Reporting Requirements of FATCA and FBAR for Indian Residents in USA

Foreign Account Tax Compliance Act (FATCA) and Report of Foreign Bank and Financial Accounts (FBAR) are reporting requirements which help the US government to keep track of the foreign assets of US persons and to keep a check on evasion of tax. In this article, the author has discussed the applicability of the provisions of FATCA and FBAR to various US persons, foreign accounts and foreign assets which are to be reported and which are exempted, penal provisions in case of non-compliance, comparison of FBAR and FATCA and present status of inter-governmental agreement between India and USA for information exchange for compliance with FATCA. The article also throws some light on Double Taxation Avoidance Agreement (DTAA) between India and USA and highlights of the newly enacted Undisclosed Foreign Income and Assets (Imposition of Tax) Act, 2015. Read on…

1. FATCA:

FATCA (Foreign Account Tax Compliance Act) came into force from March 2010. The purpose of this Act is reporting of foreign financial assets by US tax-payers. FATCA focuses on reporting of certain foreign financial accounts and offshore assets by US tax-payers. The Act also focuses on foreign financial accounts in other institutions held by US tax-payers or foreign entities in which US tax-payers hold a substantial ownership interest.

Many Indian individuals as well as businessmen, who are residents of USA and being tax-payers there, frequently raise doubts about the disclosures under FATCA. They also raise doubts about the taxability of Indian income again in USA. Relevant issues are discussed in the following paragraphs.

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FATCA attained more importance with the signing of the inter-governmental agreement (IGA) between USA and India in April 2014. The disclosures are required to be made by individuals, financial institutions and other tax payers or foreign entities in which US tax-payers hold a substantial ownership interest of more than 50% for the taxable years starting after 31st December, 2012.

Individuals

Specified individual tax-payers such as:

- A U.S. citizen.
- A resident alien of the United States for any part of the tax year.
- A non-resident alien who opts to be treated as a resident alien for the purposes of filing a joint income tax return.
- A non-resident alien who is a *bona fide* resident of American Samoa or Puerto Rico, have to disclose their specified foreign financial assets are required to report under FATCA subject to the threshold limits given below.

Threshold Limit

The following are the threshold limits based on the cumulative balances in reportable foreign accounts for the different specified individuals, exceeding which, such specified individuals should report under FATCA:

- **In the case of individual resident in USA**, $50,000 at the end of the tax-year and US$ 75,000 at any time during the tax-year.
- **In the case of married persons resident in USA and filing a joint return**, $100,000 at the end of the tax-year and US$ 150,000 at any time during the tax-year.
- **In the case of individual resident outside USA and fulfills one of the presence abroad test**, $200,000 at the end of the tax-year and US$ 300,000 at any time during the tax-year.
- **In the case of married persons resident outside USA, fulfills one of the presence abroad test and filing a joint return**, $400,000 at the end of the tax-year and US$ 600,000 at any time during the tax-year.

Presence Abroad Test

- A U.S. citizen should be *bona fide* resident of a foreign country or countries for an uninterrupted period that includes an entire tax-year or,

The Internal Revenue Service (IRS) anticipates issuing regulations that will require a domestic entity to file Form 8938 if the entity is formed or used to hold specified foreign financial assets and the total asset value exceeds the appropriate reporting threshold.

- A U.S. citizen or resident who is present in a foreign country or countries for at least 330 full days during any period of 12 consecutive months that ends in the tax-year being reported.

The tax-payers who do not have to file income tax return need not file Form 8938. Filing Form 8938 is in addition to FINCEN Form 114 for reporting of Foreign Bank Accounts (FBAR).

The following are the specified foreign financial assets which should be declared in Form 8938 along with the US Income Tax Return:

- Financial accounts held at foreign financial institutions,
- Foreign stock and securities held in or financial account held at a foreign financial institution,
- Foreign stock or securities not held in a financial account,
- Foreign partnership interests,
- Foreign mutual funds investments,
- Foreign accounts and non-accounting investments held by foreign or domestic grantor trust for which the tax-payer is the grantor,
- Foreign issued life insurance or annuity contract with a cash value,
- Foreign hedge funds and foreign equity funds and foreign equity funds has a financial interest in or signature authority over at least one financial account located outside USA, and the aggregate value of all financial accounts exceeded US$ 10,000 at any time during the year.

Following foreign financial accounts need not be disclosed:

- Financial account held at a foreign branch of a US financial institution,
- Financial account held at US Branch of foreign financial institution,
- Foreign financial account or asset for which the tax-payers have a signature authority (but reportable when there is income or gain),

- Indirect interests in foreign financial assets through an entity,
- Domestic mutual funds investing in foreign stocks and securities,
- Foreign real estate held directly,
- Foreign real estate held through a foreign entity,
- Foreign currency held directly,
- Precious metals held directly,
- Personal property held such as art and antiques, jewellery, cars and other collections,
- Social security type programme benefits provided by a foreign government.

Applicability of FATCA to Various Institutions

A. Entities

The Internal Revenue Service (IRS) anticipates issuing regulations that will require a domestic entity to file Form 8938 if the entity is formed or used to hold specified foreign financial assets and the total asset value exceeds the appropriate reporting threshold.

Until the IRS issues such regulations, only individuals must file Form 8938. That date of applicability will not be earlier than taxable years beginning after December 31, 2012.

B. Applicability of FATCA to Foreign Financial Institutions

Foreign Financial Institution include, but are not limited to:

- Depository institutions (like, banks, NBFCs and companies accepting deposits),
- Custodial institutions (like, mutual funds),
- Investment entities (like, hedge funds or private equity funds),
- Certain types of insurance companies that have cash value products or annuities.

Unless exempt, FFIs that do not register and agree to report, they will face a 30% withholding tax on certain U.S.-source payments made to them. Under FATCA, to avoid withholding of tax upon, foreign financial institutions (FFIs), they should register with the IRS and agree to report to the IRS certain information about their U.S. accounts, including accounts of certain foreign entities with substantial U.S. ownership.

Failure to report foreign financial assets in Form 8938 will result in a penalty of $ 10,000 (and a penalty up to $ 50,000 for continued failure after IRS Notification). Further, underpayments of tax, attributes to non-disclosed foreign financial assets and will be subject to an additional substantial under-statement penalty of 40 percent.

FFIs which enter into an agreement with the IRS to report on their account holders may be required to withhold 30% on certain payments to foreign payees if such payees do not comply with FATCA.

An FFI which registers on the "FATCA Registration Website" ("Website"), after approval, will be allotted a Global Intermediary Identification Number (GIIN) from the IRS. Such GIIN is not given if the FFI is treated as a Limited FFI. IRS publishes periodically a list of registered and approved FFIs and their GIINs. Withholding agents on the basis of such list, verify an FFI's GIIN and if GIIN of FFI is not there in the list, then they should withhold 30% on payments made to the FFI.

C. US Financial Institutions

While making source payments, if U.S. financial institutions (USFIs) and other types of U.S. withholding agents are unable to document such entities for purposes of FATCA, then they should withhold 30% on certain U.S. source payments made to foreign entities.

USFIs can submit a FATCA Registration application via the FATCA registration website:

- For obtaining GIIN for their foreign branch in a Model 1 IGA jurisdiction.
- For renewing their foreign branch's qualifying intermediary's agreement.
- For registering itself as a sponsoring entity for FFIs for performing, on behalf of the FFI.

A USFI may register as a lead FI to manage the FATCA registration process for members of its expanded affiliated group of FFIs.

Penalties under FATCA

Failure to report foreign financial assets in Form 8938 will result in a penalty of $ 10,000 (and a penalty up to $ 50,000 for continued failure after IRS Notification). Further, underpayments of tax, attributes to non-disclosed foreign financial assets and will be subject to an additional substantial under-statement penalty of 40 percent.

2. Report of Foreign Bank and Financial Accounts (FBAR)

FBAR is an additional disclosure of foreign financial accounts to be made by US persons including US

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citizens, US residents, entities including but not to limited corporations, partnerships, limited liability companies, trusts or estates formed under United States laws, who have a financial interest in or signature authority (it is an authority, which an individual can exercise by himself or in conjunction with other individual regarding control of disposition of assets held in foreign account) held in over any financial account(s) outside of the United States and the aggregate maximum value of the account(s) exceeds $ 10,000 at any time during the calendar year.

Purpose of FBAR

The FBAR is used by the United States government for identification of:

- persons who may be using foreign financial accounts to outwit or evade United States law,
- funds which are used for illegal purposes, and
- undisclosed income maintained or generated in other countries.

For applying the residential tests, United States includes:

- The States, the District of Columbia,
- All United States territories and possessions (e.g., American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the United States Virgin Islands), and
- The Indian lands as defined in the Indian Gaming Regulatory Act.

The following persons are not required to file FBAR:

1. An entity and is named in a consolidated FBAR filed by a greater than 50 percent owner.
2. IRA owners and beneficiaries (IRA means Individual Retirement Account which is an investing tool used by individuals to earn and earmark funds for retirement savings).
3. Participants in and beneficiaries of tax-qualified retirement plans for foreign financial account held by or on behalf of such plans.
4. Individuals having signature authority without financial interest in a foreign financial account.
5. A trust beneficiary having a direct or indirect financial interest in more than 50 percent of the trust assets or income, if the trust files FBAR.

Financial account includes the following:

- Bank accounts like savings accounts, checking accounts, and time deposits,
- Securities accounts like brokerage accounts and securities derivatives or other financial instruments accounts,
- Commodity futures or options accounts,
- Insurance policies with a cash value (i.e., policy which pays out upon the policyholder's death, and also accumulates value during the policyholder's lifetime),
- Mutual funds or similar pooled funds,
- Any other accounts maintained in a foreign financial institution or with a person performing the services of a financial institution.

The following foreign financial accounts need not to be figured in FBAR:

1) In the case of the accounts jointly owned by spouses, the spouse of an individual who files FBAR is not required to file FBAR for such accounts, if one spouse reports jointly owned accounts. In case of other accounts which are not jointly owned, each spouse should file FBAR separately.
2) Correspondent or nostro accounts (Nostro Account is a bank account held in a foreign country by a domestic bank, denominated in the currency of that country for settlement of foreign exchange and trade transactions).
3) A foreign financial account of any governmental entity.
4) A foreign financial account of any international financial institution of which the United States government is a member.
5) A financial account maintained with a financial institution located on a United States military installation outside USA.

Due date for filing FBAR in FINCEN Form 114 is on or before 30th June of the year following the calendar year being reported.

Penalties

The following chart highlights the civil and criminal penalties that may be asserted for not complying with the FBAR reporting and record-keeping requirements.

Violation	Civil Penalties	Criminal Penalties
Negligent violation (does not apply to individuals)	Up to $500	N/A
Non-willful violation	Up to $10,000 for each negligent violation	N/A
Pattern of negligent activity (Does not apply to individuals)	In addition to penalty of $ 500 for each negligent violation, with respect to any such violation penalty not more than $50,000	N/A
Willful - failure to file FBAR or retain records of account	Up to the greater of $100,000, or 50 percent of the amount in the account at the time of the violation.	$250,000 or 5 years of imprisonment or both
Willful - failure to file FBAR or retain records of account while violating certain other laws	Up to the greater of $100,000, or 50 percent of the amount in the account at the time of the violation	$500,000 or 10 years of imprisonment or both
Knowingly and willfully filing false FBAR	Up to the greater of $100,000, or 50 percent of the amount in the account at the time of the violation	$10,000 or 5 years of imprisonment or both

No exemption, deduction or set off of any carried forward losses (as provided under the Income Tax Act) would apply for such undisclosed foreign income.

Comparison of FATCA and FBAR Requirements

Description	FATCA	FBAR
Which form to file	Form 8938	FINCEN 114
When to file	Along with the Income Tax Return	On or before 30th June
With whom to file	With IRS	With US Treasury.
Who should file	USA Tax payers	Citizens, Residents of USA and US Territories, Non tax payers also
Threshold limits	Refer **"Threshold limits"** in the earlier paragraph	$ 10,000 at any time during the year

Inter Governmental Agreement (IGA) between India and USA

IGA (Inter Governmental Agreement) between US and India facilitates global sharing of information which helps in detecting any tax evasion. The Government of India has signed model I Inter Governmental Agreement on 9th July, 2015 by which the information is shared through the Regulator or Central Board of Direct Taxes (CBDT) in India. By virtue of this agreement, US need not deduct withholding tax of 30% at source while making payment to NRI's foreign financial accounts pertaining to India.

Know Your Customer (KYC) profile details should hereafter include Tax Identification Number (TIN)/GIIN of US persons in India when they open a financial account so that reporting requirements and showing of information is meaningful. Banks, financial institutions, NBFCs, companies accepting deposits should revise the KYC norms in India in the light of IGA with USA.

Double Taxation Avoidance Agreement (DTAA) Between USA and India

The information given in FATCA 8938 or FINCEN Form 114 is for the purpose of disclosure and they are not meant for taxing. If the US tax authorities find any tax is evaded which has to be taxed in US, they will take appropriate action.

India and USA entered in to a Double Taxation Avoidance agreement. By virtue of this tax treaty, certain incomes are not taxed again in USA if they are taxed already in India. Indians, who are residents

of USA, should bring details of tax treaties to the notice of their CPAs so that they need not pay taxes again in USA on certain incomes and should get credit for the taxes already paid in India.

Relief from Double Taxation

As per the Double Taxation Avoidance Agreement between India and USA, United States shall allow to resident or citizen of the United States, credit of the tax amount (income tax) paid in India while computing their tax in United States. In cases of US company owning at least 10% of shares in a company which is resident in India and US company receives dividends tax and dividend distribution tax is deducted and paid in India, then, tax paid on such dividend distribution shall be given credit.

Where resident of India derives income from USA in a financial year which is taxed in India, then India shall allow deduction of such federal tax paid in USA while computing tax on such income.

Disclosure of Foreign Income and Foreign Assets in India as Per Indian Tax Laws

If a person is resident in India as well as USA for the purpose of taxation in any financial year, then his foreign income may be taxed in India again after being taxed in USA giving due credit to federal taxes paid towards such income.

As per Section 139 of Income-tax Act 1961, any resident and ordinarily resident who has assets (including financial interest in any entity) located outside India or having signing authority in any account located outside India, or income from any source outside India, should disclose the same in the ITR he is filing.

On failure to disclose foreign assets or income, then a penalty of ₹5,000/- is to be levied. The Bill has been passed by both Lower and Upper Houses of parliament and has become an Act.

Some of the salient features of the Act are as follows:

- The new Act is totally linked to The Income-tax Act, 1961.
- This Act only applies to undisclosed foreign income and asset. Undisclosed foreign income and asset refers to such income and assets which have not been disclosed in return of income filed within time specified under Explanation 2 to sub-Section (1) or under sub-Section (4) or sub-Section (5) of Section 139.

- It is applicable to resident and ordinarily resident person i.e., a person who stays in India :
  - for a period of 182 days or more in previous year ("PY") (or)
  - for 365 days or more during 4 previous years immediately before relevant PY and 60 days or more during the PY

  and is not applicable to not ordinarily resident as per Income-tax Act, 1961 and is applicable to whole of India.
- A flat rate of 30 per cent tax would apply to undisclosed foreign income or assets of the previous assessment year.
- No exemption, deduction or set off of any carried forward losses (as provided under the Income Tax Act) would apply for such undisclosed foreign income. This would apply from April 1, 2016 onwards.
- A one-time compliance opportunity would be given to persons who have any undisclosed foreign assets/Income (for all previous assessment years), to file a declaration before a tax authority, and pay tax at 30% of such undisclosed income or assets along with a penalty at the rate of 100% of such tax paid, within a prescribed period.
- Penalties and prosecutions would also be attracted for non-compliance of applicable sections of the Act and quantum of penalty or prosecution will depend on severity of offence.

Conclusion

US tax payers who are Indians, covered by FATCA and FBAR and have assets/income outside USA should seek professional help on the above points before filing their respective returns under FBAR and FATCA.

Similarly, Indians who come back to India and become resident and ordinarily resident should also seek professional advice before filing the return. ■