R.Tulsian & Co.
CHARTERED ACCOUNTANTS

Implications of FATCA/CRS on NRI

“People who have offshore assets will now find it very difficult to hide investments and corresponding income from eyes of governments of both countries.”

Shashwat Tulsian,Partner

"Sharing and Reporting of accounts and income has become a hot topic among NRIs and there is a lot of confusion about the whether, when , what, why and how India will share the information. CRS & FATCA are two most important recent developments w.r.t. cross border taxation. I would recommend contacting your CA or CPA in India as well as in your resident country for understanding the impact of FATCA/CRS declaration and plan accordingly."

Nisha Khultia, Partner

"Have you ever been to US to work and tried investing in India. Most likely you would have faced some issue under FATCA compliance asking you to confirm. So what is FATCA and why are Americans and Indians governed by FATCA regulations?"

What is FATCA

USA enacted FATCA in March 2010. FATCA is aimed at ensuring that **US persons with financial assets outside of the US pay US tax.**
The rules require foreign financial institutions (FFI's) to provide the with information on certain investments of **U.S. persons invested in accounts outside of the U.S. and** for certain non-U.S. entities to provide information about any **U.S. owners.**

Intergovernmental Agreement (IGA)

An Intergovernmental Agreement (IGA) is a bilateral agreement between a country's Government and the U.S. government that facilitates compliance with FATCA. The model agreements enable FFIs in the designated jurisdictions to comply with FATCA, especially where privacy laws exist.

FATCA & India

On July 9, 2015, India signed the Foreign Account Tax Compliance Act (FATCA) agreement with USA and agreed to share the financial information of US based Non-Resident Indians (NRIs).
Foreign financial institutions (FFIs) in India are required to report tax information about US account holders to the Indian Government which will, in turn, relay that information to the US Internal Revenue Service (IRS). Furthermore, the US IRS will provide similar information about Indian citizens having any accounts or assets in the US.

Common Reporting Standards (CRS)

Like FATCA , GOI has implemented a Common Reporting Standard (CRS) .To combat offshore tax evasion, G20 and OECD countries are working together to develop a Common Reporting Standard (CRS) on Automated Exchange of Information (AEOI). India is one of the early adopters of CRS.
As per the CRS, financial institutions in country of source income will collect and report it to the tax authorities of that country, which in turn will relay it to the tax authority of country where the person is a "resident".
Till December 2015, 98 jurisdictions have committed themselves to CRS, 56 will do so in 2017 and balance 39 will do so in 2018 respectively.

All **non-USA financial institutions** are required to search their records for US persons and share details with **IT department** which in turn will share it with the **IRS in the USA.**

- FFIs and other entities in India will be reporting to Indian governmental agencies rather than directly with IRS.

- They however have to register at FATCA Registration Portal or file form 8957 with IRS.

Who qualify as reportable financial institutions under FATCA

Following institutions come under the purview of FATCA:

- It must be an entity (individuals do not qualify)

- The entity should be a "financial institution" (so someone like a "builder" will not qualify)

- The entity should be located in India (so any investments in outside India entities will not be covered)

- The financial institution should NOT be a non-reportable financial institution

Entities are classified into 4 categories:

- Custodial institutions (example: NSDL, CDSL, ICICI Securities etc.)

- Depository Institutions (e.g. Banks, NBFCs engaged in deposit taking activity, Credit Unions)

- Investment Entities (Mutual funds, PMS, NBFCs engaged in investment activity)

- Specified Insurance Companies (e.g. ICICI Pru Life, Kotak Life etc.)

Income Tax Rules w.r.t. India's IGA (Intergovernmental Agreement) on FATCA with USA & Multilateral Agreement on CRS

As discussed above, CBDT has issued Rule 114F to 114H in the Income Tax Rules for enabling institutions to comply with FATCA. The rules speak on the following aspects:

- Rule 114F: Definitions of the various terms referred to in the rules;
- Rule 114G: Information to be maintained and reported; and
- Rule 114H: Due diligence requirement.

<u>Key actionables arising out of these rules for reporting FIs are as follows:</u>

- Obtain registration with the Indian tax authorities vide online tax portal
- Submit information in Form 61B or NIL statement as the case may be
- Information for every calendar year to be reported to the Indian Tax Authorities by the subsequent May 31
- Nil statement to be filed even if no account is identified as reportable
- First reporting (for calendar year 2014) under FATCA is 10 September 2015 and for CRS, it is May 31, 2017.

Which accounts are exempt from reporting?

A non-reportable financial institution is exempt from reporting under FATCA. By that logic, any account held in such accounts will not be reported. Examples are credit card issues, banks with a local only base or low value account only base, government institutions, ESIC, non public fund of armed forces, specified retirement funds

> Cash value insurance contract amounting to less than $50,000 for US reportable accounts
>
> Insurance contracts that do not have surrender value e.g. term life insurance, property insurance, motor insurance
> Annuity contracts
>
> Senior Citizen Savings Scheme (SCSS)
>
> Accounts held by estate
>
> Escrow accounts etc.

Some important points from the Guidance Note is as follows:

> NPS trust will constitute as RFI and will have to report information of its policyholders.
>
> As for mutual fund units, either the depository (if held in demat form) or the AMC will report these to ITD.



Residential Status: Residential Status is THE MOST IMPORTANT FACTOR.

The whole objective of the FATCA/CRS exercise is to determine the correct residential status. It is important to understand the law relating to residential status in India and foreign county.In India, residential status under Foreign Exchange Management Act (FEMA) and Income Tax Act (ITA) are different and it is possible that a person may be a non-resident under FEMA and a resident under ITA. In foreign country, it is important to understand the difference between residential status for immigration and for income tax purposes.

The five most common misconceptions related to residential status are:

A foreign citizen living in India is a non-resident.
An Indian citizen residing abroad on work visa is not a resident of foreign country.
A PIO with OCI card is an Indian citizen and is considered as a resident of India, even if he is living outside India.
A US citizen or green card holder living in India is not a US resident.
It is okay for a non-resident to maintain accounts and assets as resident.

Coverage of persons in USA under FATCA

FATCA will affect anyone deemed a tax payer under US tax rules. This includes companies with investors, beneficial or controlling owners who are based in the US.

For identifying foreign bank or investment accounts, you are considered a US person, if one or more of these criteria apply to you:

> Citizen (living or working outside US).
> Green Card Holder.
> Tax Resident (from other countries)
> Dual-citizenship owner.
> Children of US citizen/s.
> Place of Birth.
> Residence Address.
> US person as investor or controlling owner of entity (estates, trusts, corporations and partnerships).

Will FATCA apply to any non-US person or Indians?

Foreign Account Tax is meant only for US persons with threshold-limited accounts in India. Assets include investments and partitioned/inherited family assets in India –

What is included?

> Individuals with bank or investment account balance above $50,000.
> US person living in India with bank or investment account balance above $200,000.
> Entities with bank or investment account balance above $250,000.

What is not included?

> Immovable properties like land or house property, and personal assets like jewellery are not covered by FATCA
>
> Investment in partnership or proprietorship firm not included and not reported.

US persons residing in India will continue to report foreign income under FBAR. They can disclose previous overseas money under Overseas Voluntary Disclosure Program (OVDP) 2014.

FATCA doesn't affect existing tax rights of US citizens in India or Indian tax residents in United States. Nor does it require reporting agencies to act as tax collectors for IRS.

Financial Accounts, Threshold and Tax forms under FATCA

In addition to reporting foreign income under FBAR and PBIC report, US persons will have to submit **self-reporting form** – IRS Form **8938**. This has to be attached to US person annual tax return to avoidpenalties.

Asset/investment threshold limit –

Gross assets owned in India are $50000 on last day of year or $75000 during that year for US person.

Gross assets owned in India by married couple paying joint taxes are $100000 on last day of year or $150000 during that year for US person.

Gross assets owned in India are $200000 on last day of year or $300000 during that year for US persons residing/working in India.

Gross assets owned in India are $400000 on last day of year or $600000 during that year for married couple residing/working in India and paying joint taxes.

A saving and depository account with balance below $50000 is not reportable but there is no such exemption for other financial assets.

Land and other immovable property are outside purview of FATCA compliance.

US person account classification and aggregation for FATCA reporting

To determine whether high value (above threshold limit) accounts of a customer belongs to US person, all their accounts will be taken into account.

Using Unique Identification Number of account holder, they can find linked ones.

In case of joint accounts, all holders will be considered to have equal share.

In case of Passive non-financial entity (PNFE), the controlling owner will be taken into consideration to determine reportable accounts.

Financial accounts other than saving or current accounts of both old and new customers will be reviewed, even if they are below threshold limit.

Each reported account will be mentioned separately in Form 61B.

Few Examples for FATCA –

A US person has $60000 in Indian bank as financial year-end balance, and Pension fund account of $10000. He is a reportable person under FATCA but only for one account of $60000. The pension fund would be exempt from calculation.

An NRI (for tax purposes) has shares portfolio with $15000, mutual fund folio (account) $20000, and a joint bank account with resident mother of $30000. All these accounts are held in ICICI bank. He is reportable person as total balance is $65000 and all three accounts will be reported.

AXY company has two accounts with Bank X -current account with $186000 and term deposit of $85000. As aggregated asset value is above threshold limit of $250000, both accounts will be reported separately by the bank.

Recent Monitoring Reforms to control investment and taxes in India

Requirement of PAN for investments and taxation: ALL financial transactions – opening bank account, applying for loan or credit card, buying property, buying mutual fund, paying tax, etc. require PAN. All major transactions are also being reported to the Income Tax Department (ITD) on an annual basis. It is almost impossible to do any official transaction without PAN or without notice of the ITD.

Important updates while filing tax returns in India: Recently, ITD in India has updated the forms for filing income tax return from Financial Year 2014-15. Now, Passport number is required while filing income tax return. In addition, a detailed schedule of foreign assets and related income is also required to be reported. Furthermore, the ITD now requires separate line item for payment to NRI for rent, interest, salary, etc.

Unique Customer Identification Code (UCIC): RBI has mandated that a unique customer ID is to be allotted to one person (based on PAN) for all accounts with banks, i.e. one ID for checking, savings, Demat, Trading, mutual fund, etc. accounts.

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Black Money Act: Indian Government has recently issued Black Money Act (BMA). As per BMA, any unreported asset or income of an Indian resident (even in foreign country) would be considered as Black Money and will be subjected to heavy tax and penalties, including prosecution.

Why FATCA/CRS declaration is Important?

If an NRI is investing as a resident, Passport detail will reveal the truth about his correct residential status. Also, as a resident, he will be required to report his global income and foreign accounts/assets or will be covered by the Black Money Act in India.

If a resident is investing as resident of different states by opening Demat and bank accounts as resident of different countries, the ITD will notice the inconsistency because of common PAN. With implementation of unique ID, it is now not possible to maintain different residential status with same institution.

Penalty for non-compliance

For Account Holder

For pre-existing accounts where self-certification is sought, the account can be de-activated and no further transaction is possible. For new accounts, account will not be opened pending this information

For FFIs

The penalties for FFIs for non-compliance are severe. They will have to pay 30% tax on all US source payments like interest, rent, salaries, and dividend generated from US sources.
This includes total proceeds from sale of U.S. assets and capital received on maturity.

In a global economy, almost all institutions have US assets like bonds, stock and shares as personal or client (customer) holding. Imagine having to pay 30% tax on all these holding including that of clients.

Advice-For US persons and other NRIs

- Do self-certification in all your accounts. Comply with any FATCA/CRS request letters received from financial institutions. For example, all mutual fund houses require FATCA/CRS declaration is part of the normal KYC declaration from Jan 1, 2016 irrespective of tax residency.

- USA based NRIs should understand and comply with all IRS mandated reporting requirements. There are two key reportings: **IRS FBAR Reporting by US NRI** and **Form 8938 Reporting by US NRI**

- Re-check your past years' tax returns to see if you've missed reporting any Indian income. If possible, revise the return.

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