

**Panel Discussion on
Disclosure of Foreign Assets**

J B Nagar CPE Study Circle of WIRC
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Moderator: CA Hardik Mehta
Panellists: CA Kartik Badiani and
CA Mahesh Nayak

Origin of FA Schedule

- ▶ Huge Tax evasion and offshore assets reported by various countries especially by the residents of high tax jurisdictions
- ▶ 2010- Enactment of Foreign Account Tax Compliance Act
- ▶ 2014 Common Reporting standard (CRS) on Automatic Exchange of Information (AEOI)
- ▶ Indian Perspective – FY 11-12, AY 12-13 – Schedule FA was introduced
- ▶ More onerous after Black Money (undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (BMA)
- ▶ Gradual Expansion of the Schedule
- ▶ Section 139(1) of the Act along with Rules explains the responsibility of assesseees to report foreign assets
- ▶ Mandatory filing of tax return for ROR in case of beneficiary or Beneficial owner of foreign asset

Overall objectives

- ▶ Two objectives:
 - ▶ 1. What is the Source of funds for the foreign asset that is disclosed
 - ▶ What about assets that are not acquired?
 - ▶ Gifts, ESOPs, etc.
 - ▶ 2. Taxability of income from such foreign assets
 - ▶ Mismatches can be there – need to be explained
- ▶ Principles:
 - ▶ Disclosure required, not balance sheet.
 - ▶ Focus on matching with data received.
 - ▶ Documentary evidence is important.

Basic Questions and Issues on applicability

- ▶ Whether a non-resident or RNOR need to disclose FA?
- ▶ Change of residential status?
- ▶ Whether foreign citizen needs to disclose FA?
- ▶ Whether minors need to disclose FA?

- ▶ NRI son buys house property outside India, mother is second holder for sake of convenience. Full cost paid by son. Is mother beneficial owner in that property and disclose in Sch. FA?
- ▶ Whether a nomination in foreign person life insurance policy needs to be disclosed?
- ▶ Whether investments made in Gift city to be disclosed in Schedule FA?

- ▶ If there is a non-disclosure of one or many foreign assets, what are its financial and other consequences?
- ▶ Disclosure has not been made till date. Should we do it now?

Basic Questions and Issues on coverage

- ▶ Whether FA are to be disclosed both in Sch. FA and Sch. AL?
- ▶ Where do bank accounts need to be disclosed? Are they depository accounts?
- ▶ What is covered under 'other capital assets'?
- ▶ Where and how does one disclose foreign retirement benefit accounts in Schedule FA?
 - ▶ What happens if income is taxable only on withdrawal?
- ▶ What exchange rates should one adopt for calculating the cost and peak value? Any official source/website for the same?
- ▶ Whether incomes not taxable under DTAA, like Social Security Benefit received from USA, need to be disclosed in Schedule FA?
 - ▶ What about receipts not forming income at all?
- ▶ How to reconcile the income and disclosure of assets as one is reported from Apr-Mar and another Jan-Dec?

Income derived from the asset – Which period?

- ▶ Tables A1 to Table A4 mention gross amounts paid or credited **during the period**.
- ▶ It is clear that here the **period means calendar year**.
- ▶ Remaining Tables ask for “income derived from the asset”
- ▶ Which period should be considered for this?
- ▶ Previous year or Calendar Year?

Case Study - Overseas Brokerage Account

- ▶ Mr. A holds a brokerage account with a US Custodian
- ▶ Account holds the following:
 - ▶ Cash balance.
 - ▶ Shares of different companies.
 - ▶ Mutual fund units.
- ▶ Mr. A's incomes from brokerage account comprise of the following:
 - ▶ Dividend from shares of X Co., USA;
 - ▶ Gains on sale of shares of X Co., USA;
 - ▶ Income from units earned on 31st January 2023.

Overseas Brokerage Account - Issues

- ▶ Issues to be discussed:
 - ▶ Where is the brokerage account to be disclosed Table A1 as a depository account or Table A2 as a custodial account?
 - ▶ Should the underlying securities also be disclosed separately in their respective schedule?
 - ▶ If so, where should shares be disclosed? Table A3, Table B or Table D?
 - ▶ The peak and closing balances should be based on cost or the market value?
 - ▶ What should be considered for computing the peak balance and closing balance - all underlying assets or only the cash balance in the account?
 - ▶ How to report different streams of income against one account?

Table A2 of Schedule FA – Details of Foreign Custodial Accounts

A2 Details of Foreign Custodial Accounts held (including any beneficial interest) at any time during the calendar year ending as on 31 st December, 2021											
Sl No	Country name	Country code	Name of financial institution	Address of financial institution	ZIP code	Account number	Status	Account opening date	Peak balance during the period	Closing balance	Gross amount paid/credited to the account during the period <i>(drop down to be provided specifying nature of amount viz. interest/dividend/proceeds from sale or redemption of financial assets/ other income)</i>
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
(i)											
(ii)											

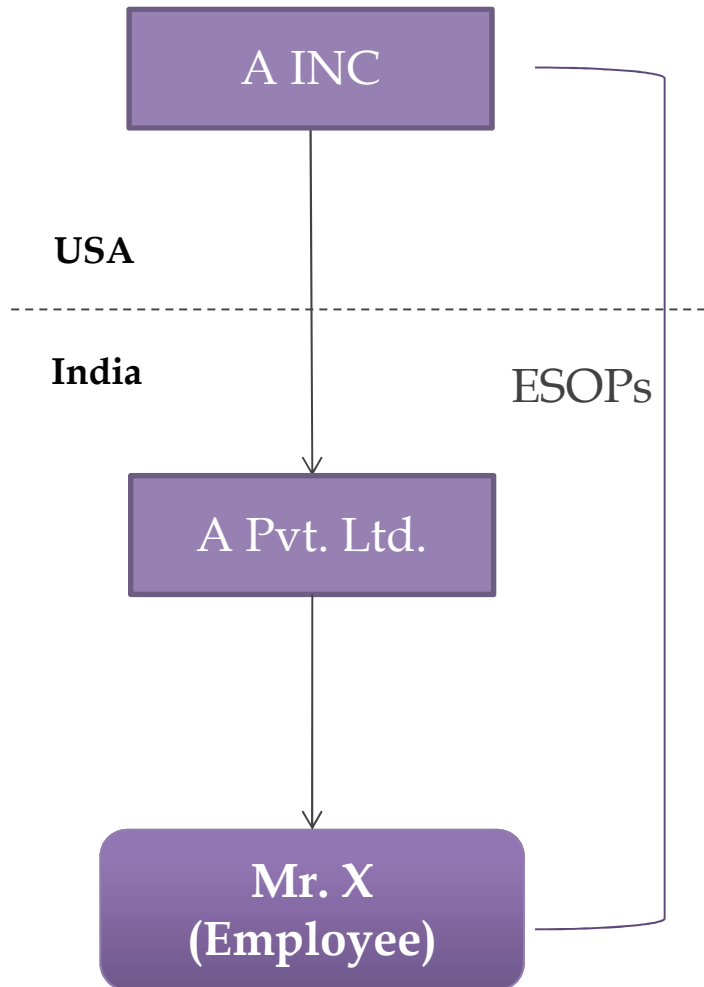
- ▶ Custodial Account as per Rule 114F means an account for the benefit of another person that holds one or more financial assets.
- ▶ A brokerage account in USA in which one can hold cash balance as well as listed securities like shares, mutual fund units, bonds, etc. will qualify as a depository account or custodial account?

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(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
(i)											
(ii)											

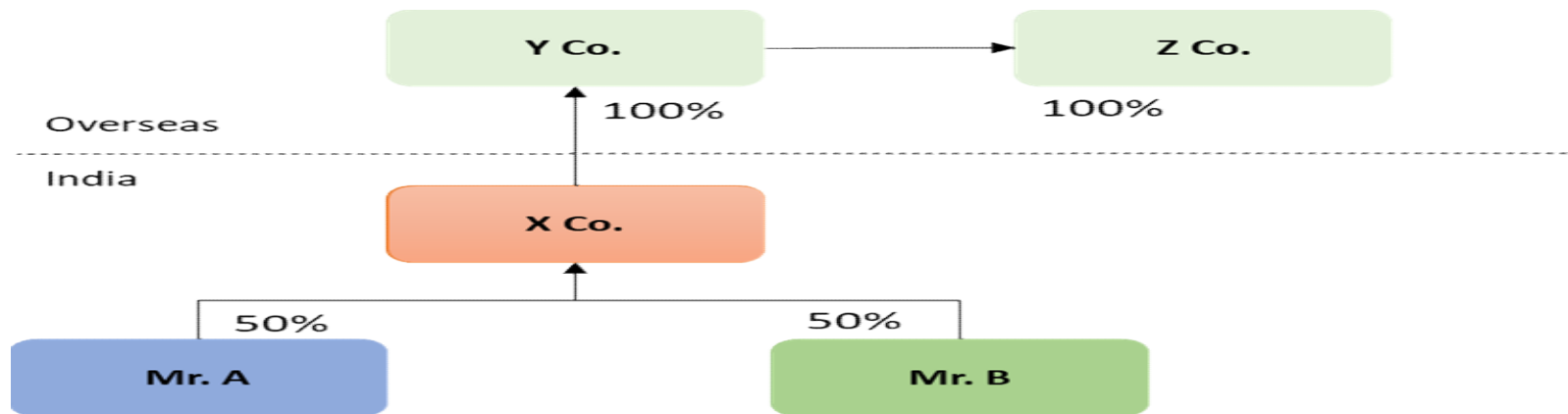
- ▶ The nature of gross amount paid should be specified from the drop-down list, viz., interest, dividend, proceeds from sale or redemption of financial assets or other income
- ▶ How to report different streams of income against one account?

Case Study – ESOPs of Foreign Company



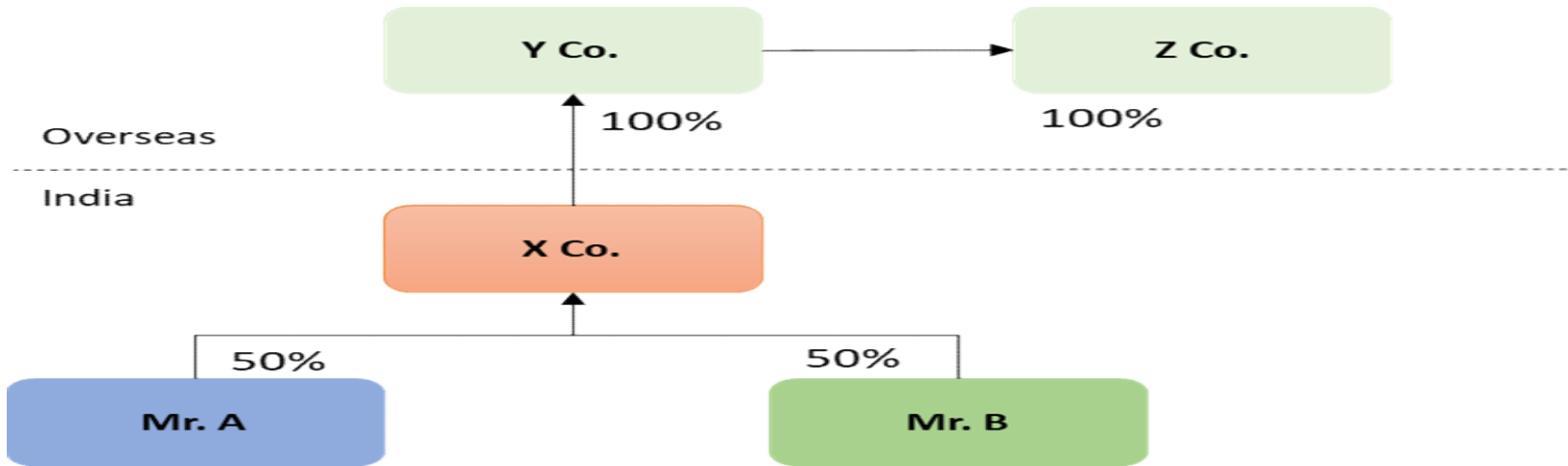
- ▶ A Inc. owns A Pvt. Ltd.
 - ▶ A Pvt. Ltd. employs Mr. X.
 - ▶ A Inc. grants ESOP to Mr. X.
 - ▶ Tax implication under ITA is only on exercise of ESOPs.
- ▶ Reporting Obligations:**
- ▶ What if ESOPs are just granted and not yet vested?
 - ▶ What if ESOPs are vested but not yet exercised by Mr. X?
 - ▶ What should be the view in case of ESPP, RSUs, PSOs, etc.?

Case Study - Holding Company Structure



- ▶ Mr. A and Mr. B own an Indian company, X Co.
- ▶ X Co. has set up a subsidiary, Y Co. in USA.
- ▶ Y Co. has further set up a subsidiary in Singapore, Z Co.
- ▶ Investment by X Co. in Y Co. and by Y Co. in Z Co. are made through their respective internal accruals, i.e., surplus funds.

Case Study - Holding Company Structure



- ▶ Reporting required only of foreign assets – is holding through X Co., India required?
- ▶ Are Mr. A and Mr. B required to disclose their indirect holding?
- ▶ If so, to what level should one disclose – holding in Y Co. only or till Z Co?
- ▶ Is X Co. required to disclose indirect ownership in Z Co.?

Case Study - Holding Company Structure

Taxman Goes After Indirect Investments in Overseas Cos

Indian residents may face tax scrutiny for non-disclosure of such info under beneficial ownership law

Sugata.Ghosh@timesgroup.com

Mumbai: Many well-heeled Indians who own stocks and properties abroad or are beneficiaries of offshore trusts may come under the glare of the income tax (I-T) department for failing to spell out their 'indirect investments'.

Indirect investments are the next-level investments — or, holdings in other overseas companies — by the entity in which the resident Indian is a stakeholder. Consider an individual holding 15% equity interest in an unlisted offshore firm (A) in Dubai, which in turn is a shareholder in three US companies (B, C and D).

Under Scanner

INDIRECT OWNERSHIP

An Indian resident buys stake in an offshore company A

Firm A buys stake in three other companies B, C and D

Indirect ownership in B, C & D has to be disclosed in I-T return along with investment in A, says tax dept

EXPERT TAKE

Definition of beneficial ownership that also covers indirect ownership is too wide

It could lead to disputes; more clarity needed from CBDT



PF BODY WRITES TO EXEMPTED TRUSTS

CPFC Seeks Info on IL&FS Exposure



The Central Provident Fund Commissioner (CPFC) has stepped in to help middle-class people whose investments in IL&FS group companies via standalone trustees are at risk, reports Saikat Das. >> 12

According to the department, indirect ownership in B, C and D has to be disclosed in the income tax return along with the investment in A. The tax office, sources said, has asked a few "high-profile individuals" to explain why they did not dis-

close their indirect investments because under the law the Indian resident is the ultimate beneficial owner (UBO) of all the companies.

Non-disclosure of information could attract a penalty of at least ₹10 lakh; and, if the taxman is not satis-

fied with the response, it can invoke the new law against black money.

"To define the term 'beneficial ownership', Section 139 of the Income tax Act was amended. The new definition, which attempted to cover indirect ownership as well, came into effect from April 1, 2016. As a result, investment in a structure outside India which in turn has made downstream investments in other structures world over is being covered under the new clause. So long as the Indian resident has substantial stake or voting power or control over board to decide the downstream investment may be covered under the amended definition. However, I feel, the definition is being interpreted too widely. Should any investment in any structure, in India or outside India which makes downstream investments in the US, Cayman or Ireland, be covered under the amended definition? It may not be legally correct," said senior chartered accountant Dilip Lakhani.

Cases of Downstream Investments >> 18

Case Study - Holding Company Structure

- ▶ Section 139 and Instructions to ITR Forms –
- ▶ “Beneficial owner” in respect of an asset means an *individual* who has provided, directly or indirectly, consideration for the asset and where such asset is held for the immediate or future benefit, direct or indirect, of the individual providing the consideration or any other person.
- ▶ Ultimate Beneficial Owner (UBO) criteria relevant?

Case Study – Trust reporting

- ▶ Mr. A, NRI, settled shares and immovable property in discretionary trust for US inheritance tax purposes in 1990.
- ▶ On retirement Mr. A has moved to India to settle for good in 2022.
- ▶ Trustees of the trust are his son and daughter, Mr. B and Ms. C.
- ▶ Beneficiaries of the trust are:
 - ▶ Children of Mr. B and Ms. C – non-residents of India.
 - ▶ Nephews and nieces of Mr. A – all Indian residents (unaware of the fact that they are marked as beneficiaries in the trust).
 - ▶ Charitable trust in India

Table F of Schedule FA – Trust created outside India in which person is a trustee, a beneficiary or settlor

F Details of trusts, created under the laws of a country outside India, in which you are a trustee, beneficiary or settlor												
Sl No	Country Name and code	ZIP Code	Name and address of the trust	Name and address of trustees	Name and address of Settlor	Name and address of Beneficiaries	Date since position held	Whether income derived is taxable in your hands?	If (8) is yes, Income derived from the trust	If (8) is yes, Income offered in this return		
										Amount	Schedule where offered	Item number of schedule
(1)	(2)	(2a)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
(i)												
(ii)												

- ▶ Is Mr. A required to disclose the trust even if settled when he was a Non-resident?
- ▶ Should he disclose the trust assets too even though he is not legal owner?
- ▶ Is a resident beneficiary of a foreign Discretionary Trust required to file tax return?
- ▶ Is the beneficiary required to disclose the underlying assets held by the Trust?

Definition of “Beneficiary” of a foreign asset

Inconsistency in the definition of “beneficiary”:

Expl. 5 to Section 139(1)	Instructions to ITR Forms	Expl. To Rule 114F(1)(c)
<p>“Beneficiary” in respect of an asset means an individual who <u>derives benefit from the asset during the previous year and the consideration for such asset has been provided by any person other than such beneficiary.</u></p>	<p>Beneficiary in respect of an asset means an individual who derives <u>an immediate or future benefit, directly or indirectly,</u> in respect of the asset during the previous year <u>and the consideration for such asset has been provided by any person other than such beneficiary.</u></p>	<p>A person will be treated as a beneficiary of a trust if he has the <u>right to receive, directly or indirectly, a mandatory distribution</u> or <u>may receive, directly or indirectly, a discretionary distribution from the trust.</u></p>