



Global Tax Update

India

Deloitte Tohmatsu Tax Co.

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1. Supreme Court ruling¹ on non-applicability of Minimum Alternate Tax (MAT) provisions to foreign companies

The Supreme Court of India in its judgement² has held that MAT provisions will not apply to foreign companies not having permanent establishment (PE) or place of business in India.

The government had earlier clarified vide the press releases³ that MAT provisions would not be applicable to FII/ FPIs⁴ and foreign companies that do not have a permanent establishment or a place of business in India.

As per the current provisions of Income-tax Act, 1961, a company is liable to pay higher of the taxes computed under the regular provisions at the rate of 30%⁵ on taxable profits and the MAT provisions at the rate of 18.5% on book profits. There was no clear guidance on applicability of MAT provisions to foreign companies. Post the press releases and the Supreme Court ruling, it is now clear that MAT provisions are not applicable to foreign companies not having place

1 Civil appeal Nos. 4559 and 4560 of 2013

2 Case of Castleton Investment Ltd.

3 Vide Press release dated 1 and 24 September 2015

4 Foreign Institutional Investors / Foreign Portfolio Investors

5 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 business/ permanent establishment in India.

2. CBDT⁶ notifies rules for application of range and multiple year data for transfer pricing

The CBDT issued a notification⁷ on 19 October 2015 providing a three step process for comparability analysis and determination of arm's length price (ALP) under the Indian transfer pricing regulations as follows:

(1) Selection of comparable

Comparables to be selected by applying quantitative and qualitative filters on current year data (if available) or immediately preceding financial year data. However, for Comparable Uncontrolled Price (CUP) method, Profit Split Method (PSM) and the other method, only current year data to be used for selection of comparables.

(2) Data to be used for ALP determination

Once the comparables are selected, weighted average of three years data or less (whichever is available) would be used for determining data values in comparable set for determining the ALP. Further, multiple year data concept cannot be applied on CUP, PSM and other method.

6 The Central Board of Direct Taxes

7 Notification No. 83/2015 [F.No.142/25/2015-TPL]

(3) Applicability of Range

If comparables are 6 or more and method used is CUP, Cost Plus Method (CPM), Resale Price Method (RPM) or Transactional Net Margin Method (TNMM), ALP shall be determined based on 35th to 65th percentile of data values in comparable set. However, if comparables are less than 6 or method used is PSM or Other Method, arithmetic mean shall be applied along with +/-3% variation for determining ALP.

Notification also provides that if current year data becomes available during the course of assessment proceedings, such data shall be used irrespective of the fact that the same was not available at the time of furnishing the return of income.

3. Karnataka High Court⁸ ruling on whether purchase activities of LO would constitute business connection or permanent establishment in India

As per the High Court, where the activities of liaison office (LO) in India are limited to purchase of goods in India for the purpose of export, neither does it give rise to any business connection in India under the provisions of the Income-tax Act, 1961⁹ nor does it create a permanent establishment (PE) in India under the tax treaty and therefore, no income can be attributed to such activities that is taxable in India.

⁸ WP No. 39548 of 2012/ 62 taxmann.com 240 in the case of Columbia Sportswear Company v DIT

⁹ Section 9

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