

## **56. Recovery of money stashed in foreign countries**

**By Gopal Krishna Agarwal,**

The generation and parking of this money in foreign countries are very closely related. The money which is parked in tax havens can be brought back only if we get proper information about the accounts being held in those countries. Ratification of UNCAC was one of the important requirements towards our empowerment of exchange of information. But these tax havens are not bound to divulge information unless these account holders are proved holding criminal money.

RECENT months have witnessed allegations of corruption of unprecedented levels. Dimensions of corruption have changed over past. Unchecked globalisation and economic development have created a situation where large amount of unaccounted money is being generated and is chasing limited available assets. This black money is generated through corruption, deficit financing and several welfare scheme freebies.

Another very important aspect from the point of view of the economy is that, this nexus of corrupt business class, real estate developers, corrupt politicians, bureaucrats and their Public Private Partnership (PPP) projects and NGO's need to be checked for creation of black money. Otherwise over a period of time, it will lead to unprecedented problems in our economy. Some international reports have also stated that, emerging economies such as India are bound to face fiscal stabilisation and a crisis similar to global meltdown.

Several well meaning organisations and individuals are doing their lot to check this rot. They have come out with several documents to check this menace. One of the primary concerns of the people is the large amount of unaccounted money stashed in foreign countries and ways and means to bring it back.

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holding criminal money. We are in catch 22 situation: unless we know the identity we can't prove it to be criminal money. These tax havens will not divulge information under tax evasion issue as they have zero tax liability and therefore tax evasion is not a crime in these countries.

They will never provide information under Double Taxation Avoidance Agreement (DTAA). I suggest that we can use the Floating Warrant Concept as was successfully done in USA known as John Doe Lawsuit. A John Doe Summons is any summons where the name of the culprit under investigation is unknown and therefore not specifically identified. A summons of this nature can only be served after approval by a court.

As we lack provisions relating to proving money stashed in tax havens as criminal money we can use this warrant. We know that the money stashed in foreign countries can be classified into three categories: money accumulated through corruption, money generated through drug trafficking, terrorism or crime related activities and the third category is the tax evasion. The identity of the culprit is not known to us therefore we have to issue a Floating Warrant on the unknown person. Based on the warrant, the person whose account is in the foreign country can be declared as an offender and the information regarding him can be demanded. The warrant gets fixed on the person at a later stage when his identity becomes known. With this, foreign countries will be bound under UNCAC agreement to divulge information of these accounts. The information received through this process will not be classified as secret and therefore the government will be free to share it with public and other law enforcement agencies.

In relation to generation and prevention of corruption, one major gap in our domestic law is the prevention of bribery in the private and NGO sector. In all our existing laws regarding corruption one party has to be government employee or a political person. United Nations Convention Against Corruption (UNCAC) has also identified these gaps. Our provisions lack mispricing and valuation of contracts and licenses. The definition regarding gratification and bribery through third party is not clear. Lobbying and influencing decision through public policy debate is not covered under corruption clearly. This year's official revenue foregone figures in our Budget is to the tune of Rs 5,11,630 crores in the form of tax concessions and therefore leaves a lot of scope for manipulations. We have also not defined code of conduct, rules, regulation and guidelines to be put in place by private sector to check and control bribery. Our laws do not enforce prevention of bribing of foreign nationals.

To tackle these issues effectively we have come out with a specific legal provisions in the form of draft 'Prevention of Bribery in private/NGO sector bill' clearly defining all these terms and provisions.

Besides these provisions, this draft bill defines 'Bribe' as facilitation payments, directly or through third parties including gift and hospitality expenses whenever they could affect the outcome of business transactions and are not reasonable. It says that a person shall be guilty of an offence of giving bribe, when committed intentionally in the course of economic, financial or commercial activities when it is established that there is a promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a commercial entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting. It also covers solicitation or acceptance, of an undue advantage, for the person himself or herself or for another person.

The draft bill states that, the bribe becomes extortion when this demand is accompanied by threats that endanger the personal integrity or the life of the private actors involved, otherwise it takes the form of speed money. Speed money is the bribe given for expediting approvals and for providing services. The draft provides protection as a whistle-blower in case of the extortionist bribe.

This draft puts an obligation on a commercial entity to make adequate procedures, designed to prevent persons associated with it from undertaking bribery. And clearly defines the code of conduct to be put in place by the commercial entity. These procedures provide for commercial entities to establish and ensure the effectiveness of internal controls and compliance measures for preventing and detecting bribery.

We strongly suggest that these two concepts should be thoroughly discussed and considered for immediate implementation. We already had several rounds of discussion with business associations, lawyers, professionals and civil activist where these concepts have found favour.