

Uncertainty continues over retrospective taxation



New Delhi, April 21: The ghost of retrospective amendments hangs over foreign investors who had made gains from indirect transfers, with added risk of penalty as high as 300 per cent going by the recent Cairn Energy case.

This is more so for all those past cases (before Arun Jaitley became Finance Minister) that were entangled in litigation around indirect transfer involving underlying Indian assets. They will now have to live in more uncertainty, especially those that had not opted for the Direct Tax Dispute Resolution scheme announced by Jaitley in his 2016 Budget speech.

For the past cases relating to transactions before retrospective amendments of 2012, all the existing proceedings would continue to run as per the retrospective amendments till the matter is finally settled by the courts.

UK-based oil explorer Cairn Energy, whose tax demand of ₹10,247 crore related to a transaction dating back to 2007, had not opted for the 2016 dispute resolution scheme.

Dispute resolution scheme

This dispute resolution scheme has not found favour with firms facing huge tax demands on indirect transfers as the scheme required payment of specified amount of tax along with 25 per cent of penalty and interest.

The big pain point is nobody wants to pay interest and penalty. Tax is something that litigants may be willing to pay to bury the hatchet. However, with the government not willing to sacrifice interest or penalty, the dispute resolution scheme has almost turned into a flop.

The bottomline is indirect transfers, especially those falling within the new guidelines and vetted by a committee of the Income-Tax Department, will be brought to tax in India and this is ingrained in the current income tax law.

Jaitley's assurance

It may be recalled that Finance Minister Arun Jaitley had in his 2014 Budget speech announced a three-pronged approach on indirect transfers and retrospective amendments.

He had then said that the government will not ordinarily bring about any change retrospectively which creates a fresh liability.

Jaitley had also said that the few cases that had come up in various Courts following retrospective amendments carried through Finance Act 2012 will be allowed to reach their "logical conclusion".

To provide a stable and predictable taxation regime that would be investor friendly, Jaitley had announced that all fresh cases arising out of the retrospective amendments of 2012 in respect of indirect transfers and coming to the notice of the Assessing Officers will be scrutinised by a High Level Committee to be constituted by the CBDT before any action is initiated in such cases.

As for the Cairn Energy case, the Income-Tax Department has now initiated penalty action under Section 271 (1)(c) of the income tax law. The show cause notice of why penalty of 300 per cent of tax demand (₹10,247 crore) cannot be levied has been issued, putting the ball in Cairn Energy's court.

Aseem Chawla, Partner, Phoenix Legal and Regional Vice-President, Indo-American Chamber of Commerce, said that it would be interesting to see whether such penalty proceedings will be kept in abeyance or in the alternative if adverse penalty order is passed, the same will not be enforced against the taxpayer considering that the matter is pending for arbitration in international courts.

In any case appeals against such penalty orders are allowed under domestic tax laws, he added.

Levy of penalty is the prerogative of the assessing officer who passes the order. Only if the penalty is contested can a Tribunal see if it was correctly initiated or not. A Tribunal has no power to initiate levy of penalty or direct levy of penalty.

Constitutional validity

However, the situation may become interesting and maybe even beneficial for all those facing tax demands if the High Courts were to rule on the Constitutional validity of retrospective amendments carried out by the government.

For instance, the Calcutta High Court is yet to decide on McLeod Russell's writ petition challenging the constitutional validity of retrospective amendments, say tax experts.

(This article was published on April 21, 2017)