

LÉGALÍCS

Liability of Banks for Aiding and Abetting in Tax Evasion and Money Laundering

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in Tax Evasion and Money Laundering

- I. India has enacted various legislations to deal with issues relating to tax evasion and money laundering. Each statute deals with different situations and prescribes for different penal provisions. The common thread which runs through almost all statutes is that in order to constitute an offence of abetting, there must be a deliberate act by the accused. Most statutes contain a provision namely 'offences by companies' which essentially states that a person who, at the time of commission of offence, was directly in charge of and responsible to the company for the conduct of its business, would be liable for the offence committed by the company. Thus, liability may be fastened to the manager, officer or director of a company for aiding and abetting, except where (i) the offence was committed without his knowledge, or (ii) he exercised all due diligence to prevent the commission of the offence. This note briefly outlines the liability of a bank under certain statutes for aiding and abetting Indian domiciled clients in tax evasion and money laundering.
- II. Certain major regulations, under which banks and / or their employee(s) may be held liable for aiding and abetting, are discussed, briefly, as under:

A. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

On May 27, 2015, the Indian Government enacted the Undisclosed Foreign Income and Assets (Imposition of Tax) Act, 2015' ("UFIA Act"), which is conceptualized as a separate tax regime, independent of the ITA. The UFIA Act will be effective from 1 April 2016, i.e. from the financial year April 2015- March 2016. The UFIA Act deals with the problem of black money that is 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.

C. Income Tax Act, 1961 ("ITA")

Indian Income tax authority can file a complaint against a foreign bank for allegedly abetting tax evasion in India if the bank (i) does not disclose client information as required under the ITA, and / or (ii) layer the transaction in order to avoid law enforcement. Usually, proceedings are filed under Section 278 of the ITA (reproduced below) which provides for rigorous imprisonment of seven years along with fine if the amount of tax evaded, or wilfully attempted to be evaded, exceeds US\$ 45,500 (approx.).

Further, India and the United States of America have signed an Inter Governmental Agreement to implement the Foreign Account Tax Compliance Act ("FATCA") and to promote transparency on tax matters. From September 30, 2015, both countries will share information relating to bank accounts and /

or financial investments made by their citizens in each other's jurisdiction. The FATCA rules require maintenance and reporting of information by financial institutions. It further requires financial institutions to develop due diligence procedure for identifying reportable accounts.

Besides being prosecuted under the ITA, banks may also be prosecuted under the Indian Penal Code, 1860 ("IPC") for falsification of accounts or destroying valuable securities or secreting them.

C. Prevention of Money Laundering Act, 2002 ("PMLA")

Under PMLA every banking company, financial institution and intermediary is obliged to maintain a record and furnish information to the concerned authority as prescribed under the Act.

Per Section 12 of the PMLA, a bank is required to (a) maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions integrally connected to each other, and where such series of transactions take place within a month; (b) furnish information of transactions referred to in clause (a) to the concerned authority within such time as may be prescribed; (c) verify and maintain the records of the identity of all its clients, in such manner as may be prescribed. The said records must be maintained for a period of 10 years from the date of transactions between the clients and the banking company or financial institution or intermediary, as the case may be.

Under Section 13 of PMLA, if a bank, financial institution or intermediary fails to comply with the obligations of maintenance of records, then, such a bank, financial institution or intermediary may be fined upto US\$ 1,818 (approx.) for each failure, in addition to other administrative sanctions. Failure to comply with the regulations may also entail action against foreign banks as well.

Rule 3 of the PML (Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules, 2005, requires a bank to maintain certain records.

The Government of India has also set up an independent body called 'Financial Intelligence Unit – India' ("FIU-Ind") which is responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions. FIU-Ind mandates a series of reporting requirements, inter alia, (i) reporting all cash transactions above rupees ten lakhs (approx. US\$ 18,181) or its equivalent in foreign currency; (ii) every banking company, financial institution and intermediary shall furnish information of all suspicious transactions whether or not made in cash.

D. Reserve Bank of India Act, 1934 ("RBI Act")

The RBI Act is aimed at advising banks about fraud prone processes and safeguards necessary for prevention of fraud. The said Act obligates banks to report all suspected transactions to Reserve Bank of India (“RBI”). Further, it instructs all banks and financial institutions to follow know your customer (“KYC”) norms and anti-money laundering (“AML”) standards. RBI has power to penalise a bank or suspend / cancel its license.

E. Securities and Exchange Board of India Act, 1992 (“SEBI Act”)

SEBI Act protects the interests of investors from fraudulent activities of corporates. Securities and Exchange Board of India (“SEBI”) can ban an intermediary from trading if it finds that the intermediary has not complied with the requisite regulations. Per SEBI regulations, registered intermediaries must ensure that all customer and transaction records and information are available on a timely basis to the competent investigating authorities. Thus, foreign institutional / portfolio investors would be required to make these records available as and when required by any competent investigating authorities. Recently SEBI has asked international private banks to register their offshore units with it if they are soliciting business in India. Later, it is possible for SEBI to seek further information from such banks about Indian individuals.

- III. As to what constitutes ‘abetment’ or ‘inducement’ ‘to make and deliver an account or a statement or declaration relating to tax payable under this Act which is false and which a person either knows to be false or does not believe to be true or to commit an offence’ has not been defined by the Act.

Certain other Indian enactments of a civil nature also provide for abetment but none of them define or explain the meaning of the word. Indian General Clauses Act, 1897, in its Section 3(1) states that ‘abet’ with its grammatical variations and cognate expressions has the same meaning as provided in the Indian Penal Code, 1860. The Indian Penal Code in Section 107 provides, as follows:

“Section 107: A person abets the doing of a thing, who-

First - Instigates any person to do that thing; or

Secondly - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1: A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration: A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2: Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.

- IV. In past SEBI or RBI has taken action against certain banks / financial institution for non-compliance with KYC norms and / or AML standards. Income tax authority has also in certain cases pursued matters relating to tax evasions. A Directorate of Criminal Investigation has also been created as an attached office of the Central Board of Direct Taxes to track financial transactions relating to illegal / criminal activities, including illicit cross-border transactions.
- V. As to the statement of accounts, RBI requires banks to adhere to the monthly periodicity while sending statement of accounts. The statements of accounts for current account holders may be sent to the depositors in a staggered manner instead of sending by a target date every month. Further, banks should advise their inspecting officers to carry out sample check at the time of internal inspection of branches to verify whether the statements are being dispatched in time.
