



# Global Tax Update

India

Deloitte Tohmatsu Tax Co.

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## 1. Minimum Alternate Tax (MAT) not applicable to foreign companies not having a permanent establishment / place of business in India

Continuing the trend of simplifying the Indian tax law and without wasting much time after clarifying that MAT provisions are not applicable to FII/ FPIs<sup>1</sup> in September 2015, the Indian Government has further decided to amend the Income-tax Act, 1961 (IT Act) to settle the controversies around applicability of MAT provisions<sup>2</sup> to foreign companies.

The government has clarified vide the press release<sup>3</sup> that MAT provisions would not be applicable to foreign companies that do not have a permanent establishment or a place of business in India. Further, it has been clarified that the amendment (which is yet to be carried out) would be retrospectively applicable from 1 April 2001.

As per the current provisions of IT Act, a company is liable to pay higher of the taxes computed under the regular provisions at the rate of 30%<sup>4</sup> and the MAT provisions at the rate

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1 Foreign Institutional Investors / Foreign Portfolio Investors

2 Section 115JB of the Income-tax Act, 1961

3 Vide Press release dated 24 September 2015

4 In the case of domestic companies. In the case of foreign companies, the tax rate is 40%. The tax is then increased by applicable surcharge and education cess

of 18.5% and there is no clear guidance on applicability of MAT provisions to foreign companies. Post this press release, foreign companies not having place of business/ permanent establishment in India (say like a branch etc.) would only pay taxes computed under the regular provisions of IT Act.

## 2. Delhi High Court ruling<sup>5</sup> on withholding tax obligations in respect of sums that have not been acknowledged as debt

Under the IT Act<sup>6</sup>, any person responsible for paying any sum chargeable to tax in India to a non-resident, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, withhold taxes at source thereon at the rates in force.

The Court held that obligation of the person to withhold taxes would arise only if payer owes a sum (chargeable under the IT Act) to the non-resident and such sum is acknowledged as a debt payable by payer to such non-resident. The Court further held that mere passing of book entries which are subsequently reversed would not give rise to an obligation to withhold tax by the payer.

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5 DIT v. Ericsson Communications Ltd

6 Section 195 of the Income tax Act, 1961

This ruling has reiterated that where a sum is not chargeable to tax in the hands of a non-resident, there is no requirement for the payer to withhold tax at source.

### **3. Bangalore Tribunal (ITAT) ruling<sup>7</sup> on disallowance of expenditure<sup>8</sup> on account of non-deduction of taxes when nil / lower withholding certificate from tax authorities is available**

Bangalore ITAT in a recent decision held that no disallowance can be made in the computation of taxable income of Indian entity in respect of payments made without deduction of tax based on a 'nil' withholding certificate obtained from the tax authorities.

Under the IT Act, expenditure on which taxes have not been withheld as per the relevant provisions of the IT Act are not tax deductible in the computation of taxable income. Further, an order can be obtained from tax authorities for nil/lower withholding based on facts of the case. Whether disallowance can be made even in a situation where such an order referred above is obtained from tax authorities was the issue in this case.

The ITAT held that:

- The tax authorities while granting nil withholding tax certificate had considered all the facts and nature of services rendered and thereafter had ruled that no taxes are required to be withheld based on beneficial provisions under the tax treaty.
- Disallowance can be made only where taxpayer has violated the provisions of IT Act. Once taxpayer has obtained a certificate from the tax authorities, the taxpayer cannot be penalized further.

### **4. Extension of due date for filing of tax returns for FY 2014-15**

Pursuant to the order of various High Courts, the CBDT<sup>9</sup> has extended<sup>10</sup> the due date for filing of tax return and tax audit reports up to 31 October 2015 for all tax payers across India.

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7 In the case of Carl Zeiss

8 Under section 40(a)(i) of the Income tax Act, 1961

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9 Central Board of Direct Taxes

10 vide Press Release dated 01.10.2015

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