also hopes the SIT must discover how the authorities made castle in the thin air, and explore what made the Revenue authorities build such castles. Whenever such things happen, the people's trust in administration and the governance by the Executive reaches its vanishing point. It is wished that the SIT would trail its odyssey outside India; and again its intrusion into India in many ways - one of which is round tripping.

The author wants the SIT headed by great jurists to throw light on how funds are creatively managed from the Ugland House in the Cayman Islands, or from the Cathedral Square in the Mauritian capital Port Louis. The ways of the stock market must be understood and exposed. The author mourns how indiscriminate welcome of FDI has done a great deal of harm to our country. He observes that in the passionate pursuits for more and more FDI, corruption flourishes, black economy is patronised and black money thrives. Although all swear by transparency, yet they all work for 'darkness' - a necessary condition for corruption and black money to grow more and more. Referring to the most controversial *CBDT Circular No. 789* he wants the SIT to work for its withdrawal as this Circular happens to be a major abettor of black money-promoting activities. He notes that this administrative Circular is evidently illegal and abuses the provisions of Income Tax Act to enable wrong doers to rob the country of its share of taxes. He wants the SIT to focus on review of bilateral investment promotion agreements (BIPA) which seek to override our laws and oust the jurisdiction of our superior courts and grant the benefits of treaty shopping to all foreign investors. The most effective solution to black money issue, as per the author, will be to withdraw Circular No. 789 and declare all BIPAs domestically inoperative. He also wants the SIT to review

all the statutory provisions introduced in various Acts in the recent years as he feels these changes in economic laws were sponsored by external forces to make loot easier for crooks. Some of these laws are FEMA, PMLA and DTAAs.

The author wants the SIT to create some mechanism to keep under surveillance the domestic operators under the opaque system. Given the GFI's finding that a huge chunk of illicit funds are conduited out of India through trade mis-invoicing, the Author is very clear that the SIT needs to look into various WTO-sponsored obligations which have led to this situation. In the name of trade

13. *Ram Jethmalani v. Union of India,* 2011-TII-05-SC-INTL : (2011) 8 SCC 1.

promotion, the global financial economy has been badly damaged and what the global community has achieved is the fleecing of exchequer's money. The modern system has worked well only for crooks who have been siphoning off funds to tax havens. It is true that the USA and the UK have managed to compel some dirty jurisdictions disgorge their wrongfully acquired wealth, but this cannot be treated as the international norm. The USA and the UK are mighty economies so their writs could run but the same cannot be true for India.

In a flashback, gleaning from his experiences in handling Fodder Scam, the author has a few words of caution for the SIT which is bound to run into some operational problems, mostly created by those who do not want the truth to come out. While probing the fodder scam, he had noticed that quite frequently hierarchic issues and ego hassles were out to derail the investigation. Most of the times the response of CBI was unsatisfactory. He fears that the SIT on Black Money is likely to face such problems as several investigating agencies are

involved in the black money cases.

Referring to the Apex Court's decision in the case of *Ram Jethmalani*, he observes that the Supreme Court has failed to notice the features of the criminal conspiracy at work in the generation of black money, the siphoning-off of the black money and the stashing of the same in foreign tax jurisdictions. In the context of *Fodder Scam*[14], the Patna High Court had observed: *"It is clear that the excess drawals were not isolated act; they were manifestations and results of well-knit conspiracy to commit loot and plunder of public money in a systematic manner, which could not be possible without the support of higher-ups."* Thus, the author has alerted the Supreme Court-constituted SIT against 'creative delay'.

Apart from black money issue, the Second Edition has exhaustive commentaries on topics like *The Destiny of Our Nation: The Advent of Narendra Modi*; *Ambit of the Constitutional Restraints on the Treaty-Making Power and Global Economy - A Deal with the Devil*; *Anti-Corruption Movement - Challenge & Response*. Some of the chapters like 26, 29 and 30 are titled *"The Realm of Darkness - The Triumph of Corporatocracy"; "The Portrait of our Time"; and "A Miscellany of my ideas from my personal journal"*.

In a nutshell, the Second Edition indeed makes a fascinating reading material even for those who are mesmerised by the glamour of systemic distortions and irreparable ills of the global economy. Some of the words of caution for the SIT on Black Money are indeed vital inputs for the noted jurists who are destined to find themselves pitted against a barrage of inimical forces working against the recovery of lost wealth of India. I am in full agreement with the author when he suggests that its structure should be a honeycomb of hexagonal cells manned by persons of competence from different services and professions out to study everything that would have a bearing on the work of the SIT. Let's hope our last hope (the SIT)

14. *Susheel kumar modi v. State of Bihar*, 1996 (2) BLJR 869 : 1996 (1) PLJR 561.

finally triumphs and brings, if not the entire lost treasure, at least a part of it so that the trust of the common taxpayers is restored in our democratic system.

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SHOULD SIT REALLY FRITTER AWAY ITS ENERGY BY FOCUSING ON RECOVERY FROM TAX HAVENS?[15]

My favourite black beast (money) is back in news. While hearing the counsels for the PIL crusaders against black money the Three-Judge Bench led by the Chief Justice of India, Mr. H.L. Dattu, for the first time noted that the Apex Court is more interested in bringing back to the country the plundered money vaulted in tax havens rather than knowing the names of foreign bank account holders. When the petitioners' counsels pleaded that the Government should be directed to disclose the names in at least those cases where the foreign bank account holders have admitted their illegality and paid penalty, they were asked to go back to the Special Investigation Team (SIT) which is competent to take a call on such requests. When one of the counsels expressed his disappointment with the Government for virtually no recovery of the lost wealth from tax havens even after so many months of being in power, and wanted to discuss the ways and means suggested by the Security Advisor Ajit Doval way back in 2011, the Bench once again reposed its faith in the SIT and directed them to share all such suggestions with the SIT.

Let's now move away from the facts and look for insightful shift in the approach of the Bench particularly towards the issue of disclosure of names. In a marked departure from what has been reported in the past when the Bench was stubbornly insistent upon knowing the

names of account holders of Geneva-based HSBC bank, the Apex Court introspectively moved to the recovery aspect of the lost wealth. Let's welcome this change as in the past it was a case of missing the wood for the trees! There can be 100 or 10,000 account holders of illicit funds in various tax havens but what matters for the Nation are the chances of recovery of such wealth stolen as early as early 1990s. As per the Global Financial Integrity (GFI) Report, as high as almost two-thirds of the Indian money stashed in foreign banks were generated post-liberalisation. In other words, the history of most of such cases is not too old and it can be unearthed if our investigating agencies join their hands and piece together whatever inputs they might dig out from their tattered files to zero in on known fraudsters and smugglers of yesteryears.

Before we discuss the various aspects of recovery possibilities, one implication of the change in the approach of the Bench could be the early clearance of clouds of doubts over India signing the FATCA treaty. It appears

15. Published in www.taxindiaonline.com, TIOL–COB(WEB)–432, 22 January, 2015.

that the Apex Court has softened its stand towards confidentiality clause of most of such agreements and tax treaties. The two key international agreements where uncertainty continues to hover are FATCA and the G-20 sponsored Automatic Exchange of Information relating to tax matters. Unless the Apex Court reviews its earlier order with respect to the confidentiality nature of information shared either under a tax treaty or FATCA India cannot enter into fresh agreements as such confidentiality is a *sine qua non* for all international treaties within the fold of global taxation jurisprudence. And more delay on part of the Apex Court may

prove to be financially devastating for the entire financial institutions in India as they would suffer 30% withholding tax notified by the Internal Revenue Service of the USA. Secondly, our banks and other financial entities do need sufficient time to gear up to provide gigantic information in a particular format before the same is sifted through and shared with the IRS by the Income Tax authorities. As regards the automatic exchange of information agreement India has already missed the opportunity notwithstanding the fact that it was one of the early birds to support it. So, if India wants relevant tax information from other countries it needs to accord due respect to the confidentiality clause of all international treaties.

As regards the recovery proceedings the Apex Court has supported the suggestion made by Mr. Doval. And, what did he suggest? About four years back Mr. Doval has called for registration of 'omnibus' criminal cases against *"unidentified persons who have been indulging in criminal activities and unauthorizedly transferring the money to tax havens abroad"*. He had also suggested that the case may be transferred to a special team of the CBI and investigated under supervision of the Supreme Court. Registration of the criminal case was to empower investigating agencies to issue summons, seize incriminating papers, quiz suspects and gather evidence. This would finally enable the Government to approach foreign banks or revenue authorities to share money trail as they would be relating to criminal cases. The Bench requested the SIT to consider such suggestions furnished by the counsels.

Now, the debatable questions are - how efficacious would such measures prove? Would India be really able to recover even a part of the lost wealth from tax havens? Should India also believe that all the tainted money continues to be parked in Swiss Banks? To answer these questions one needs to look at, apart from DTAA provisions, also the Mutual Legal Assistance Treaties (MLATs) which facilitate exchange of information and extradition of law violators. India has so far signed barely 37 MLATs. Secondly, the history of giving due respect to Letters Rogatory (LA) is not very encouraging.

Although taxation, Customs duties and other revenue matters are extraditable offences but in practice, exchange of information and soliciting response from most foreign jurisdictions takes unduly exorbitant time. So, even if a criminal case is lodged and some suspects may be identified, getting information from foreign tax authorities or

banks is going to be full of uncertainties. Even if India manages to get some information on request, whether it would be able to bring back the illicit funds is a logical suspect. More importantly, whether such funds continue to be in countries with which India has signed legal treaties.

As per inputs collected from the bankers and other experts of international transactions, although the Union of India continues to focus on Swiss Banks but a major chunk of such funds has slithered out of Europe to two key Asian destinations - Dubai and Singapore. Unfortunately, *India does not have MLATs with both of them*. Only recently on the sidelines of Interpol's Plenary Session at Monaco the Union Home Minister, Mr.Rajnath Singh, asked the Singapore Deputy Prime Minister to speed up the process of legal assistance so that it could receive some inputs relating to CBI probe into Tatra truck purchase scam. In recent years, Singapore and Dubai have become major origin of investments in India. And it would not be wrong to presume that a good chunk of funds stashed in tax havens is coming back to India in the form of investments.

Such investment raises yet another fundamental question - Is India legally equipped to peel off the multiple-layered investments made through letter-box companies? And the answer is perhaps NO. One vital piece of legislation that is missing is the GAAR (General Anti-avoidance Rule). Although a good number of Asian economies like Singapore (1998); Indonesia (2008); China

(2008) and even Nepal (2001) have gone for GAAR but India continues to debate over its implementation. Its industry bodies continue to seek its postponement from 2016 to 2018. Whether the Modi Government would oblige such a demand or not but the fact remains that if it does it would dampen India's fight against black money which is channelised into the country in the form of dubious investments.

In this background where the chances of recovery of India's plundered wealth are dim or at least exorbitantly time-consuming, the SIT should ideally focus on the domestic economy which is getting hurt by the bulging size of the parallel economy. The role of cash has grown manifold in the recent years. Whether it is election or a simple purchase of a flat, cash (untaxed money) is the currency to execute all such transactions. Therefore, instead of deploying all resources and energy on recovery from tax havens the SIT should be focusing more on the cash-generating sectors of the economy and the respective laws should be fine-tuned/amended to plug the loophole promoting cash transactions. For instance, Real Estate Regulator could be one such body which can save the large real estate sector (it accounts for almost 11% of the economy) from being further corrupted and getting delinked from the mainstream of the financial markets. The entire spectrum of sectoral domestic laws should be reviewed to identify the flaws which are exploited by all sorts of audiences - the politicians, bureaucrats, corporate, brokers and many others - to multiply the cash economy. Let's hope the SIT puts its weight behind the framing of modern legislative tools

to prevent the growth of parallel economy which is guesstimated to be above 65% of India's GDP.

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BLACK MONEY - TRADE MIS-PRICING - SIT NEEDS TO SENSITISE INDIAN CUSTOMS[16]

Every time there is a poll, the issue of black money comes to the fore with a vengeance. Only two days back when the delicately oscillating political scenario appeared to be going against the BJP, the Prime Minister, Mr. Narendra Modi, once again decided to launch his frontal attack against the front-runner Aam Aadmi Party (AAP) by resorting to the alleged use of black money and accepting donations from dubious sources. A lot of hue and cry was orchestrated by the splinter group of AAP and allegations of sham companies being used for channelising black money into AAP's kitty were richly made. Whether there is any grain of truth in such allegations or not but the ground reality is that black money plays a critical role in elections in India. Politicians do make tall promises to take action against generation of black money and also to bring back such illicit funds parked outside India but they often find it difficult to do much on this front.

This is obviously not to say that nothing tangible can be done. Thanks to the political hypes created by virtually all the political parties and the Supreme Court setting up SIT to monitor investigations, the Enforcement Directorate is learnt to have found some documents indicating a large number of Indians operating companies and having bank accounts in one of the least known tax havens in India - British Virgin Islands (BVI). Investigators believe that the bank account holders - a good number from Mumbai - have apparently not taken any permission from the Reserve Bank of India. Their initial reaction is that the funds were taken out of India through *hawala* channel and either new companies were set up or existing entities were purchased to do business and the profits generated there were parked in this secrecy jurisdiction. Readers may recall that although India does not have a DTAA with BVI but it did sign Tax Information Exchange Agreement

(TIEA) in 2011, and such an instrument is likely to be used to gather more information about all such suspicious accounts in the coming months.

Now the major question is - Whether such bank account holders only use channels like *hawala* or also some of the legal routes like exports and imports. Given the large matrix of dozens of export promotions schemes being in place since 1990, trade mispricing is certainly the safest and the most profitable route for money laundering from India. What may substantiate such an assumption is

16. Published in www.taxindiaonline.com, TIOL–COB(WEB)–434, 5 February, 2015.

the recent finding of the Global Financial Integrity (GFI). As per their report, India lost as much as USD 95 billion on account of illicit outflows in 2012 only. As against such outflows, the total inflows in the form of FDI and overseas development aid amounted to barely USD 26 billion in 2012. In the last one decade, the GFI notes that India lost as much as USD 440 billion.

Let's consider the statements of the GFI's President Raymond Baker who has observed that the mis-invoicing of goods being shipped is certainly not a source of black money but a tunnel through which black money leaves a country. As per IMF data, close to 80% of all cross-border illicit flows moves through the route of trade mispricing. For poor and least developed economies, this is about 90 per cent. But for India, the IMF data indicates that this is as high as 99 per cent!

If the Modi Government believes in the studies done by the IMF and GFI, the answer to the issue of curbing outflow of illicit funds from India lies in not focusing too much on bringing back the lost wealth but to build thick

walls to prevent such money going out of the economy. And the SIT which appears to be pinning high hopes on the direct tax aspect of the black money issue should actually be panning its eyes on the Customs frontier. Even after so many years of heated debate over this issue, the CBEC and its Customs field formations are not at all sensitised about this demonic issue. Ideally the Modi Government should put all its might to curb trade mispricing which alone if reduced by 50%, can given enough resources which can fund most of its welfare schemes and also reduce the tax burden on honest taxpayers.

How does the trade mis-pricing work? How exactly the trade-based money laundering (TBML) has been flourishing in India? Trade is perhaps the safest mechanism to disguise the proceeds of crime and legitimise them. And the most common methods are over and under-invoicing of goods and services; mis-declaration of goods; over and under-shipments of goods and outright commercial frauds where sander woods being declared as exports of garments or rice bags or plastic items. Undervaluation is done by fabricating documents or suppressing values or getting a new invoice raised from any other location except from the origin of such goods to avoid paying high Customs duty and also antidumping duty.

Exemption notifications are another tool wherein end-use conditions are abused to divert goods for higher profits. Although such exemptions are granted to provide relief to certain sectors but they are often misused for various purposes. Similarly, Foreign Trade Agreement or Preferential Trade Agreements are also abused by third party traders who are in the first place not eligible to take their benefits. Readers may recall the case of a large number of importers using the Thailand route to import gold at lower tariff. Only after it was reported by the media, this route has been plugged. A large number of

cases have been identified

where dubious exporters and importers have been trading with fake Importer-Exporter Code (IEC).

Only recently the Directorate of Revenue Intelligence has detected that dozens of exporters have been over-invoicing common carpets as hand-made handicraft items and something worth a few hundred bucks was being exported for more than Rs. 50,000. And it resulted in not only wrongful claims of exports benefits but also money laundering of sums in the range of more than Rs. 2600 Crore. Such an export of worthless carpet facilitated huge inflow of illicit funds parked abroad.

In this background, what is happening in reality is that Indian Customs continues to be in a facilitative mode. India has now more than 100 remotely-located CFS (Container Freight Station) and ICDs (Inland Container Depots) which have become safe haven for fraudsters to grease the palm of officers who are expected to inspect the containers loaded with goods and certify their export values as per Export Valuation Rules. Instead of doing their duty, they make good use of their 'remote' posting by charging exporters on per container basis and they often succeed in keeping their bosses happy by doing lavish protocols. There are instances where the seals of inspected containers have been broken on way to sea ports and the goods have been replaced. In a few instances, the seals were left untouched but the top side of the container was removed and once the goods were replaced, they were welded like the original ones.

All such instances tend to suggest that the Indian Customs is not at all sensitised towards the global problem of trade mispricing and the damage it does to an economy. Although the Special Valuation Branch (SVB) of the CBEC has presence in all the major cities to keep an eye on mispricing in imports by MNCs which are obviously large importers but the SVB is a

lacklustre arm of the Customs which is yet to establish its effectiveness and credentials. It is a neglected body where good officers are scared to do any stint. In other words the Modi Government and the SIT do require to focus on the tightening of the working of the Indian Customs which alone can ensure significant reduction in the instances of trade mispricing - a hot vehicle to transport illicit funds out of India. It is high time the CBEC also gears up along with its sister Board to blunt the pangs of black money votaries in the country. Both the Revenue Boards need to realise that by doing their duties they would be doing a great deal of service to the Nation by preventing billions of dollars disappearing into tax havens. On a larger plane, it would be the biggest service to the cause of democracy which faces serious risks from tax havens eating out scarce finances of poor and emerging economies which are not able to take care of their poor populace.

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TAX EVASION - ALLEGATIONS AGAINST HSBC INDIA - A CLUE FOR SIT[17]

Black Money and Switzerland are globally perceived as the two sides of the same coin. But, going by the recent exposes by the International Consortium of Investigative Journalists (ICIJ), it appears that more than Switzerland, the real Siamese twins are the laundered money and the HSBC Bank. So much notoriety it has earned for its tainted operations across the world that it has been facing criminal investigations in more than half a dozen countries. The latest news has come from its most reliable 'shelter' i.e. Geneva. As per media reports, the Swiss Police yesterday searched the Geneva subsidiary of the bank for alleged money-laundering. Although the HSBC reportedly said that it was cooperating with the Swiss

authorities, the probe is likely to be extended to banking officials who committed money laundering.

The Swiss authorities which had been bravely holding the fort for the tainted bank for many years ever since one of the bank employees leaked the huge data of account holders to France and in turn to many other countries, including India, finally got swept away by the rising tide of charges levelled against the Geneva division of the London-headquartered banker. The Swiss raided its premises a week after allegations were made against the banker that it helped the rich and famous to evade taxes. In a reported Statement the Swiss Attorney General Olivier Jornot and the prosecutor Yves Bertossa said that the search was underway in the premises of the bank.

Last Sunday, virtually admitting the wrongdoing by its private investment arm in Geneva, the HSBC Global CEO, Mr. Stuart Gulliver, made a public apology to the entire nation and the same was carried in full-page advertisement in many newspapers in the UK. He admitted the lapses on part of the Swiss Private Bank in assisting account holders evade taxes in their home countries. He claimed that such lapses were a thing of the past and firm measures have been taken to prevent non-recurrence. Although one may tend to appreciate such transparency policy demonstrated by Mr. Gulliver but what may surprise a large part of the world, including India, is the fact that such an apology was tendered exclusively to the fellow countrymen in the UK. It is a fact that dozens of its subsidiaries are accused of aiding and abetting tax evasion in may tax jurisdictions but Mr. Gulliver's apology is meant to be only for his home country. What is more surprising is the fact that what seems to have triggered an early announcement of his apology is the latest scandal that involves the HSBC India but no remorse has been communicated to the Indian patrons.

Readers may recall that although the HSBC India has

been a part of the global tax evasion and money laundering scam for many years but the latest

17. Published in www.taxindiaonline.com, TIOL–COB(WEB)–436, 19 February, 2015.

allegation has come from the USA where its employees have aided NRIs and promised them that their deposits would be beyond the glare of the Internal Revenue Service (IRS). The US Revenue authorities would certainly extend their on-going probe into the US subsidiary of the bank but what is required to be done by India is that the SIT should *suomoto* initiate investigation not only by the Income Tax authorities but also the Enforcement Directorate to examine the dimension of alleged money-laundering. Now that the holding company has admitted its oversight failure and the Swiss authorities have themselves initiated investigation, it is the opportune time for India *to put pressure on the Swiss counterpart to exchange information about all those Indians whose names were disclosed by the ICIJ* and recently published by some newspapers in India. Since money laundering is now a universal offence and there is no tax jurisdiction which can ask for more specific and precise information about account holders in the light of what Mr. Gulliver advertised, the SIT has a good chance to recover at least a part of the Indian lost wealth to Swiss Banks.

How much of Indian illicit funds are still parked in Swiss Banks is not very clear but if we go by various studies it can be anything but not less than a sizeable chunk. As per a 2012 Report of the Tax Justice Network, there were about USD 21 trillion to USD 32 trillion sheltered in tax havens worldwide. And the Report notes that if 3% capital gains tax is collected on such an amount, it may yield tax revenue to the tune of USD 200 bn. Other studies indicate that the total wealth in all tax havens could be as low as USD eight trillion dollars. The

OECD in 2007 estimated that the wealth held offshore could be in the region of USD 5 to 7 trillion - about 6 to 8% of total global investments. Even though the accuracy of such figures may be a suspect but what is beyond doubt is that a major chunk of such funds is vaulted in the Swiss banks. And going by this logic, a major chunk of Indian money which could be anywhere between USD 0.5 trillion to USD one trillion can be traced to Swiss banks.

Before I come back to the home turf, it would be pertinent to recall that the HSBC has been the epicentre of many tax scandals reported in the past 10 years. Only three years back in 2012, the US Senate Committee found serious lacunae in its anti-money laundering measures. It also found that the HSBC had allegedly been laundering drug money from Mexico and had shown contempt for the legal safeguards to prevent transactions involving terrorists and drug lords. It was also accused of hiding about USD 20 billion in transactions with Iran. To avert criminal prosecution it had reportedly paid USD 1.92 billion to the US Authorities in the money laundering case. And such a decision of the US Justice Department was labelled by the New York Times as the ‘dark day for the rule of law’.

What preceded the US investigation into the wrong-doing by the HSBC was one of the most sensational banking leaks in history by one of its computer engineers. And the leak shed light on about 30,000 account holders having nationalities like American, French, German, Italian, Dutch and Indian. Although the French authorities did share about 700 names with India but the recent revelations indicate that there are hundreds of more names in that list. In fact, a few dozen names were recently published by some newspapers based on reports of ICIJ.

In this background, the onus lies on the SIT which has been appointed as the torch-bearer for India's investigation into all cases of tax evasion and money laundering and also ensure recovery of the Indian funds if any. Given the admission of the Global CEO of wrongdoing in the past and also the fact that the HSBC India has been actively facilitating NRIs there is a possibility that it may have been instrumental in luring High Networth Individuals (HNIs) from India to open accounts in its Geneva branch in the past and also help evade taxes. Ideally, the SIT probe should post-mortem the entire operations of HSBC India in the past decade and report to the nation whatever is found. It should also seek assistance from the IRS in the USA for sharing information and catch hold of Indians in the USA to testify against it in India. Now that India is about to sign FATCA, it should not only share information with the IRS but also seek valuable and actionable inputs relating to the Indian subsidiary.

It is equally important that the Government of India should take a fresh look at all the investments made by the HSBC India in critical projects - of course, indirectly through Indian financial institutions. Yet another step which the Finance Minister, Mr. Arun Jaitley, should examine in today's context is the recommendation of the M.C. Joshi Committee on black money. And it has suggested that India may opt for a new law like the USA Patriot Act under which all global transactions above a limit should be reported to certain designated revenue agencies. Such a measure would enable the Revenue to keep a close watch on cross-border transactions. One should not be confusing its objective with the FIU which keeps an eye on large cash transactions and transactions of suspicious nature. The reporting of heavy cross-border transactions may result in clues about the mercurial character of transactions being undertaken for certain official purposes but that is how money laundering is

accomplished. Let's hope the probe into HSBC India holds some promise for the SIT to make a part recovery of India's lost wealth.

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BLACK MONEY IN TAX HAVENS - UN DECLARATION BACKS INDIA'S EFFORTS AT RECOVERY[18]

There is no denying the fact that Foreign Direct Investment (FDI) plays a positive role for both developing as well as a developed economy. The only intriguing fact which every Finance Minister, in charge of the growth driver for an economy, needs to know is - at what cost? If the FDI caravan is not handled tactfully and intelligently its costs could be a drag on the economy. In this backdrop the Indian Finance Minister, Mr. Arun Jaitley, seems to be grappling with an unpleasant situation where, for a change, he happens to be the first Finance Minister to take a bold and unambiguous stand on a 'hugely taxing' issue. He seems to be so much firm in his stand that irrespective of a forum and a foreign land he has been sharing his mind on the issue of levy of MAT on Foreign Institutional Investors (FIIs). For a change, even one of the leading Industry Associations has openly rallied behind him. Whether India is a tax haven or not is certainly not the relevant point in this case. What is pertinent here is that the carriers of foreign investments have been seeking retrospective exemption from the Government and to achieve so, they appear to be resorting to unethical or call it habitual, market-based tricks. And it was evidently seen when they pulled out a good chunk of funds from the Indian bourses and let the sensitive index take a tumble. In fact it was expected of them and, thankfully, the Finance Minister was expecting it and that is why he did not entertain tremors of panic while talking to the media.

Kudos to him for embracing 'stability' in his stand while he has been working hard to infuse elements of stability and predictability in the Indian tax system (Last evening clarification by the Revenue Secretary that DTAA provisions will override domestic laws provisions is one such step in this direction). But whether the Exchequer would finally be richer by Rs. 40,000 Crore revenue or not, such issues should be left by both the parties at the doorsteps of the judiciary.

Now that I have entered into the precincts of the judiciary let's go straight to Hon'ble Chief Justice H.L. Dattu's Court where the PIL on the black money issue came up for hearing last Tuesday. Palpably perturbed Mr. Ram Jethmalani pleaded that the Union Government was attempting to thwart the efforts of the Apex Court at recovering the Indian money parked in tax havens. He reportedly said that he had something which might shock the court but the Bench restrained him and promised to hear him after the SIT submits its status report on the key black money cases on May 12. Outside the court room while talking to some media persons Mr. Jethmalani reportedly said that he had recently been to Germany and the German Revenue authorities told him that they had not received any formal requests under the provisions of the DTAA about the LGT bank

18. Published in www.taxindiaonline.com, TIOL–COB(WEB)–445, 23 April, 2015.

account holders. He said that there are about 1400 such account holders but the Ministry of Finance is going slow in investigating against them.

If there is any element of truth in Mr. Jethmalani's reported statement, it would amount to very serious indictment of the NDA Government. A large swathe of the country is apparently pinning hope on Mr. Narendra Modi

that he would bring back, if not in *toto*, at least a part of the Indian money parked in tax havens. Whether the Foreign Taxation Division of the CBDT has really not formally sought tax information about the LGT bank account holders is a little intriguing. If that is the case the major question that may arise is - Whether correct information is being provided to the SIT or not?

Anyway, let's wait for the truth to spring out of the secret bag on May 12 and then delve deeper into the various dimensions of the contentions raised by Mr. Jethmalani. What would also merit a discussion by the Apex Court is the recent news item that Germany and the UK have registered their protest with India about the alleged breach of confidentiality of information furnished by them under the DTAA provisions. The readers may recall that a little more than a dozen names of LGT bank account holders were furnished to the Apex Court and the same was reported by the media. Their line of argument is that such information obtained under the DTAA provisions should not have been disclosed whereas the Indian Revenue authorities have been trying to convince them that it is not a case of violation of confidentiality clause as such information was furnished on the direction of a court order. No doubt, going by the archaic international practice which puts many barriers even if such information is shared with a court of law, the CBDT would be facing serious challenges ahead. Although the Union Cabinet recently approved the proposal to join the international convention on automatic exchange of tax information which was profusely emphasised upon by Mr. Jaitley recently when he was in the USA, India would be facing tough time ahead unless the Apex Court amends its interpretation of Article 26 of the India-Germany DTAA given in the case of *Ram Jethmalani v. Union of India*[19] in 2011. While extolling the utility of the Common Reporting Standards on Automatic Exchange of Information Mr. Jaitley said that it should be implemented fully on

reciprocal basis.

Meanwhile, what has come as a major boost for India's effort to recover Indian money stashed in tax havens is last Sunday's resolution of the UN body at Doha. At the 13th UN Congress on Crime Prevention and Criminal Justice, it was resolved that effective measures should be taken to trace, recover and freeze *"money and other assets that have not been accounted for and are found in safe havens"* so that they can be confiscated and transparently disposed of. It stated that confiscation can be done as per domestic law and can also be 'non-

19. 2011-TII-05-SC-INTL : (2011) 8 SCC 1.

conviction-based'. The meeting was chaired by the Secretary General, Ban ki-Moon and the Indian Law Minister D.V.S. Gowda. The Declaration called for developing strategies to combat 'all illicit financial flows' and urgent steps to be taken *to fight against economic and financial crimes, including fraud, as well as tax and corporate crimes, especially in their relevant trans-national dimensions."*

Another interesting development on the international front which is worth noting is that under pressure from India and G-20 initiatives for greater transparency, many Swiss Banks have asked their Indian clients to furnish fresh undertaking to vouch that their funds deposited with them are not untaxed. A good number of High Net worth Individuals (HNIs) have been given a time-frame under which they are required to submit their auditor's certificates to certify the 'white colour' of their funds. Wealth management and portfolio management clients and also corporate have been directed by the HSBC and Credit Suisse to ensure timely compliance with their recent initiatives.

In a nutshell, India has apparently not made substantial

recovery of funds parked in tax havens but if the new international financial order becomes more transparent and conventionally popular destinations for untaxed and tainted money become more cooperative in investigations initiated by the developing countries, it augurs well for the future. With tax shelters being unavailable in the international market, tax dodgers and money launderers will have no place to hide their treasure and greater exchange of information on automatic basis would further clip their wings to take funds across borders. Let's hope the pressure of the judiciary and the objective of the black money bill are realised in terms of good revenue collections for Mr. Jaitley.

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Conclusion

The book makes an attempt to record and explore several quantitative and qualitative aspects of black money over the past seven years dissecting and diagnosing the factors which lead to its generation, stocking and flow from one point to another. The book encompasses two broad aspects - the first explores the international perspective on black money challenges, and the second deals with the domestic micro causes contributing to generation of black money and the different ways to conduit the same out of India. While we all commonly use the term black money, yet it is so difficult to define the same because it keeps changing its skin like a chameleon. From the simplest version of black money arising due to evasion of tax, it could be an offspring of tainted money such as corruption, *hawala* transactions, bribery and cash transactions. And it can easily walk across our borders through the tunnels of trade mispricing, money laundering, money earned through narcotics, terrorism and so on and so forth. It is also true that black money has not been defined in any of our Indian legislations. But that is not the objective of this book. Rather my attempt is to understand and investigate into the

ever-expanding frontiers of black money. This is exactly what I have tried to seek through this book.

The book admits that black money is a reality and is all pervading whether at the individual level, political level, business community level and even constitutionally-set up institutional level. Black money runs like a common string binding each of these levels together. It hardly needs to be emphasised that the problem has taken deep roots and unfortunately we have spent too many decades in our slumbers. Just like a perfectly egalitarian society is utopian, so is the hope for a society completely freed from the evils of black money. Yet there is a situation in front of us and we have to deal with it with specific measures. We have certain laws to counter black money, however, with the rapid growth in its complexity, all these laws need major overhauling. Even if we amend the laws, the million dollar question that arises is - are we really willing to implement them in the right spirit. Post sanction of the President, the Lokpal has finally taken the shape of a law and is awaiting its due notification. While we all understand that Lokpal law cannot be a panacea for the mammoth problem of black money generation through corruption route, yet huge expectations have been attached to the same hoping against the hope that this law would bring in a major shift in

countering corruption, which is one of the prime contributors to the black money ocean.

As the legendary Late Dr. Rajendra Prasad, India's first President, said once during the Constituent Assembly debates that Constitution like a machine is a 'lifeless thing' and its success or failure entirely depends on the people who control it and operate it. This is what makes the whole difference. This noble statement holds true as on date as much as it did in those early years. Our elected representatives are experiencing the lowest point of trust deficit since Independence. Some ray of

hope is being expected from the new Government. However, only actions will evidence whether the present Government chooses only to learn from the mistakes of their predecessors on how not to commit the same mistakes while again indulging in poor governance or whether they actually bring in a change for the better. There is no dearth of intellectual inputs available on how to counter black money. There are voluminous reports and research papers digging into the complexities of black money. The most pertinent and relevant question is - are we willing to act upon them?

The heat of black money has been experienced by the international community courtesy growing economic setbacks and the threat of terrorism. The biggest positive fallout of this has been that the international community in the form of G-8, G-20 and OECD has gone up in arms against the menace of black money, bank secrecy laws and the notorious tax havens. However, at the end of the day each country would have to fight for its own sovereign interests. Taking a cue from the USA which has compelled all countries to sign the Foreign Account Tax Compliance Act (FATCA), India should rise to the situation and push forward its agenda for exerting pressure on tax havens to exchange relevant bank account information with it. In fact, to win this fight against the black money, India must pitch for criminal sanctions in these taxation treaties with the tax havens (may be the New Black Money Legislation would partly achieve this goal). There would not be a better situation than now when there is such bone-breaking pressure on institutions like HSBC bank which itself has admitted being a party to tax evasions and gross lapses. The noose is getting tightened on the black money or at least the mood is being set to counter the evil of black money for the first time in a serious and coordinated manner. For the first time after several years of deliberations, the international community is arriving at a global consensus over the need for an automatic exchange of information regime. But whether such exchange of information would really eliminate the confidentiality layer that shrouds the relationship between a banker and its clients is to be seen in the

coming years.

If the Government is really serious in recovering India's lost wealth, it must utilize the present momentum to pitch for criminal sanctions in these taxation treaties with the tax havens to curb the relentless overseas stashing of funds.

Simultaneously, we also have to address the specific domestic challenges and major institutional shortcomings which are only adding to the rising graph of black money. Unless the domestic generation of black money is checked, the flight of black money outside India would continue in some or other way and any recovery of lost wealth from foreign vaults would remain a battle half-won.

To speak further about the domestic turf, the judicial activism of the Supreme Court has already earned the acceptance of the masses and it is making every possible effort through the SIT to bring black money hoarders to book. Legal impediments like confidentiality clauses in the Double Taxation Avoidance Agreements are being renegotiated.

To sum up, the future is not that black and hope is still alive. But if the Indian polity still chooses not to join the international bandwagon and harness the domestic consensus against black money, the bus would be missed forever. We already have had enough of rhetorical statements and skillful beating around bushes for perpetuating "you scratch my back and I scratch yours" syndrome. What we now need is a paradigm shift in our approach, for a meaningful change in this global combat against black money which has also emerged as the biggest enemy against poverty in this world. In other words, even if an elected government is keen to introduce welfare schemes or fulfill the United Nations goals of development, it is often short of funds and what is due to

the Exchequer is often found parked in tax havens destabilizing the global financial markets.

Kudos to the Modi Government for proposing two new legislations on Black Money and *Benami* Transactions but the history is witness to the events like these where *Benami* Transactions (Prohibition) Act was enacted but could not be fully implemented because the Rules were never framed. Sometimes the intent displayed on the floor of the Parliament never gets translated into concrete measures. Secondly, the New Legislation on foreign assets and undisclosed income is to be watched for how and to what extent it may succeed in recovering the Indian funds parked in foreign banks. Thirdly, the proposed matrix of penal provisions may turn out to be counter-productive if we go by the results of the Amnesty Schemes introduced in the past. Although the 'Compliance Window' proposed by the New Legislation was necessary but to make it a success the Union Government needs to do some extra legwork. Merely criminalising an offence often does not solve the problem unless the ground realities rooted in the socio-economic and political conditions of a country are addressed with various institutional responses. For instance, key black money generating sectors of the economy should be brought under the vigil of sector-specific regulators in place such as Real Estate Regulator; state funding of elections; greater accountability of Institutions like CBI, CVC and also Lok Pal. The future is certainly not that bleak but greater challenges lie ahead as India will have to at one stage resort to United Nations' Convention Against Corruption to recover a part of the illicit

funds parked in tax havens. I am hopeful that the Modi Government would leave no stone unturned to live up to the expectations of the civil society, honest taxpayers, foreign investors and even penury-ridden masses by sincerely curbing

the menace of black money, corruption and money laundering.

APPENDICES

Appendix – I

Indian Finance Minister's Letter to Swiss Counterpart on Exchange of Information

DO F. No. 504/307/2012-FTD

FINANCE MINISTER INDIA, NEW DELHI

March 13, 2014

Excellency

This is with reference to your letter dated 20th December, 2013 regarding an effective exchange of information under the Double Taxation Avoidance Convention (DTAC) between our countries.

In view of your assurance that the Swiss Government is keen to cooperate with India and find possible ways of complying with our requests for information under DTAC, a bilateral discussion at the official level was held in New Delhi on 4th and 5th February, 2014. However, no progress was made during the discussions and the Swiss delegation merely reiterated their previously stated positions and refused to consider any options or alternate approaches. Further, the Swiss authorities through a letter dated 20th February, 2014, have suggested that

they are "closing" the requests made by India in 562 cases. You would appreciate that, such a situation, where there is no effective exchange of information between India and Switzerland despite a clear legal obligation of Switzerland under Article 26 of the DTAC, is a matter of grave concern for India.

The Swiss Government had proposed revision of the Domestic Law of Switzerland for providing information under the tax treaties, i.e., Swiss Administration Assistance Act (TAAA), which would have enabled Switzerland to provide information to India in the HSBC cases even in respect of the so-called stolen data, as the Government of India had not obtained the data in an un-authorized manner. However, it is learnt that the proposed revision did not take place due to strong political opposition in Switzerland, It should be noted that Switzerland's refusal to provide information in serious cases of tax evasion in India is a sensitive matter in India too. With a view to complying with internationally accepted standards and conventions, and to strengthen the ties of friendship and cooperation between the two countries, the Swiss Government should be able to persuade

the Swiss Parliament to agree to the proposed changes in its domestic law. Switzerland cannot violate its obligations under the DTAC with India on any ground, including on moralistic grounds, when the Government of India has all along acted in good faith and has requested the information in a *bona fide* manner. The Government of India, as a matter of policy, is seriously concerned that some Indian taxpayers may have parked substantial unaccounted income and assets in offshore jurisdictions, and it expects cooperation from those jurisdictions to deal with them effectively.

The G20 leaders had declared in London in April, 2009 that the "era of bank secrecy is over". Switzerland's refusal to provide information to India and other countries on the grounds that the source of the information requested is based on "stolen data" means that, in practice, Switzerland still believes in bank secrecy and is therefore not in tune with the modern era. Further, the G20 leaders

declared that they stand ready to deploy sanctions to protect their public finances and financial systems. In the event of continued denial of access to vital information, which Switzerland is obliged to provide under the DTAC, India may be constrained to actively consider the options available under our domestic laws.

I also wish to state that the suggestion that the issue of stolen data can be better addressed by allowing Phase 2 review of Switzerland in the Global Forum is impractical. If information continues to be denied to India under the DTAC, the Government of India will be constrained to take a position in the Global Forum that Switzerland still does not comply with the standards of transparency and that the required legal and regulatory framework (examined in Phase 1) is still not in place in Switzerland. Further, the Government of India may also have to raise this issue in other multilateral for a such as the G20.

I had impressed upon you during our bilateral discussions of 12th October, 2013 in Washington D.C., and also through my letter dated 19th November, 2013, that the investigation in some cases of serious tax evasion would statutorily become time barred on 31st March, 2014. I would, therefore, request you to kindly get the matter re-examined and convey the decision of the Swiss Government at the earliest.

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Ms. Eveline Widmer Schiumpf
Finance Minister of Switzerland Federal Department of Finance FDF Bern.

Appendix II

The Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015

ARRANGEMENT OF CLAUSES

CHAPTER I

PRELIMINARY

Clauses

CHAPTER IV PENALTIE

Power to remove difficulties.
Amendment of section 2 of Act 54 of 1963.
Amendment of Act 15 of 2003.

THE UNDISCLOSED FOREIGN INCOME AND ASSETS (IMPOSITION OF TAX) BILL, 2015*

A

BILL

to make provisions for undisclosed foreign income and assets, the procedure for dealing with such income and assets and to provide for imposition of tax on any undisclosed foreign income and asset held outside India and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Sixty-sixth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title, extent and commencement.

1. (1) This Act may be called the Undisclosed Foreign Income and Assets (Imposition of Tax) Act, 2015.

It extends to the whole of India.

Save as otherwise provided in this Act, it shall come into force on the 1st day of April, 2016.

Definitions.

2. In this Act, unless the context otherwise requires,—

"assessee" means a person, being a resident other than not ordinarily resident in India within the meaning of clause (*6*) of section 6 of the Income-tax Act, by whom tax in respect of undisclosed foreign income and assets, or any other sum of money, is payable under this Act and includes every person who is deemed to be an assessee in default under this Act;

"appellate Tribunal" means the Appellate Tribunal constituted under section 252 of the Income-tax Act;

"assessment" includes re-assessment;

"assessment year" means the period of twelve months commencing on the 1st day of April every year;

"Board" means the Central Board of Direct Taxes constituted under the Central Boards of Revenue Act, 1963; (54 of 1963.)

"Income-tax Act" means the Income-tax Act, 1961; (43 of 1961.)

"participant "means—

a partner in relation to a firm; or

a member in relation to an association of persons or body of individuals;

"prescribed" means prescribed by rules made under this Act;

"previous year" means—

(*a*) the period beginning with the date of setting up of a business and ending with date of the closure of the business or the 31st day of March following the date of setting up of such business, whichever is earlier;

* Bill No. 84 of 2015, as introduced in Lok Sabha.

the period beginning with the date on which a new source of income comes into existence and ending with the date of closure of the business or the 31st day of March following the date on which such new source comes into existence, whichever is earlier;

the period beginning with the 1st day of the financial year and ending with the date of discontinuance of the business other than business referred to in clause (*b*) or dissolution of an unincorporated body or liquidation of a company, as the case may be; or

the period of twelve months commencing on the 1st day of April of the relevant year in any other case, and which immediately precedes the assessment year.

"resident" means a person who is resident in India within the meaning of section 6 of the Income-tax Act;

"undisclosed asset located outside India" means an asset (including financial interest in any entity) located outside India, held by the assessee in his name or in respect of which he is a beneficial owner, and he has no explanation about the source of investment in such asset or the explanation given by him is in the opinion of the Assessing Officer unsatisfactory;

"undisclosed foreign income and asset" means the total amount of undisclosed income of an assessee from a source located outside India and the value of an undisclosed asset located outside India, referred to in section 4, and computed in the manner laid down in section 5;

"unincorporated body" means—

a firm;

an association of persons; or

a body of individuals;

"value of an undisclosed asset" shall have the meaning assigned to it in subsection (*2*) of section 3;

all other words and expressions used herein but not defined and defined in the Income-tax Act shall have the meanings respectively assigned to them in that Act.

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Charge of tax.

3. (1) There shall be charged on every assessee for every assessment year commencing on or after the 1st day of April, 2016, subject to the provisions of this Act, a tax in respect of his total undisclosed foreign income and asset of the previous year at the rate of thirty per cent of such undisclosed income and asset:

Provided that an undisclosed asset located outside India shall be charged to tax on its value in the previous year in which such asset comes to the notice of the Assessing Officer.

(2) For the purposes of this section "value of an undisclosed asset" means the fair market value of an asset (including financial interest in any entity) determined in such manner as may be prescribed.

Scope of total undisclosed foreign income and asset.

4. (1) Subject to the provisions of this Act, the total undisclosed foreign income and

asset of any previous year of an assessee shall be,–

the income from a source located outside India, which has not been disclosed in the return of income furnished within the time specified in *Explanation* 2 to sub-section (*1*) or under sub-section (*4*) or sub-section (*5*) of section 139 of the Income-tax Act;

the income, from a source located outside India, in respect of which a return is required to be furnished under section 139 of the Income-tax Act but no return of income has been furnished within the time specified in *Explanation* 2 to sub-section (*1*) or under sub-section (*4*) or sub-section (*5*) of section 139 of the said Act; and (*c*) the value of an undisclosed asset located outside India.

Notwithstanding anything contained in sub-section (*1*), any variation made in the income from a source outside India in the assessment or reassessment of the total income of any previous year, of the assessee under the Income-tax Act in accordance with the provisions of section 29 to section 43C or section 57 to section 59 or section 92C of the said Act shall not be included in the total undisclosed foreign income.

The income included in the total undisclosed foreign income and asset under this Act shall not form part of the total income under the Income-tax Act.

Computation of total undisclosed foreign income and asset.

5. (1) In computing the total undisclosed foreign income and asset of any previous

year of an assessee,—

(*i*) no deduction in respect of any expenditure or allowance or set off of any lossshall be allowed to the assessee, whether or not it is allowable in accordance with the provisions of the Income-tax Act;

(*ii*) any income,—

which has been assessed to tax for any assessment year under the Income-tax Act prior to the assessment year to which this Act applies; or

which is assessable or has been assessed to tax for any assessment year under this Act, shall be reduced from the value of the undisclosed asset located

outside India, if, the assessee furnishes evidence to the satisfaction of the Assessing Officer that the asset has been acquired from the income which has been assessed or is assessable, as the case may be, to tax.

(2) The amount of deduction referred to in clause (*ii*) of sub-section (*1*) in case of an immovable property shall be the amount which bears to the value of the asset as on the first day of the financial year in which it comes to the notice of the Assessing Officer, the same proportion as the assessable or assessed foreign income bears to the total cost of the asset.

Illustration

A house property located outside India was acquired by an assessee in the previous year 2009-10 for fifty lakh rupees. Out of the investment of fifty lakh rupees, twenty lakh rupees was assessed to tax in the total income of the previous year 2009-10 and earlier years. Such undisclosed asset comes to the notice of the Assessing Officer in the year 2017-18. If the value of the asset in the year 2017-18 is one crore rupees, the amount

chargeable to tax shall be A-B=C where, A=Rs.1 crore, B=Rs. (100 x 20/50) lakh= Rs.40 lakh, C=Rs. (100-40) lakh=Rs.60 lakh.

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Tax Authorities.

6. (1) The Income-tax authorities specified in section 116 of the Income-tax Act shall

be the tax authorities for the purposes of this Act.

Every such authority shall exercise the powers and perform the functions of a tax authority under this Act in respect of any person within his jurisdiction.

Subject to the provisions of sub-section (4), the jurisdiction of a tax authority under this Act shall be the same as he has under the Income-tax Act by virtue of orders or directions issued under section 120 of that Act (including orders or directions assigning the concurrent jurisdiction) or under any other provision of that Act.

The tax authority having jurisdiction in relation to an assessee who has no income assessable to income-tax under the Income-tax Act shall be the tax authority having jurisdiction in respect of the area in which the assessee resides or carries on its business or has its principal place of business.

Section 118 of the Income-tax Act and any notification issued thereunder shall apply in relation to the control of tax authorities as they apply in relation to the control of the corresponding income-tax authorities, except to the extent to which the Board may, by notification in the Official Gazette, otherwise direct in respect of any tax authority.

Change of incumbent.

7. (1) The tax authority who succeeds another authority as a result of change in

jurisdiction or for any other reason, shall continue the proceedings from the stage at which it was left by his predecessor.

(2) The assessee in such a case may be given an opportunity of being heard, if he so requests in writing, before passing any order in his case.

Powers regarding discovery and production of evidence.

8. (1) The prescribed tax authorities shall, for the purposes of this Act, have the same

powers as are vested in a court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:—(5 of 1908.)

discovery and inspection;

enforcing the attendance of any person, including any officer

of a banking company and examining him on oath;

compelling the production of books of account and other documents; and

issuing commissions.

For the purposes of making any inquiry or investigation, the prescribed tax authority shall be vested with the powers referred to in sub-section (*1*), whether or not any proceedings are pending before it.

Any tax authority prescribed for the purposes of sub-section (*1*) or sub-section (*2*) may, subject to the rules made in this behalf, impound any books of account

or other documents produced before it and retain them in its custody for such period as it thinks fit.

(4) Any tax authority below the rank of Commissioner shall not —

impound any books of account or other documents without recording his reasons for doing so; or

retain in his custody any such books or documents for a period exceeding thirty days without obtaining the approval of the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner.

Proceedings before tax authorities to be judicial proceedings.

9. (1) Any proceeding under this Act before a tax authority shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 and for the purposes of section 196 of the Indian Penal Code.(45 of 1860.)

(2) Every tax authority shall be deemed to be a civil court for the purposes of section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973. (2 of 1974.)

Assessment.

10. (1) For the purposes of making an assessment or reassessment under this Act, the

Assessing Officer may, on receipt of an information from an income-tax authority under the Income-tax Act or any other authority under any law for the time being in force or on coming of any information to his notice, serve on any

person, a notice requiring him on a date to be specified to produce or cause to be produced such accounts or documents or evidence as the Assessing Officer may require for the purposes of this Act and may, from time to time, serve further notices requiring the production of such other accounts or documents or evidence as he may require.

The Assessing Officer may make such inquiry, as he considers necessary, for the purpose of obtaining full information in respect of undisclosed foreign income and asset of any person for the relevant financial year or years.

The Assessing Officer, after considering such accounts, documents or evidence, as he has obtained under sub-section (*1*), and after taking into account any relevant material which he has gathered, under sub-section (*2*) and any other evidence produced by the assessee, shall by an order in writing, assess the undisclosed foreign income and asset and determine the sum payable by the assessee.

If any person fails to comply with the terms of the notice under sub-section (*1*), the Assessing Officer shall, after taking into account all the relevant material which he has gathered and after giving the assessee an opportunity of being heard, make the assessment of undisclosed foreign income and asset to the best of his judgment and determine the sum payable by the assessee.

Time limit for completion of assessment and reassessment.

11. (1) No order of assessment or reassessment shall be made under section 10 after the

expiry of two years from the end of the financial year in which the notice under sub-section(*1*) of section 10 was issued by the Assessing Officer.

(2) Notwithstanding anything contained in sub-section (*1*), an order of fresh assessment in pursuance of an order passed under section 18 setting aside or cancelling an assessment, may be made at any time before the expiry of the

period of two years from the end of the financial year in which the order under section 18 is received by the Principal Commissioner or the Commissioner.

(3) The provisions of sub-section (*1*) shall not apply to the assessment or reassessment made in the consequence of, or to give effect to, any finding or direction contained in an

order under section 16 or section 18 or section 19 or section 22 of this Act or in an order of any Court in a proceeding otherwise than by way of appeal under this Act and such assessment or reassessment may, subject to the provisions of sub-section (*2*), be completed at any time, before the expiry of the period of two years from the end of the financial year in which such order is received by the Principal Commissioner or the Commissioner.

Explanation 1.–In computing the period of limitation for the purpose of this section–

(*i*) the time taken in reopening the whole or any part of the proceeding; or

(*ii*) the period during which the assessment proceeding is stayed by an order or injunction of any court; or

(*iii*) the period commencing from the date on which a reference or first of the references for exchange of information is made by an authority competent under an agreement referred to in section 90 or section 90A of the Income-tax Act or under section 73 of this Act and ending with the date on which the Principal Commissioner or the Commissioner last receives, the information so requested or a period of one year, whichever is less, shall be excluded:

Provided that where immediately after the exclusion of the aforesaid time or period, the period of limitation referred to in sub-section (*1*), (*2*) and (*3*) available to the Assessing Officer for making an order of assessment or reassessment, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly.

Explanation 2.—Where, by an order referred to in sub-section (*3*), any undisclosed foreign income and asset is excluded from the total undisclosed foreign income and asset for an assessment year in respect of an assessee, then, an assessment of such undisclosed foreign income and asset for another assessment year shall, for the purposes of section 10 and this section, be deemed to be one made in consequence of, or to give effect to, any finding or direction contained in the said order.

Rectification of mistake.

12. (1) A tax authority may amend any order passed by it under this Act so as to rectify any mistake apparent from the record.

No amendment under this section shall be made after a period of four years from the end of the financial year in which the order sought to be amended was passed.

The tax authority shall not make any amendment, which has the effect of enhancing the undisclosed foreign income and asset or reducing a refund or otherwise increasing the liability of the assessee, unless the authority concerned has given to the assessee an opportunity of being heard.

(4) The tax authority concerned may make an amendment under this section—

(*a*) on its own motion; or

(*b*) on the application made to it by the assessee or, as the case may be, by the Assessing Officer.

Any application received by the tax authority for amendment of an order shall be decided within a period of six months from the end of the month in which such application is received by it.

In a case where the order has been made in an appeal or revision, the power of the tax authority to amend the order shall be restricted to matters other than those decided in appeal or revision.

Notice of demand.

13. Any sum payable in consequence of any order made under this Act shall be demanded by a tax authority by serving upon the assessee a notice of demand in such form and manner as may be prescribed.

Direct assessment or recovery not barred.

14. Nothing in this Chapter shall prevent either the direct assessment of the person on whose behalf or for whose benefit the undisclosed income from a source located outside India is receivable or undisclosed asset located outside India is held, or the recovery from such person of the tax or any other sum of money payable in respect of such income and asset.

Appeals to the Commissioner (Appeals).

15. (1) Any person, – (*a*) objecting to the amount of tax on undisclosed foreign income and asset for which he is assessed by the Assessing Officer; or (*b*) denying his liability to be assessed under this Act; or (*c*) objecting to any penalty imposed by the Assessing Officer; or (*d*) objecting to an order of rectification having the effect of enhancing the assessment or reducing the refund; or (*e*) objecting to an order refusing to allow the claim made by the assessee for a rectification under section 12, may appeal to the Commissioner (Appeals).

Every appeal shall be filed in such form and verified in such manner and be accompanied by a fee as may be prescribed.

An appeal shall be presented within a period of thirty days from —

the date of service of the notice of demand relating to the assessment or penalty, or

the date on which the intimation of the order sought to be appealed against is served in any other case.

(4) The Commissioner (Appeals) may admit an appeal after the expiration of the
period referred to in sub-section (*3*)—

if he is satisfied that the appellant had sufficient cause for not presenting it within that period; and

the delay in preferring the appeal does not exceed a period of one year.

(5) The Commissioner (Appeals) shall hear and determine the appeal and, subject to
the provisions of this Act, pass such orders as he thinks fit and such orders may
include an order enhancing the assessment or penalty:

Provided that an order enhancing the assessment or penalty shall not be made unless the assessee has been given a reasonable opportunity of being heard.

Procedure to be followed in appeal.

16. (1) The Commissioner (Appeals) shall fix a date and place for the hearing of the
appeal, and shall give notice of the same to the appellant and the Assessing Officer against whose order the appeal is preferred.

(2) The following shall have the right to be heard at the hearing of the appeal,
namely:—

the appellant, either in person or by an authorised representative;

the Assessing Officer, either in person or by a representative.

The Commissioner (Appeals) may adjourn the hearing of the appeal whenever he considers it necessary or expedient to do so.

The Commissioner (Appeals) may, before disposing of any appeal, make such further inquiry as he thinks fit.

The Commissioner (Appeals) may, during the proceedings before him, direct the Assessing Officer to make an inquiry and report to him on the points arising out of any question of law or fact.

The Commissioner (Appeals) may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission was not wilful or unreasonable.

The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons therefor.

Every appeal preferred under section 15 shall be heard and disposed of by the Commissioner (Appeals) as expeditiously as possible and endeavour shall be made to dispose of such appeal within a period of one year from the end of the financial year in which the appeal is preferred.

On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the assessee and to the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner.

Powers of Commissioner (Appeals).

17. (1) In disposing of an appeal, the Commissioner (Appeals) shall have the following
powers, namely:—

in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;

in an appeal against an order imposing a penalty, he may confirm or cancel such order;

in any other case, he may determine the issues arising in the appeal and pass such orders thereon, as he thinks fit.

The Commissioner (Appeals) may consider and decide any matter which was not considered by the Assessing Officer.

The Commissioner (Appeals) shall not enhance an assessment or a penalty unless the appellant has had an opportunity of being heard.

In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against

was passed, notwithstanding that such matter was not raised before him by the appellant.

Appeals to Appellate Tribunal.

18. (1) Any assessee aggrieved by an order passed by the Commissioner (Appeals)

under section 15, or an order passed by the Principal Commissioner or the Commissioner under any provision of this Act, may appeal to the Appellate Tribunal against such order.

The Principal Commissioner or the Commissioner may, if he objects to any order passed by the Commissioner (Appeals) under any provision of this Act, direct the Assessing Officer to appeal to the Appellate Tribunal against the order.

Every appeal under sub-section (*1*) or sub-section (*2*) shall be filed within a period of sixty days from the date on which the order sought to be appealed against is communicated to the assessee or to the Principal Commissioner or the Commissioner, as the case may be.

The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Commissioner (Appeals) has been preferred under subsection (*1*) or sub-section (*2*) by the other party may, notwithstanding that he may not have appealed against such order or any part thereof, within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (*3*).

The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the period referred to in sub-section (*3*) or sub-section (*4*), if —

it is satisfied that there was sufficient cause for not presenting it within that period; and

the delay in filing the appeal does not exceed a period of one year.

An appeal to the Appellate Tribunal shall be filed in such form, and verified in such manner and, shall, except in the case of an appeal referred to in sub-section (*2*) or a memorandum of cross-objections referred to in sub-section (*4*), be accompanied by a fee as may be prescribed.

Subject to the provisions of this Act, in hearing and making an order on any appeal under this section, the Appellate Tribunal shall exercise the same powers and follow the procedure as it exercises and follows in hearing and making an order on any appeal under the Income-tax Act.

Appeal to High Court.

19. (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

(2) The Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner or an assessee, may file an appeal to the High Court on being aggrieved by any order passed by the Appellate Tribunal and such appeal shall be—

filed within a period of one hundred and twenty days from the date on which the order appealed against is received by Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner or the assessee;

in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in sub-section (*2*), if it is satisfied that there was sufficient cause for not filing the appeal within that period.

If the High Court is satisfied that a substantial question of law is

involved in any case, it shall formulate that question.

The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Notwithstanding anything in sub-sections (*4*) and (*5*), the High Court may exercise its power to hear the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question of law.

The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

The High Court may determine any issue which—

has not been determined by the Appellate Tribunal; or

has been wrongly determined by the Appellate Tribunal, by reason of a decision on the question of law referred to in sub-section (*1*).

(9) The provisions of the Code of Civil Procedure, 1908, relating to appeals to the
High Court shall, so far as may be, apply in the case of appeals under this
section (5 of 1908).

(10) When the High Court delivers a judgment in an appeal filed before it under subsection (*7*), effect shall be given to the order passed on the appeal by the Assessing Officer on the basis of a certified copy of the judgment.

Case before High Court to be heard by not less than two Judges.

20. (1) An appeal filed before the High Court shall be heard by a Bench of not less than two Judges of the High Court and shall be decided in accordance with the opinion of such Judges or if the Bench is of more than two Judges, by the majority of such Judges.

(2) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall then be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

Appeal to Supreme Court.

21. An appeal shall lie to the Supreme Court from any judgment of the High Court delivered under section 19 which the High Court certifies to be a fit case for appeal to the Supreme Court.

Hearing before Supreme Court.

22. (1) The provisions of the Code of Civil Procedure, 1908, relating to appeals to the Supreme Court shall, so far as may be, apply in the case of appeals under section 21 as they apply in the case of appeals from decrees of a High Court. (5 of 1908.)

The costs of the appeal shall be in the discretion of the Supreme Court.

Where the judgment of the High Court is varied or reversed in the appeal, effect shall be given to the order of the Supreme Court in the manner provided in subsection (*10*) of section 19.

Revision of orders prejudicial to revenue.

23. (1) The Principal Commissioner or the Commissioner may, for the purposes of revising any order passed in any proceeding under this Act before any tax authority subordinate to him, call for and examine all available records relating thereto.

The Principal Commissioner or the Commissioner may, after giving the assessee an opportunity of being heard, pass an order (hereinafter referred to as the revision order)as the circumstances of the case justify, if he is satisfied that the order sought to be revised is erroneous in so far as it is prejudicial to the interests of the revenue.

The Principal Commissioner or the Commissioner may make, or cause to be made, such inquiry as he considers necessary for the purposes of passing an order under sub-section (*2*).

The revision order passed by the Principal Commissioner or the Commissioner under sub-section (*2*) may have the effect of enhancing or modifying the assessment but shall not be an order cancelling the assessment and directing a fresh assessment.

The power of the Principal Commissioner or the Commissioner under subsection (*2*) for revising an order shall extend to such matters as have not been considered and decided in any appeal.

No order under sub-section (*2*) shall be made after the expiry of a period of two years from the end of the financial year in which the order sought to be revised was passed.

Notwithstanding anything in sub-section (*6*), an order in revision under this section may be passed at any time in respect of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, the High Court or the Supreme Court.

In computing the period of limitation under sub-section (*6*), the following shall not be included, namely:—

the time taken in giving an opportunity to the assessee to be reheard under section 7; or

any period during which any proceeding under this section is stayed by an order or injunction of any court.

(9) Without prejudice to the generality of the foregoing provisions, an order passed by a tax authority shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if in the opinion of the Principal Commissioner or the Commissioner—

(*a*) the order is passed without making inquiries or verification which, should have been made; or

the order has not been made in accordance with any order, direction or instruction issued by the Board; or

the order has not been passed in accordance with any decision, prejudicial to the assessee, rendered by the jurisdictional High Court or the Supreme Court in the case of the assessee or any other person under this Act or the Income-tax Act.

(10) In this section, "record" shall include all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or the Commissioner.

Revision of other orders.

24. (1) The Principal Commissioner or the Commissioner may, either *suo motu* or on an application made by the assessee, for the purposes of revising any order passed by an authority

subordinate to him, other than an order to which section 23 applies, call for and examine all available records relating thereto.

The Principal Commissioner or the Commissioner may pass an order, as he considers necessary, which is not prejudicial to the assessee.

The power of the Principal Commissioner or the Commissioner under subsection (*2*) ro revise an order shall not extend to such order—

against which an appeal has not been filed but the time for filing an appeal before the Commissioner (Appeals) has not expired;

against which an appeal is pending before the Commissioner (Appeals); or

which has been considered and decided in any appeal.

The assessee shall make the application for revision of any order referred to in subsection (*1*), within a period of one year from the date on which the order sought to be revised was communicated to him, or the date on which he otherwise came to know of it, whichever is earlier.

The Principal Commissioner or the Commissioner may, if he is satisfied that the assessee was prevented by sufficient cause from making the application within the period of one year, admit an application made after the expiry of one year but before expiry of two years from the date referred to in sub-section (*4*).

Every application by an assessee for revision under this section shall be accompanied by such fees as may be prescribed.

No order under sub-section (*2*) shall be made after the expiry of —

a period of one year from the end of the financial year in which an application is made by the assessee under sub-section (*4*); or

a period of one year from the date of the order sought to be revised, if the order is revised *suo motu* by the Commissioner.

(8) In computing the period of limitation under sub-section (*7*), the following shall
not be included, namely:—

the time taken in giving an opportunity to the assessee to be

reheard under section 7; or

any period during which any proceeding under this section is stayed by an order or injunction of any court.

(9) An order by the Principal Commissioner or the Commissioner declining to interfere shall, for the purposes of this section, be deemed not to be an order prejudicial to the assessee.

Tax to be paid pending appeal.

25. Notwithstanding any appeal preferred to the High Court or the Supreme Court, the
tax shall be paid in accordance with the assessment made under this Act.

Execution of order for costs awarded by Supreme Court.

26. The High Court may, on petition made for the execution of the order in respect of
the costs awarded by the Supreme Court, transmit such order for execution to any
court subordinate to it.

Amendment of assessment on appeal.

27. Where as a result of an appeal under section 15 or section 18, any change is made
in the assessment of a body of individuals or an association of persons or an order
for new assessment of a body of individuals or an association of persons is made,
the Commissioner (Appeals) or the Appellate Tribunal, as the case may be, shall
pass an order authorising the Assessing Officer either to amend the assessment
made or make a fresh assessment on any member of the body or association.

Exclusion of time taken for obtaining copy.

28. In computing the period of limitation prescribed for an appeal under this Act, the day
on which the notice of the order was served upon the assessee without serving a copy
of the order the time taken for obtaining a copy of such order, shall be excluded.

Filing of appeal by tax authority.

29. (1) The Board may, from time to time, issue orders, instructions or directions to other tax authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating the filing of appeal by any tax authority under this Chapter.

(2) Where, in pursuance of the orders, instructions or directions issued under
subsection (*1*), a tax authority has not filed any appeal on any issue in the case of
an assessee for any financial year, it shall not preclude such authority from filing
an appeal on the same issue in the case of—

the same assessee for any other financial year; or

any other assessee for the same or any other financial year.

Notwithstanding that no appeal has been filed by a tax authority pursuant to the orders or instructions or directions issued under sub-section (*1*), it shall not be lawful for an assessee, being a party in any appeal, to contend that the tax authority has acquiesced in the decision on the disputed issue by not filing an appeal in any case.

The Appellate Tribunal, hearing such appeal, shall have regard to the orders, instructions or directions issued under sub-section (*1*) and the circumstances under which such appeal was filed or not filed in respect of any case.

Every order, instruction or direction which has been issued by the Board fixing monetary limits for filing an appeal shall be deemed to have been issued under sub-section (*1*) and the provisions of sub-sections (*2*), (*3*) and (*4*) shall apply accordingly.

Recovery of tax dues by Assessing Officer.

30. (1) Any amount specified as payable in a notice of demand under section 13 shall be
paid within a period of thirty days of the service of the notice, to the credit of the Central Government in such manner as may be prescribed.

Where the Assessing Officer has any reason to believe that it will be detrimental to the interests of revenue, if the period of thirty days referred to in sub-section (*1*) is allowed, he may, with the previous approval of the Joint Commissioner,

reduce such period as he deems fit.

The Assessing Officer may, on an application made by the assessee, before the expiry of a period of thirty days or the period reduced under sub-section (*2*) or during the pendency of appeal with the Commissioner (Appeals), extend the time for payment, or allow payment by instalments, subject to such conditions as he may think fit to impose in the circumstances of the case.

An assessee shall be deemed to be an assessee in default, if the tax arrear is not paid within the time allowed under sub-section (*1*) or the period reduced under sub-section (*2*) or extended under sub-section (*3*), as the case may be.

Where an assessee defaults in paying any one of the instalments within the time fixed under sub-section (*3*), he shall be deemed to be an assessee in default in respect of the whole of the then outstanding amount.

The Assessing Officer may, in a case where no certificate has been drawn up under section 31 by the Tax Recovery Officer, recover the amount in respect of which the assessee is in default, or is deemed to be in default, by any one or more of the modes provided in section 32.

The Tax Recovery Officer shall be vested with the powers to recover the tax arrear on drawing up of a statement of tax arrear under section 31.

Recovery of tax dues by Tax Recovery Officer.

31. (1) The Tax Recovery Officer may draw up under his signature a statement of tax

arrears of an assessee referred to in sub-section (*4*) or sub-section (*5*) of section 30, in such form, as may be prescribed (such statement hereafter in this Chapter referred to as "certificate").

The certificate under sub-section (*1*) shall stand amended from time to time consequent to any proceeding under this Act and the Tax Recovery Officer shall recover the amount so modified.

The Tax Recovery Officer may rectify any mistake apparent from the record.

The Tax Recovery Officer shall have the power to extend the time for payment, or allow payment by installments, subject to such conditions as he may think fit to impose in the circumstances of the case.

The Tax Recovery Officer shall proceed to recover from the assessee the amount specified in the certificate by one or more of the modes referred to in section 32 or in the Second Schedule to the Income-tax Act.

It shall not be open to the assessee to dispute the correctness of any certificate drawn up by the Tax Recovery Officer on any ground whatsoever, but it shall be lawful for the Tax Recovery Officer to cancel the certificate if, for any reason, he thinks it necessary so to do.

Modes of recovery of tax dues.

32. (1) The Assessing Officer or the Tax Recovery Officer may require the employer of the assessee to deduct from any payment to the assessee such amount as is sufficient to meet the tax arrear from the assessee.

Upon requisition under sub-section (*1*), the employer shall comply with the requisition and shall pay the sum so deducted to the credit of the Central Government in such manner as may be prescribed.

Any part of the salary, exempt from attachment in execution of a decree of a civil court under section 60 of the Code of Civil Procedure, 1908, shall be exempt from any requisition made under sub-section (*1*). (5 of 1908.)

The Assessing Officer or the Tax Recovery Officer may, by notice in writing, require any debtor of the assessee to pay such amount, not exceeding the amount of debt, as is sufficient to meet the tax arrear of the assessee.

Upon receipt of the notice under sub-section (*4*), the debtor shall comply with the requisition and shall pay the sum to the credit of the Central Government in such manner as may be prescribed within the time (not being before the debt becomes due to the assessee) specified in the notice.

A copy of the notice issued under sub-section (*4*) shall be forwarded to the assessee at his last address known to the Assessing Officer or the Tax Recovery Officer and in the case of a joint account, to all the joint holders at their last addresses known to the Assessing Officer or the Tax Recovery Officer.

It shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any

entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary if the notice under sub-section (*4*) is issued to a post office, banking company, insurer or any other person.

Any claim in respect of any property, in relation to which a notice under subsection (*4*) has been issued, arising after the date of the notice, shall be void as against any demand contained in the notice.

A person to whom a notice under sub-section (*4*) has been issued, shall not be required to pay the amount of tax arrear specified therein, or part thereof, if he objects to it by a statement on oath that the sum demanded, or any part thereof, is not due to the assessee or that he does not hold any money for, or on account of, the assessee.

The person referred to in sub-section (*9*) shall be personally liable to the Assessing Officer or the Tax Recovery Officer, as the case may be, to the extent of his own liability to the assessee on the date of the notice, or to the extent of the liability of the assessee for any sum due under this Act, whichever is less, if it is discovered that the statement made by him was false in any respect.

The Assessing Officer or the Tax Recovery Officer may amend or revoke any notice issued under sub-section (*4*) or extend the time for making any payment in pursuance of such notice.

The Assessing Officer or the Tax Recovery Officer shall grant a receipt for any amount paid in compliance with a notice issued under sub-section (*4*), and the person so paying shall be fully discharged from his liability to the assessee to the extent of the amount so paid.

Any person discharging any liability to the assessee after receipt of a notice under sub-section (*4*) shall be personally liable to the Assessing Officer or the Tax Recovery Officer to the extent of his own liability to the assessee so discharged or to the extent of the liability of the assessee for any sum due under this Act, whichever is less.

The debtor to whom a notice under sub-section (*4*) is sent shall be deemed to be an assessee in default, if he fails to make such payment and further proceedings may be initiated against him for the realisation of the amount in the manner provided in this section and the Second Schedule to the Income-tax

Act.

The Assessing Officer or the Tax Recovery Officer may apply to the court, in whose custody there is money belonging to the assessee, for payment to him of the entire amount of such money or if it is more than the tax arrear, an amount sufficient to meet the tax arrear.

The Assessing Officer or the Tax Recovery Officer shall effect the recovery of any tax arrear in the same manner as attachment, distraint and sale of any movable property under the Second Schedule to the Income-tax Act, if he is so authorised by the Principal Chief Commissioner or the Chief Commissioner, or the Principal Commissioner or the Commissioner, by general or special order.

In this section,—

(*a*) ''debtor'' in relation to an assessee, means,—

(*i*) any person from whom any money is due, or may become due, to the assessee; or

(*ii*) any person who holds, or may subsequently hold, any money for, or on account of, the assessee; or

(*iii*) any person who holds, or may subsequently hold, any money for, or on account of, the assessee jointly with any other person;

(*b*) shares of the joint holders in the account shall be presumed, until the contrary is proved, to be equal.

Tax Recovery Officer by whom recovery of tax dues is to be effected.

33. (1) The Tax Recovery Officer competent to take action under section 31 shall be the Tax Recovery Officer —

(*a*) within whose jurisdiction —

(*i*) the assessee carries on his business;

(*ii*) the principal place of business of the assessee is situate; (*iii*) the assessee resides; or (*iv*) any movable or immovable property of the assessee is situate; or

(*b*) who has been assigned jurisdiction under section 6.

(2) The Tax Recovery Officer, referred to in sub-section (*1*), may send a certificate, in such manner as may be prescribed, specifying the tax arrear to be recovered, to another Tax Recovery Officer within whose jurisdiction the assessee resides or has property, if the first mentioned Tax Recovery Officer —

(*a*) is not able to recover the entire amount by sale of the property, movable or immovable, within his jurisdiction; or

(*b*) is of the opinion that, for the purpose of expediting, or securing, the recovery of the whole, or any part, of the amount under this Chapter, it is necessary to send such certificate.

(3) The second-mentioned Tax Recovery Officer shall, on receipt of the certificate, assume jurisdiction for recovery of the amount of tax arrear specified therein and proceed to recover the amount in accordance with the provisions of this Chapter.

Recovery of tax dues in case of a company in liquidation.

34. (1) The liquidator shall inform the Assessing Officer, who has jurisdiction to assess the undisclosed foreign income and asset of the company, of his appointment within a period of thirty days of his becoming the liquidator.

The Assessing Officer shall, within a period of three months from the date on which he receives the information, intimate to the liquidator the amount which, in his opinion, would be sufficient to provide for any tax arrears or any amount which is likely to become payable thereafter, by the company under this Act.

The liquidator—

shall not part with any of the assets of the company, or the properties, in his custody until he has been intimated by the Assessing Officer under subsection (*2*); and

on being so intimated, shall set aside an amount equal to the amount intimated.

(4) Upon receipt of the intimation from the Assessing Officer under sub-section (*2*),
the amount so intimated shall, notwithstanding anything in

any other law for the
time being in force, be the first charge on the assets of the company remaining
after payment of the following dues, namely:—

workmen's dues; and

debts due to secured creditors to the extent such debts under clause (*iii*) of the proviso to sub-section (*1*) of section 325 of the Companies Act, 2013 *paripassu* with such dues. (18 of 2013.)

(5) The liquidator shall be personally liable for the payment of the amount payable
by the company, if he—

fails to inform in accordance with sub-section (*1*); or

fails to set aside the amount as required by sub-section (*3*).

The obligations and liabilities attached to the liquidator under this section shall attach to all the liquidators jointly and severally in a case where there is more than one liquidator.

The provisions of this section shall prevail over anything to the contrary contained in any other law for the time being in force.

In this section,—

"liquidator" in relation to a company which is being wound up, whether under the orders of a court or otherwise, shall include a receiver of the assets of the company;

"workmen's dues" shall have the meaning assigned to it in section 325 of the Companies Act, 2013. (18 of 2013.)

Liability of manager of a company.

35. (1) Every person being a manager at any time during the financial year shall be
jointly and severally liable for the payment of any amount due under this Act in respect of the company for the financial year, if the amount cannot be recovered from the company.

The provisions of sub-section (*1*) shall not apply, if the manager proves that non recovery cannot be attributed to any neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

The provisions of this section shall prevail over anything to the

contrary contained in the Companies Act, 2013. (18 of 2013.)

In this section, "manager" shall include a managing director and both shall have the meaning respectively assigned to them in clause (*53*) and clause (*54*) of section 2 of the Companies Act, 2013.

Joint and several liability of participants.

36. (1) Every person, being a participant in an unincorporated body at any time during the financial year, or the representative assessee of the deceased participant, shall be jointly and severally liable, along with the unincorporated body, for payment of any amount payable by the unincorporated body under this Act and all the provisions of this Act shall apply accordingly. (18 of 2013.)

In case of a limited liability partnership, the provisions of sub-section (*1*) shall not apply, if the partner proves that non-recovery cannot be attributed to any neglect, misfeasance or breach of duty on his part in relation to the affairs of the partnership.

The provisions of this section shall prevail over anything to the contrary contained in the Limited Liability Partnership Act, 2008. (6 of 2009.)

Recovery through State Government.

37. If the recovery of tax in any area has been entrusted to a State Government under clause (*1*) of article 258 of the Constitution, the State Government may direct, with respect to that area or any part thereof, that tax shall be recovered therein with, and as an addition to, any municipal tax or local rate, by the same person and in the manner as the municipal tax or local rate is recovered.

Recovery of tax dues in pursuance of agreements with foreign countries or specified territory.

38. (1) The Tax Recovery Officer may, in a case where an assessee has property in a country or a specified territory outside India, forward a certificate to the Board for recovery of the tax arrears from the assessee, where the Central Government or any specified association in India has entered into an agreement with that country or territory under section 90 or section 90A of the Income-tax Act or under sub-sections (*1*), (*2*) or sub-section (*4*) of section 73 of this Act, as the case

may be, for the purposes of recovery of tax.

(2) On receipt of the certificate under sub-section (*3*) from the Tax Recovery Officer, the Board may take such action thereon as it may deem appropriate having regard to the terms of the agreement with such country or a specified territory.

Recovery by suit or under other law not affected.

39. (1) The several modes of recovery specified in this Chapter shall not affect in any way—

any other law for the time being in force relating to the recovery of debts due to the Government; or

the right of the Government to institute a suit for the recovery of the tax arrears from the assessee.

(2) It shall be lawful for the Assessing Officer, or the Government, to have recourse to any such law or suit, notwithstanding that the tax arrears are being recovered from the assessee by any mode specified in this Chapter.

Interest for default in furnishing return and payment or deferment of advance tax.

40. (1) Where the assessee has any income from a source outside India which has not been disclosed in the return of income furnished under sub-section (*1*) of section 139 of the Income-tax Act or the return of income has not been furnished under the said subsection, the interest shall be chargeable in accordance with the provisions of section 234A of the Income-tax Act.

(2) Where the assessee has any undisclosed income from a source outside India and the advance tax on such income has not been paid in accordance with Part C of Chapter XVII of the Income-tax Act, the interest shall be chargeable in accordance with the provisions of section 234B and 234C of the Income-tax Act.

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Penalty in relation to undisclosed foreign income and asset.

41. The Assessing Officer may, direct that, in a case where tax has been computed
under section 10 in respect of undisclosed foreign income and asset, the assessee
shall pay by way of penalty, in addition to tax, if any, payable by him, a sum equal
to three times the tax computed under that section.

Penalty for failure to furnish return in relation to foreign income and asset.

42. If a person, being a resident other than not ordinarily resident in India within the
meaning of clause (*6*) of section 6 of the Income-tax Act, who is required to
furnish a return of his income for any previous year, as required under sub-section
(*1*) of section 139 of the Income-tax Act or by the provisos to that sub-section, and
who at any time during such previous year,

(*i*) held any asset (including financial interest in any entity) located outside India as a beneficial owner or otherwise; or

(*ii*) was a beneficiary of any asset (including financial interest in any entity) located outside India; or

(*iii*) had any income from a source located outside India, and fails to furnish such return before the end of the relevant assessment year, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of ten lakh rupees:

Provided that this section shall not apply in respect of an asset, being one or more bank accounts having an aggregate balance which does not exceed a

value equivalent to five hundred thousand rupees at any time during the previous year.

Explanation.–For determining the value equivalent in rupees of the balance in an account maintained in foreign currency the rate of exchange for calculation of the value in rupees shall be the telegraphic transfer buying rate of such currency as on the date for which the value is to be determined as adopted by the State Bank of India constituted under the State Bank of India Act, 1955. (23 of 1955.)

Penalty for failure to furnish return of income, an information or furnish inaccurate particulars about an asset (including financial interest in any entity) located outside India.

43. If any person, being a resident other than not ordinarily resident in India within the meaning of clause (*6*) of section 6 of the Income-tax Act, who has furnished the return of income for any previous year under sub-section (*1*) or sub-section (*4*) or sub-section (*5*) of section 139 of the said Act, fails to furnish any information or furnishes inaccurate particulars in such return relating to any asset (including financial interest in any entity) located outside India, held by him as a beneficial owner or otherwise, or in respect of which he was a beneficiary, or relating to any income from a source located outside India, at any time during such previous year, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of ten lakh rupees: Provided that this section shall not apply in respect of an asset, being one or more bank accounts having an aggregate balance which does not exceed a value equivalent to five hundred thousand rupees at any time during the previous year.

Explanation.—The value equivalent in rupees shall be determined in the manner provided in the *Explanation* to

section 42.

Penalty for default in payment of tax arrear.

44. (1) Every person who is an assessee in default, or an assessee deemed to be in default, as the case may be, in making payment of tax, and in case of continuing default by such assessee, he shall be liable to a penalty of an amount, equal to the amount of tax arrear.

(2) An assessee shall not cease to be liable to any penalty under sub-section (*1*) merely by reason of the fact that before the levy of such penalty he has paid the tax.

Penalty for other defaults.

45. (1) A person shall be liable to a penalty if he has, without reasonable cause, failed to—

answer any question put to him by a tax authority in the exercise of its powers under this Act;

sign any statement made by him in the course of any proceedings under this Act which a tax authority may legally require him to sign;

attend or produce books of account or documents at the place or time, if he is required to attend or to give evidence or produce books of account or other documents, at certain place and time in response to summons issued under section 8.

(2) The penalty referred to in sub-section (*1*) shall be a sum which shall not be less than fifty thousand rupees but which may extend to two lakh rupees.

Procedure.

46. (1) The tax authority shall, for the purposes of imposing any penalty under this Chapter, issue a notice to an assessee requiring him to show cause why the penalty should not be imposed on him.

(2) The notice referred to in sub-section (*1*) shall be issued—

during the pendency of any proceedings under this Act for the relevant previous year, in respect of penalty referred to in section 41;

within a period of three years from the end of the financial year in which the default is committed, in respect of penalties referred to in section 45.

No order imposing a penalty under this Chapter shall be made unless the assessee has been given an opportunity of being heard.

An order imposing a penalty under this Chapter shall be made with the approval of the Joint Commissioner, if—

the penalty exceeds one lakh rupees and the tax authority levying the penalty is in the rank of Income-tax Officer; or

the penalty exceeds five lakh rupees and the tax authority levying the penalty is in the rank of Assistant Commissioner or Deputy Commissioner.

(5) Every order of penalty issued under this Chapter shall be accompanied by a notice of demand in respect of the amount of penalty imposed and such notice of demand shall be deemed to be a notice under section 13.

Bar of limitation for imposing penalty.

47. (1) No order imposing a penalty under this Chapter shall be passed after the expiry of a period of one year from the end of the financial year in which the notice for imposition of penalty is issued under section 46.

An order imposing, or dropping the proceedings for imposition of, penalty under this Chapter may be revised, or revived, as the case may be, on the basis of assessment of the undisclosed foreign income and asset as revised after giving effect to the order of the Commissioner (Appeals), the Appellate Tribunal, the High Court or the Supreme Court or order of revision under section 23 or section 24.

An order revising or reviving the penalty under sub-section (*2*) shall not be passed after the expiry of a period of six months from the end of the month in which order of the Commissioner (Appeals), the Appellate Tribunal, the High Court or the Supreme Court is received by the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner or the order of revision under section 23 or section 24 is passed.

In computing the period of limitation for the purposes of this section, the following time or period shall not be included—

the time taken in giving an opportunity to the assessee to be reheard under section 7; and

any period during which a proceeding under this Chapter for the levy of penalty is stayed by an order, or injunction, of any court.

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Chapter not in derogation of any other law or any other provision of this Act.

48. (1) The provisions of this Chapter shall be in addition to, and not in derogation of, the provisions of any other law providing for prosecution for offences thereunder. (*2*) The provisions of this Chapter shall be independent of any order under this Act that may be made, or has not been made, on any person and it shall be no defence that the order has not been made on account of time limitation or for any other reason.

Punishment for failure to furnish return in relation to foreign income and asset.

49. If a person, being a resident other than not ordinarily resident in India within the meaning of clause (*6*) of section 6 of the Income-tax Act, who at any time during the previous year, held any asset (including financial interest in any entity) located outside India as a beneficial owner or otherwise, or was a beneficiary of such asset or had income from a source outside India and wilfully fails to furnish in due time the return of income which he is required to furnish under sub-section (*1*) of section 139 of that Act, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine:

Provided that a person shall not be proceeded against under

this section for failure to furnish in due time the return of income under sub-section (*1*) of section 139 of the Income tax Act if the return is furnished by him before the expiry of the assessment year.

Punishment for failure to furnish in return of income, any information about an asset (including financial interest in any entity) located outside India.

50. If any person, being a resident other than not ordinarily resident in India within the meaning of clause (*6*) of section 6 of the Income-tax Act, who has furnished the return of income for any previous year under sub-section (*1*) or sub-section (*4*) or sub-section (*5*) of section 139 of that Act, wilfully fails to furnish in such return any information relating to an asset (including financial interest in any entity) located outside India, held by him, as a beneficial owner or otherwise or in which he was a beneficiary, at any time during such previous year, or disclose any income from a source outside India, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.

Punishment for willful attempt to evade tax.

51. (1) If a person, being a resident other than not ordinarily resident in India within the meaning of clause (*6*) of section 6 of the Income-tax Act, wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and with fine.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than

three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

(3) For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person—

(*i*) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(*ii*) makes or causes to be made any false entry or statement in such books of account or other documents; or

(*iii*) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(*iv*) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.

Punishment for false statement in verification.

52. If a person, makes a statement in any verification under this Act or under any rule
made thereunder, or delivers an account or statement which is false, and which he
either knows or believes to be false, or does not believe to be true, he shall be
punishable with rigorous imprisonment for a term which shall not be less than six
months but which may extend to seven years and with fine.

Punishment for abetment.

53. If a person abets or induces in any manner another person to make and deliver an
account or a statement or declaration relating to tax payable under this Act which
is false and which he either knows to be false or does not believe to be true or to
commit an offence under sub-section (*1*) of section 51, he shall be punishable with
rigorous imprisonment for a term which shall not be less than six months but
which may extend to seven years and with fine.

Presumption as to culpable mental state.

54. (1) In any prosecution for any offence under this Act which requires a culpable

mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.—In this sub-section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established y a preponderance of probability.

Prosecution to be at instance of Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

55. (1) A person shall not be proceeded against for an offence under section 49 to

section 53 (both inclusive) except with the sanction of the Principal Commissioner or Commissioner or the Commissioner (Appeals), as the case may be.

The Principal Chief Commissioner or the Chief Commissioner may issue such instructions, or directions, to the tax authorities referred to in sub-section (*1*) as he may think fit for the institution of proceedings under this section.

The power of the Board to issue orders, instructions or directions under this Act shall include the power to issue orders, instructions or directions (including instructions or directions to obtain its previous approval) to other tax authorities for the proper composition of offences (including an authorisation to file and pursue complaints by one or more Inspectors of tax) under this section.

Offences by companies.

56. (1) Where an offence under this Act has been committed by a company, every

person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the

conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Nothing in sub-section (*1*) shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Notwithstanding anything in sub-section (*1*), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Where an offence under this Act has been committed by a person, being a company, and the punishment for such offence is imprisonment and fine, then, without prejudice to sub-section (*1*) or sub-section (*3*), such company shall be punished with fine and every person, referred to in sub-section (*1*), or the director, manager, secretary or other officer of the company referred to in subsection (*3*), shall be liable to be proceeded against and punished in accordance with the provisions of this Act.

In this section—

(*a*) "company" means a body corporate, and includes —

(*i*) an unincorporated body;

(*ii*) a Hindu undivided family;

(*b*) "director", in relation to —

(*i*) an unincorporated body, means a participant in the body;

(*ii*) a Hindu undivided family, means an adult member of the family; and (*iii*) a company, means a whole-time director, or where there is no such director, any other director or manager or officer, who is in charge of the affairs of the company.

Proof of entries in records or documents.

57. (1) The entries in the records, or other documents, in the custody

of a tax authority

shall be admitted in evidence in any proceeding for the prosecution of any person for an offence under this Chapter.

(2) The entries referred to in sub-section (*1*) may be proved by the production of—

the records or other documents (containing such entries) in the custody of the tax authority; or

a copy of the entries certified by that authority under its signature, as true copy of the original entries contained in the records or other documents in its custody.

Punishment for second and subsequent offences.

58. If any person convicted of an offence under section 49 to section 53 (both inclusive) is again convicted of an offence under any of the aforesaid provisions, he shall be punishable for the second and every subsequent offence with rigorous imprisonment for a term which shall not be less than three years, but which may extend to ten years and with fine which shall not be less than five lakh rupees, but which may extend to one crore rupees.

CHAPTER VI

TAX COMPLIANCE FOR UNDISCLOSED FOREIGN INCOME AND ASSETS

Declaration of undisclosed foreign asset.

59. Subject to the provisions of this Chapter, any person may make, on or after the date of commencement of this Act but on or before a date to be notified by the Central Government in the Official Gazette, a declaration in respect of any undisclosed asset located outside India and acquired from income chargeable to tax under the Income-tax Act for any assessment year prior to the assessment year beginning on 1st day of April, 2016—

for which he has failed to furnish a return under section 139

of the Income-tax Act;

which he has failed to disclose in a return of income furnished by him under the Income-tax Act before the date of commencement of this Act;

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

Charge of tax.

60. Notwithstanding anything contained in the Income-tax Act or in any Finance Act,
the undisclosed asset located outside India and declared under section 59 within
the time specified therein shall be chargeable to tax at the rate of thirty per cent of
value of such undisclosed asset on the date of commencement of this Act.

Penalty.

61. Notwithstanding anything contained in the Income-tax Act or in any Finance Act,
the person making a declaration of undisclosed asset located outside India shall, in
addition to tax charged under section 60, be liable to penalty at the rate of one
hundred percent of such tax.

Manner of declaration.

62. (1) A declaration under section 59 shall be made to the Principal Commissioner or the Commissioner and shall be in such form and shall be verified in such manner as may be prescribed.

(2) The declaration shall be signed,—

(*i*) where the declarant is an individual, by the individual himself; where such individual is absent from India, by the individual concerned or by some person duly authorised by him in this behalf; and where the individual is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf;

(*ii*) where the declarant is a Hindu undivided family, by the karta, and where the karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family;

(*iii*) where the declarant is a company, by the managing director thereof, or where for any unavoidable reason such managing director is not able to sign the declaration or where there is no managing director, by any director thereof;

(*iv*) where the declarant is a firm, by the managing partner thereof, or where for any unavoidable reason such managing partner is not able to sign the declaration, or where there is no managing partner as such, by any partner thereof, not being a minor;

(*v*) where the declarant is any other association, by any member of the association or the principal officer thereof; and

(*vi*) where the declarant is any other person, by that person or by some other person competent to act on his behalf.

(3) Any person, who has made a declaration under sub-section (*1*) in respect of his asset or as a representative assessee in respect of the asset of any other person, shall not be entitled to make any other declaration, under that sub-section in respect of his asset or the asset of such other person, and any such other declaration, if made, shall be deemed to be void.

Time for payment of tax.

63. (1) The tax payable under section 60 and penalty payable under section 61 in respect of the undisclosed asset located outside India, shall be paid on or before a date to be notified by the Central Government in the Official Gazette.

The declarant shall file the proof of payment of tax and penalty on or before the date notified under sub-section (*1*), with the Principal Commissioner or the Commissioner before whom the declaration under section 59 was made.

If the declarant fails to pay the tax in respect of the declaration made under section 59 on or before the date notified under sub-section (*1*), the declaration filed by him shall be deemed never to have been made under this Chapter.

Undisclosed foreign asset declared not to be included in total

income.

64. The amount of undisclosed investment in an asset located outside India declared in
accordance with section 59 shall not be included in the total income of the
declarant for any assessment year under the Income-tax Act, if the declarant makes
the payment of tax referred to in section 60 and the penalty referred to in section
61 by the date notified under sub-section (*1*) of section 63.

Undisclosed foreign asset declared not to affect finality of completed assessments.

65. The declarant shall not be entitled, in respect of undisclosed asset located outside
India declared or any amount of tax paid thereon, to reopen any assessment or

reassessment made under the Income-tax Act or the Wealth-tax Act, 1957 or claim any set off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment. (27 of 1957.)

Tax in respect of voluntarily disclosed asset not refundable.

66. Any amount of tax paid under section 60 or penalty paid under section 61 in
pursuance of a declaration made under section 59 shall not be refundable.

Declaration not admissible in evidence against declarant.

67. Notwithstanding anything contained in any other law for the time being in force,
nothing contained in any declaration made under section 59 shall be admissible in
evidence against the declarant for the purpose of any proceeding relating to
imposition of penalty, other than the penalty leviable under section 61, or for the
purposes of prosecution under the Income-tax Act, 1957 or the Wealth-tax Act or
the Foreign Exchange Management Act, 1999 or the Companies Act, 2013 or the
Customs Act, 1962 . (27 of 1957., 42 of 1999., 18 of 2013., 52

of 1962.)

Declaration by misrepresentation of facts to be void.

68. Notwithstanding anything contained in this Chapter, where a declaration has been
made by misrepresentation or suppression of facts, such declaration shall be void
and shall be deemed never to have been made under this Chapter.

Exemption from wealth tax in respect of assets specified in declaration.

69. (1) Where the undisclosed asset located outside India is represented by cash (including bank deposits), bullion or any other assets specified in the declaration made under section 59—

in respect of which the declarant has failed to furnish a return under section 14 of the Wealth-tax Act, 1957 for the assessment year commencing on or before the 1st day of April, 2015; or (27 of 1957.)

which have not been shown in the return of net wealth furnished by him for the said assessment year or years; or

which have been understated in value in the return of net wealth furnished by him for the said assessment year or years, then, notwithstanding anything contained in the Wealth-tax Act, 1957 or any rules made thereunder,—(27 of 1957.) (*I*) wealth-tax shall not be payable by the declarant in respect of the assets referred to in clause (*a*) or clause (*b*) and such assets shall not be included in his net wealth for the said assessment year or years; (*II*) the amount by which the value of the assets referred to in clause (*c*) has been understated in the return of net wealth for the said assessment year or years, to the extent such amount does not exceed the voluntarily disclosed income utilised for acquiring such assets, shall not be taken into account in computing the net wealth of the declarant for the said assessment year or years.

Explanation.—Where a declaration under section 59 is made by a firm, the assets referred to in clause (*I*) or, as the case may be, the amount referred to in clause (*II*) shall not be taken into account in computing the net wealth of any partner of the firm or, as the case may be, in determining the value of the interest of any partner in

the firm.

(2) The provisions of sub-section (*1*) shall not apply unless the conditions specified in sub-sections (*1*) and (*2*) of section 63 are fulfilled by the declarant.

Applicability of certain provisions of Income-tax Act and of Chapter V of Wealth-tax Act.

70. The provisions of Chapter XV of the Income-tax Act relating to liability in special cases and of section 189 of that Act or of Chapter V of the Wealth-tax Act relating to liability to assessment in special cases shall, so far as may be, apply in relation to proceedings under this Chapter as they apply in relation to proceedings under the Income-tax Act or, as the case may be, the Wealth-tax Act.

Chapter not to apply to certain persons.

71. The provisions of this Chapter shall not apply—

(*a*) to any person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974: (52 of 1974.) Provided that—

(*i*) such order of detention, being an order to which the provisions of section 9 or section 12A of the said Act do not apply, has not been revoked on the report of the Advisory Board under section 8 of the said Act or before the receipt of the report of the Advisory Board; or

(*ii*) such order of detention, being an order to which the provisions of section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under sub-section (*3*) of section 9, or on the report of the Advisory Board under section 8, read with sub-section (*2*) of section 9, of the said Act; or (*iii*) such order of detention, being an order to which the provisions of section 12A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under subsection (*3*) of that section, or on the basis of the report of the Advisory

Board under section 8, read with sub-section (*6*) of section 12A, of the said Act; or

(*iv*) such order of detention has not been set aside by a court of competent jurisdiction;

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, the Prevention of Corruption Act, 1988; (45 of 1860., 61 of 1985., 37 of 1967., 49 of 1988., 27 of 1992.)

to any person notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

in relation to any undisclosed asset located outside India which has been acquired from income chargeable to tax under the Income-tax Act for any previous year relevant to an assessment year prior to the assessment year beginning on the 1st day of April, 2016—

(*i*) where a notice under section 142 or sub-section (*2*) of section 143 or section 148 or section 153A or section 153C of the Income-tax Act has been issued in respect of such assessment year and the proceeding is pending before the Assessing Officer; or

(*ii*) where a search has been conducted under section 132 or requisition has been made under section 132A or a survey has been carried out under

section 133A of the Income-tax Act in a previous year and a notice under subsection (*2*) of section 143 for the assessment year relevant to such previous year or a notice under section 153A or under section 153C of the said Act for an assessment year relevant to any previous year prior to such previous year has not been issued and the time for issuance of such notice has not expired; or (*iii*) where any information has been received by the competent authority under an agreement entered into by the Central Government under section 90 or section 90A of the Income-tax Act in respect of such undisclosed asset.

Explanation.—For the purpose of this sub-clause asset shall include a bank account

whether having any balance or not.

Removal of doubts.

72. For the removal of doubts, it is hereby declared that—

save as otherwise expressly provided in the *Explanation* to sub-section (*1*) of section 69, nothing contained in this Chapter shall be construed as conferring any benefit, concession or immunity on any person other than the person making the declaration under this Chapter;

where any declaration has been made under section 59 but no tax and penalty has been paid within the time specified under section 60 and section 61, the value of such asset shall be chargeable to tax under this Act in the previous year in which such declaration is made;

where any asset has been acquired or made prior to commencement of this Act, and no declaration in respect of such asset is made under this Chapter, such asset shall be deemed to have been acquired or made in the year in which a notice under section 10 is issued by the Assessing Officer and the provisions of this Act shall apply accordingly.

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Agreement with foreign countries or specified territories.

73. (1) The Central Government may enter into an agreement with the Government of any other country—

(*a*) for the granting of relief in respect of—

(*i*) income on which tax has been paid both under this Act and under the corresponding law in force in that country; or

(*ii*) tax chargeable under this Act;

for the avoidance of double taxation of income under this Act and under the corresponding law in force in that

country;

for exchange of information for the prevention of evasion or avoidance of tax on undisclosed foreign income chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance;

for recovery of tax under this Act and under the corresponding law in force in that country; or

(*e*) for carrying out any other purpose of this Act not expressly covered under clauses (*a*) to (*d*) or the corresponding law in force in that country.

The Central Government may enter into an agreement with the Government of any specified territory outside India for the purposes specified in sub-section (*1*).

The Central Government may, by notification, make such provisions as may be necessary for implementing the agreements referred to in sub-sections (*1*) and (*2*).

Any specified association in India may enter into an agreement with any specified association in the specified territory outside India for the purposes of sub-section (*1*) and the Central Government may by notification make such provisions as may be necessary for adopting and implementing such agreement.

Any term used but not defined in this Act or in the agreement referred to in subsections (*1*), (*2*) or sub-section (*4*) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the meaning assigned to it in the notification issued by the Central Government and such meaning shall be deemed to have effect from the date on which the said agreement came into force.

Service of notice generally.

74. (1) The service of any notice, summons, requisition, order or any other communication under this Act (herein referred to in this section as "communication") may be made by delivering or transmitting a copy thereof, to the person named therein,—

by post or by such courier service as may be approved by the Board;

in such manner as provided under the Code of Civil Procedure, 1908 for the purposes of service of summons; (5 of 1908.)

in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000; or (21 of 2000.)

by any other means of transmission of documents, including fax message or electronic mail message, as may be prescribed.

The Board may make rules providing for the addresses including the address for electronic mail or electronic mail message to which the communication referred to in sub-section (*1*) may be delivered or transmitted to the person named therein.

In this section, the expressions "electronic mail" and "electronic mail message" shall have the same meanings as assigned to them in the *Explanation* to section 66A of the Information Technology Act, 2000. (21 of 2000.)

Authentication of notices and other documents.

75. (1) A notice or any other document required to be issued, served or given for the purposes of this Act by any tax authority shall be authenticated by that authority.

Every notice or other document to be issued, served or given for the purposes of this Act by any tax authority shall be deemed to be authenticated, if the name and office of a designated tax authority is printed, stamped or otherwise written thereon.

In this section, a designated tax authority shall mean any tax authority authorised by the Board to issue, serve or give such notice or other document after authentication in the manner as provided in sub-section (*2*).

Notice deemed to be valid in certain circumstances.

76. (1) A notice which is required to be served upon a person for the purposes of assessment under this Act shall be deemed to have been duly served upon him in accordance with the provisions of this Act, if the person has appeared in any proceeding or co-operated in any inquiry relating to an assessment.

(2) The person, referred to in sub-section (*1*), shall be precluded from taking any

objection in any proceeding or inquiry under this Act that the notice was—

not served upon him;

not served upon him in time; or

served upon him in an improper manner.

(3) The provisions of this section shall not apply, if the person has raised the objection before the completion of the assessment.

Appearance by approved valuer in certain matters.

77. (1) Any assessee who is entitled or required to attend before any tax authority or the Appellate Tribunal, in connection with any matter relating to the valuation of any asset, may attend through a valuer approved by the Principal Commissioner or the Commissioner in accordance with such rules as may be prescribed.

(2) The provisions of sub-section (*1*) shall not apply in a case where the assessee is required to attend personally for examination on oath or affirmation under section 8.

Appearance by authorised representative.

78. (1) Any assessee who is entitled or required to attend before any tax authority or the Appellate Tribunal, in connection with any proceeding under this Act, may attend through an authorised representative.

The provisions of sub-section (*1*) shall not apply in a case where the assessee is required to attend personally for examination on oath or affirmation under section 8.

In this section, "authorised representative" means a person authorised by the assessee in writing to appear on his behalf, being—

a person related to the assessee in any manner, or a person regularly employed by the assessee;

any officer of a scheduled bank with which the assessee maintains a current account or has other regular dealings;

any legal practitioner who is entitled to practice in any civil court in India;

an accountant;

any person who has passed any accountancy examination

recognised in this behalf by the Board; or

any person who has acquired such educational qualifications as may be prescribed.

(4) The following persons shall not be qualified to represent an assessee under sub section (*1*), namely:—

a person who has been dismissed or removed from Government service;

a legal practitioner, or an accountant, who is found guilty of misconduct in his professional capacity by any authority entitled to institute disciplinary proceedings against him;

(*c*) a person, not being a legal practitioner or an accountant, who is found guilty of misconduct in any tax proceedings by such authority as may be prescribed.

(5) The Principal Chief Commissioner or the Chief Commissioner may, by an order in writing, specify the period upto which the disqualification under sub section (*4*) shall continue, having regard to the nature of misconduct and such disqualification shall not exceed—

(*i*) in case of clauses (*a*) and (*c*) of sub-section (*4*), a period of ten years;

(*ii*) in case of clause (*b*) of sub-section (*4*), the period for which the legal practitioner or an accountant is not entitled to practice.

(6) A person shall not be allowed to appear as an authorised representative, if he has committed any fraud or misrepresented the facts which resulted in loss to the revenue and that person has been declared as such by an order of the Principal Chief Commissioner or the Chief Commissioner.

Explanation.—In this section, "accountant" means a chartered accountant as defined in clause (*b*) of sub-section (*1*) of section 2 of the Chartered Accountants Act, 1949 who holds a valid certificate of practice under sub-section (*1*) of section 6 of that Act. (38 of 1949.)

Rounding off of income, value of asset and tax.

79. (1) The amount of undisclosed foreign income and asset computed in accordance with this Act shall be rounded off to the nearest multiple of one hundred rupees.

Any amount payable or receivable by the assessee under this Act shall be rounded off to the nearest multiple of ten rupees.

The method of rounding off under sub-section (*1*) or sub-section (*2*), shall be such as may be prescribed.

Congnizance of offences.

80. No court inferior to that of a metropolitan magistrate or a magistrate of the First
Class shall try any offence under this Act.

Assessment not to be invalid on certain grounds.

81. No assessment, notice, summons or other proceedings, made or issued or taken or
purported to have been made or issued or taken in pursuance of any of the
provisions of this Act shall be invalid or shall be deemed to be invalid merely by
reason of any mistake, defect or omission in such assessment, notice, summons or
other proceeding if such assessment, notice, summons or other proceeding is in
substance and effect in conformity with or according to the intent and purpose of
this Act.

Bar of suits in civil courts.

82. (1) No suit shall be brought in any civil court to set aside or modify any proceeding taken or order made under this Act.

(2) No prosecution, suit or other proceeding shall lie against the Government or any officer of the Government, for anything in good faith done or intended to be done, under this Act.

Income-tax papers to be available for purposes of this Act.

83. Notwithstanding anything contained in the Income-tax Act, all information
contained in any statement or return made or furnished under the provisions of that

Act or obtained or collected for the purposes of the said Act may be used for the
purposes of this Act.

Application of provisions of Income-tax Act.

84. The provisions of clauses (*c*) and (*d*) of sub-section (*1*) of section 90, clauses (*c*)
and (*d*) of sub-section (*1*) of section 90A, sections 119, 133, 134, 135, 138,
Chapter XV, 237, 240, 245, 280, 280A, 280B, 280D, 281, 281B and 284 shall
apply with necessary modifications as if the said provisions refer to undisclosed
foreign income and asset instead of to income tax.

Power to make rules.

85. (1) The Board may, subject to the approval of the Central Government, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters:—

the manner of determination of the value of an undisclosed foreign asset referred to in sub-section (*2*) of section 3;

the tax authority to be prescribed for any of the purposes of this Act;

the form and manner of service of a notice of demand under sub-section (*1*) of section 13;

the form in which any appeal, revision or cross-objection may be filed under this Act, the manner in which they may be verified and the fee payable in respect thereof;

the form in which the Tax Recovery Officer may draw up the statement of tax arrears under sub-section (*1*) of section 31;

the manner in which the sum is to be paid to the credit of central Government under sub-section (*2*) or sub-section (*5*) of section 32;

the manner in which the Tax Recovery Officer shall send a certificate referred to in sub-section (*2*) of section 33;

(*h*) the form in which a declaration referred to in sub-section (*1*) of section 62 is to be made and the manner in which it is to be verified;

(*i*) the means of transmission of documents under clause (*d*) of sub-section (*1*) of section 74;

(*j*) the procedure for approval of a valuer by the Principal Commissioner or the Commissioner under section 77;

(*k*) the educational qualifications required, to be an authorised representative under clause (*f*) of sub-section (*3*) of section 78;

(*l*) the tax authority under clause (*c*) of sub-section (*4*) of section 78;

(*m*) the method of rounding off of the amount referred to in sub-section (*1*) or sub-section (*2*) of section 79;

(*n*) any other matter which by this Act is to be, or may be, prescribed.

The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date of commencement of this Act and no retrospective effect shall be given to any rule so as to prejudicially affect the interest of assessees.

The Central Government shall cause every rule made under this Act to be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Power to remove difficulties.

86. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, not inconsistent with the provisions of this Act, remove the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date on which the provisions of this Act come into force.

(2) Every order made under this section shall be laid before each

House of Parliament.

Amendment of section 2 of Act 54 of 1963.

87. In section 2 of the Central Boards of Revenue Act, 1963, in sub-clause (*1*) of
clause (c),—

in item (vii), the word "and" occurring at the end shall be omitted; and

after item (vii) as so amended, the following item shall be inserted, namely:— "(viii) the Undisclosed Foreign Income and Assets (Imposition of Tax) Act, 2015; and"(15 of 2003.)

Amendment of Act of 15 of 2003.

88. In the Prevention of Money Laundering Act, 2002 in the Schedule, in Part C, after
entry 3 relating to the offences against property under Chapter XVII of the Indian
Penal Code, the following entry shall be inserted, namely:—

"(*4*) The offence of wilful attempt to evade any tax, penalty or interest referred to in section 51 of the Undisclosed Foreign Income and Assets (Imposition of Tax) Act, 2015". (45 of 1860.)

STATEMENT OF OBJECTS AND REASONS

1. Stashing away of black money abroad by some people with intent to evade taxes has been a matter of deep concern to the nation. 'Black Money' is a common expression used in reference to tax-evaded income. Evasion of tax robs the nation of critical resources necessary to undertake programs for social inclusion and economic development. It also puts a disproportionate burden on the honest taxpayers as they have to bear the brunt of higher taxes to make up for the revenue leakage caused by evasion. The money stashed away abroad by evading tax could also be used in ways which could threaten the national security.

The Central Government is strongly committed to the task of tracking down and bringing back undisclosed foreign assets and income which legitimately belong to the nation. Recognising the limitations of the existing legislation, it is proposed to introduce a new legislation to deal with

undisclosed assets and income stashed away abroad.

The Supreme Court of India has also expressed concern over this issue. The Special Investigation Team constituted by the Central Government to implement the decision of the Supreme Court, has also expressed the views that measures may be taken to curb the menace of black money. Internationally, a new regime for automatic exchange of financial information is fast taking shape and India is a leading force in this effort.

The new legislation will apply to all persons resident in India and holding undisclosed foreign income and assets. A limited window is proposed to persons who have any undisclosed foreign assets. Such persons may file a declaration before the specified tax authority within a specified period, followed by payment of tax at the rate of 30 per cent and an equal amount by way of penalty. Exemptions, deductions, set off and carried forward losses etc. shall also be not allowed under the new legislation. Upon fulfilling these conditions, a person shall not be prosecuted under the Bill and the declaration made by him will not be used as evidence against him under the Wealth-tax Act, the Foreign Exchange Management Act (FEMA), the Companies Act or the Customs Act. Wealth-tax shall not be payable on any asset so disclosed. It is merely an opportunity for persons to become tax compliant before the stringent provisions of the new legislation come into force.

The Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 *inter alia* provides for the following, namely:—

(*i*) Concealment of income in relation to a foreign asset will attract penalty equal to three times the amount of tax (i.e., 90 per cent of the undisclosed income or the value of the undisclosed asset). Failure to furnish return of income by person holding foreign asset, failure to disclose the foreign asset in the return or furnishing of inaccurate particulars of such asset shall attract a penalty of Rs.10 lakh.

(*ii*) The Bill provides for criminal liability with enhanced punishment. Wilful attempt to evade tax in relation to a foreign income will be punished with rigorous imprisonment from three years to ten years and with fine. Failure to furnish a return of income though holding a foreign asset, failure to disclose the foreign asset or furnishing of inaccurate particulars of the foreign asset will be punishable with rigorous imprisonment for a term of six months to seven years. The provisions will also apply to banks and financial

institutions aiding in concealment of foreign income or assets of resident Indians or falsification of documents.

(*iii*) Second and subsequent offence will be punishable with rigorous imprisonment for a term of three years to ten years and with fine of Rs.1 crore to Rs.25 lakh. In prosecution proceedings, the wilful nature of the default shall be presumed and it shall be for the accused to prove the absence of the guilty state of mind.

(*iv*) To facilitate enquiry and investigation, authorities under the Act have been vested with the powers of discovery and inspection, issue of commissions,

issue of summonses, enforcement of attendance, production of evidence, impounding of books of account and documents.

(*v*) The Central Government has been empowered to enter into agreements with other countries, specified territories and associations outside India *inter alia* for exchange of information, recovery of tax and avoidance of double taxation.

(*vi*) Safeguards to prevent misuse have been embedded in the Bill. It will be mandatory to issue notices and grant of opportunity of being heard, record reasons for various actions and pass written orders. Appeal to the Income-tax Appellate Tribunal, and to the jurisdictional High Court and the Supreme Court on substantial questions of law have been provided for.

(*vii*) Persons holding foreign accounts with minor balances which may not have been reported out of oversight or ignorance have been protected from criminal consequences.

(*viii*) The Bill also proposes to amend Prevention of Money Laundering Act (PMLA), 2002 to include offence of tax evasion under the proposed legislation as a scheduled offence under PMLA.

The enactment of the proposed new Bill will enable the Central Government to tax undisclosed foreign income and assets acquired from such undisclosed foreign income, and punish the persons indulging in illegitimate means of generating money causing loss to the revenue. It will also prevent such illegitimate income and assets kept outside the country from

being utilised in ways which are detrimental to India's social, economic and strategic interests and its national security.

The Notes on clauses explain, in detail, the provisions of the Undisclosed Income and Assets (Imposition of Tax) Act, 2015.

The Bill seeks to achieve the above objectives.

NEW DELHI;

ARUN JAITELY

The 19th March, 2015.

PRESIDENT'S RECOMMENDATION UNDER ARTICLES 117(1) AND 274(1) OF THE CONSTITUTION OF INDIA

[Copy of letter No. F. 133/9/2015TPL, dated the 18th March, 2015 from Shri Arun Jaitely, Minister of Finance to the Secretary General, Lok Sabha].

The President, having been informed of the subject matter of the proposed Bill, recommends, under clauses (1) and (3) of Article 117, read with clause (1) of article 274 of the Constitution of India, the introduction of the Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 to the Lok Sabha and also recommends to the Lok Sabha the consideration of the Bill.

Notes on Clauses

Clause 1.—of the Bill provides that Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 extends to the whole of India. It also provides that unless otherwise specified, it shall come into force on the 1st day of April, 2016.

Clause 2.—deals with definitions. The said clause provides definition of the terms used in this Bill and which have not been separately provided in the respective Chapters. It defines certain terms such as "assessee", "undisclosed foreign income and asset",

"undisclosed asset located outside India" etc. It also provides that all other words and expressions used in this Bill but not defined and defined in the Income-tax Act shall have the meanings respectively assigned to them in that Act.

Clause 3.—provides for charge of tax. It provides that every assessee shall be liable to tax in respect of his total undisclosed

foreign income and asset at the rate of thirty per cent of such undisclosed income and asset. It also defines the term "value of an undisclosed asset" to mean the fair market value of an asset (including financial interest in any entity) determined in the prescribed manner.

Clause 4.—deals with the scope of total undisclosed foreign income and asset. It provides that the total undisclosed foreign income and asset of any previous year of an assessee shall be,—

the income from a source located outside India, which has not been disclosed in the return of income furnished under sub-section (1) or subsection (4) or subsection (5) of section 139 of the Income-tax Act;

the income, from a source located outside India ,in respect of which a return is required to be furnished under section 139 of the Income-tax Act but no return of income has been furnished under sub-section (1) or sub-section (4) or subsection (5) of section 139 of the Income-tax Act;

the value of any undisclosed asset located outside India. It further provides that any variation made in the income from a source outside India in the assessment or reassessment of the total income of any previous year, of the assessee under the Income-tax Act in accordance with the provisions of section 29 to section 43C or section 57 to section 59 or section 92C of the said Act shall not be included in the total undisclosed foreign income. It also provides that the income included in the total undisclosed foreign income and asset under this Act shall not from part of the total income under the Income-tax Act.

Clause 5.—deals with the computation of total undisclosed foreign income and asset. It, *inter alia*, provides that in computing the total undisclosed foreign income and asset no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee, which is otherwise allowable in accordance with the provisions of the Income-tax Act. It further provides that any income which has been assessed to tax for any assessment year under the Income-tax Act prior to the assessment year to which this Act applies, or which is assessable or has been assessed to tax for any assessment year under this Act, shall be reduced from the value of the undisclosed asset located outside India, if, the assessee furnishes evidence to the satisfaction of the Assessing Officer that the asset has been acquired from such income which has been assessed or is assessable, as the case may be to tax. It also gives an illustration to

explain the methodology for proportionate deduction of the amount assessed to tax in the case of an immovable property.

Clause 6.—provides that the Income-tax authorities specified in section 116 of the Income-tax Act, 1961 (hereafter referred to as Income-tax Act) shall be the tax authorities for the purposes of this Act. The jurisdiction of a tax authority under this Act shall be the same as he has under the Income-tax Act by virtue of orders or directions issued section 120 of that Act (including orders or directions assigning the concurrent jurisdiction) or under any other provision of that Act. Section 118 of the Income-tax Act and any notification issued thereunder shall apply in relation to the control of tax authorities under this Act as they apply in relation to the control of the corresponding

income-tax authorities. However, the Board may, by notification in the Official Gazette, make exception in this regard.

Clause 7.—provides that the tax authority who succeeds another authority as a result of change in jurisdiction or for any other reason, shall continue the proceedings from the stage at which it was left by his predecessor. It also provides that in such case the assessee may be given an opportunity of being heard, if he so requests, before passing any order in his case.

Clause 8.—relating to powers regarding discovery and production of evidence seeks to provide that the prescribed tax authorities shall, for the purposes of the Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:—

discovery and inspection;

enforcing the attendance of any person, including any officer of a banking company and examining him on oath;

compelling the production of books of account and other documents; and

issuing commissions.

The said clause further provides that for the purposes of making any inquiry or investigation, the prescribed tax authority shall be vested with the powers referred to above, whether or not any proceedings are pending before it.

The said clause also provides that any prescribed tax authority may, subject to the rules made in this behalf, impound any books of account or other documents produced before it and retain them in its

custody for such period as it thinks fit if such authority is of the rank of Commissioner and above. Any tax authority below the rank of Commissioner shall not impound any books of account or other documents without recording his reasons for doing so; or retain in his custody any such books or documents for a period exceeding thirty days without obtaining the approval of the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner.

Clause 9.—provides that any proceeding under this Act before a tax authority shall be deemed to be a judicial proceeding within the meaning of section 194 and section 229 and for the purposes of section 197 of the Indian Penal Code, 1860. It further provides that every tax authority shall be deemed to be a civil court for the purposes of section 196, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973.

*Clause*10.—relating to assessment, *inter-alia*, provides that for the purposes of making an assessment or reassessment under the Act, the Assessing Officer may, on receipt of an information from an income-tax authority under the Income-tax Act or any other authority under any law for the time being in force or on coming of any information to his notice, serve a notice on any person requiring him to produce or cause to be produced, on a date specified in the notice, any books of accounts or documents or evidence as the Assessing Officer may require for the purposes of this Act. The Assessing Officer may, from time to time, serve further notices requiring the production of such other accounts or documents or evidence as he may require. It further provides that the Assessing Officer may make such inquiry, as he considers necessary, for the purpose of obtaining full information in respect of undisclosed foreign income and asset of any person for the relevant financial year. It also provides that the Assessing Officer shall, after considering the accounts, documents or evidence

produced by the assessee, and any relevant material which he has gathered, pass an order in writing whereby assess the undisclosed foreign income and asset and determine the sum payable by the assessee. It also provides that if any person fails to comply with all the terms of a notice issued under the said clause, the Assessing Officer shall, make the assessment of undisclosed foreign income and asset to the best of his judgment and determine the sum payable by the assessee.

Clause 11.—provides the time limit for completion of

assessment and reassessment. It also provides that such time limit shall not apply in respect of the assessment or reassessment made in the consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Authorities or any Court in a proceeding otherwise than by way of appeal under the Act.

The said clause also provides that in computing the period of limitation, certain specified time period shall be excluded. It further provides that where any undisclosed foreign income and asset is excluded from the total undisclosed foreign income and asset for an assessment year in respect of an assessee, then, an assessment of such undisclosed foreign income and asset for another assessment year shall, for the purposes of clause 10 and this clause, be deemed to be one made in consequence of, or to give effect to, any finding or direction contained in the said order.

Clause 12.—relating to rectification of mistake, *inter alia*, provides that a tax authority may amend any order passed by it so as to rectify any mistake apparent from the record. It further provides that no amendment under this clause shall be made after a period of four years from the end of the financial year in which the order sought to be amended was passed. It also provides that the tax authority shall, before making an amendment which has the effect of enhancing the undisclosed foreign income and asset or reducing a refund or otherwise increasing the liability of the assessee, give an opportunity of being heard to the assessee. It also provides that the tax authority concerned may make an amendment under this clause either on its own motion or on the application made to it by the assessee or the Assessing Officer. It also provides that the tax authority shall decide any application received by it within a period of six months from the end of the month in which it is received.

Clause 13.—provides that any sum payable in consequence of any order made under this Act shall be demanded by a tax authority by serving upon the assessee a notice of demand in such form and manner as may be prescribed.

Clause 14.—provides that neither the direct assessment of the person on whose behalf or for whose benefit the undisclosed income from a source located outside India is receivable or undisclosed asset located outside India is held, nor the recovery from such person of the tax payable in respect of such income and asset is barred.

*Clause*15.—relates to appeals before the Commissioner (Appeals) and, *inter alia*, provides that any person may file an appeal to the Commissioner (Appeals) where he (a) objects to the amount of tax on undisclosed foreign income and asset for which he is assessed by the Assessing Officer; or (b) denies his liability to be assessed

under this Act; or (c) objects to any penalty imposed by the Assessing Officer; or (d) objects to an order of rectification having the effect of enhancing the assessment or reducing the refund; or (e) objects to an order refusing to allow the claim made by him for a rectification. It further provides that for the time period for filing an appeal and the form and manner in which the appeal is to be filed.

Clause 16.—relates to procedure to be followed in case of an appeal before the Commissioner (Appeals). It, *inter alia*, provides that the Commissioner (Appeals) may, before disposing of any appeal, make such inquiry as he thinks fit or direct the Assessing Officer to do so. He may also allow the appellant to go into any new ground of appeal if he is satisfied that the omission was not wilful or unreasonable.

Clause 17.—relates to the powers of the Commissioner (Appeals) and, *inter alia*, provides that in case of an appeal before him, the Commissioner (Appeals) shall have the power to confirm, reduce, enhance or annul the assessment or to confirm or cancel a penalty. It further provides that the Commissioner (Appeals) may consider and decide any matter which was not considered by the Assessing Officer.

Clause 18.—relates to appeal to the Appellate Tribunal and, *inter alia*, provides that any assessee aggrieved by an order passed by Commissioner (Appeals) or the Principal Commissioner or the Commissioner may appeal to the Appellate Tribunal against such order. Similarly, the Principal Commissioner or the Commissioner may, if he objects to any order passed by the Commissioner (Appeals) direct the Assessing Officer to appeal to the Appellate Tribunal against the order. It further provides that every appeal shall be filed within the time period specified therein and allows the respondent to file a memorandum of cross-objections, against any part of the order of the Commissioner (Appeals). The Appellate Tribunal may admit an appeal, or a memorandum of cross-objections, after the expiry of the specified period if it is satisfied that there was sufficient cause for not presenting it within that time and the delay in filing the appeal does not exceed a period of one year. It also provides that in hearing and making an order on any appeal under this Act, the Appellate Tribunal shall exercise the same powers and follow the procedure as it exercises and follows in hearing and making an order on any appeal under the Income-tax Act.

Clause 19.—relates to appeal to the High Court and provides that an appeal shall lie to the High Court from every order passed in

appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law. It further provides that the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner or an assessee, may file an appeal to the High Court within the specified time and in the specified form. The High Court may admit an appeal after the expiry of the specified period, if it is satisfied that there was sufficient cause for not filing the appeal within that period. The said clause also provides that the High Court may exercise its power to hear the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question of law and shall decide the question of law so formulated and deliver such judgment as it deems fit. The effect shall be given to the order passed on the appeal by the Assessing Officer on the basis of a certified copy of the judgment.

Clause 20.—provides that an appeal filed before the High Court shall be heard by a Bench of not less than two Judges of the High Court and shall be decided in accordance with the opinion of such Judges or if the Bench is of more than two Judges, by the majority of such Judges.

Clause 21.—deals with appeal to the Supreme Court and provides that an appeal shall lie to the Supreme Court from any judgment of the High Court delivered under clause 19 which the High Court certifies to be a fit case for appeal to the Supreme Court.

Clause 22.—relates to hearing before the Supreme Court and provides that the provisions of the Code of Civil Procedure, 1908, relating to appeals to the Supreme Court

shall, so far as may be, apply in the case of appeals under clause 21 as they apply in the case of appeals from decrees of a High Court. It further provides that where the judgment of the High Court is varied or reversed in the appeal, effect shall be given to the order of the Supreme Court in the manner provided under clause 19.

Clause 23.—relates to revision of orders prejudicial to revenue and seeks to, *inter alia*, provide that the Principal Commissioner or the Commissioner may revise any order passed by any tax authority subordinate to him, after examining all available records, hearing the assessee and making such inquiries as he considers necessary if he is satisfied that the order sought to be revised is erroneous in so far as it is prejudicial to the interests of the revenue. The said clause further

provides that the revision order may have the effect of enhancing or modifying the assessment but shall not be an order cancelling the assessment and directing a fresh assessment. Further, the power of the Principal Commissioner or the Commissioner for revising an order shall not extend to certain orders specified therein. Besides, no order shall be made after the expiry of a period of two years from the end of the financial year in which the order sought to be revised was passed. The said clause also provides that in order passed by a tax authority shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if it falls in any of the categories specified therein. The clause also defines the expression "record".

Clause 24.—seeks to provide, *inter alia*, that the Principal Commissioner or the Commissioner may revise any order passed by a tax authority subordinate to it, other than an order to which clause 23 applies, after examining all available records. However, such order shall not be prejudicial to the assessee. The said clause further provides that the power of the Principal Commissioner or the Commissioner shall not extend to such orders as specified therein. The said clause also provides that the assessee shall make an application for revision of any order within the specified time, accompanied by the prescribed fee. Further the revision order shall not be passed after expiry of a period of one year from the end of the financial year in which such application is made or a period of one year from the date of the order sought to be revised if the Principal Commissioner or the Commissioner revises the order *suo motu.*

Clause 25.—provides that notwithstanding any appeal preferred to the High Court or the Supreme Court, the tax shall be paid in accordance with the assessment made under this Act.

Clause 26.—provides that the High Court may, on petition made for the execution of the order in respect of the costs awarded by the Supreme Court, transmit such order for execution to any court subordinate to it.

Clause 27.—provides that where as a result of an appeal under clause 15 or clause 18, any change is made in the assessment of a body of individuals or an association of persons or an order for new assessment of a body of individuals or an association of persons is made, the Commissioner (Appeals) or the Appellate Tribunal, as the case may be, shall pass an order authorising the Assessing Officer either to amend the assessment made or make a fresh assessment on any member of the body or association.

Clause 28.—provides that in computing the period of limitation

prescribed for an appeal, the day on which the notice of the order was served upon the assessee without serving a copy of the order the time taken for obtaining a copy of such order, shall be excluded.

Clause 29.—*inter alia*, provides that the Board may, from time to time, issue orders, instructions or directions to other tax authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating the filing of appeal by any tax authority. The said clause further provides that where, in pursuance of such order, instruction or direction a appeal has not been filed by the tax authority on any issue in the case of an assessee for any financial year, it shall not be precluded from filing an appeal on the same issue in the case of the same assessee for any other financial year; or any other assessee for the same or any other financial year. The said clause also provides that it shall not be lawful for an assessee, being a party in any appeal, to contend that the tax authority has acquiesced in the decision on the disputed issue by not filing an appeal in any case and the Appellate Tribunal, shall have regard to the such orders, instructions or directions issued by the Board.

Clause 30.—relating to recovery of tax dues by the Assessing Officer, *inter alia*, that any amount specified as payable in a notice of demand under clause 13 shall be paid within a period of thirty days of the service of the notice, to the credit of the Central Government in prescribed manner. However, where the Assessing Officer has any reason to believe that it will be detrimental to the interests of revenue, he may reduce the period for payment of tax with the previous approval of the Joint Commissioner. The said clause further provides that the Assessing Officer may before the expiry of the specified period or during the pendency of appeal with the Commissioner (Appeals), extend the time for payment, or allow payment by installments, subject to such conditions as he may think fit. The said clause also provides that an assessee shall be deemed to be an assessee in default, if the tax arrear is not paid within the specified time. The said clause also provides that the tax arrear may be recovered by the Assessing Officer if no certificate has been drawn up under clause 31 by the Tax Recovery Officer and the Tax Recovery Officer shall be vested with the powers to recover the tax arrear on drawing up of a statement of tax arrear.

Clause 31.—relating to recovery of tax dues by the Tax Recovery Officer seeks to, *inter alia,* provide that such officer may draw up under his signature a statement of tax arrears (certificate) and shall proceed to recover from the assessee the amount specified in the

certificate by one or more of the modes referred to in clause 32 of this Bill or in the Second Schedule to the Income-tax Act.

Clause 32.—*inter alia,* seeks to provide for the modes of recovery of tax dues by the Assessing Officer or the Tax Recovery Officer. The recovery of tax arrear can be made through employer, debtor or by applying to the Court which has custody over the money belonging to the assessee.

Clause 33.—relating to the Tax Recovery Officer by whom recovery of tax dues is to be effective, *inter alia*, provides as to who shall be the Tax Recovery Officer competent to take action under clause 31. Such tax recovery officers shall be within whose jurisdiction the assessee carries on his business; or the principal place of business of the assessee is situate; or the assessee resides; or any movable or immovable property of the assessee is situate; or who has been assigned jurisdiction under clause 6. This clause further provides that if the Tax Recovery Officer competent to take action under clause 31 is not able to recover the tax arrears, he may send a certificate to another Tax Recovery Officer within whose jurisdiction the assessee resides or has property and then such Tax Recovery Officer shall assume jurisdiction for recovery of tax arrears. 39

Clause 34.—relating to recovery of tax dues in case of a company in liquidation, *inter alia*, seeks to provide that the liquidator shall inform the concerned Assessing

Officer, of his appointment within a period of thirty days and thereafter the Assessing Officer shall intimate to the liquidator, within a period of three months, on which he receives the information, intimate to the liquidator the amount sufficient to provide for any tax arrears or any amount which is likely to become payable thereafter, by the company. The liquidator shall not part with any of the assets of the company, or the properties, in his custody until he has been intimated by the Assessing Officer. The amount so intimated shall be the first charge on the assets of the company remaining after payment of the workmen's dues and debts due to secured creditors to the extent specified.

Clause 35.—relates to liability of manager of a company and, *inter alia*, provides that every person being a manager at any time during the financial year shall be jointly and severally liable for the payment of any amount due under this Act in respect of the company for the financial year, if the amount cannot be recovered from the company. These provisions shall not apply, if the manager proves that

non-recovery cannot be attributed to any neglect, misfeasance or breach of duty on his part in relation to the affairs of the company. These provisions shall prevail over anything to the contrary contained in the Companies Act, 2013. This clause further seeks to define the term "manager".

Clause 36.—relates joint and several liabilities of participants. It, *inter alia*, seeks to provide that every person, being a participant in an unincorporated body at any time during the financial year, or the representative assessee of the deceased participant, shall be jointly and severally liable, along with the unincorporated body, for payment of any amount payable by the unincorporated body under this Act. The said clause further provides that in case of a limited liability partnership, these provisions shall not apply, if the partner proves that non-recovery cannot be attributed to any neglect, misfeasance or breach of duty on his part in relation to the affairs of the partnership.

Clause 37.—relates to recovery through State Government. It seeks to provide that if the recovery of tax in any area has been entrusted to a State Government under clause (1) of article 258 of the Constitution, the State Government may direct, with respect to that area or any part thereof, that tax shall be recovered therein with, and as an addition to, any municipal tax or local rate, by the same person and in the manner as the municipal tax or local rate is recovered.

Clause 38.—relates to recovery of tax dues in pursuance of agreements with foreign countries or specified territories. It seeks to, *inter alia*, provide for procedure to be followed by the Board and the Tax Recovery Officer for recovery of tax in this regard.

Clause 39.—relates to recovery by suit or under other law not affected. It, *inter alia*, seeks to provide that the several modes of recovery specified in this Chapter shall not affect in any way any other law for the time being in force relating to the recovery of debts due to the Government, or the right of the Government to institute a suit for the recovery of the tax arrears from the assessee.

Clause 40.—relates to interest for default in furnishing return and payment or deferment of advance tax. This clause seeks to provide that where the assessee has any income from a source outside India which has not been disclosed in the return of income furnished under sub-section (1) of section 139 of the Income-tax Act or the return of income has not been furnished under the said sub-section, interest shall be chargeable in accordance with the provisions of section 234A of the Income-tax Act. It further provides that where the assessee has any undisclosed income from a source outside India and the advance tax on such income has not been paid in accordance with Part C of Chapter XVII

of the Income-tax Act, the interest shall be chargeable in accordance with the provisions of section 234B and 234C of the Income-tax Act.

Clause 41.—relates to penalty in relation to undisclosed foreign income and asset. It seeks to provide that the Assessing Officer may, direct that, in a case where tax has been computed under clause 10 in respect of undisclosed foreign income and asset, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum equal to three times the tax computed under that clause.

Clause 42.—relates to penalty for failure to furnish return in relation to foreign income and asset. It seeks to provide that if a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, who is required to furnish a return of his income for any previous year, as required under subsection (1) of section 139 of the Income-tax Act or by the provisos to that sub-section, and who at any time during such previous year, held any asset (including financial interest in any entity) located outside India as a beneficial owner or otherwise; or was a beneficiary of any asset (including financial interest in any entity) located outside India; or had any income from a source located outside India, and fails to furnish such return before the end of the relevant assessment year, the Assessing Officer may direct that such person shall pay, a penalty of ten lakh rupees. The said clause further provides that no penalty shall be levied in respect of an asset, being one or more bank accounts having an aggregate balance which does not exceed a value equivalent to five hundred thousand rupees at any time during the previous year. It also provides for determining the value equivalent in rupees of the balance in an account maintained in foreign currency.

Clause 43.—relates to penalty for failure to furnish in return of income, an information or furnish inaccurate particulars about an asset (including financial interest in any entity) located outside India. This clause seeks to provide that if any person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, who has furnished the return of income for any previous year under subsection (1) or sub-section (4) or sub-section (5) of section 139 of the said Act, fails to furnish any information or furnishes inaccurate particulars in such return relating to any asset (including financial interest in any entity) located outside India, held by him as a beneficial owner or otherwise, or in respect of which he was a beneficiary, or relating to any income from a source located outside India, at any time during such previous year, the

Assessing Officer may direct that such person shall pay a penalty of ten lakh rupees. The said clause further provides that no penalty shall be levied in respect of an asset, being one or more bank accounts having an aggregate balance which does not exceed a value equivalent to five hundred thousand rupees at any time during the previous year.

Clause 44.—relates to penalty for default in payment of tax arrear. This clause seeks to provide that every person who is an assessee in default, or an assessee deemed to be in default in respect of payment of tax, and in case of continuing default by such assessee, he shall be liable to pay a penalty of an amount, equal to the amount of tax arrear. The said clause further provides that an assessee shall not cease to be liable to any penalty merely by reason of the fact that before the levy of such penalty he has paid the tax.

Clause 45.—relates to penalty for other defaults. This clause seeks to, *inter alia*, provide that a person shall be liable to a penalty if he has, without reasonable cause committed the defaults that have been listed therein. The said clause also provides that

the minimum penalty for the defaults listed therein shall be fifty thousand rupees and maximum penalty shall be of two lakh rupees.

Clause 46.—deals with procedure for imposition of penalties. It, *inter alia*, provides that the specified tax authority shall issue a notice within the stipulated time period to any assessee requiring him to show cause why the penalty should not be imposed on him. It further provides that no order imposing a penalty shall be made under Chapter IV unless the assessee has been given an opportunity of being heard. The said clause also lays down the procedure for approval of an order by the Joint Commissioner.

Clause 47.—relates to bar of limitation for imposing penalty. It, *inter alia*, provides for the time limit for passing the penalty orders. It further provides that in computing that period of limitation, certain specified time periods shall be excluded. It also provides that an order imposing or dropping the proceedings for imposition of penalty may be revised or revived on the basis of assessment of the undisclosed foreign income and asset as revised after giving effect to the Appellate Order or the order of revision under clause 23 or clause 24.

Clause 48.—provides that Chapter IV shall be in addition to and not in derogation of any other law providing for prosecution for offences. It further provides that the provisions of Chapter IV shall be

independent of any order under this Act that may be made, or has not been made, on any person and it shall be no defence that the order has not been made on account of time limitation or for any other reason.

Clause 49.—relates to punishment for failure to furnish returns in relation to foreign income and asset. This clause seeks to, *inter alia*, provide that if a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, who at any time during the previous year, held any asset (including financial interest in any entity) located outside India as a beneficial owner or otherwise, or was a beneficiary of such asset or had income from a source outside India and wilfully fails to furnish in due time the return of income which he is required to furnish under sub-section (1) of section 139 of that Act, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine. It further provides that a person shall not be punished if the return is furnished by him before the expiry of the assessment year.

Clause 50.—relates to punishment for failure to furnish in return of income, any information about an asset (including financial interest in any entity) located outside India. It seeks to provide that if any person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, who has furnished the return of income for any previous year under sub-section (1) or subsection (4) or subsection (5) of section 139 of that Act, wilfully fails to furnish in such return any information relating to an asset (including financial interest in any entity) located outside India, held by him, as a beneficial owner or otherwise or in which he was a beneficiary, at any time during such previous year, or disclose any income from a source outside India, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.

Clause 51.—relates to punishment for wilful attempt to evade tax. This clause seeks to provide that if a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall be punishable with rigorous imprisonment for a term which shall

not be less than three years but which may extend to ten years and

with fine. The said clause further provides that if a person wilfully attempts to evade the payment of any tax, penalty or interest, he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine. The said clause also defines the term 'wilful attempt to evade'.

Clause 52.—relates to punishment for false statement in verification. This clause seeks to provide that if a person, makes a statement in any verification under this Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.

Clause 53.—relates to punishment for abetment. This clause seeks to provide that if a person abets or induces in any manner another person to make and deliver an account or a statement or declaration relating to any tax payable under this Act which is false and which he either knows to be false or does not believe to be true or to commit an offence under sub-clause (1) of clause 51, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.

Clause 54.—relates to presumption as to culpable mental state. This clause seeks to provide that in any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state. However, the said clause also provides that it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. The said clause further provides that a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. The said clause also defines the term "culpable mental state".

Clause 55.—provides for prosecution to be at the instance of the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner. The said clause, *inter alia*, seeks to provide that no person shall be proceeded against for an offence under clause 49 to clause 53 except with the sanction of the Principal Commissioner or Commissioner or the Commissioner (Appeals), as the case may be. The said clause further provides that the Principal Chief Commissioner or the Chief Commissioner may issue such instructions, or directions, to such Principal Commissioner

or Commissioner or Commissioner (Appeals) as he may think fit for the institution of proceedings under this clause.

Clause 56.—relates to offences by companies. In respect of any such offence, this clause seeks to provide that the company as well as every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However, the said clause further provides that any such person shall not be so liable if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. The said clause also provides that where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager,

secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. It also provides that where an offence under this Act has been committed by a company, and the punishment for such offence is imprisonment and fine, then, the company shall be punished with fine and every person, referred to in the preceding paragraphs shall be liable to be proceeded against and punished in accordance with the provisions of this Act. The said clause also defines the term "company" and "director".

Clause 57.—relates to proof of entries in records or documents. This clause seeks to provide that the entries in the records, or other documents, in the custody of a tax authority shall be admitted in evidence in any proceeding for the prosecution of any person for an offence under this Chapter V. The said clause further provides that the entries may be proved by the production of the records or other documents (containing such entries) which are in the custody of the tax authority or by the production of a copy of the entries certified by that authority under its signature, as true copy of the original entries.

Clause 58.—relates to punishment for second and subsequent offences. This clause seeks to provide that if any person convicted of an offence under clauses 49 to 53 is again convicted of an offence under any of the aforesaid provisions, he shall be punishable for the second and every subsequent offence with rigorous imprisonment for a term which shall not be less than three years, but which may extend

to ten years and with fine which shall not be less than five lakh rupees, but which may extend to one crore rupees.

Clause 59.—provides for declaration of undisclosed foreign asset. This clause seeks to provide that any person may, on or after the date of commencement of this Act but on or before a date to be notified by the Central Government in the Official Gazette, make a declaration in respect of any undisclosed asset located outside India and acquired from income chargeable to tax under the Income-tax Act for any assessment year prior to the assessment year beginning on 1st day of April, 2016 which has escaped assessment by reason of the omission or failure on the part of such person to make a return under the Income-tax Act or to disclose fully and truly all material facts necessary for the assessment or otherwise.

Clause 60.—relates to charge of tax. This clause seeks to provide that notwithstanding anything contained in the Income-tax Act or in any Finance Act, the undisclosed asset located outside India and declared under clause 59 within the time specified therein shall be chargeable to tax at the rate of thirty per cent of value of such undisclosed asset on the date of commencement of this Act.

Clause 61.—relates to penalty. This clause seeks to provide that notwithstanding anything contained in the Income-tax Act or in any Finance Act, the person making a declaration of undisclosed asset located outside India shall, in addition to tax charged under clause 60, be liable to penalty at the rate of one hundred percent of such tax.

Clause 62.—relates to manner of declaration. This clause seeks to provide that a declaration under clause 59 shall be made to the Principal Commissioner or the Commissioner and shall be in prescribed form and shall be verified in the prescribed manner. The said clause specifies that when a declaration is made by any person under clause 59, then, who shall be competent to sign such a declaration. The said clause also provides that any person, who has made a declaration in respect of his asset or as a representative assessee in respect of the asset of any other person, he shall not be entitled

to make any other declaration, in respect of his asset or the asset of such other person, and any such other declaration, if made, shall be deemed to be void.

Clause 63.—relates to time for payment of tax. It seeks to provide that the tax payable under clause 60 and penalty payable under clause 61 in respect of the undisclosed asset located outside

India, shall be paid on or before a date to be notified by the Central Government in the Official Gazette. The said clause further provides that the declarant shall file the proof of payment of tax and penalty on or before the notified date with the Principal Commissioner or the Commissioner before whom the declaration under clause 59 was made. It also provides that if the declarant fails to pay the tax on or before the notified date, the declaration filed by him shall be deemed never to have been made.

Clause 64.—provides that the amount of undisclosed investment in an asset located outside India declared in accordance with clause 59 shall not be included in the total income of the declarant for any assessment year under the Income-tax Act, if the declarant makes the payment of tax referred to in clause 60 and the penalty referred to in clause 61 by the notified date.

Clause 65.—provides that the declarant shall not be entitled, in respect of undisclosed asset located outside India declared or any amount of tax paid thereon, to reopen any assessment or reassessment made under the Income-tax Act or the Wealth-tax Act, 1957 or claim any set off or relief in any appeal, reference or other proceeding in relation to any such assessment or reassessment.

Clause 66.—provides that any amount of tax paid under clause 60 or penalty paid under clause 61 in pursuance of a declaration made under clause 59 shall not be refundable.

Clause 67.—relates to declaration not admissible in evidence against declarant. The said clause seeks to provide that nothing contained in any declaration made under clause 59 shall be admissible in evidence against the declarant for the purpose of any proceeding relating to imposition of penalty, other than the penalty leviable under clause 61, or for the purposes of prosecution under the Income-tax Act or the Wealth-tax Act, 1957 or the Foreign Exchange Management Act, 1999 or the Companies Act, 2013 or the Customs Act, 1962.

Clause 68.—relates to declaration by misrepresentation of facts to be void. The said clause seeks to provide that where a declaration has been made by misrepresentation or suppression of facts, such declaration shall be void and shall be deemed never to have been made under this Chapter VI.

Clause 69.—relates to exemption from wealth-tax in respect of assets specified in the declaration. The said clause, *inter alia*, seeks to provide that where the undisclosed asset located outside India is represented by cash (including bank deposits), bullion or any other assets specified in the declaration made under clause 59 in respect of

which the declarant has not furnished a return under section 14 of the Wealth-tax Act, 1957 for the assessment year commencing on or before the 1st April, 2015; or which have not been shown or their value has been understated in the return of net wealth for the said assessment year or years, then, notwithstanding anything contained in the Wealth-tax Act, 1957 or any rules made thereunder, then such asset shall not be included in his net wealth for the said assessment year or years and no wealth tax shall be payable by the declarant in respect of such assets. It further provides that where the value of the asset has been understated in the return of net wealth for the said assessment year or years, such amount to the extent does not exceed the voluntarily disclosed income utilised for acquiring such assets, shall not be taken into account in computing the net wealth of the declarant for the

said assessment year or years. It also provides that where a declaration under clause 59 is made by a firm, such assets shall not be taken into account in computing the net wealth of any partner of the firm or in determining the value of the interest of any partner in the firm. It also provides that the above exemption from wealth tax is applicable only in a case where conditions specified in clause 63 are fulfilled by the declarant.

Clause 70.—relates to applicability of certain provisions of Income-tax Act and of Chapter V of Wealth-tax Act. The said clause seeks to provide that the provisions of Chapter XV of the Income-tax Act relating to liability in special cases and of section 189 of that Act or of Chapter V of the Wealth-tax Act, 1957 relating to liability to assessment in special cases shall, so far as may be, apply in relation to proceedings under Chapter V as they apply in relation to proceedings under the Income-tax Act or, as the case may be, the Wealth-tax Act.

Clause 71.—*inter alia*, provides that the Chapter VI relating to tax compliance for undisclosed foreign income and assets shall not apply to the persons and under the circumstances specified therein.

Clause 72.—relates to removal of doubts. The said clause seeks to clarify that—

except as provided in the *Explanation* to sub-clause (1) of clause 69, nothing contained in Chapter VI shall be construed as conferring any benefit, concession or immunity on any person other than the person making the declaration therein;

where any declaration has been made under clause 59 but no tax and penalty has been paid within the time specified under clause 60 and clause 61, the value of such asset shall be chargeable to tax in the previous year in which such declaration is made;

where any asset has been acquired or made prior to commencement of this Act, and no declaration in respect of such asset is made under the said Chapter VI, such asset shall be deemed to have been acquired or made in the year in which a notice under clause 10 is issued by the Assessing Officer and the provisions of this Act shall apply accordingly.

Clause 73.—relates to agreement with foreign countries or specified territories. The said clause, *inter alia*, seeks to provide that the Central Government may enter into an agreement with the Government of any other country or specified territory for exchange of information for the prevention of evasion or avoidance of tax on undisclosed foreign income chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance; for recovery of tax under this Act and under the corresponding law in force in that country; or for carrying out any other purpose of this Act or the corresponding law in force in that country. Where for such agreements, the other country has designated certain associations, the clause provides that any specified association in India may enter into such agreement with the specified association of the specified territory outside India and the Central Government will notify the agreement for adopting it.

Clause 74.—relates to service of notice generally. The said clause seeks to provide for the manner of service of any notice, summons, requisition, order etc. under this Act.

Clause 75.—relates to authentication of notices and other documents. The said clause seeks to provide the manner of authentication of a notice or any other document required to be issued or served or given for the purposes of this Act.

Clause 76.—relates to notice deemed to be valid in certain circumstances. The said clause seeks to provide that a notice would be deemed to be duly served if the person has appeared in any proceeding or co-operated in any inquiry relating to an assessment. This provision will not apply, if the person has raised the objection before the completion of the assessment.

Clause 77.—relates to appearance by approved valuer in certain matters. The said clause seeks to provide that any assessee entitled or required to attend before any tax authority or the Appellate Tribunal, in connection with valuation of any asset, may attend through a approved valuer except where he is required to attend personally.

Clause 78.—relates to appearance by authorised representative. The said clause, *inter alia*, seeks to provide that any assessee entitled or required to attend before any tax authority or the Appellate Tribunal, in connection with any proceeding under this Act, may attend through an authorised representative except where he is required to attend personally. The said clause further seeks to provide the meaning of "authorised representative" and persons not qualified to represent an assessee.

Clause 79.—relates to rounding off of income, value of asset and tax. The said clause seeks to provide that the amount of undisclosed foreign income and asset computed in accordance with this Act shall be rounded off to the nearest multiple of one hundred rupees. It further provides that any amount payable or receivable by the assessee under this Act shall be rounded off to the nearest multiple of ten rupees. It also provides that the method of rounding off shall be such as may be prescribed.

Clause 80.—relates to congnizance of offences. The said clause seeks to provide that no court inferior to that of a metropolitan magistrate or a magistrate of the First Class shall try any offence under this Act.

Clause 81.—relates to assessment not to be invalid on certain grounds. The said clause seeks to provide that no assessment, notice, summons or other proceedings, made or 46 issued or taken or purported to have been made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such assessment, notice, summons or other proceeding if such assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act.

Clause 82.—relates to bar of suits in civil courts. The said clause seeks to provide that no suit shall be brought in any civil court to set aside or modify any proceeding taken or order made under this Act. The said clause further provides that no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government, for anything in good faith done or intended to be done, under this Act.

Clause 83.—relates to Income-tax papers to be available for purposes of this Act. The said clause seeks to provide that

notwithstanding anything contained in the Income-tax Act, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes of the said Act may be used for the purposes of this Act.

Clause 84.—relates to application of provisions of the Income-tax Act. The said clause seeks to specify certain sections of the Income-tax Act that shall apply with necessary modifications as if the said provisions refer to undisclosed foreign income and asset instead of to income tax.

Clause 85.—relates to power to make rules. The said clause seeks to empower the Board to make rules for carrying out the provisions of this Act, subject to the approval of

the Central Government. The said clause seeks to provide, *inter alia*, the form in which appeals under clause 15 or clause 18 may be filed and the manner in which they may be verified; the procedure to be followed on applications for rectification of mistakes and application for refunds; the fee payable in respect of any reference or appeal; and any other matter which by this Act is to be, or may be, prescribed. The said clause further seeks to provide that the power to make rules shall include the power to give retrospective effect from a date not earlier than the date of commencement of this Act. The said clause also specifies the time and consequence of laying of every rule made under this Act before each House of Parliament.

Clause 86.—relates to power to remove difficulties. The said clause seeks to provide that if any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by an order, remove the difficulty. However, no such order shall be made after the expiry of a period of two years from the date on which the provisions of this Act come into force. The said clause further provides that every order made under this clause shall be laid before each House of Parliament.

Clause 87.—relates to amendment of section 2 of Act 54 of 1963. The said clause seeks to amend of clause 1 of clause (c) of section 2 of the Central Boards of Revenue Act, 1963, so as to include the Undisclosed Foreign Income and Assets (Imposition of Tax) Act, 2015 within the purview of Central Board of Direct Taxes.

Clause 88.—relates to amendment of Act 15 of 2003. The said clause seeks to include wilful attempt to evade tax in relation to undisclosed foreign income and asset referred to in clause 51 of the Undisclosed Foreign Income and Assets (Imposition of Tax) Act,

2015 in Part C of the Prevention of Money Laundering Act, 2002.

FINANCIAL MEMORANDUM

This Bill seeks to make provision for taxation of undisclosed income from a source, or the value of an undisclosed asset, located outside India. The Bill is proposed to be administered by the Central Board of Direct Taxes. Thus no significant additional expenditure is contemplated on the enactment of the Bill.

MEMORANDUM REGARDING DELEGATED LEGISLATION

Sub-clause (2) of clause 3 of the Bill seeks to provide that value of an undisclosed asset means the fair market value of an asset (including financial interest in any entity) determined in such manner as may be prescribed.

Sub-clause (1) of clause 8 of the Bill seeks to provide that the prescribed tax authorities shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908, while trying a suit in respect of the matters specified in the said clause. Further, sub-clause 3 of clause 8 of the Bill seeks to provide that any tax authority prescribed for the purposes of sub-clause (1) or sub-clause (2) of the said clause may, subject to the rules made in this behalf, impound any books of account or other documents produced before it and retain them in its custody for such period as it thinks fit.

Sub-clause (1) of clause 13 of the Bill seeks to provide that any sum payable in consequence of any order made under this Act shall be demanded by a tax authority by serving upon the assessee a notice of demand in such form and manner as may be prescribed.

Sub-clause (2) of clause 15 of the Bill seeks to provide that every appeal, before Commissioner (Appeals), shall be filed in such Form and verified in such manner and be accompanied by a fee as may be prescribed.

Sub-clause (4) of clause 18 of the Bill seeks to provide that the Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Commissioner (Appeals) has been preferred before the Appellate Tribunal under subclause (1) or sub-clause (2) of the said clause by the

other party may, notwithstanding that he may not have appealed against such order or any part thereof, within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-clause (3).

Sub-clause (6) of the said clause of the Bill seeks to provide that an appeal to the Appellate Tribunal shall be filed in such Form, and verified in such manner and, shall, except in the case of an appeal referred to in sub-clause (2) or a memorandum of cross-objections referred to in sub-clause (4), be accompanied by a fee as may be prescribed.

Sub-clause (6) of clause 24 of the Bill seeks to provide that every application by an assessee for revision under this clause shall be accompanied by such fees as may be prescribed.

Sub-clause (1) of clause 30 of the Bill seeks to provide that any amount specified as payable in a notice of demand under clause 13 shall be paid within a period of thirty days of the service of the notice, to the credit of the Central Government in such manner as may be prescribed.

Sub-clause (1) of clause 31 of the Bill seeks to provide that the Tax Recovery Officer may draw up under his signature a statement of tax arrears of an assessee referred to in sub-clause (4) or sub-clause (5) of clause 30, in such form, as may be prescribed.

Sub-clause (2) of clause 32 of the Bill seeks to provide that upon requisition made by the Assessing Officer or the Tax Recovery Officer under sub-clause (1) of the said clause, the employer shall comply with the requisition and shall pay the sum so deducted to the credit of the Central Government in such manner as may be prescribed.

Sub-clause (5) of the said clause provides that upon receipt of the notice from the Assessing Officer or the Tax Recovery Officer under sub-clause (4) of the said clause, the debtor of the assessee shall comply with the requisition and shall pay the sum to the credit of the Central Government in such manner as may be prescribed within the time (not being before the debt becomes due to the assessee) specified in the notice.

Sub-clause (2) of clause 33 of the Bill seeks to provide that, in certain conditions as specified therein, the Tax Recovery Officer, referred to in sub-clause (1) of the said clause, may send a certificate, in such manner as may be prescribed, specifying the tax arrears to be recovered, to another Tax Recovery Officer

within whose jurisdiction the assessee resides or has property.

Sub-clause (1) of clause 62 of the Bill seeks to provide that a declaration, in respect of any undisclosed asset located outside India, under clause 59 of the Act

shall be made to the Principal Commissioner or the Commissioner and shall be in such form and shall be verified in such manner as may be prescribed.

Sub-clause (1) of clause 74 of the Bill seeks to provide that the service of any notice, summons, requisition, order or any other communication under the Act (herein referred to this clause referred to as "communication") may be made by delivering or transmitting a copy thereof, to the person named therein by any other means of transmission of documents, including fax message or electronic mail message, as may be prescribed.

Clause 77 of the Bill seeks to provide that a valuer may be approved by the Principal Commissioner or Commissioner in accordance with the rules as may be prescribed.

Sub-clause (1) of clause 78 of the Bill seeks to provide that any assessee who is entitled or required to attend before any tax authority or the Appellate Tribunal, in connection with any proceeding under this Act, may attend through an authorised representative.

Sub-clause (3) of the said clause provides that authorised representative means a person authorised by the assessee in writing to appear on his behalf, being any person who has acquired such educational qualifications as may be prescribed.

Sub-clause (4) of the said clause provide that a person, not being a legal practitioner or an accountant, who is found guilty of misconduct in any tax proceedings by such authority as may be prescribed shall not be qualified to represent an assessee under sub-clause (1) of the said clause.

Sub-clause (1) of clause 79 of the Bill seeks to provide that the amount of undisclosed foreign income and asset computed in accordance with this Act shall be rounded off to the nearest multiple of one hundred rupees. Sub-clause 2 of clause 79 of the Bill seeks to provide that any amount payable or receivable by the assessee under this Act shall be rounded off to the nearest multiple of ten rupees. Sub-clause 3 of clause 79 of the Bill seeks to provide that the method of rounding off under sub-clause (1) or sub-clause (2), shall be such as may be

prescribed.

The matters in respect which rules may be made are generally matters of procedure and administrative details and it is not practicable to provide for them in the Bill itself. The delegation of legislative power is, therefore, of a normal character.

ANNEXURE

Extract from the Central Boards of Revenue Act, 1963 (54 OF 1963)

Definitions.

2. In this Act, unless the context otherwise requires,— (*c*) ''direct tax'' means—

(*I*) any duty leviable or tax chargeable under— (*i*) the Estate Duty Act, 1953; (*ii*) the Wealth-tax Act, 1957; (*iii*) the Expenditure-tax Act, 1957; (*iv*) the Gift-tax Act, 1958;

(*v*) the Income-tax Act, 1961; (*vi*) the Super Profits Tax Act, 1963; (*vii*) the Interest-tax Act, 1974; (*viii*) the Hotel-Receipts Tax Act, 1980;

(*ix*) the Expenditure-tax Act, 1987.

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to make provisions for undisclosed foreign income and assets, the procedure for dealing with such income and assets and to provide for imposition of tax on any undisclosed foreign income and asset held outside India and for matters connected therewith or incidental thereto.

(*Shri Arun Jaitely, Minister of Finance*)