

India needs to rethink attitude towards corporate tax avoidance

Kluwer International Tax Blog
April 8, 2019

Shilpa Goel (Editor) (Tax Lawyer)

Please refer to this post as: Shilpa Goel (Editor), 'India needs to rethink attitude towards corporate tax avoidance', *Kluwer International Tax Blog*, April 8, 2019, <http://kluwertaxblog.com/2019/04/08/india-needs-to-rethink-attitude-towards-corporate-tax-avoidance/>

According to an oft-cited research by the UN University World Institute for Development Economics Research, India loses over 40 billion US dollars in revenue, annually, to corporate tax avoidance. Obviously, for a country like India, the money could have been used to reduce poverty-related deaths and to provide basic social care to the poor and underprivileged. Despite its impact, corporate tax avoidance is one of the lesser debated issues in India.

Multinational tax avoidance has almost never made it to the front pages of popular Indian newspapers and has never been discussed on primetime TV news debates. That corporate tax avoidance is not 'popular' with the Indian voters today is also indicated by the fact that not a single question relating to "tax avoidance" or "corporate tax avoidance" was raised in the Sixteenth Lower House of Parliament (2014-2019).

This is not to suggest that nothing has been done so far. I have blogged about some of the changes recently carried out to the Income Tax Act to mirror the OECD's BEPS recommendations. Also, in 2017, the government introduced a legislative general anti-avoidance rule (GAAR) to disregard aggressive tax planning arrangements and deny tax treaty benefits. Of course, the GAAR came too late in the day and came only after the Supreme Court, in the case of *Vodafone*, rather bluntly noted that tax benefits cannot be denied in the absence of any explicit anti-abuse rule in the tax law.

These changes, though necessary, are not sufficient to win India's fight against corporate tax avoidance. A lot needs to change, both at domestic and international levels.

First, the GAAR needs to be supplemented with targeted tax disclosure rules in the Income Tax Act to require tax professionals to disclose to the Income Tax Department specific tax schemes that could potentially attract the GAAR.

What information needs to be disclosed (for instance, should the rules also cover advised structures that a taxpayer does not proceed with) and by what category of professionals? How do we respect taxpayer confidentiality in the absence of a strong data protection law? These questions need to be discussed and debated. If implemented properly, the rules would enable the tax authority to get meaningful, timely access to key taxpayer information and result into more efficient tax audits, as well as disincentivize promoters of tax avoidance schemes.

Second, a separate, stern penalty regime must be introduced in the Income Tax Act to deter companies from attempting to bypass the GAAR. In case of repeated violations, companies should be subject to serious consequences, including facing winding-up proceedings. In principle, such a step should be taken only in the event that there is a final, binding judicial determination that the taxpayer in fact sought to unlawfully obtain a tax benefit.

Third, a Task Force on Tax Avoidance should be set up dedicated entirely to investigate and tackle tax avoidance cases at its core, such as the one already existing in Australia. Currently, the Central Board of Direct Taxes does not maintain a separate database on cases relating to tax avoidance (be it notices sent or cases pending in courts). This needs to immediately change.

Fourth, as part of the OECD's BEPS project, India has agreed to use a principle purpose test in some of its tax treaties that are covered under the Multilateral Instrument. Many of India's tax treaties also contain a limitation on benefits clause. India should ensure that those tax treaties that are not covered under the Multilateral Instrument are renegotiated to incorporate a principal purpose test or a limitation on benefits clause to prevent inappropriate use of treaty benefits.

Fifth, the current threshold for the application of the new country-by-country reporting requirement is extremely high and should be reduced to cast a wider net. India also needs to debate if public country-by-country reporting needs to be adopted to deter and detect tax avoidance.

Finally, detailed guidance on the GAAR should be published (and constantly updated) setting out the kinds of commercial arrangements that are considered artificial/legitimate and the consequences thereof.

Of course, one does not need to entirely agree with some or all of these suggestions, but it is important we at least set the stage for policy debate and expose areas that are lacking in reform. Whether or not India rethinks its attitude towards corporate tax avoidance - time will tell.