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From the President

CA Jayant Gokhale

Dear Members,

Another Month of Successes

As team CTC returned from the 4 day Residential Refresher Course (RRC), we witnessed the Indian T20 team creating history by retaining the ICC T20 World Cup. This victory resulted in a continuation of the euphoric feeling that many of our members experienced at the RRC.

I am delighted to share with you that team CTC too had one more record breaking and successful event. I refer to the 49th Direct Tax RRC of CTC which had the highest ever enrolment (370 participants). The academic content was widely acknowledged to be excellent. Equally important is the diversity of participants from as many as 46 cities and towns and 100+younger participants; demonstrating that quality is appreciated across ages and geographies. I appreciate the tireless efforts put in by the RRC Committee and am confident that the momentum will sustain for an even more grand performance when we move to the landmark 50th RRC in the next year.

There is also the bitter-sweet whiff of success in regard to the writ petition which the Chamber has filed to take up the cause of charitable trusts who were being unjustly denied registration. I use the word bitter-sweet because at s CTC, it gives us no pleasure to take issue with the Income Tax Department in courts. But where any patent injustice comes to our attention; we do not hesitate to take on the authorities. In the interest of the nation and society at large, we follow the dictum of the Supreme Court as enunciated by Justice P.N. Bhagwati stating *"Procedure established by law must be just, fair, and reasonable, not fanciful, oppressive, or arbitrary.*[1]". In this spirit CTC along with BCAS and other affected trusts filed a writ petition before the Hon'ble Bombay High Court on 27th February 2026. Recognising the urgency of the matter, the Hon'ble court was kind enough to hear the matter at length on 4th March 2026. The final order is awaited, but the court has already indicated that orders rejecting registration u/s 12A on the ground of absence of irrevocability clause would be quashed. I have a feeling of quiet satisfaction that the CTC is living up to its high ideals as a champion of justice.

Looking ahead

We are presently in the midst of a lull before the storm. As this month draws to a close, we enter a period of hectic activity in terms of bank audits, filing of appeals, and other compliances on the direct and indirect taxes front. The RRC mentioned above was timed to enable members to be refreshed and geared up for meeting these seasonal challenges. In the same spirit, during this brief window of marginally lower professional deadlines, we have planned an **inter-firm cricket tournament** and a special **program** to engage with our **new and younger generation of members**. To encourage greater participation

1. *Maneka Gandhi v. Union of India (1978)*

by smaller firms, some special rules permitting combination of firms are also being worked out. I am sure that these activities will foster bonding and fraternity amongst our members. It is this spirit which is essential to the development and flowering of professionals and the progress of CTC as an organisation. I urge members to participate in these events.

The International Tax RRC is already announced for early June. Interested members may please enrol ASAP, as at every RRC held this year, we have been booked to capacity and were compelled to close registration. A grand centenary year finale program is also scheduled for 20th June 26 - but more details of the same will be announced once these are finalised.

Global Turmoil

While we celebrate our successes, we cannot ignore the global crisis which is hitting the world economy. The war in Ukraine had already created stormy economic weather. The recent attacks on Iran have added to the economic turmoil and uncertainty. While India has thankfully steered away from any extended conflict (even with Pakistan); the war in the Gulf continues to threaten the normal economic order. Volatility has roiled rupee rates, precious metals and inevitably the stock markets. Daily necessities such as cooking gas and fuel are showing signs of supply stress. As I write, efforts to de-escalate the situation are ongoing. Perhaps India as a **'middle power[2]'** having a large number of our citizens in the Gulf countries may be able to play a positive role in ending this conflict. I therefore hope that this needless war comes to a speedy end and our citizens and the national and global economy do not become victims of what is callously referred to as 'collateral damage'. I sincerely hope that the timeless concept of **"Vasudhaiva Kutumbakam[3]"** which was given by India and which is as relevant today as it ever was, can find true global acceptance in todays fractured world.

Regards,

CA Jayant Gokhale
President



2. *As described by the Canadian PM Mark Carney*
3. *Which literally means "The world is one family"*

From The Editor's Desk

CA Anish M. Thacker

My Brothers and Sisters,

"I don't really think about other people's opinions or expectations. The only ones I have are that of myself, to improve and get better."

– Emma Raducanu

When we see the young women of today, like Emma, the famous tennis player, bold, confident and self-assured, one cannot but feel happy and proud. We have come a long way from the days where women were repressed. They had no voice in society, they were treated badly, they were not given even basic facilities, in the past. There however is a discernible change when women have earned and rightfully claimed their positions in society. When I see young women professionals of today, doing perhaps better than their male counterparts, I feel happy. I also feel happy that in the one hundredth and first year, it is very likely that the Chamber will have its first woman president, something that we should have seen much earlier, but something that I hope will happen much more regularly than it has in the past. I feel that irrespective of gender, a person's capabilities must be recognised and appreciated. Each of us has climbed a mountain to reach to a particular stage in our lives. The mountain may feel a bit more steep for women, given their attributes, but their resilience and courage stand out, when they stand shoulder to shoulder with men and be as successful if not more. I only hope and pray that this is understood by more of the human species and that humankind stops discriminating the between the genders as indeed it is beginning to happen today. We are probably yet to fully accept an Ananya Bangar, who changed her gender, into playing women's cricket, but I am hopeful that the days of true gender equality, without any regard to gender of the person, at least in non-physical spheres, are not far off.

The tax profession has been more vibrant in terms of seeing women at the forefront. Whether it is Chartered Accountants, Advocates, Tribunal Members or even Judges of the High Courts and the Supreme Court, one has seen shining examples of women discharging their roles with great self-esteem, assurance, finesse and exceptional wisdom. 8th March is celebrated across the Globe as International Women's Day and marks a tribute to all the women who, in the days of repression and scarcity, stood up for their rights and claimed the right to be treated as equal to men, in the society at large. The Chamber's Journal also, from the past few years, has made its March issue as a "Women's Special' issue where all the special stories are authored by women. This year the same practice has continued. Women authors of finesse and repute have dealt with the complex subject

of the dynamic and complex subject of international taxation.

The international tax world, particularly in the recent past, has had its fair share of strongly discussed developments on the judicial front, where intense debates have been generated as a result of at least three Supreme Court decisions, i.e. the decisions of Hyatt International, American Express Bank and Tiger Global. It was therefore thoughtful on the part of the Journal Committee to bring out these topical discussions to the readers. This issue contains very insightful articles on international taxation from learned and sagacious women authors. I am grateful to these women authors for their contribution and would also like to thank Ritu Punjabi and Rohan Umranikar, members of the Journal Committee, along with Chairman of the Journal Committee, CA Ameya Kunte for their efforts in bringing this issue to you. Hope you will like this issue of the Journal.

Holi, the festival of colours, heralding the onset of Spring, has just gone by. There is renewed hope and energy in the air and expectations of a good harvest from the farmers. For us tax professionals, the work in operationalising of the Income-tax Act, 2025 has crossed another milestone with the draft rules and forms being put out to the public, for comments. A change of the vast magnitude, as the Income-tax Act, 2025 will bring, despite no major policy changes envisaged, is massive and one hopes that the transition is as less disruptive as it can get.

My best wishes to you for the upcoming season, and the new financial and tax year, 2026-27.

"Let your joy be in your journey
—not in some distant goal."

– Tim Cook

Jai Hind!

CA Anish M. Thacker
Editor



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SOVEREIGNTY REIGNS, TREATIES STRAIN: A CRITICAL LOOK AT TIGER GLOBAL





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Overview

The Supreme Court's ruling in Authority for Advance Rulings (Income-tax) v. Tiger Global International II Holdings ("Tiger Global")[1], though based on the specific facts of the case, offers significant insights into the future approach of the tax administration regarding General Anti-Avoidance Rules ("GAAR") and treaty residence. The judgment signals a stricter, more expansive application of India's anti-avoidance rules and unsettles several longstanding principles of Indian tax jurisprudence. The ruling departs from established jurisprudence on treaty eligibility, tax residency under treaties, and the binding nature of circulars. The Court's reasoning reveals a deliberate recalibration; placing sovereign authority above the procedural discipline of due process and the reciprocity embedded in treaty obligations.

Background

Structure and Transactions

Between October 2011 and April 2015, Cayman Islands limited partnerships pooling capital from global investors, invested in Mauritius-based Special Purpose Vehicles (SPVs). The investment manager of the Cayman Islands' entities was Tiger Global Management LLC, which is founded by Charles Coleman. The Mauritius-based SPVs invested in shares of a Singapore-based company. The Singapore-based company derived significant value (50% or more) from its investments in Flipkart India. In 2018, following Walmart Inc.'s acquisition of Flipkart Singapore, the taxpayers sold their shares to Walmart's Luxembourg subsidiary, Fit Holdings S.à r.l. The taxpayers applied for NIL or withholding tax under section 197 of the Income-tax Act, 1961, relying on their Mauritius tax residency and valid Tax Residency Certificates to claim exemption under the India–Mauritius tax treaty. The tax authorities rejected this claim, asserting that

1. *Authority for Advance Rulings (Income-tax) vs. Tiger Global International II Holdings [2026] 182 taxmann.com 375 (SC) [15-01-2026]*

the Mauritius entities were not genuinely controlled or managed from Mauritius and were therefore ineligible for treaty benefits. The taxpayers subsequently filed applications before the Authority for Advance Rulings ("AAR") under section 245Q(1) of the Income-tax Act, 1961 ("the Act"), seeking a determination on whether the gains were taxable in India under domestic law and under the treaty.

Proceedings before AAR

AAR dismissed the taxpayers' applications at the threshold, holding that the transactions involved appear to have been designed for tax avoidance and were therefore not suitable for an advance ruling. In reaching this conclusion, the AAR found that the Mauritius entities did not exercise genuine control or management from Mauritius and were effectively managed by Tiger Global Management in the United States[2]. The AAR observed that the entities lacked independent commercial substance and operated merely as intermediary or conduit vehicles created to obtain treaty benefits[3]. The AAR noted the presence of foreign directors in critical board meetings, the signing authority for the bank accounts and concluded that the actual control and management of the applicants was not in Mauritius but in USA with Mr. Charles P. Coleman, the reported beneficial owner of the entire group structure. The AAR noted that it had no hesitation in conclude that the entire arrangement made by the applicants was with an intention to claim benefit under India - Mauritius DTAA, which was not intended by the lawmakers, and such an arrangement was nothing but an arrangement for avoidance of tax in India. Therefore, the bar under clause (iii) to proviso to section 245R(2) of the Act was found to be squarely applicable to the matter and the applications are rejected[4].

Proceedings before the Delhi High Court

The Delhi High Court overturned the AAR's decision and held that the taxpayers' applications were wrongly rejected. It emphasised that the TRCs issued by the Mauritius authorities were valid and binding, and that structuring investments through Mauritius was not unlawful merely because it resulted in tax benefits. On the substantive issue, the Court held that the taxpayers were entitled to treaty protection under the India–Mauritius tax treaty, noting that the grandfathering provisions covered their investments and that the relevant CBDT circulars supported their claim. Accordingly, the High Court quashed the AAR's orders and ruled in favour of the taxpayers, and the tax department appealed the decision to the Supreme Court.

The Supreme Court's Ruling

The Supreme Court allowed the tax department's appeal and reversed the Delhi

The Court observed that a transaction may be treated as *prima facie* tax avoidance structure if it is structured in a manner that seeks to avoid tax otherwise payable under law. Therefore, the AAR was correct in declining to admit the applications on maintainability grounds.

2. *Para 6.1, Ibid*
3. *Para 6.9, Ibid*
4. *Para 48, Ibid*

High Court's judgment, holding that AAR was justified in refusing to entertain the taxpayers' applications. The Court observed that a transaction may be treated as prima facie tax avoidance structure if it is structured in a manner that seeks to avoid tax otherwise payable under law. Therefore, the AAR was correct in declining to admit the applications on maintainability grounds. The Court further clarified that the possession of a TRC is only one of the conditions for claiming treaty benefits and does not conclusively establish treaty entitlement, especially in light of the 2016 amendments to the India-Mauritius tax treaty and the introduction of GAAR[5]. It held that earlier authorities, such as CBDT Circular No. 789 and the decision in *Azadi Bachao Andolan*[6], were based on the legal framework existing at that time and could not prevent tax authorities from examining issues of residence, control, and potential abuse under the current law[7]. The Court also found that the transactions constituted impermissible avoidance arrangements and that the treaty's grandfathering protection does not provide blanket immunity from GAAR scrutiny[8]. Additionally, it ruled that the treaty protection applied only to direct transfers of shares in Indian companies and did not extend to transfers of shares of foreign companies holding Indian assets[9]. On these grounds, the Supreme Court set aside the High Court's decision and ruled in favour of the tax department.

Additionally, it ruled that the treaty protection applied only to direct transfers of shares in Indian companies and did not extend to transfers of shares of foreign companies holding Indian assets.

The Court emphasised that, in the absence of specific anti-abuse provisions in the treaty itself, the tax authorities could not deny treaty protection merely because of a perceived lack of commercial substance or foreign control over the resident entity.

Analysis

Indian tax jurisprudence has historically reflected some tension in its approach to concepts such as "substance" and "control and management." However, with respect to treaty entitlement, particularly in situations where the applicable tax treaty did not contain a Limitation of Benefits (LOB) provision, the legal position was significantly clarified by the Supreme Court in ***Vodafone International Holdings B.V. vs. Union of India***[10]. In that decision, the Court reaffirmed the principles laid down earlier in *Azadi Bachao Andolan*[11], recognising that a Tax Residency Certificate (TRC) issued by the treaty partner jurisdiction constituted sufficient evidence of residence for the purpose of claiming treaty benefits[12].

5. *Para 43, Ibid*
6. *Union of India vs. Azadi Bachao Andolan [2003] 132 Taxman 373 (SC)/[2003] 263 ITR 706 (SC)/[2003] 184 CTR 450 (SC) [07-10-2003]*
7. *Para 44 and 48, Supra Note 1*
8. *Para 45, Supra Note 1*
9. *Para 18, Supra Note 1*
10. *Vodafone International Holdings B.V. vs. Union of India [2012] 17 taxmann.com 202 (SC)/[2012] 204 Taxman 408 (SC)/[2012] 341 ITR 1 (SC)/[2012] 247 CTR 1 (SC) [20-01-2012]*
11. *Supra Note 5*
12. *Para no. of Vodafone ruling*



The Court emphasised that, in the absence of specific anti-abuse provisions in the treaty itself, the tax authorities could not deny treaty protection merely because of a perceived lack of commercial substance or foreign control over the resident entity.

In particular, the Supreme Court in *Vodafone* expressly held that, where Circular No. 789 of 2000 applied and the entity held a valid TRC, treaty benefits could not be denied to a Mauritius-resident entity solely because it functioned as a holding vehicle or was managed by an overseas parent. The Court acknowledged that holding structures are a common and legitimate feature of international investment and that the absence of diversified business operations does not, by itself, undermine the legal validity of such entities. Similarly, in the *Azadi Bachao Andolan* case, a caveat to the commercial substance test was introduced, stating that words like "sham" and "device" should not be used as magic mantras or catch-all phrases to defeat or nullify the effect of a legal situation[13].

Against this backdrop, the decision in *Tiger Global* represents a notable shift in judicial reasoning, as the Court appears to have blurred the distinction between determining treaty residence and evaluating treaty eligibility. From an international law perspective, this approach raises important considerations. Tax treaties are bilateral agreements entered into between sovereign states, and their interpretation is guided by established principles of treaty law, including the obligation to perform treaty commitments

13. *Para 141, Supra Note 5*

in good faith. Subjecting treaty residence to additional domestic anti-avoidance tests, rather than applying the treaty's own provisions and interpretative framework, may be viewed as introducing domestic law concepts into an area governed by an international agreement. The substantive issues in the judgment that merit careful examination are analysed in detail below:

1. Indirect Transfers and Scope of Article 13

A concern with the Supreme Court's observation that an "indirect sale of shares" would not fall within the protection of Article 13[14] lies in the ambiguity of its reasoning and the limited clarity it offers for treaty interpretation. As framed, the Court's conclusion appears difficult to operationalise without introducing further assumptions about what constitutes property "directly held"[15] by a resident of Mauritius. Every instance of an indirect transfer involves a direct alienation of shares by the transferor, even if those shares belong to a company situated outside India whose value is derived from Indian assets. Therefore, solely on the statement that Article 13(4) of the India-Mauritius DTAA applies wherever the transferred property is "directly held" by a transferor resident in Mauritius does not in itself bring indirect transfer of shares outside its ambit.

The Court's reasoning to exclude indirect transfers from the Scope of Article 13(4) only makes sense if it is assumed that the reference to "directly held" is intended to mean shares or movable property situated in India. However, even after such an assumption, the reasoning and conclusion do not reconcile with the structure, wording, and intention of Article 13 of DTAAs, which does not limit its residual clause to property situated exclusively within the source state. The premise on which the Supreme Court reached such a conclusion, i.e., a combined reading of Articles 13(2), 13(3A), and 13(4), suggests its applicability only to gains arising to a resident of one contracting State from a transfer of property directly held in the other contracting State, which is flawed in itself. Particularly, Article 13(2) extends source-state taxation to property forming part of the business assets of a permanent establishment, regardless of where such property is physically located[16]. This demonstrates that the treaty framework does not consistently restrict taxing rights to property located within the source state's territorial jurisdiction.

Further, such a restrictive interpretation also leads to economically inconsistent outcomes. It preserves treaty protection for direct transfers of Indian shares acquired before 1 April 2017, but denies it to indirect transfers involving the same underlying investments. Such differential treatment is inconsistent with

14. *Para 18, Supra Note 1*
15. *Ibid*
16. *Para 67 of the commentary on Article 5 of the 2017 OECD Model Tax Convention states that "for the purposes of the paragraph, property will form part of the business property of a permanent establishment if the "economic" ownership of the property is allocated to that permanent establishment. In the context of that paragraph, the "economic" ownership of property means the equivalent of ownership for income tax purposes by a separate enterprise, with the attendant benefits and burdens (e.g. the right to any income attributable to the ownership of that property, the right to any available depreciation and the potential exposure to gains or losses from the appreciation or depreciation of that property)."*

Further, such a restrictive interpretation also leads to economically inconsistent outcomes. It preserves treaty protection for direct transfers of Indian shares acquired before 1 April 2017, but denies it to indirect transfers involving the same underlying investments.

the intent and design of Article 13 in light of India's pre-established treaty practice. India has pari materia provisions to Article 13(4) in several of its treaties. Notably, Singapore, France, the Netherlands, Luxembourg, and Ireland are jurisdictions where taxpayers are entitled to the benefit, either by exempting all capital gains other than equity shares, by exempting tax on offshore indirect transfers, or by doing both. The inclusion of such provisions in other treaties suggests that, absent explicit language, indirect transfers would otherwise fall within the general capital gains framework of Article 13. If, as the Apex Court suggests, indirect transfers were already excluded from Article 13 altogether, there would have been no need for India to negotiate specific treaty provisions to address indirect transfers like India did in its treaties with Israel, Namibia, South Africa and Chile.

Lastly, this interpretation also diverges from the broader international consensus reflected in guidance issued by multilateral institutions such as the OECD, UN, IMF, and World Bank, which recognise that capital gains arising from transfer of shares of a foreign company are governed by the capital gains article in tax treaties, and source-state taxation of such indirect transfers usually require explicit authorisation by the concerned treaty[17]. Since the Court had already concluded that treaty benefits are unavailable because the arrangement constitutes an impermissible avoidance arrangement, a more cautious and consistent approach to interpreting Article 13 could have avoided creating uncertainty for legitimate cross-border investment arrangements supported by a valid commercial rationale and structured in reliance on settled treaty principles.

2. Liable to Tax v. Subject to Tax

The Supreme Court's reasoning in Tiger Global also marks a departure from the established understanding of the phrase "liable to tax" in tax treaty interpretation. Under public international law, a person may qualify as a resident of a contracting state, and therefore be eligible for treaty benefits, even if no tax is ultimately paid on a particular item of income. This is further fortified in the definition of "liable to tax" as introduced in India's domestic law[18]. The Supreme Court of Canada in ***Crown Forest Industries Ltd vs. Canada***[19] found that being "liable to tax" entails "being subject to as comprehensive a tax liability as is imposed by a state". In response, the CRA (Canada Revenue Agency) confirmed that the decision was consistent with its long-standing position, and the same does not necessarily mean that a person must pay tax to a particular jurisdiction since there may be situations where a person's worldwide income is subject to a Contracting State's full

17. *See www.un.org/esa/ffd/wp-content/uploads/2017/08/Taxation-of-Offshore-Indirect-Transfers-A-Toolkit.pdf*
18. *Section 2(29A): "liable to tax", in relation to a person and with reference to a country, means that there is an income-tax liability on such person under the law of that country for the time being in force and shall include a person who has subsequently been exempted from such liability under the law of that country;*
19. *Crown Forest Industries Ltd vs. Canada [1995] 2 S.C.R. 802, Para. 40.*

taxing jurisdiction. Still, that state's domestic law does not levy tax on a person's taxable income or taxes it at low rates. Similarly, in the Azadi Bachao case, the Supreme Court clarified that liability to taxation, not actual payment, is the correct test[20]. To substantiate such a finding, the judgement quoted Philip Baker who observed that "*it seems clear that a person does not have to be actually paying tax to be "liable to tax" - otherwise a person who had deductible losses or allowances, which reduced his tax bill to zero, would find himself unable to enjoy the benefits of the convention.*"[21] Therefore, key consideration is whether the person falls within the tax jurisdiction of that state by virtue of residence or another connecting factor and would be subject to tax under its laws but for the operation of an exemption or special regime. However, the Court appears to have introduced an additional requirement by linking treaty eligibility to taxability in the state of residence[22].

This interpretation has far-reaching implications. Many countries, as part of their domestic tax policy, exempt certain categories of income or provide preferential regimes such as participation exemptions (for instance, in the Netherlands) or tax holidays (for instance, in Mauritius). If treaty eligibility were made contingent on actual taxation of the specific income, it would call into question the treaty status of entities in jurisdictions with legitimate exemption regimes. This could affect a wide range of international investment structures, including collective investment vehicles and hybrid or fiscally transparent entities. In many such cases, taxation occurs at the investor level rather than at the entity level, yet the entity is still recognised as resident under domestic law and treaty practice. When contracting states seek to link treaty eligibility to the actual taxation of income, they typically do so through clear and express treaty provisions. For instance, BEPS Action 2 specifically provides that treaty benefits for hybrid or fiscally transparent entities are available only where the relevant income is subject to tax in the hands of the appropriate taxpayer. The absence of such language in the India-Mauritius treaty suggests that treaty residence was not intended to depend on actual taxation of the relevant income.

3. Expansion of Residence Test

The Supreme Court's conclusion that a TRC, on its own, is no longer sufficient to establish entitlement under the India-Mauritius treaty[23] represents a significant shift from its earlier jurisprudence and from the framework that has historically governed determination treaty residence in India. In prior decisions, the Court had treated the TRC as reliable evidence of residence, particularly where the treaty itself lacked specific anti-abuse provisions. In Tiger Global, however, the Court appears to have moved away from this approach. While acknowledging that residence is determined under domestic law, the Supreme Court clarified that Indian tax authorities are entitled to examine whether the claimed residence reflects the real economic and legal substance.

20. *Para 79, Supra Note 5*
21. *Para 87, Ibid*
22. *Para 19, Supra Note 1*
23. *Para 27, Supra Note 1*

The Court's firm conclusion, despite acknowledging that it was only required to conduct a prima facie review, raises serious concerns because it blurs the line between a preliminary assessment and a final finding and calls into question whether the proper legal standards were followed.

Therefore, in addition to formal residence, the determination also includes an examination of the centre of management, the control structure, and economic reality. Notably, the Court has neither referred to any model convention nor the Vienna Convention on Law of Treaties while interpreting a treaty term.

Although the judgment refers to subsequent legislative developments, including the introduction of GAAR, it does not clearly articulate why these changes justify a routine re-examination of residence in situations where the statutory requirements for invoking GAAR are not met. It is true that GAAR, as enacted, permits the denial of treaty benefits where an arrangement qualifies as an impermissible avoidance arrangement ("IAA"). However, this override operates only within the confines of the statutory framework laid down in Chapter X-A. GAAR is intended to function as a targeted anti-abuse mechanism, triggered only when its defined conditions are satisfied, rather than as a general qualification on treaty residence. The judgment does not sufficiently explain why the mere presence of GAAR in the statute should weaken the evidentiary value of a TRC in every case, including situations involving long-standing investments or transactions expressly protected under grandfathering provisions. This approach risks diluting the certainty that the treaty framework and statutory scheme were designed to provide and blurs the distinction between residence determination and anti-avoidance review.

It is true that GAAR, as enacted, permits the denial of treaty benefits where an arrangement qualifies as an impermissible avoidance arrangement ("IAA"). However, this override operates only within the confines of the statutory framework laid down in Chapter X-A.

4. GAAR and 'prima-facie' tax avoidance

The Court noted its finding that the transaction undertaken by Tiger Global was, on its face, one undertaken for the avoidance of tax. The Court characterised the arrangement as "prima-facie" tax avoidant by invoking the GAAR framework[24]. However, having acknowledged that it was operating only at a prima facie threshold, the Court nevertheless proceeded to declare the transaction an IAA, thereby blurring the distinction between a tentative threshold view and a final determination by invoking GAAR in accordance with due process. The GAAR circular issued in 2017 categorically stated that the proposal to declare an arrangement as an IAA would be vetted first by the Principal Commissioner / Commissioner and, at the second stage, by

24. *Para 34, Supra Note 1*

an Approving Panel, headed by a judge of a High Court, thereby ensuring that adequate safeguards are in place to ensure GAAR is invoked only in deserving cases[25]. Therefore, the Court's firm conclusion, despite acknowledging that it was only required to conduct a prima facie review, raises serious concerns because it blurs the line between a preliminary assessment and a final finding and calls into question whether the proper legal standards were followed.

The Court also did not clearly explain how the arrangement met the core GAAR requirement that its main purpose was to obtain a tax benefit. Important facts suggesting a genuine commercial structure were not fully addressed. Instead, the Court focused heavily on common fund governance features, such as a signatory to the bank account and authority to operate it[26]. These practices do not by themselves show that the "main purpose" of such an arrangement was to obtain a tax benefit.

5. Arrangements Include Investment

The Supreme Court held that if an investment is made as part of an arrangement, GAAR will apply to income earned from such investments, even if the investment was made before 2017. Therefore, after adopting a lower standard for identifying tax avoidance, the Court went on to apply GAAR even though investments made before 1 April 2017 were clearly protected under Rule 10U(1)(d) of the Income-tax Rules, 1962. The Court accepted the Revenue's argument that Rule 10U(2) allows GAAR to apply where tax benefits arise after that date. However, this reading appears to expand the scope of Rule 10U(2) beyond its intended meaning. A "without prejudice" clause is generally meant to protect existing rights, not take them away. By interpreting Rule 10U(2) in a way that weakens the grandfathering protection in Rule 10U(1)(d), the judgment effectively reduces the protection that Parliament had expressly granted to pre-GAAR investments. This part of the ruling may be seen as inconsistent with established legal interpretation. In ***ITO vs. Gwalior Rayon Silk***[27], the Supreme Court had clarified that a "without prejudice" clause preserves protections rather than overriding them. If the Court intended to depart from this settled interpretation, judicial discipline would normally require the issue to be referred to a larger Bench for reconsideration[28].

6. Sovereignty

In a concurring opinion, Justice Pardiwala has observed *"Taxing an income arising out of its own country is an inherent sovereign right to that country. Any application of filters or diffusers to this is a direct attack or threat to its sovereignty which can affect a nation's long term interest."*

25. *See https://itgoawbunit.org/pdf/229777923Cir%2007.pdf, Circular No. 7 of 2017 dated 27/01/2017*
26. *Para 6.1, Supra Note 1*
27. *Income Tax Officer, 'A' Ward, Indore vs. Gwalior Rayon Silk Manufacturing (Weaving) Co. Ltd. (1975) 2 SCC 721*
28. *Dawoodi Bohra Community vs. Maharashtra, (2005) 2 SCC 673*



Justice J.B. Pardiwala's concurring opinion stresses that India must protect its basic right to tax income generated within the country and should not let complicated international structures or tax treaties weaken that power. He warns that using artificial arrangements or shell companies to avoid Indian taxes threatens the nation's long-term economic interests and says treaties must be interpreted in a way that supports and does not undermine India's sovereignty. He also urges the government to include strong safeguards like anti-abuse rules in future treaties so that only genuine investors benefit from them.

The authors submit that with all due respect once India has entered into a tax treaty, till such time as the treaty is modified or rescinded, India must accept its treaty obligations in good faith and uphold the *pacta sunt servanda* principle that guides treaty interpretation globally and is well recognised in Indian jurisprudence.

Conclusion

The Supreme Court's decision in *Tiger Global* marks a significant shift in India's approach to treaty interpretation and anti-avoidance. By lowering the threshold for examining tax avoidance, questioning the conclusiveness of tax residency certificates, and allowing greater reliance on GAAR, the judgment reinstates the environment of uncertainty that was sought to be dispelled by earlier rulings. At the same time, the decision leaves several interpretational questions open, particularly regarding the scope of grandfathering and applicability of the treaty on indirect transfers, the meaning of "liable to tax", and the extent to which domestic authorities can revisit treaty residence.

He warns that using artificial arrangements or shell companies to avoid Indian taxes threatens the nation's long-term economic interests and says treaties must be interpreted in a way that supports and does not undermine India's sovereignty.

The judgment signals a decisive doctrinal shift, privileging sovereign prerogative even where it strains the expectations of procedural fidelity and established treaty norms. Greater clarity from courts or the tax administration will be essential to restore certainty and maintain confidence in India's treaty framework and investment regime.

■

GLOBAL MINIMUM TAX AND INDIA'S POLICY STANCE



Shreya Munot

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Overview

Pillar Two represents the Organisation for Economic Co-operation and Development's (OECD) global minimum tax initiative aimed at addressing remaining base erosion and profit-shifting risks after BEPS 1.0. The complexity of the GloBE Rules has been a flashpoint, promoting multiple rounds of OECD deliberations, representations, and consequential release of guidance and simplification measures. Illustratively, to ease early stage compliance, Transitional CbCR Safe Harbour (TCSH) allows to 'almost' disapply the complex computations under GloBE Rules for a jurisdiction which satisfies CbCR driven tests.

Beyond transitional relief, newer simplification measures have emerged, including the Permanent Simplified ETR Safe Harbour (SETRSH) from FY 2027-28 onward, which allows a simplified Effective Tax Rate (ETR) computation and the Substance-Based Tax Incentive Safe Harbour (SBTI SH) that preserves qualifying substance-linked incentives with monetary cap.

Compliance under Pillar Two covers a range of obligations, including notifications, registrations, local QDMTT related filings, submission of GloBE Information Return (GIR), apart from continued CbCR obligations. The GIR serves as a centralised reporting return which is in a consistent format across jurisdictions.

Over 2024 to 2026, a multitude of jurisdictions have legislated Pillar Two. The OECD has also supported implementation by refining the framework through administrative guidance, addressing potential loopholes.

While India has proceeded cautiously and has not implemented domestic Pillar Two rules so far, India headed MNEs grapple with Pillar 2 compliance and exposures in the implementing jurisdictions where constituent entities operate.

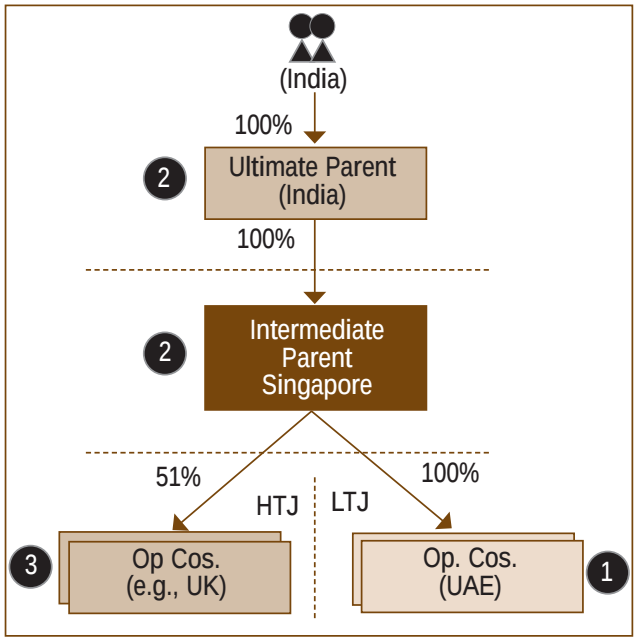
1. Overview of Pillar Two

Despite Base Erosion and Profit Shifting (BEPS) 1.0 having significantly strengthened the international tax framework, it was felt that profit-shifting risks had not been fully eliminated. There were concerns about multi-national groups (MNEs) continuing to allocate substantial returns related to intangibles-and-financial-risks in group entities in low-tax jurisdictions that have a modest or minimal level of substance. In order to address these vulnerabilities, the OECD launched a second phase of reform - Pillar Two or GloBE Rules

– to introduce a coordinated framework to achieve minimum tax.

GloBE Rules apply in a fiscal year, only if:- (a) a group is an MNE group (i.e., ultimate parent entity[1] has at least one branch or subsidiary outside its jurisdiction), and (b) a group has revenue as per its consolidated financial statements (CFS) of € 750 million or more in at least two of four preceding fiscal years.

For such MNE Groups, GloBE Rules aims to ensure that profits arising in each jurisdiction where there is a subsidiary or a branch are taxed at a minimum rate of 15% under a jurisdictional blending approach (i.e., by combining results of all subsidiaries or branches located in a particular jurisdiction). To illustrate this concept, consider the following example:



The OECD launched a second phase of reform - Pillar Two or GloBE Rules – to introduce a coordinated framework to achieve minimum tax.

In this case, the ultimate parent entity is in India having subsidiaries operating in free-trade zone of UAE which are not liable to regular corporate tax of UAE. In respect of subsidiaries in UK and India, as their Effective Tax Rate (ETR) owing to regular corporate tax liability itself is > 15%, there is no top-up tax liability under GloBE rules. In respect of subsidiaries in UAE, top-up tax liability can arise because ETR considering regular corporate tax of UAE is zero. To clarify, despite group-wide ETR (as per CFS of the ultimate parent entity) is more than 15% on account of losses in some countries or high-tax rates in some countries, top-up tax liability can arise where ETR of a specific country is less than 15%. In the facts of the case, top-up tax liability in respect of subsidiaries in UAE is recovered as follows:

- UAE can enact qualified domestic minimum top-up tax (DMTT) whereby subsidiaries in UAE are themselves liable to pay such top-up tax in respect of their profits. A 'qualified' DMTT (QDMTT) refers to a domestic tax legislation which is internationally recognized and fully aligns with Pillar Two rules (with permissible/required deviations therefrom).

- If UAE fails to enact QDMTT, parent jurisdictions (i.e., India) can enact income-inclusion rule (IIR) and levy top-up tax in respect of profits of subsidiaries in UAE.

1. *UPE is one which holds controlling interest in other entities, such that it consolidates these other entities line-by-line in its CFS*

- If both the above fails, intermediate parent jurisdiction (i.e., Singapore) can enact income-inclusion rule (IIR) and levy top-up tax in respect of profits of subsidiaries in UAE[2].

- If all the above fails, all other countries where the group has subsidiaries (i.e., UK and South Korea) can enact under-taxed payment rule (UTPR) and levy top-up tax in respect of profits of subsidiaries in UAE, by recovering such top-up tax from subsidiaries in UK and South Korea respectively. In such case, top-up tax liability is shared between UK and South Korea based on relative number of employees and value of tangible assets in those jurisdictions.

Thus, UK and South Korea can, through UTPR, require subsidiaries in UK and South Korea respectively to pay tax to negate the incentives granted by UAE. Not only that, UTPR can also negate the incentives granted by India to the ultimate parent entity and its subsidiaries in India, if the ETR of India is less than 15%.

At present, while most jurisdictions have already enacted QDMTT, cash impact of IIR/UTPR is often limited and hence, IIR/UTPR is "largely academic" in many cases.

2. Nuances of ETR

To determine top-up tax liability, the start point is to compute effective tax rate (ETR) for each country where the MNE has one or more subsidiaries. The numerator is income-tax expense, and the denominator is profit after tax. Both these parameters are picked up from the 'fit for consolidation' accounts of the subsidiary (i.e., the Ind-AS CFS, for an Indian MNE). These amounts includes profit/loss on account of intra-group transactions. Then, akin to s.115JB of Income-tax Act, 1961, certain specified upward/downward adjustments are made to arrive at numerator and denominator figures for each subsidiary. Then, assuming top-up tax liability is to be determined in respect of UAE, aforesaid adjusted amounts of each subsidiary located in UAE is aggregated, to arrive at numerator called 'adjusted covered tax' and denominator called 'GloBE income', to determine UAE's ETR. Then, top-up tax percentage of UAE is calculated by finding delta between 15% (minimum tax rate) and UAE's ETR. Assuming UAE's ETR is 9%, the top-up tax percentage is determined at 6% (15-9). Then, top-up tax liability is determined for UAE by applying top-up tax percentage to "excess profit". Such excess profit is calculated as GloBE income as reduced by normative deduction for substance-based income exclusion (SBIE). SBIE is 10% of eligible payroll costs of eligible employees located in UAE plus 8% of average (i.e. opening + closing) net book value of eligible tangible assets located in UAE[3].

Also, the aforesaid calculations are done for each fiscal year of the CFS. In the context of India-headed MNE, the calculations will be done for all its overseas subsidiaries for financial year beginning from 1 April and ending on 31 March irrespective of fiscal

2. *However, if more than 20% ownership interest in Singapore entity is owned directly/indirectly by third parties outside the group, Singapore gets the first right to levy IIR in preference to India*
3. *These percentages are for fiscal year beginning in 2023 (Article 9.2.1). They decline gradually over 10 years to reach 5% for fiscal year beginning 2033 and later.*

year adopted for local tax purposes in the respective overseas jurisdictions[4].

ETR takes into account deferred tax expense to eliminate impact of temporary differences. Top-up tax is levied without considering societal or economic significance of any tax incentive.

Also, some simplifications are contemplated for jurisdictions which have enacted QDMTT. To illustrate, ETR for QDMTT can be calculated based on local financial statements as per local GAAP (instead of GAAP used in UPE's CFS). This is to recognise that local tax authority of UAE would likely be more familiar with local GAAP of UAE, than GAAP applied in India.

At a conceptual level, one of the upward/ downward adjustments to arrive at GloBE income is exclusion in respect of dividend and gain/loss on sale of equity shares wherein stake in the investee is at least 10%. Some further adjustments in GloBE income consist of: Add back fines and penalties (only if amount ≥ € 50,000 per entity), and bribes and illegal expenses[5]; Deduct provisions on account of contributions to pension fund only on actual payment[6]; Adjustments to align transaction value in respect of intra-group cross border transactions with ALP adopted for local tax purposes; Ignore fair valuation/impairment gain/loss and consider such gain/loss only on actual realisation[7]. The calculation of ETR is highly complex and requires collation of as many as 400 data points which may not have otherwise been captured for MIS or regular tax compliances.

3. Transitional CbCR Safe Harbour (TCSH)

In wake of complexity of calculating ETR, it was acknowledged that MNEs would take time to implement data collection and reporting systems. To achieve a soft-landing, ameliorate immediate compliance burden, and limit top-up tax liability to high-risk jurisdictions, TCSH was introduced. TCSH allows to 'almost' disapply GloBE rules if a jurisdiction satisfies either of the following CbCR-driven tests. For instance, GloBE rules are altogether inapplicable in respect of profits of subsidiaries in UAE, if either of the following tests are met:

- ***De minimis test*** - Revenue of UAE (as per CbCR) is < €10M **and** Net profit before tax of UAE (as per CbCR) is < €1M.

- ***Simplified effective tax rate (ETR) test*** – Simplified ETR, computed as below, is at least 15% for fiscal year ending on 31 March 2025 (16% for fiscal year ending on 31 March 2026, 17% for 31 March 2027 and 31 March 2028).

  — *Numerator*: Aggregate of current tax and deferred tax expense of subsidiaries in UAE (as per books used to prepare CbCR)

4. *However, Ind-AS allows consolidating using accounts of a different period. If CFS is prepared by consolidating accounts of overseas subsidiaries for fiscal year ending on 31 December, GloBE calculations are to be based on such accounts used for preparing CFS.*
5. *Article 3.2.1(g)*
6. *Article 3.2.1(i)*
7. *Article 3.2.5 - if realisation method is elected, such option applies qua jurisdiction (cannot pick and choose for one of the CE) – also, such option can be exercised either qua all assets or only qua all tangible assets*

— *Denominator*: Net profit before tax of UAE (as per CbCR)[8].

- ***Routine profits tes***t – where Net profit before tax of UAE (as per CbCR)8 is either a loss, or less than SBIE.

If UAE satisfies either of the above three tests, top-up tax is zero in respect of subsidiaries in UAE – although similar exercise would be required for each of the other jurisdictions where Indian MNE has presence. The above tests are evaluated separately qua each country where the MNE has presence, and qua each fiscal year separately. Alternative tests can be applied for different jurisdictions, and the same jurisdiction can use alternative tests over different fiscal years.

TCSH follows "once out, always out" approach i.e., to illustrate, if a jurisdiction does not qualify for TCSH for fiscal year ending on 31 March 2025 when it is subject to GloBE rules, it cannot qualify for TCSH in any later year. Since late 2023, administrative guidance has tightened TCSH by adding guardrails on anti-hybrid mismatch arrangements (for e.g., borrower entity accounts for interest free loan by recording notional interest expenditure, while lender entity (of the same MNE Group) adopts a different GAAP which does not require recording notional interest income i.e., such loan is not to be restated at NPV). In such cases, interest expenditure is added back.

TCSH follows "once out, always out" approach i.e., to illustrate, if a jurisdiction does not qualify for TCSH for fiscal year ending on 31 March 2025 when it is subject to GloBE rules, it cannot qualify for TCSH in any later year.

For jurisdictions which are loss-making, it is important to recognise deferred tax asset in the books for any tax losses ahead of when these jurisdictions become profitable. If DTA is recognised during loss-making years, when these jurisdictions become profitable at any time before 31 March 2028, reversal of DTA can help to achieve Simplified ETR threshold.

4. New Permanent Simplified ETR Safe Harbour (SETRSH)

While TCSH was a 'transitional' measure up to 31 March 2028, OECD has recently announced a 'permanent' simplification measure called SETRSH, which would be relevant if TCSH expires or is not available. SETRSH is applicable for fiscal year 2027-28 onwards and in certain circumstances, for fiscal years 2026-27 onwards, if jurisdictions choose to apply it early. Under SETRSH, ETR is determined under the same philosophy as detailed GloBE rules, but by using a simplified approach to the upward/downward adjustments. If the tested jurisdiction has a Simplified ETR of at least 15%, calculation of ETR as per detailed GloBE rules is not required. To illustrate, in detailed GloBE rules, if the MNE group has acquired controlling interest in a target through share purchase, ETR of the target should be based on pre-acquisition historical carrying values, without reckoning fair values of its net assets recognised in the CFS on the acquisition date. Also, in CFS, typically, a provision for deferred tax liability is recognised relating to

8. *There are very few specified adjustments. One of the illustrative adjustment is to add back net unrealised fair valuation loss in respect of all investments (other than portfolio shareholdings wherein stake in the investee is less than 10%), unless net FV loss (after FV gain) at a jurisdiction level is less than € 50 mn.*

A QTI is an incentive generally available to all taxpayers and is calculated based on expenditure incurred (an expenditure-based incentive) or on the amount of tangible property produced in the jurisdiction (a production-based tax incentive).

such fair values, as no step-up is available to the target for its local tax purposes. Consistent with denominator, numerator of ETR also excludes such deferred tax adjustments. However, SETRSH dispenses with these adjustments if, inter alia, depreciation charged based on fair values of assets is accompanied by a corresponding reversal of deferred tax liability.

Several further simplifications are in the pipeline, including finishing ongoing work on a routine profits test and a de minimis test under New Permanent Simplified Safe Harbour (which is scheduled to be completed within the first half of 2026) and exploring use of SETRSH to not only determine safe harbour but also compute top-up tax liability.

5. Substance-based Tax Incentive Safe Harbour (SBTISH)

OECD has recently announced SBTISH applicable for fiscal years 2026-27 onwards, to allow MNE Groups to continue to benefit from Qualifying Tax Incentives (QTIs) that are sufficiently connected to economic substance in the relevant jurisdiction. It allows an MNE Group to increase adjusted covered tax for the relevant jurisdiction by QTIs while calculating ETR as per detailed GloBE rules. A QTI is an incentive generally available to all taxpayers and is calculated based on expenditure incurred (an expenditure-based incentive) or on the amount of tangible property produced in the jurisdiction (a production-based tax incentive). A Substance Cap limits the allowance for QTIs based on the amount of substance in the jurisdiction. The cap is equal to the greater of 5.5% of the payroll costs or depreciation of tangible assets in the jurisdiction. At its choice, the MNE Group can use an alternative cap that is equal to 1% of the carrying value of tangible assets in the jurisdiction.

For instance, if R&D expenditure qualifies for a 200% weighted deduction, spending ` 1,000 generates an effective tax benefit of ` 300 at a 30% tax rate, SBTISH allows to notionally increase the adjusted covered taxes by ` 300, subject to the applicable aforesaid monetary cap. SBTISH is over and above allowance for SBIE.

SBTISH applies only if incentives granted by the relevant jurisdiction spur present or future activity - incentives granted based on past expenditure or investment are ineligible.

6. "Side by Side" (SbS) package

"Following months of intense negotiations, the comprehensive package for a "side by side" arrangement announced today represents a significant political and technical agreement which will set the foundation for stability and certainty in the international tax system. It will preserve the gains achieved so far in the global minimum tax framework and protect the ability for all jurisdictions, particularly developing countries, to have first taxing rights over income generated in their jurisdictions."

- OECD Secretariat
(Press Release, 5 January 2026)

6.1. U.S. was not willing to modify its Global Intangible Low-Taxed Income (GILTI) regime, to align it with GloBE rules. U.S. had also warned of retaliatory measures against other countries imposing IIR and UTPR on domestic U.S. profits or foreign

profits of U.S.-headed MNEs. Hence, it was recently agreed that Pillar Two would co-exist 'side-by-side' with other global minimum tax systems already in vogue, such as GILTI. To achieve this, Side-by-Side Safe harbour (SBS SH) was developed, as follows:

- SbS SH exempts an entire MNE group which is headquartered in a jurisdiction that already sufficiently taxes both domestic and foreign profits. For foreign profits, taxes should apply on a broad base that includes active and passive income of foreign branches and CFCs, regardless of its distribution. For domestic profits (arising within the UPE jurisdiction), the UPE jurisdiction should have at least 20% nominal corporate income tax rate; and also have either QDMTT or corporate alternative minimum tax based on book profits which achieves same policy objectives as GloBE Rules.

- To date, the U.S. is the only jurisdiction identified to qualify for SBS SH. U.S. Treasury statements framed the arrangement as a historic victory in preserving U.S. sovereignty and protecting American workers and businesses from extraterritorial overreach[9]. As a result of SBS SH, a US-headed MNE (including all of its constituent entities) will not be subject to IIR or UTPR in other countries. For instance, other countries would not levy top-up tax under UTPR on profits of U.S. parent or its U.S. subsidiaries. If a U.S. parent owns subsidiaries in Panama (which has not enacted QDMTT) through an intermediate parent entity (say – in Singapore), as a result of SBS SH, Singapore would not levy IIR in respect of such subsidiaries in Panama. However, in respect of subsidiaries in jurisdictions which have enacted QDMTT (e.g., UAE), despite SBS SH, QDMTT can still be levied.

6.2. There is another safe harbour called UPE Safe Harbour (UPE SH), which shields only domestic profits of MNE Groups and not their foreign profits i.e. assuming India satisfies UPE SH, other countries cannot levy top-up tax under UTPR in respect of low-taxed profits of an Indian parent or its Indian subsidiaries. For satisfaction of UPE SH, the UPE jurisdiction should have at least 20% nominal corporate income tax rate; and also have either QDMTT or corporate alternative minimum tax based on book profits which achieves same policy objectives as GloBE Rules.

7. GloBE Information Return (GIR)

GIR is a comprehensive document showing how GloBE rules apply to each country where the MNE has presence. It essentially captures information on group's structure, which jurisdiction is taxing which profits, safe harbour usage, and top up tax calculations. It offers a globally consistent reporting template

9. *Treasury Secures Agreement to Exempt U.S.-Headquartered Companies from Biden Global Tax Plan | U.S. Department of the Treasury*

and provides a single, structured source of truth to support audits and reduce back and forth queries with tax authorities.

MNEs must file the GIR typically with the UPE's tax authority, or with the tax authority of the identified central filing entity. The expectation is that, within 3 months of filing the GIR as aforesaid, the tax authority of the UPE or identified central filing entity would automatically exchange the GIR with all other jurisdictions where the MNE has presence. Where no such information exchange mechanism exists, GIR needs to be filed individually in each of the countries where the MNE has presence.

8. India and OECD Pillar Two: Participation Without Implementation

8.1. India has been an active participant in the OECD/G20 Inclusive Framework on BEPS, including on Pillar Two. India was among the 147 jurisdictions that endorsed the Pillar Two framework in October 2021.

8.2. While there is no formal announcement by India, deletion of equalization levy in the year 2024 by India was projected to be a step in the direction of implementation of OECD package on Pillar 1 (i.e. allocating taxation rights to market jurisdiction) and Pillar Two.

8.3. In October 2024, a government official was quoted in a news article[10] as saying: *"The gains (from Pillar 2 estimated to be 100 – 200 Cr. from Pillar 2) are not much, and losing the right to make laws for such a small amount is a big price to pay."* Some possible reasons for India not implementing Pillar Two could be as follows:

- ***Limited revenue consideration*** - The revenue considerations appear limited, especially if weighed against the complexity. As most tax havens have introduced QDMTT, there is limited scope for India to garner taxes on profits booked by foreign subsidiaries of India-headed MNEs.

- ***Adopt wait and watch approach*** - India has preferred to wait-and-watch to observe how Pillar Two operates in early adopting jurisdictions, especially in relation to disputes, safe harbour effectiveness and the interaction between QDMTT and IIR/UTPR.

- ***Mindful of complexity*** - India has been mindful about complexity of the legislation and has been pushing for simplifications.

However, India has been engaged in negotiations as a part of the Inclusive Framework on administrative guidance, safe harbours, etc. being developed on Pillar Two.

8.4. In August 2025, the Ministry of Corporate Affairs amended Ind AS 12 to introduce mandatory disclosures relating to Pillar Two exposure. This amendment aligns Indian accounting standards with

10. *https://www.financialexpress.com/policy/economy-pillar-2-tax-rules-may-be-deferred-as-govt-sees-no-net-gain-3652290/*

global practice and requires in scope Indian groups to disclose their potential exposure to Pillar Two top up taxes - though, with respect to tax liability exposure in jurisdictions outside of India.

8.5. **Consequences for Indian MNEs if India does not implement Pillar Two**

- Pillar Two compliances and its tax consequences have become a reality starting from fiscal year 2024-25 onwards in early-adopting jurisdictions; and it has intensified to other late-adopting jurisdictions starting from fiscal year 2025-26 onwards. QDMTT is applicable if an Indian ultimate parent entity has subsidiaries in jurisdictions such as Australia, Canada, France, Japan, Mauritius, Netherlands, Mauritius, Singapore, UAE, Switzerland, etc. Alternatively, if an Indian ultimate parent entity has established an intermediate holding company in jurisdictions such as Singapore, UK, etc., which holds subsidiaries in Egypt or Panama where QDMTT is not yet implemented, there can be trigger of IIR in Singapore or UK in respect of profits of subsidiaries in Egypt or Panama.

- Starting from fiscal year 2025-26 onwards, top-up tax can be levied under UTPR as Australia, EU countries, UK have enacted UTPR. This can scoop taxes on profits earned in other jurisdictions which have not implemented QDMTT, which are also not subject to IIR.

- From a compliance standpoint, registration requirements have already triggered in jurisdictions such as Hungary, Belgium, UK, etc. QDMTT advance tax liability and QDMTT returns have triggered in certain jurisdictions like Hungary, with due dates falling as early as 28 February 2026. The first GIR for fiscal year 2024-25 is due to be filed by 30 September 2026.

- Going forward, although India has not implemented Pillar Two, still, if India introduces facility for centralised GIR filing and exchange mechanisms for Indian MNEs, it can avoid duplicative reporting burden on Indian MNEs in each jurisdiction. Further, such centralized filing can also enable Indian policy makers to have relevant data points about tax liability triggered by Indian MNEs under IIR or UTPR which could have been potentially recovered by India.

8.6. **What makes India different: no CFC, no GloBE Rules:**

- Uniquely among many large economies, India does not have a CFC regime, and it has also not enacted Pillar Two. It is likely that Indian MNEs will not fulfil SBS SH, since India does not tax foreign profits of overseas constituent entities pending its distribution. It is also likely that Indian MNEs will not fulfil UPE SH, which is intended to shield domestic profits of Indian parent and its Indian subsidiaries from UTPR. UPE SH requires a nominal corporate tax rate of 20% coupled with book-profit based alternate minimum tax covering a substantial portion of Indian profits. Whereas, Indian constituent entities can



have concessional tax rate of 15% (plus surcharge and cess) under s. 115BAB of Income Tax Act (ITA), 1961 or they may still be enjoying tax holidays which are yet to expire. In any case, MAT provisions are inapplicable to a substantial portion of Indian profits.

- After introduction of Pillar Two in other countries, MNEs headquartered abroad can, instead of retaining profits in other countries which would now be subject to top-up tax, shift that presence to a subsidiary in Gujarat's GIFT City. A subsidiary in GIFT City may not trigger any Pillar Two consequences, if such MNE also has a presence in Mainland India, such that due to jurisdictional blending of Mainland India subsidiary with Gift City subsidiary the combined ETR is > 15%.

8.7. Conclusion

The global tax landscape is undergoing a historic shift with the implementation of OECD Pillar Two, and while many jurisdictions have already adopted QDMTTs, IIRs, and UTPRs, India has chosen a deliberate, cautious approach—participating in policy development but refraining from domestic implementation.

For Indian MNEs, however, Pillar Two is already a practical reality because foreign jurisdictions have implemented these rules. Indian groups must therefore prepare for detailed ETR calculations, multiple safe harbour evaluations, GIR filing obligations and possible foreign-imposed top-up taxes.

■

The author is thankful to CA Geeta D. Jani and CA Vinod Ramachandran for their guidance and support.

PERMANENT ESTABLISHMENT (PE) JURISPRUDENCE



Priyanka Limaye

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Overview

The concept of a Permanent Establishment ("PE") has long operated as a foundational basis for source-based taxation of business profits. In recent years, however, there has been a marked shift from traditional brick-and-mortar business models to more digital, decentralized, asset-light structures that increasingly challenge conventional PE standards. Traditionally, PE determinations relied heavily on physical presence—whether in the form of premises, a project site, or personnel. In the absence of such a presence, a foreign enterprise would ordinarily fall outside the scope of Article 5(1) of the applicable Double Taxation Avoidance Agreement.

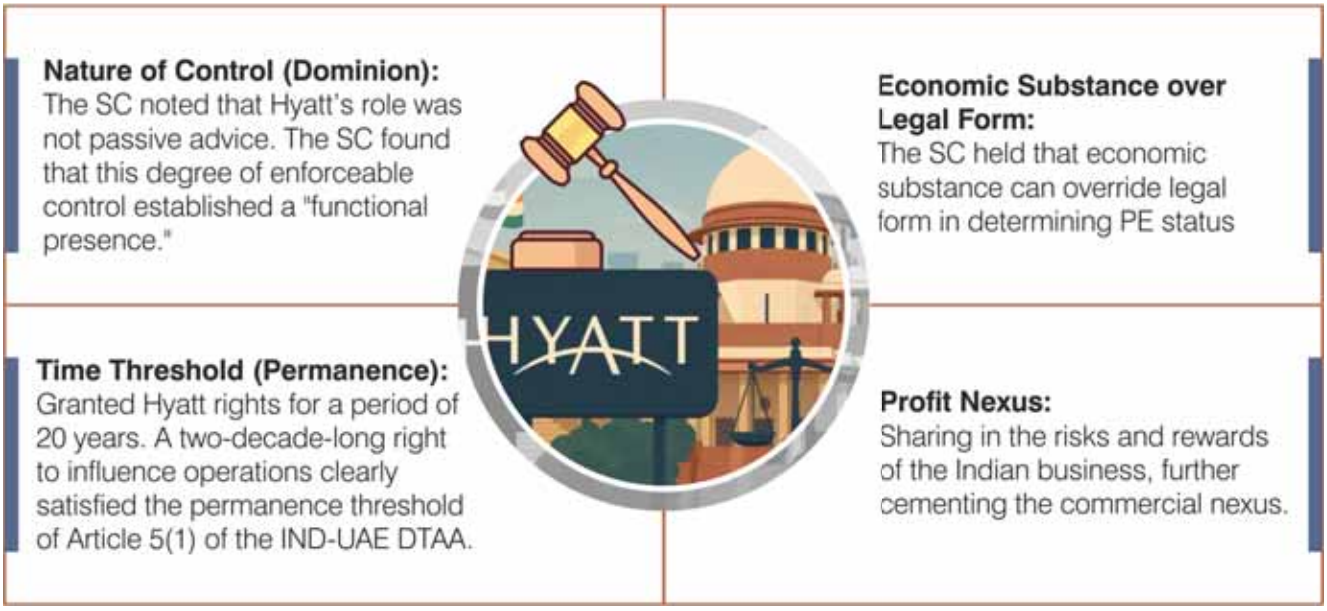
The recent judgment of the Hon'ble Supreme Court of India in ***Hyatt International Southwest Asia Ltd. v. Additional Director of Income Tax (2025)***[1]*, however, represents a significant departure from this established approach. By elevating the relevance of "operational control" and "contextual disposal" over formal legal tenancy, the Court has substantially broadened the contours of the Fixed Place PE by adopting a substance-over-form approach for the determination of a PE in India. This article provides an in-depth expansion of the Hyatt ruling, juxtaposing it against landmark precedents such as Formula One*[2]*, Morgan Stanley*[3]*, and E-Funds*[4]*, and analyzes the transition of traditional fixed-place principles to emerging, more current standards—analyzing the Court's reasoning that led to this doctrinal shift and assessing its implications for multinational enterprises (MNEs), particularly those operating through asset-light structures or matrix management models.*

Comprehensive Analysis of the Supreme Court's Ruling in Hyatt International Ltd. and the Evolution of Fixed Place Permanent Establishment in India

The Hyatt International Case – Brief Synopsis

The taxpayer, Hyatt International Ltd. ('Hyatt'), a tax resident of the UAE, was

1. *Hyatt International Southwest Asia Ltd. vs ADIT [2025] 176 taxmann.com 783 (SC) [24-07-2025]*
2. *Formula One World Championship Ltd vs CIT [2017] 80 taxmann.com 347 [24-04-2017]*
3. *DIT (Int. Tax) vs Morgan Stanley [2007] 162 taxmann 165 [09-07-2007]*
4. *ADIT vs E-Funds vs E-Funds IT Solutions [2017] 86 taxmann.com 240 (SC)[24-10-2017]*



engaged in providing consultancy services in the hotel sector. It entered into two Strategic Oversight Services Agreements ('SOSA') with Asian Hotels Ltd. ('AHL') for its hotels in Delhi and Mumbai. Under the SOSA, Hyatt was responsible for strategic planning and ensuring that the hotels met Hyatt's global operating standards. It was noted that Hyatt was responsible for the formulation of strategic plans covering branding, marketing, product development, day-to-day onsite operations, policy formulation, including Human Resources (staffing policies and key appointments), procurement (dictating purchasing policies for food, beverages, furnishings, and operating equipment), Guest Relations (determining policies for the admittance of guests and setting standards for service charges), and commercial functions (promotion and marketing of the hotel, sales services, and centralized reservation systems).

The revenue authorities argued that the SOSA granted Hyatt UAE such extensive powers over the hotels that the premises of AHL effectively became a place of business for Hyatt UAE. The Supreme Court ('SC') concurred with the above thought and held that Hyatt constituted a Fixed Place PE under Article 5(1) of the India-UAE DTAA based on the following:

- **Nature of Control (Dominion):** The SC noted that Hyatt's role was not passive advice. The agreement empowered Hyatt to influence "all strategic and operational aspects." This included vetting key staffing decisions, dictating marketing strategies, and enforcing brand standards. The SC found that this degree of enforceable control established a "functional presence."

- **Economic Substance over Legal Form:** Daily operations were handled by Hyatt India Pvt. Ltd., a separate Indian legal entity; however, in substance, the functioning of the hotels was driven by Hyatt International. The SC held that economic substance can override legal form in determining PE status.

- **Time Threshold (Permanence):** The SOSA was not a fleeting engagement. It

The SC concluded that the hotel premises in Delhi and Mumbai were, for all practical purposes, "at the disposal" of Hyatt International to carry out its business of managing hotel chains.

granted Hyatt rights for a period of 20 years. In international tax jurisprudence, a "fixed" place of business requires a degree of permanence. A two-decade-long right to influence operations clearly satisfied the permanence threshold of Article 5(1) of the IND-UAE DTAA.

- **Profit Nexus:** The fee structure, being linked to the hotels' earnings, demonstrated that Hyatt was sharing in the risks and rewards of the Indian business, further cementing the commercial nexus.

The SC concluded that the hotel premises in Delhi and Mumbai were, for all practical purposes, "at the disposal" of Hyatt International to carry out its business of managing hotel chains. The Supreme Court's decision marks a shift in the approach to Permanent Establishment (PE) thresholds, while broadly concurring with the principles regarding 'dominant control' established in Formula One.

Difference between passive advisory vs. strategic management	Observations
Control & Influence	The SC thus laid emphasis on the extent of control, strategic decision-making, and influence exercised by Hyatt to distinguish between "consultancy" vs. "strategic management".
Enforcement Power	What can be inferred is that when a consultant not only advises but has the power to enforce compliance or holds veto power over strategic decisions, they cease to be an external advisor/service provider, and become an integral part of the business machinery.

Evolution of PE Jurisprudence – From Morgan Stanley to Hyatt

Formula One World Championship ('Formula One') and De Facto Control (2017)

There is a similarity between the decisions in *Hyatt and Formula One*. In fact, *Formula One* serves as the foundational precedent where the SC first emphasized determining the constitution of a PE based on the real economic substance of transactions rather than their legal form. Upon reviewing the various contractual agreements between the parties, the SC concluded that Formula One exercised effective and complete control over the circuit. This was in stark contrast to Jaypee, the Indian entity, which had constructed the track and held legal title to the land. Furthermore, Jaypee was subjected to various restrictions including media control (approval of third parties engaged for live television feeds and broadcasting), access control (Formula One dictated who could enter and exit the circuit, including the "paddock" and other sensitive areas),

and commercial rights (Jaypee was granted only restricted rights, limited primarily to ticketing, local hospitality at the venue, and specific, non-conflicting advertising slots).

Through a meticulous analysis of the Race Promotion Contract and other agreements, it was established that *Formula One* had 'real and dominant' control over the event through restrictions imposed on Jaypee, effectively reducing the track owner to a service provider for the duration of the event. In *Formula One*, the track was at its disposal to race; in *Hyatt*, the hotel was at Hyatt's disposal to manage. Both cases confirm that when an enterprise has the power to exclude others and dictate the use of a space, a PE is constituted. The SC's approach towards determining PE constitution in these decisions is, therefore, aligned. In both these decisions, the "effective" or "operational control" principle was emphasized as opposed to the legal disposition.

Morgan Stanley and Stewardship (2007)

The *Hyatt* decision can be contrasted with the earlier *Morgan Stanley* ruling, which introduced the concept of "Stewardship" and PE constitution due to deputationists.

- ***Stewardship***: In *Morgan Stanley*, the SC held that if a foreign company sends personnel merely to protect its own interests (e.g., ensuring quality control of an outsourcing unit) without participating in day-to-day management, it does not constitute a PE. These are "stewards." Their role was passive and oversight-oriented. Conversely, deputationists were held to constitute a Service PE in India. There were no express observations on the constitution of a Fixed PE.

Difference between Stewardship and pervasive control	Observations
Level of Supervision	A steward supervises passively; Hyatt exerted pervasive control and dictated how the business should run.
Role Scope	Hyatt's role went far beyond stewardship.

E-Funds IT Solution (2017)

The SC held that the Indian subsidiary did not constitute a Permanent Establishment because it was engaged merely in providing back-office support services. This conclusion was derived in the absence of any express finding that the foreign company exercised control over the core business functions of the Indian entity. Besides, the functions carried out at the Indian subsidiary's premises were back-office support services (such as call center operations and data entry), which, in any case, were regarded as auxiliary functions and not core business operations. The foreign entity was not carrying out its primary business through the Indian premises; rather, it was merely procuring support services from India. Therefore, the SC concluded there was NO

PE. This is understandable, since there was no express finding that the foreign company exercised control over the core business functions of the Indian entity.

Distinction between preparatory and auxiliary activities vs. core business activities	Observations
Classification of Activities	Activities carried on by Hyatt can definitely not be regarded as preparatory and auxiliary activities; rather, they are core business activities relating to the business of running hotels.

The facts of Hyatt can clearly be distinguished from the functions performed by stewards.

Distinguishing Virtual PE: The Substance Defense

The concept of a "Virtual PE" is fundamentally alien to the existing DTAAs, which define PEs based on physical presence. The recent decision of the Delhi HC in *Clifford Chance*[5] reaffirms this principle. A notable exception to this is *ABB FZ LLC*[6], which upheld the Service PE based on virtual presence. However, these decisions were in the context of a Service PE where physical presence is a sine *qua* non as per the relevant clause of the DTAA.

In contrast, the Hyatt ruling seems to suggest that there is no need for an explicit "Virtual PE" clause to tax remote oversight. By expanding the definition of "Fixed Place" to include "intangible dominion," the SC has effectively bypassed the strict physical presence requirement of the Service PE clause. If a foreign company can exercise "effective control" over Indian operations remotely (via technology, Zoom, or binding contracts), the Courts may now view the Indian subsidiary's office as being "at the disposal" of the foreign entity. This achieves the outcome of a Virtual PE (taxing control exerted remotely) while legally categorizing it as a traditional Fixed Place PE.

Impact of the Hyatt Decision on Evolving Business Models

Manufacturing and trading businesses have traditionally been viewed as having a clear separation: the Indian subsidiary owns the factory or warehouse and carries out its own business using those assets. Does this mean that no PE situation can arise for a foreign parent? Post-Hyatt, the answer is a clear "No." While a manufacturing facility is physically static, control over it can be exercised remotely. As per Hyatt, if the foreign parent company exercises "complete control and discretion" over the manufacturing process—dictating production schedules, quality standards, procurement

5. *CIT, Int. tax vs Clifford Chance Pte. Ltd. [2025] 181 taxmann.com 254 (Delhi)*
6. *ABB FZ-LLC vs DCIT (Int. Tax.) [2017] 83 taxmann.com 86 (Bengaluru – Trib)*

sources, and staffing—the Indian factory could be perceived as being "at the disposal" of the parent company, thereby constituting a Fixed Place PE.

In the service industry and global delivery models (IT outsourcing, R&D, etc.), this distinction is already blurred. Indian employees can be working on global projects, reporting to project managers abroad. The traditional boundaries of physical location are replaced by matrix reporting.

The risk of PE constitution is aggravated by the increasing prevalence of **Matrix Reporting structure**s in Multinational Enterprises (MNEs). In a modern matrix structure, India employees often maintain a "solid line" (legal) reporting relationship to the Indian Board of Directors, but a "dotted line" (functional) reporting relationship to a Global Head based overseas. PE risk arises when the "dotted line" becomes the real line of command. If the Global Head exercises day-to-day control over the Indian team—such as deciding the team involved in projects, approving leave, setting daily targets, and reviewing output—the distinction blurs. The Hyatt ruling implies that if this functional control is "effective and complete," the premises used by these Indian employees could be treated as a Fixed Place PE of the foreign Global Head.

The functional control test can be applied in the context of **unrelated entities** as well. For instance, in Global Delivery models or Offshore Development Centres, Indian companies are engaged to provide certain IT services to end customers. The "Build Operate" or "Build Operate Transfer" models are also gaining prominence in India, where F Cos, before setting up their own enterprise in India, typically contract with a Service Provider to set up the necessary infrastructure, recruit teams for providing IT services, and later offer to transfer the entire setup when fully operational and developed. In such cases, the entire unit may be perceived as catering to the F Co and working exclusively for the F Co. PE risks could arise if the contractual framework and workflows are not structured appropriately.

There is another angle to the foregoing discussion. If the employees of the Indian entity work extensively under the supervision, direction, and control of the F Co, there is a possibility that they are regarded as de-facto employees of the F Co and, accordingly, places from where these employees work are regarded as places of business available to the foreign company, leading to a Fixed Place PE risk. Such tests of real employment based on OECD and other factors are laid down in the context of secondment scenarios and not in the context of the foregoing discussion.

However, it may be worthwhile to mention here that the Delhi HC did not seem to concur with this thought in Progress Rail Locomotive Inc. (2024)[7]. The tax authority alleged that the factory premises were at the disposal of the taxpayer and thus constituted a PE. A case was brought forward by the tax authority based on several factors:

- Reporting of key officers to the foreign taxpayer.
- The Indian entity was engaged in discharging functions pertaining to

7. *Progress Rail Locomotive Inc. vs DCIT, [2024] 163 taxmann.com 52 (Delhi) [28-05-2024]*

Subsidiary PE refers to situations where a subsidiary or related entity in a source country is treated as an extension, virtual projection, or "alter ego" of the foreign parent company.

compliance, inventory management, transportation, and shipping functions, which could not be regarded as preparatory and auxiliary services.

- Intense agency-related activities were carried out from Indian premises, including participation in tenders, etc., by the Indian entity on behalf of the overseas entity.

The HC ruled that it was appropriate and expedient for the F Co, standing in the shoes of the parent company, to exercise a degree of managerial oversight, and this did not constitute a Service PE. The role of the F Co was looked at as a sharing of best practices, experiences, and problem-solving, and not the rendering of a service or "normal management contribution".

Subsidiary PE and Alter Ego Companies

Subsidiary PE refers to situations where a subsidiary or related entity in a source country is treated as an extension, virtual projection, or "alter ego" of the foreign parent company. This doctrine looks beyond legal form (as that of an independent company) and focuses on substance over form, questioning whether the local entity is effectively carrying out the parent's business. The crux of the matter is whether the Subsidiary PE test can be applied independently or whether the satisfaction of disposal and other classical tests must still be considered for PE determination. The general consensus expressed by Courts is that the Subsidiary PE test cannot be applied on its own independently, but PE constitution will need to adhere to other tests laid down under the Fixed Place PE concept *(Nokia Network OY*[8], Delhi HC (2025)).

In the book authored by renowned author Arvid Aage Skaar, titled "Permanent Establishment – Erosion of a Tax Treaty Principle", the Subsidiary PE concept has been explained in detail. Prof. Skaar explains that a Subsidiary PE is constituted if it is found that both entities are, in fact, "alter egos" and undertake a "joint business activity". He is of the view that a Subsidiary PE shall normally not be created on the basis of extensive cooperation. He explains that the performance of shareholder activities, including having a say in operational top management, would not in itself create a PE. However, there can be certain circumstances where the PE gets triggered. For instance, if the members of the Board of Directors / management perform activities for the company that go beyond the activities the Directors are supposed to do in their capacity as members of the BOD—such as taking over functions of a local Managing Director, engaging in sales activities, management of production, or hiring decisions (except for the MD)—these activities are the business activities of the subsidiary and not of the parent. If the person representing another company is engaged in the business of the enterprise, this may indicate that the person and enterprise are conducting a joint business activity, which may qualify as a PE. The

8. *CIT, Int Tax vs Nokia Network OY [2025] 171 taxmann.com 757 (Delhi)[21-02-2025]*



MNEs will need to relook at their business models, contractual setups, and operational realities. Intra-group service arrangements will need to be reviewed to ensure that the Indian entity's operational aspects are well taken care of by the local Indian management.

Hyatt decision reiterates the concept of a Subsidiary PE without explicitly using the terms.

Looking Beyond the Corporate Veil

The Hyatt decision is a landmark in international taxation principles. It seeks to redefine the parameters for PE constitution by prioritizing ground realities over legal form. It compels multinational entities ('MNEs') to look beyond the form. MNEs will need to relook at their business models, contractual setups, and operational realities. Intra-group service arrangements will need to be reviewed to ensure that the Indian entity's operational aspects are well taken care of by the local Indian management.

To sum up, it is no longer sufficient to merely state, "We have a separate legal entity in India." Read alongside the decision of Tiger Global, the approach of the SC is clear that substance is paramount, and the legal form cannot override economic substance. This approach is closely aligned with the Base Erosion and Profit Shifting ('BEPS') project, which seeks to tax value creation and economic substance. For now, aligning operational substance with contractual form is no longer optional — it is imperative.

■

EMERGING TRENDS IN PROFIT ATTRIBUTION TO PE – NITI AAYOG REPORT AND TRANSFER PRICING ANALYSIS





Karishma Phatarphekar

Sanjay Mistry

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Overview

This article examines emerging developments in the taxation of Permanent Establishments (PEs) in India through the lens of the recent NITI Aayog Working Paper on enhancing tax certainty in PE determination and profit attribution. Historically, PE profit attribution in India was often determined through ad hoc approaches, resulting in significant disputes and uncertainty for foreign investors. Over time, judicial precedents and administrative practices have shifted toward a more structured framework grounded in economic substance, the arm's length principle, and the separate enterprise concept.

The NITI Aayog report proposes several reforms aimed at reducing PE litigation and improving predictability, most notably an optional presumptive taxation regime that applies sector-specific deemed profit margins on gross receipts earned in India. While this approach promises administrative simplicity and certainty, it raises concerns regarding alignment with transfer pricing principles, treaty obligations, and the risk of economic double taxation if deemed margins diverge from commercial realities.

The paper also recommends strengthening dispute resolution through expanded APA and MAP frameworks, safe harbour rules, clearer statutory guidance on PE attribution, and enhanced administrative capacity.

The article analyses these proposals from a transfer pricing perspective and argues that while presumptive taxation may serve as a supplementary simplification tool, FAR-based attribution under the arm's length principle should remain the primary framework to ensure fairness, treaty compatibility, and sustainable tax certainty.

1. Background

India's ambition to become a Viksit Bharat by 2047 hinges on a predictable tax environment that reduces disputes for foreign investors. One of the persistent pain point is the ambiguity and protracted disputes on taxation of Permanent Establishments (PEs) and profits

attribution. To address this, NITI Aayog[1] constituted a Consultative Group on Tax Policy to pursue ease of doing business, FDI facilitation and simplification of tax processes. Its first working paper[2] – **NITI Tax Policy Working Paper Series–I**, titled "*Enhancing Tax Certainty in Permanent Establishment and Profit Attribution for Foreign Investors in India*" (Paper) seeks to consider options to bring much needed clarity for foreign investors, reduce litigation and align India's tax framework with contemporary business models and global tax reforms.

2. Profit attribution laws and practices in India

• *Era of ad hoc determination*

Historically, once PE exposure was asserted, tax authorities often used ad hoc percentages to attribute sizable shares of global profits to Indian operations, say 40–75% without close linkage to functions, assets and risks (FAR) of Indian operations. In absence of detailed statutory rules, officers often resorted to Rule 10 with wide discretion, producing aggressive attribution claims.

• *Economic Substance in PE determination*

As cross-border business structures grew increasingly intricate, Indian courts and tax authorities gradually shifted from form based & adhoc assessments to evaluating economic substance of activities carried out in India, following the arm's length principle (ALP) as well as the 'separate enterprise' concept, in line with international standards.

With digitalization, traditional PE tests under captured user based value. India introduced Significant Economic Presence (SEP) and the Equalisation Levy and implemented BEPS/MLI changes to widen agency nexus.

The Supreme Court in *Morgan Stanley*[3] held that once a PE has been compensated at arm's length, no additional profits need to be attributed to it, once FAR has been accurately and completely captured. Further, the recent *Hyatt ruling*[4], marks a critical pivot, by disconnecting Indian PE profitability from global results and emphasizing the "separate enterprise" fiction.

Overall, this phase marked India's transition toward a more substance driven, evidence based PE and attribution framework, broadly aligned with international models while retaining its source based policy stance.

• *The Digital Era — Expanding Nexus Beyond Physical Presence*

With digitalization, traditional PE tests under captured user based value. India introduced Significant Economic Presence (SEP) and the Equalisation Levy and implemented BEPS/MLI changes to widen agency nexus and curb artificial avoidance of PE status, reflecting demand side/user value where appropriate.

1. *NITI Aayog serves as the apex public policy think tank of the Government of India and the nodal agency tasked with catalysing economic development and fostering cooperative federalism through the involvement of State Governments in the economic policy-making process using a bottom-up approach.*
2. *https://niti.gov.in/sites/default/files/2025-10/Tax_Policy_Report_WEB.pdf*
3. *DIT (Int tax) v. Morgan Stanley & Co. [2007] 162 Taxman 165 (SC)*
4. *Hyatt International Southwest Asia Ltd. v. ADIT [2024] 166 taxmann.com 466 (Delhi HC) (Full Bench) affirmed by Hyatt International Southwest Asia Limited v. Additional DIT [2025] 478 ITR 238 (SC)*

- ***CBDT's Draft Proposal on Profit Attribution***

In 2019, the CBDT came with a draft proposal on profit attribution (though not adopted), based on a multi factor formula (equal weights to sales, employees and assets; plus a user factor for digital) to embed market side elements. It nevertheless signalled India's preference for objective, market linked attribution. However, challenge remains to reconcile the separate enterprise / ALP tradition with a market based allocation, without treaty conflict or double taxation.

3. Profit Attribution to PEs: Transfer Pricing–Led Approach

Attribution theories broadly fall into:

- **Supply** (where core operations, assets, functions reside),
- **Demand** (where customers / market are), and
- **Mixed** (splitting value between supply and demand side contributions).

The OECD 2008 Model Tax Convention[5] acknowledged profits to be attributed to PE through apportionment techniques based on a 'separate entity' hypothesis. The OECD introduced the Authorised OECD Approach ('AOA')[6], which attributes profits using a detailed FAR analysis, treating PE as a separate enterprise. The 2018 OECD Report[7] guidance reaffirmed this principle and clarified that countries with pre 2010 Article 7 treaty language may continue applying customary apportionment methods and also coordinate Articles 7 and 9 to prevent double taxation.

In contrast, India has not adopted the AOA. Also, most Indian DTAAs are based on UN and pre 2010 OECD versions, which retain the rule of source state taxing profits to the extent attributable to PE, treating it as separate enterprise.

4. Addressing PE and profit attribution challenges– Key excerpts from the Report

The Report outlines five strategic recommendations aimed at strengthening tax certainty and predictability:

1. Introduce an optional presumptive regime
2. Robust Dispute Resolution Mechanism for APA / MAP
3. Codify clear PE and profit attribution principles within domestic tax law, OECD and UN Models.
4. Training officers, active discussions on Pillar one and Pillar Two, consultation with industry bodies, tax experts and investor associations.
5. Mandatory Public Consultations

Each of the above recommendations have been evaluated in detail below alongwith its implications:

5. *OECD Model Tax Convention on Income and on Capital*
6. *Report on Attribution of Profits to PEs*
7. *Additional Guidance on the Attribution of Profits to a PEs under BEPS*



5. Implications of the Strategic Recommendations suggested by NITI Aayog

A. Introduce an optional presumptive regime

The core idea of the Report is to introduce an optional Presumptive Taxation Scheme for foreign companies, with industry-specific profit rates deemed as taxable. The scheme will assign a deemed profit percentage on gross receipts earned in India for each sector / business models.

Key Implications arising from the said scheme are as below:

i. Optional in nature

The regime is proposed as optional, thereby allowing taxpayers to elect between:

— **Opt-in** and declare income as per the presumptive percentage, with exemption from maintaining detailed accounts in India for those activities.

— **Opt-out** and file a normal tax return with supporting audited Indian books. The report recommends that if opting out, maintaining and potentially auditing India related accounts would be required, acting as a deterrent against frivolous opting-out.

The Report recommends safeguards / conditions such as:

— Multi-year lock-in periods

— Restrictions on frequent switching or cherry-picking years

— Possible prior approval for reversion

While formally optional (to avoid treaty discrimination concerns), the surrounding compliance conditions - particularly the requirement to maintain and potentially audit India-specific books if opting out - may create significant compliance pressure. As a result, taxpayers may feel commercially compelled to adopt the presumptive regime for administrative ease, even if the deemed margin exceeds what could be justified under a FAR-based attribution.

To maintain balance and protect genuine cases, implementation will need to ensure that compliance burdens for opting out do not operate as an indirect opting in mechanism. One possible approach could be to introduce suitable exemptions from certain compliance requirements, to incentivize a higher rate.

ii. Departs from FAR analysis

The most significant implication is the structural departure from the ALP/FAR analysis by using an oversimplified approach.

Currently the Report has proposed sample presumptive profit rates for key industries (on gross receipts):

— Infrastructure construction/EPC: 10%

— Engineering/Oilfield services: 10%

— Telecom/Tech equipment with installation: 5% (offshore supply)/20% (onshore services) to avoid contract splitting disputes.

— Digital/e commerce: 30%

— General services (consultancy/management/software): 20%

— Marketing & distribution support: 15%

These presumptive rates, however, replace fact-intensive benchmarking analysis with a standardized deemed margin applied to gross receipts, leading to several implications:

— It implicitly assumes that a fixed pre-determined share of the enterprise's global profits is attributable to India.

— It risks overstating India's contribution in capital-intensive or IP-driven models.

— It detaches taxation from the enterprise's actual value creation.

— It can lead to increased likelihood of economic double taxation.

Moreover, these presumptive rates are not calibrated to commercial and industry realities, one of the evident examples being high deemed profit margin of 30% for digital/e-commerce firms. Global comparables operate at a lower threshold and do not earn such high margins. For e.g. in the digital and e-commerce, the industry operates on net margins of 3–10%, depending on the intensity of functions performed. Even highly profitable tech firms rarely report 30%+ profit margins on gross revenue. Leading companies such as Alibaba (~5%), Amazon (~9.3%), and Spotify (~7%) operate on modest margins and

fall short of the proposed benchmark when applied to gross revenue.

While the Report also acknowledges these high rates, the justification for that is it provides "certainty, simplicity, and reduced litigation", allowing the foreign entities to budget for taxes, avoid costly disputes and operate with greater predictability. However, if the presumptive rates are not calibrated to commercial and industry realities, the regime could, in effect, override the ALP framework and create friction with treaty obligations.

Moreover, the proposal assumes that a significant portion of value e.g. in digital businesses is created in India. In practice, the core value drivers such as intellectual property, strategic decision-making, and platform development are typically located outside India. Indian operations often focus on support functions like marketing or customer service or sales. This proposal risks over-taxation, misrepresents the actual value chain and undermines the principles of fair and proportionate taxation.

These dynamics suggests that while the scheme may streamline resolution in straightforward cases, it is unlikely to immediately curtail litigation in more contentious sectors, more particularly where taxpayers believe that FAR based attribution provides a more defensible and lower tax outcome.

iii. Treaty credit and double taxation risk

The pre-determined profit margins in the scheme carry inherent risks for India's treaty network. By moving away from the treaty aligned FAR based attribution method, the scheme could unearth a possibility of higher income being taxed in India to what tax treaties permit under the "separate and independent enterprise" principle. Such inconsistency can result in foreign jurisdictions refusing to grant the excess foreign tax credit, leading to double taxation, effectively diluting the intended policy benefits.

However, if the presumptive rates are not calibrated to commercial and industry realities, the regime could, in effect, override the ALP framework and create friction with treaty obligations.

To mitigate these risks, aligning the regime with treaty commitments is also essential to ensure deemed profit rates closely mirror commercial realities. Active coordination with treaty partners is required to secure acceptance of the presumptive methodology or at minimum establish clarity around foreign tax credit treatment. Without such safeguards, the regime risks unintentionally creating more double taxation, more cross border disputes and reduced investor confidence.

iv. No Separate PE Determination Needed

A critical aspect is that if a foreign company opts for presumptive taxation for a particular activity, the tax authorities would not separately litigate the existence of a PE for that activity. This offers certainty by sidestepping the PE threshold debate, providing foreign investors with a clear path forward.

By providing a clear, agreed basis for taxation, the endless disputes over PE existence would significantly diminish. This redirection of resources for both the Income Tax Department and companies to more productive matters is a crucial gain.

However, clarity is required whether opting into the regime implies any admission of PE, which would then be leveraged upon by the tax authorities for the on-going past litigation / future years. Without explicit safeguards, the taxpayers may be hesitant to opt in for the scheme.

v. Impact on the on-going past litigation on PE

While the presumptive regime seeks to provide clarity and certainty for future years, it remains largely silent on the treatment of ongoing litigation relating to profit attribution for PE.

Considering the objective is to meaningfully reduce controversy and enhance investor confidence, a complementary settlement framework could be considered (similar to Vivad se Vishwas) to enable closure of pending cases. Such a framework may provide taxpayers with an option to settle attribution-related disputes, without commenting or admitting PE, potentially linked to the deemed margins under the presumptive regime and granting immunity from penalties and interest. This would not only accelerate dispute resolution but also unlock administrative bandwidth currently consumed by protracted PE litigation.

The second recommendation of the Report is to invest in expanding the capacity of Advance Pricing Agreement (APA) and Mutual Agreement Procedure (MAP) programs.

vi. Uncertainty in determining gross receipts:

The proposal does not specify the methodology for computing gross receipts to which the fixed percentage would apply, creating ambiguity on whether it should be based on global revenue allocations, actual invoicing to Indian customers, or any other formula.

B. Robust Dispute Resolution Mechanisms

The second recommendation of the Report is to invest in expanding the capacity of Advance Pricing Agreement (APA) and Mutual Agreement Procedure (MAP) programs.

The Report recommends multiple suggestions to achieve this. We have given below the same alongwith its implications.

— Reducing resolution timelines for APA and MAP – The Indian Government

The paper recommends adopting a system modelled on the OECD's TRACE framework to ensure a faster and more streamlined withholding tax process including cases where PE opts in for presumptive taxation scheme.

has already taken this recommendation. The Union Budget 2026 presented by Indian Government recently has prescribed a fast-track timeline of 2 years (extendable by six months upon taxpayer's request) for resolution of APAs for IT services and 3 years for non-IT, as against current average completion period of 42 - 45 months.

Moreover, the paper specifically focuses on promoting Bilateral APAs ('BAPA') for PE attribution. The paper pushes to define a formal framework for negotiations, including acceptable attribution methods, documentation standards, timelines, and coordination protocols with treaty partners and also provide clarity on access and procedure for multilateral MAP or APA in triangular structures.

— Adoption of mandatory binding arbitration for unresolved MAP cases - When a taxpayer invokes MAP under a tax treaty, the competent authorities of the two jurisdictions negotiate to eliminate double taxation. The paper suggests that if the jurisdictions fail to reach an agreement within a specified period (say 2–3 years), the case will automatically move to Arbitration. The Arbitration Panel will then be required to deliver a final and binding decision within a defined timeline, which will become part of the MAP settlement and must be implemented by both the countries.

— Adopting standardized systems, such as the OECD's TRACE – India current system of 'withhold first, claim later' approach for foreign portfolio investors results in over withholding followed by long refund cycles, administrative burdens etc. The OECD Tax Relief and Compliance Enhancement (TRACE) system offers a standardized global model for granting withholding tax relief at source, using Authorised Intermediaries (AIs) who apply the correct treaty rate directly when income is paid. Finland has already implemented TRACE, with other jurisdictions preparing to follow. The paper recommends adopting a system modelled on the OECD's TRACE framework to ensure a faster and more streamlined withholding tax process including cases where PE opts in for presumptive taxation scheme, thereby, providing relief at source and reducing refund based friction and making India's cross border tax framework more predictable and internationally compatible.

— Safe Harbour for PE attribution – While currently the Income-tax Act covers determination of attribution to PE within the scope of SHR and APA (if PE is admitted), however it is recommended to explicitly notify that transfer pricing principles / rates that would be used for determining profits attributable to a PE. The Union Budget 2026 also takes a notably forward looking approach by extending the safe harbour framework to emerging sectors, most notably by introducing a 15% cost plus margin for data centre services and a 2% safe harbour margin for non resident electronic component warehousing in bonded facilities. These

The Union Budget 2026 also takes a notably forward looking approach by extending the safe harbour framework to emerging sectors.

measures are not only progressive in supporting India's digital and manufacturing ecosystems, but they are also closely aligned with the paper's recommendations to modernise and expand safe harbour rules as a means of reducing PE related disputes and bringing greater predictability to profit attribution.

— Treaty Eligibility for US LLCs - Extending India–US DTAA eligibility to fiscally transparent US LLCs that meet Limitation of Benefits (LOB) criteria would be a welcome reform in the paper, as it would finally resolve long standing uncertainty around the treaty status of such entities. Although Indian tribunals have upheld treaty access for LLCs, the absence of explicit recognition in the treaty has continued to create avoidable disputes. Formalizing their eligibility would align India with global tax practice, provide clearer and more reliable access to APA and MAP frameworks, reduce litigation and ultimately offer a more stable and predictable environment for cross border investment.

Overall, while the proposal mentions on-ground acceptance of APA and MAP to cover PE attribution, it's unclear on how the presumptive rates will be reconciled with negotiated ALP outcomes. This could create conflicts between unilateral and bilateral agreements. APA / MAP processes are built on detailed FAR analysis and benchmarking studies, which are fundamentally different from the fixed-rate presumptive approach. This divergence could create conflicts between unilateral agreements (India's presumptive regime) and bilateral / multilateral agreements negotiated under treaty frameworks.

C. Codify clear PE and profit attribution principles within domestic tax law, OECD and UN Models.

This recommendation assumes particular importance in the Indian context. Despite decades of jurisprudence and extensive administrative guidance, the interpretation of Permanent Establishment (PE) provisions and profit attribution principles in India continues to remain fragmented and, at times, unpredictable. Divergent judicial views and inconsistent application across assessing officers have resulted in uncertainty for both taxpayers and the revenue authorities.

Given the increasing complexity of global tax development - particularly in the context of Pillar One and Pillar Two - officers must be equipped with a clear understanding of emerging allocation rules, digital nexus principles, and interaction with existing treaty provisions.

In this backdrop, codification of clear PE and attribution principles within domestic tax law would materially enhance certainty. A structured legislative articulation would reduce interpretational discretion at the field level, provide objective thresholds where feasible, and create a more predictable compliance environment. Importantly, alignment with the OECD and UN Model Commentaries—while preserving India's negotiating positions—would foster coherence between domestic law and treaty interpretation.

D. Training officers, active discussions on Pillar one and Pillar Two, consultation with industry bodies, tax experts and investor associations.

Another important recommendation is the strengthening of India's tax administration capacity through more rigorous and specialised training for Tax authorities. Specialised training programmes for officers dealing with international taxation would definitely be essential. Given the increasing complexity of global tax development - particularly in the context of Pillar One and Pillar Two - officers must be equipped with a clear understanding of emerging allocation rules, digital nexus principles, and interaction with existing treaty provisions. Regular workshops, cross-functional sessions between transfer pricing and international tax wings, and exposure to global best practices would significantly enhance administrative consistency.

The Paper also underscores the importance of India remaining actively and constructively engaged in global negotiations on Pillar One and Pillar Two. The international tax environment has entered a phase of heightened uncertainty, particularly following U.S. policy changes in early 2025 that led to the US disavowing its commitments to parts of the OECD's global minimum tax framework, contributing to divergence in global tax cooperation and complicating negotiations under Pillar One and Pillar Two. In such a fluid landscape, continued participation in OECD and Inclusive Framework discussions becomes strategically significant for India.

E. Mandatory Public Consultations

Another welcome recommendation of mandatory consultations would align India with global best practices in tax policy formulation. Given the far-reaching implications of PE and attribution reforms, a formal and mandatory public consultation process should be embedded within the legislative framework itself.

6. Conclusion

In sum, India's recent jurisprudence is exemplified by decisions that privilege economic substance, recognise arm's length outcomes and permit attribution based on FAR. At the same time, the Paper advances an optional presumptive regime with sectoral deemed margins on gross receipts to simplify administration and curb litigation. While this promises certainty, it can be contradictory with FAR based attribution and APA/MAP processes, if rates are not calibrated to commercial reality and treaty norms.

To achieve a globally acceptable and consistent approach for profit attribution to PEs, the transfer pricing mechanism should be prioritized. A pragmatic path would be to codify clear PE/attribution rules, expand APA/MAP and dispute resolution tools. Presumptive taxation should be positioned strictly as a rebuttable safe harbour alternative that coexists with ALP as the primary standard.

Such a calibrated framework can reduce controversy without diluting the integrity of profit attribution to PEs, aligning India's source based objectives with international practice and modern business models.

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INTERNATIONAL TAX COMPLIANCE IN A DIGITAL INDIA: MANAGING PAN, RESIDENCY AND REMITTANCE OBLIGATIONS





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Overview

India's international tax framework has shifted towards a highly procedural, digitally enforced compliance model where small documentation gaps can materially affect withholding outcomes. Requirements around PAN, residency evidence and foreign remittance filings now operate through system driven validations, making accuracy, timing and completeness central to tax certainty. PAN based withholding continues to create friction for non residents, and while limited relaxations exist, practical implementation challenges often persist. Establishing treaty residency has become equally complex, with TRC and Form 10F forming the core documentation, amplified by electronic filing requirements and additional scrutiny for fiscally transparent entities and globally mobile individuals. This procedural intensity culminates in the 15CA/15CB workflow, where characterisation disputes, mixed contract complications and portal checks influence the final withholding position. The overall landscape now demands disciplined, step wise execution, strong documentation practices, and alignment with digital processes to ensure that cross border payments remain compliant and defensible.

Introduction

International tax compliance in India has been increasingly shifting from a substantive law exercise to one where procedural lapses can temporarily outweigh legal entitlement. A telling example arises from the *Skaps Industries India Pvt. Ltd.*[1] matter, where the Commissioner (Appeals) denied treaty benefits solely because the non-resident had not furnished Tax Residency Certificate ('TRC'). Although the Tribunal later restored treaty protection, the episode illustrates that procedural non-compliances (PAN gaps, TRC/Form 10F delays, portal issues, 15CA/

1. *Skaps Industries India (P.) Ltd. vs. Income Tax Officer, International Taxation, Ahmedabad [2018] 94 taxmann.com 448 (Ahmedabad - Trib.)/[2018] 171 ITD 723 (Ahmedabad - Trib.)[21-06-2018]*



CB technicalities, etc) can create immediate and significant tax costs even when the underlying transaction is genuine.

As tax administration becomes more automated, international tax disputes are no longer driven only by characterisation and treaty interpretation. They now often arise from procedural shortcomings, system incompatibilities, and challenges in meeting precise documentation requirements- both in terms of digital format and timely submission as stipulated by relevant laws and online portals.. This growing emphasis on procedural compliances over substance means that taxpayers must navigate not only the legal provisions but also the granular mechanics of India's compliance framework, where the smallest lapse can alter the tax rate, trigger disallowances, or lead to prolonged disputes despite full substantive merit.

As tax administration becomes more automated, international tax disputes are no longer driven only by characterisation and treaty interpretation.

While earlier jurisprudence (e.g., *Azadi Bachao Andolan*[2]) treated a TRC as strong evidence for treaty relief, recent Supreme Court guidance in ***AAR (IT) vs. Tiger Global International II Holdings***[3] marks a shift: a TRC is necessary but not sufficient; authorities may look through to substance, apply GAAR, and deny relief if arrangements lack commercial rationale even with a valid TRC. This evolution explains why process, documentation, and substance now decide outcomes at the withholding stage itself.
Against this backdrop where processes increasingly determine the outcomes, the practical challenges arise at the very first procedural gateway viz. PAN compliance.

Although this was intended to strengthen traceability and prevent revenue leakage, the provision frequently affects genuine non residents whose India exposure is incidental.

PAN Compliance & Higher Withholding Tax Rates

Permanent Account Number ('PAN') began as a domestic taxpayer identifier when first introduced in 1972 and was later made statutory under Section 139A of the Income-tax Act, 1961 ('the Act') from 1976. Over time, PAN transitioned from a resident focused identification tool into a broader compliance instrument applicable to non residents as well. In FY 2010-11, Section 206AA was introduced, mandating that every recipient of taxable income, including non residents,

2. *Union of India vs. Azadi Bachao Andolan [2003] 132 Taxman 373 (SC)/[2003] 263 ITR 706 (SC)/[2003] 184 CTR 450 (SC) [07-10-2003]*
3. *Authority for Advance Rulings (Income-tax) vs. Tiger Global International II Holdings [2026] 182 taxmann.com 375 (SC) [15-01-2026]*

must furnish PAN, failing which withholding would apply at 20% regardless of treaty eligibility. Although this was intended to strengthen traceability and prevent revenue leakage, the provision frequently affects genuine non residents whose India exposure is incidental.



For such taxpayers, the absence of PAN can mechanically push withholding to 20% even when the underlying income is taxable at a lower rate or not chargeable to tax at all under a tax treaty. The result is a disproportionate cash flow burden on the non resident and a compliance dilemma for the deductor, who must choose between commercial practicality and defensive withholding.

To mitigate this rigidity, Rule 37BC provides an important relaxation for non residents by allowing them to forgo PAN if they furnish alternative prescribed particulars such as tax identification number, address in the country of residence, e mail, contact details and TRC. However, Rule 37BC is applicable only to certain payments viz. payments in the nature of interest, royalty, fees for technical services, dividend and payments on transfer of any capital asset.

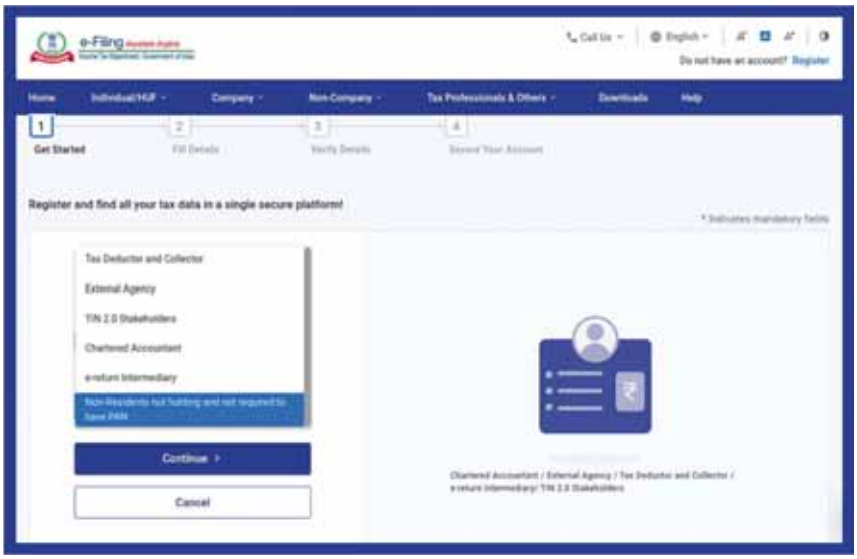
Under Indian law, a TRC is mandatory for claiming treaty relief, but if the TRC does not contain all the prescribed particulars, the non resident must additionally furnish Form 10F to supply missing information.

In theory, this relaxation allows the deductor to apply the correct lower rate without insisting on PAN. However practically, deductors often face operational challenges as banks may continue to request PAN for remittances despite Rule 37BC, and internal finance teams frequently adopt conservative withholding to avoid future scrutiny. As a result, the relief intended under Rule 37BC may not always translate smoothly at the implementation level.

Courts, such as in the case of ***CIT (Intl. Tax) v. Adani Wilmar Ltd***.[4], have consistently held that a more beneficial DTAA rate prevails over the 20% default in Section 206AA where treaty eligibility is established. This principle is useful even when banks or internal SOPs nudge deductors toward conservative withholding.

However, PAN is only the beginning. Once the basic identification hurdle is crossed, the

4. *Commissioner of Income-tax (International Taxation and Transfer Pricing) vs. Adani Wilmar Ltd. [2025] 175 taxmann.com 909 (Gujarat)[10-06-2025]*



next stage is establishing and evidencing the non resident's tax residency, which forms the foundation for applying treaty benefits and reduced withholding rates in accordance with provisions of section 90 read with Rule 21AB.

Practical Challenges in Establishing and Evidencing Tax Residency

In practice, establishing tax residency for treaty purposes is one of the most operationally challenging aspect of international withholding, because the evidentiary burden goes well beyond furnishing a TRC. Under Indian law, a TRC is mandatory for claiming treaty relief, but if the TRC does not contain all the prescribed particulars, the non resident must additionally furnish Form 10F to supply missing information. This dual document requirement itself creates friction because TRCs issued abroad rarely follow India specific formats, forcing almost all taxpayers to rely on Form 10F to complete the documentation. In reality, banks, auditors, and deductors routinely insist on Form 10F even when the TRC is otherwise valid, simply to ensure smoother remittance and lower withholding rate application.

The situation is further complicated by technology driven challenges. Following the 2022 mandate that Form 10F be filed electronically, non residents without PAN faced portal level difficulties because the Indian e filing system initially required PAN for login and submission. These users could not file Form 10F online, leading to delays in remittances and higher withholding in multiple cases. The CBDT later acknowledged these challenges and issued temporary relaxations permitting manual filing and eventually enabled a new "non residents not having PAN and not required to have PAN" category for portal registration to ease the bottleneck. This shows that residency documentation today is not only a legal requirement but a technology dependent workflow where missing fields and portal constraints can directly impact withholding outcomes.

Azadi Bachao Andolan (supra) and subsequent rulings long supported reliance on TRC for treaty relief; however, *Tiger Global (supra)* clarifies that TRC is an eligibility condition and not a conclusive shield and that GAAR may be invoked where facts point to conduit type structures or inadequate commercial substance.

Complexity increases for fiscally transparent entities (e.g., partnerships like German Co. KG structures). Since such entities may not be taxable in their home jurisdiction, their TRCs may not conclusively establish treaty eligibility, leading deductors to request TRCs of partners, passthrough declarations, or confirmation of "liable to tax" status at the

The process has become documentation first, law second, because payers must defend their position if challenged later.

partner level. While not codified in statute, these practical checks are triggered because treaty relief for hybrids depends on whether the income is taxed in the partner's hands or at the entity level, information that the TRC alone will not reveal.

For individuals, residency proof is equally documentation heavy. Even though the statutory tests revolve around day counts, deductors often ask for passports, travel logs, employer letters or foreign tax returns to corroborate the individual's claim, because the TRC alone may not reflect mobility patterns-especially for expatriates, secondees, or globally mobile executives. Banks and payers commonly insist on TRC + Form 10F before applying treaty rates, even for salary linked or dependent personal services income, because this combination is seen as the minimum defensible documentation for lower withholding in case of future scrutiny.

Across all categories, the common thread is this: residency compliance now demands a full documentary pack of TRC, Form 10F, entity/individual level evidence, and substance based clarifications before lower withholding rate as per treaty is applied. The process has become documentation first, law second, because payers must defend their position if challenged later. As a result, even legitimate, treaty protected payments face delays or conservative withholding when documentary completeness is uncertain. However, where a TRC is unavailable or incomplete, eligibility may still be proved by other credible evidence. as highlighted above, in the case of *Skaps Industries*[5], the Tribunal accepted that treaty benefit cannot be denied merely for non-furnishing of a TRC, provided residency is otherwise established.

Once residency is established and supporting documentation is assembled, the remittance process moves into its most operationally intensive phase which is electronic compliance through Forms 15CA and 15CB.

Electronic Compliance with Forms 15CA & 15CB: Process, Litigation Risks, and Practical Complexities

Foreign remittance compliance in India has evolved dramatically over the past decade. What was once a bank driven process based largely on Form A2 and importer/exporter documents has transformed into a tax driven, electronic, pre remittance verification system. The shift began when the government recognised that many cross border payments were escaping scrutiny because banks were not equipped to evaluate taxability. This led to the introduction and gradual tightening of Forms 15CA and 15CB, coupled with Rule 37BB, making tax documentation a mandatory prerequisite for any taxable outward remittance (other than specified exceptions). As digitisation accelerated, these forms moved from paper submission to being fully integrated with the Income Tax e filing portal, allowing authorities to monitor remittances real time and match them with withholding returns, Form 26AS, and financial statements. In effect, what used

5. *Skaps Industries India (P.) Ltd. vs. Income Tax Officer, International Taxation, Ahmedabad [2018] 94 taxmann.com 448 (Ahmedabad - Trib.)/[2018] 171 ITD 723 (Ahmedabad - Trib.) [21-06-2018]*

to be a banking compliance now operates as front end tax administration, where the tax position must be defensible before the money leaves India.

At remittance stage, Section 195 permits the more beneficial treaty rate only where treaty eligibility is actually evidenced. In practice, that means having TRC and Form 10F on record before deduction and certification, not after. The portal's enablement for 10F e filing without PAN was specifically introduced to let non residents complete this proof concurrently with the payment.

Today, Form 15CA serves as the payer's self declaration on taxability and applicable withholding, while Form 15CB requires a CA to certify the nature of income, treaty applicability, rate of tax, and PE exposure. Banks cannot process most foreign remittances unless these forms are filed, making them

At remittance stage, Section 195 permits the more beneficial treaty rate only where treaty eligibility is actually evidenced. In practice, that means having TRC and Form 10F on record before deduction and certification, not after.

operationally indispensable. Their evolution reflects the government's need for a uniform information trail, early stage risk capture, and a mechanism to prevent under withholding at the source.

However, these forms create practical pressures around characterisation at the certification stage. The CA issuing Form 15CB must determine whether a payment is royalty, FTS, business income, or non taxable. Challenges intensify with mixed contracts involving offshore supply plus onshore services, software plus maintenance or design plus supervision. Even when offshore components are tax neutral, splitting consideration is not always straightforward, and banks often insist on a single 15CB. The CA must therefore reconcile multiple tax treatments within a rigid form format, often leading to over withholding.

These complexities have led to an increase in litigation and notices tied to 15CA / 15CB filings. Assessing officers now routinely call for complete contracts, basis of characterisation and justification for treaty benefit claims referenced in the forms. In some cases, the department uses inconsistencies between 15CA / 15CB and consequential tax positions to question the deductor's "reasonableness" or to reopen withholding disputes. Even procedural issues such as incorrect selection of nature of payment codes, mismatches in amounts or non filing of revised forms trigger inquiries.

To navigate these risks, some of the best practices include conducting a quick tax review of the transaction before initiating the remittance process; maintaining a robust repository of TRCs, Form 10F, contracts, invoices and internal approvals; preparing short characterisation notes for recurring payment types; including assumptions and reliance statements in Form 15CB; and creating internal SOPs so finance teams know when to escalate difficult cases. For high value payments or ambiguous contracts, early tax team involvement helps avoid last minute conflicts with banks or auditors.

Forms 15CA and 15CB are required for any payment made to a non resident, irrespective of whether the remitter is a resident or a non-resident, if the payment is taxable in India. As a result, all pre requirements of having a valid PAN, the deductor's TAN, and access

to the Income tax e filing portal through an Indian login become mandatory before any remittance can be processed. Budget 2026 has proposed a significant relaxation for immovable property transactions involving non resident sellers. Under the new proposal, resident individuals and HUFs buying property from an NRI will no longer be required to obtain a TAN; instead tax will be deducted and deposited through a simple PAN based challan, aligning the process with transactions between two residents. This removes a long standing compliance burden where one time buyers were forced to apply for TAN solely for a single remittance.

In effect, electronic compliance with Forms 15CA and 15CB is no longer an administrative afterthought. It is a real time tax risk checkpoint, where incomplete documentation, unclear facts or timing pressures can directly influence the rate of withholding. A structured, well documented process is now essential to ensure treaty consistent withholding and reduce the likelihood of future disputes.

These evolving complexities underscore that foreign payments now require not just correct legal interpretation but disciplined, step wise execution. This leads to the practical question: what does a compliant remittance workflow actually look like in real time? The foreign remittance compliance chain captures this sequence end to end.

Foreign Remittance Compliance Chain

In practice, every cross border payment follows a documentation heavy compliance chain and a lapse at any stage can change the withholding rate or delay the remittance altogether. The first step is to determine the payee's residential status, because the entire withholding framework depends on that. Once residency is clear, the payer must obtain the non resident's PAN or confirm whether Rule 37BC can be applied.

With these basics in place, the payer must apply the correct tax provision, adequately supported by documentation. This leads to the



next step: assessing the correct withholding rate, factoring in characterisation, treaty article mapping and any surcharge / cess implications. Then the payer must assemble the required documentation like TRC, Form 10F (if needed), invoices, contracts, residency proof, beneficial ownership declarations, and internal approval notes.

Once the factual and legal basis is established, the CA can issue Form 15CB, certifying the taxability and confirming the rate of withholding. The payer must then file Form 15CA electronically, making a self declaration that matches the 15CB certificate and the underlying documents. These forms are then submitted to the bank, which validates them along with KYC, purpose code, and other remittance requirements before releasing the funds. The chain does not end with remittance: a robust audit trail must be preserved including copies of 15CA / CB, supporting documents, email correspondence, and contract extracts because future assessments often revisit the positions taken at the remittance stage.

Taxpayers and deductors will need to maintain watertight records not only to support withholding decisions but also to defend them years later in scrutiny or reassessment.

Way Forward & Conclusion

What emerges from this evolution is clear: India's international tax compliance framework is no longer document-driven alone; it is now digitally validated, behaviour-monitored, and system-enforced.
Looking ahead, India's international tax compliance framework is set to become increasingly system driven, with validations built directly into the income tax portal, banking channels, and real time data matching tools. As electronic workflows mature, the expectation is for greater alignment between the RBI, authorised dealer banks and the CBDT, so that taxpayers are not caught between divergent interpretations or procedural inconsistencies during foreign remittances. The Union Budget 2026 has already signalled an intent to simplify procedural bottlenecks such as easing TAN requirements for certain property transactions. A natural extension of this direction may be the simplification or consolidation of Forms 15CA and 15CB, especially where repetitive information, duplicate declarations, or mismatches create friction without adding substantive value. Even if consolidation is gradual, one can expect the forms to become more structured, less narrative dependent, and increasingly pre filled through data captured elsewhere in the system.

At the same time, the compliance burden is unlikely to reduce in qualitative terms. Instead, the emphasis will shift further towards documentation, substance, and traceability. Taxpayers and deductors will need to maintain watertight records not only to support withholding decisions but also to defend them years later in scrutiny or reassessment.

In conclusion, India's foreign remittance compliance ecosystem is evolving from a paperwork led process into a digitally verified, risk flagging, documentation first framework. With robust systems, SOPs, and evidentiary discipline, taxpayers can ensure that international payments are not only compliant in form but defensible in substance in any future scrutiny.

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CROSS BORDER EMPLOYMENT AND COMPENSATION – TAX LANDSCAPE AND EVOLVING ISSUES





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Overview

Globalization and rapid advances in digital technology have changed the way companies operate. To support the international growth, businesses use different models for cross-border mobility, such as employee secondments, short-term business trips, remote work arrangements etc that span countries.

While these approaches give companies more flexibility and efficiency, they also bring complex tax challenges for both employers and employees. Successfully managing these issues is crucial for organizations with global mobility programs.

Key Tax Issues in Cross-Border Employment

This article highlights the main tax concerns that arise when employees work across borders, focusing on two important areas:

- **Employee Deputation: Permanent Establishment (PE) Risks and Withholding Tax**

  When employees are sent to work in another country, their presence or activities can create a PE for the company in that country. This means the business might have to pay local taxes, even if it is not formally set up there. Understanding what triggers a PE and how to structure employee assignments is essential to stay compliant and reduce risks.

  Withholding tax is another important consideration. When employees are seconded or deputed, companies must determine who is responsible for withholding taxes on their income. This depends on factors like how costs are recharged between entities and the nature of the employer-employee relationship. Getting these details right helps companies follow local tax laws and avoid unexpected liabilities.

- **Taxation of Employee Stock Options (ESOPs)**

  When employees work in more than one country, taxing ESOPs becomes complicated. Different countries have their own rules about how and when ESOPs are taxed, which can lead to problems like double taxation if not managed carefully. Employers need to understand how these rules interact

and apply to their equity compensation plans.

The article brings together Indian tax laws, Double Tax Treaties (DTAA), and key judicial precedents to offer practical, actionable guidance on managing cross border employment and compensation structures and provides employers with clear strategies to structure global mobility programs effectively while reducing exposure to tax risks.

Overview of cross border movement

Cross border mobility through deputation or secondment typically involves the movement of an employee from an enterprise in the home country ("F Co.") to a related group entity in the host country ("I Co."). Such arrangements are driven by various business needs, including oversight of operations to ensure adherence to group quality standards, management of local business activities, provision of specialised services, training of local teams etc. Depending on the business objectives, the period of deputation may range from short term assignments to long term placements.

Employee movement from a foreign jurisdiction to India is generally referred to as inbound mobility, while the transfer of personnel from India to overseas jurisdictions constitutes outbound mobility.

Cross border employee movement invariably leads to tax implications for all stakeholders—the employee, the F Co. and I Co.

From an employee's perspective, key tax considerations include determination of residential status in the host jurisdiction, especially where dual residence may arise, the scope of income taxable in the host country, and the ability to claim foreign tax credit

Employee movement from a foreign jurisdiction to India is generally referred to as inbound mobility, while the transfer of personnel from India to overseas jurisdictions constitutes outbound mobility.

where worldwide income becomes taxable based on residence.

From an employer's perspective, the critical issues relate to potential permanent establishment (PE) exposure for the home country entity, withholding tax obligations on employee remuneration, the tax characterisation of reimbursements made by the host entity (especially where salary continues to be paid in the home country for administrative convenience), and whether such reimbursements could be viewed as fees for technical services (FTS).

This article examines, in detail, the tax implications for employers—both F Co. and I Co.—arising from cross border employee deputation arrangements.

- **Permanent Establishment: Exposure:**

A PE arises when a F Co. has a business presence in the source country through which its operations are wholly or partly carried on. In the context of employee secondment, PE exposure may arise in the form of a Fixed Place PE, Service PE, or, in certain cases, an Installation PE.

A Fixed Place PE may be triggered when the deputed employees' presence in the host country results in a sufficient degree of ongoing business activity, authority, or control on behalf of F Co., such that the premises where services are performed are effectively "at the disposal" of F Co.

A Service PE may arise where F Co.:

- provides services other than FTS,
- through seconded employees or other personnel, and
- the duration of their presence exceeds the threshold prescribed in the relevant DTAA

Guiding principles for analysing PE - emerging from Key Judicial rulings

The following aspects significantly influence the PE analysis in secondment arrangements:

a) Lien Over Employment & the Real Employer Test (Legal vs. Economic Employer)

Under secondment arrangements, different scenarios may arise:

Scenario 1: The deputed employee works for I Co. but continues on the payroll of F Co. for administrative convenience, and F Co. recovers the salary cost from I Co.

In such cases, a critical question arises is who is the real employer—F Co. (legal employer) or I Co. (economic employer)?

The determination generally rests on assessing who retains the lien over the employment. If F Co. continues to control key employment terms, such as the ability to terminate the employee, dictate career progression, or restrict I Co.'s ability to remove the employee, it indicates that the lien remains with F Co. Consequently, F Co. may be considered the real employer.

Judicial Guidance

The Apex Court in case of ***Morgan Stanley & Co.***[1] held that where employees remain on the payroll of the multinational enterprise, retain their lien with the foreign employer, and the foreign entity remains responsible for their work, a Service PE may be constituted. Similar view has reiterated Delhi Tribunal in case of ***Teradata Operations Inc. v. Dy. CIT***[2].

The Apex Court in case of ***Centrica India Offshore (P.) Ltd***[3] held that even if secondees operate under the day to day supervision of I Co., the foreign entity may still be treated as the real employer. The Court relied on factors such as continued participation in foreign social security plans, the inability of employees to sue I Co. for employment related dues, and F Co.'s involvement in remuneration and termination decisions.

These rulings underscore that the economic reality of the employer–employee relationship prevails over mere payroll mechanics.

Importance of Proper Structuring of the Deputation Agreement

To mitigate the risk of F Co. being regarded as the real employer and thereby reduce the potential for Service PE exposure, the deputation arrangement should be carefully drafted. The agreement should clearly specify that:

1. The deputed employee operates under the supervision, direction, and control of I Co.

1. *Director of Income-tax (International Taxation) v. Morgan Stanley & Co. [2007] 162 Taxman 165*
2. *Teradata Operations Inc. v. Dy CIT 116 taxmann.com 404 (Delhi – Trib.*
3. *Centrica India Offshore (P.) Ltd. v. Commissioner of Income-tax, New Delhi [2014] 51 taxmann.com 386*

2. The employee reports to and is appraised by I Co. during the deputation period.

3. The employee has no recourse to F Co. for employment related matters during the deputation; I Co. is solely responsible for their services and work.

Proper structuring, supported by consistent conduct in practice, can significantly help mitigate PE risks for F Co.

Scenario 2 - Deputed employee working for I Co and on payroll of I Co

In this scenario, the PE risk is comparatively lower than in Scenario 1, as both the legal and economic employer is I Co. However, the analysis does not end here. It remains important to evaluate who effectively retains the lien over employment and under whose direction, supervision, and control the employee performs services. If F Co. continues to influence key employment terms, or if the employee retains substantive ties to F Co., PE exposure cannot be ruled out.

Scenario 3 - Deputed employee working for F Co and on payroll of F Co.

Under this scenario, F Co. is clearly rendering services to I Co. through its employees. The key determinants of Service PE exposure are:

1. Nature of services performed, and

2. Duration of stay of the employee in the host country.

Under most DTAAs, the definition of a Service PE excludes services that qualify as FTS. Therefore, if the services rendered satisfy the FTS test under the treaty, the Service PE threshold becomes irrelevant—Service PE exposure would not arise, regardless of the number of days spent in India.

However, even if Service PE is excluded, it is still essential to evaluate whether the activities trigger a Fixed Place PE.

Economic Substance and Fixed Place PE

Even where employees are formally seconded or visiting from F Co., a Fixed Place PE may arise if:

- employees of F Co. have access to I Co.'s premises, and

- they exercise substantive control or influence over core operations in India.

In such a situation, the place where activities are performed may be considered **"at the disposal"** of F Co., thereby giving rise to a Fixed Place PE.

The Supreme Court decision in ***Hyatt International Southwest Asia Ltd***.[4] is instructive. The Court upheld a Fixed Place PE where a foreign brand owner exercised sustained strategic, managerial, and operational influence over Indian hotels through:

- continuous oversight,

- periodic visits of foreign personnel, and

- deep involvement in decision making.

4. *Hyatt International Southwest Asia Ltd. v. Additional Director of Income-tax [2025] 176 taxmann.com 783*

The Court held that even in the absence of a dedicated office, the combination of structured access, continuous functional involvement, and commercial nexus satisfied the "at disposal" test, resulting in a Fixed Place PE.

For secondment and mobility models, Hyatt underscores a key principle: substance prevails over form. If secondees and visiting personnel collectively establish ongoing, meaningful control over Indian operations, a Fixed Place PE may arise, regardless of the contractual characterisation.

Duration of Stay of the employee in host location

Where the services under the DTAA does not qualify as FTS, one may need to examine the duration of the stay of employees in India to qualify as Service PE under the relevant DTAA.

Different DTAAs prescribe different day count thresholds. For example:

- **India–USA DTAA:**

  Associated Enterprise (AE): Even **one day** of presence can trigger a Service PE where services are rendered to an AE. Non AE:30 days (as per specific treaty threshold).

- **India–UK DTAA:**

  AE: Threshold of 30 days. Non AE: 90 days (as per treaty).

In cases where a DTAA does not contain a Service PE clause, then one need to analyse the Fixed place PE basis the principles given in the preceding paragraph.

Counting of the number of days in host country

For counting duration of stay in India for multiple employees during same period shall be based on solar days and not man days[5]. i.e. if 3 employees are in India for 30 days during same period, they will be considered as 30 days and not 90 days (3 employees * 30 days).

Further, for couniting days only workdays will be considered. Any holidays or leave period will not be considered.

b) Activities performed by the deputed employee -Core or Stewardship activities

The key element in Service PE analysis is understanding what the secondee is doing in India.

Stewardship Activities: Stewardship activities typically involve:

- protecting the foreign enterprise's interest,
- ensuring adherence to group wide standards, and
- monitoring deliverables outsourced to the host entity.

5. *Linklater LLP(Mumbai Tribunal) [2019] 106 taxmann.com 195 (Mum – Trib.)*

Under current treaty rules, the concept of Virtual PE is not recognised in India.

Stewards do **not** engage in day to day operational management nor provide specific services to the Indian entity. Their presence is supervisory and protective in nature.

Accordingly, if deputed employees are engaged solely in stewardship activities, Service PE should not arise, as such activities are not considered "services rendered" to the host entity. This principle is endorsed by SC in the case of Morgan Stanley (referred supra).

Core or Operational Activities

Where secondees undertake activities beyond stewardship, such as managerial functions, operational execution, hands on project delivery, or roles integral to the foreign enterprise's business, there is a higher likelihood of Service PE exposure.

To summarize for evaluating the existence of PE, one need to apply holistic approach stitching all the relevant factors discussed above.

Virtual PE

Traditionally, a PE requires a physical presence in the host country, such as an office, branch, fixed place of business, or the presence of employees or agents. With increasing digitalisation, a common question is whether F Co. providing services remotely to customers in India can still create a "Virtual PE" in India.

Indian tax authorities have, at times, taken the position that the continuous and commercially significant provision of remote services to Indian clients may create a form of "virtual" or "economic" presence equivalent to physical presence. In their view, sustained digital interaction with the Indian market may amount to a functional nexus, leading to potential PE exposure.

However, Indian courts have not accepted this interpretation.

In ***Clifford Chance Pte Ltd***[6], it was held t was held that the treaty definition of PE is based on physical presence, and unless the DTAA expressly provides for a virtual or digital PE, such an interpretation cannot be imported. Therefore, under current treaty rules, the concept of Virtual PE is not recognised in India.

Taxability of PE income in India

Once a PE is constituted, the foreign enterprise becomes liable to corporate income tax in the host country on the profits attributable to that PE, based on attribution principles under the Authorized OECD Approach or equivalent domestic rules that allocate profits according to functions performed, assets used, and risks assumed. Where the F. Co. remunerates the PE at arm's length price, it could be argued that there is no further exposure for F. Co. in India. This view is endorsed by Apex court in the case of Morgan Stanley referred supra.

6. *Clifford Chance Pte Ltd [2025] 181 taxmann.com 254 (Delhi)*

Reimbursement of salary cost by I Co. to F. Co – whether FTS in India and whether liable to TDS

This question arises in **Scenario 1**, where F Co. pays the employee's salary overseas and subsequently **recovers the cost** from I Co.

Under Section 195 of ITA, I Co. must withhold tax on any payment to a non resident that is chargeable to tax in India. Pure reimbursements without income elements are generally not taxable.

In secondment cases, courts[7] have repeatedly held that where:

- I Co. is the real / economic employer, and
- the salary is taxed in India in the hands of the employee,

the reimbursement to F Co. is not income and therefore not subject to TDS.

The exception is Centrica, where the Apex Court held that even cost reimbursement can be characterised as FTS when secondees use their specialised expertise for the Indian business, making the payment taxable.

Post Centrica Judicial Trend

Subsequent High Courts and Tribunals[8] have narrowed Centrica, holding it to be fact specific. Where the Indian company is the true employer and the foreign company merely recovers actual salary cost without markup, the reimbursement is not FTS, hence no withholding is required.

Indirect Tax – secondment implications

In ***Northern Operating Systems (P.) Ltd***.[9] the Supreme Court held on those specific facts secondment amounted to a manpower supply service, taxable under reverse charge, because the foreign entity remained the real employer.

Following NOS, field officers initially treated most secondments as taxable. The Central Board of Indirect Taxes and Customs (CBIC) later clarified[10] that GST analysis must be **facts driven**, and where a genuine employer employee relationship exists with the Indian entity, Schedule III excludes such services from the scope of supply.

Remote Work: Recent OECD 2025 update

The OECD's 2025 update to the Model Tax Convention (19 November 2025) elevates remote work PE risks. Employers must now closely track where employees work and whose business they are serving.

An Indian employee working largely overseas may create a foreign PE; conversely, a foreign employee working mainly from India may trigger Indian PE exposure.

7. *Dy. DIT v. Tekmark Global Solutions LLC [2010] 38 SOT 7 (Mum.).Applied Materials India (P.) Ltd [2025] 176 taxmann.com 789 (Bangalore - Trib.); Toshiba Energy System & Solutions Corporation [2025] 181 taxmann.com 619 (Delhi - Trib.); Google LLC [2023] 147 taxmann.com 428 (Bengaluru – Trib); Flipkart Internet (P.) Ltd. v. Dy. CIT [2022] 139 taxmann.com 595/288 Taxman 699/448 ITR 268 (Ker.)*
8. *Refer decision at reference note 7*
9. *C.C.,C.E. & S.T. Bangalore v. Northern Operating Systems (P.) Ltd. [2022] 138 taxmann.com 359*
10. *CBIC Instruction 05/2023â€'GST (13 Dec 2023)*



The revised Commentary to Article 5 introduces a clearer framework for determining when a home office or other personal workspace constitutes a fixed place PE. Core tests include:

- regular and substantial use, with a commonly referenced 50% working time threshold,
- a commercial purpose for the foreign presence, and
- a refined "at the disposal" test, shifting focus away from whether work from home was mandated.

While not legally binding, the updated Commentary is highly persuasive and is expected to influence Indian PE assessments and tribunal decisions going forward.

Navigating ESOP Complexity: Multi Country Taxation, Employer Costs and Compliance Frameworks

ESOPs are now a central component of global compensation strategies, especially for attracting and retaining high value talent. ESOPs may be granted directly by the Indian employer to inbound or outbound employees, or by the foreign parent to employees of its Indian subsidiaries. ESOPs give employees a right, not an obligation, to acquire shares at a predetermined price and follow a defined grant–vest–exercise lifecycle.

Grant - Options are first granted or offered by the company to eligible employees which may be either high skilled employee or for long number of years in organisation.

Vesting: Options granted vest over a period as service or performance conditions are met. Vesting period could differ for different kind of employees and is determined based on the ESOP plan.

Exercise: Once the vesting period is over, employees have a right to exercise their options of buying shares either with or without exercise price, and the process concludes with the allotment of shares, at which point the employee becomes a shareholder.

Taxation of ESOP- two layered

Perquisite at the time of Exercise

Under Indian tax law, the exercise of ESOPs is treated as a taxable perquisite, in the hands of employees reflecting a benefit arising from employment. The taxable value is determined as per the difference between the Fair Market Value (FMV)[11] of the shares on the exercise date and the price paid by the employee, and this notional gain forms part of the employee's salary income.

Capital gains on sale of shares

Subsequently when the employee sells the shares, it will be taxable as capital gains. The perquisite value of ESOP will be considered as cost of acquisition of shares while computing the capital gains. For computing the capital gains as short term or long term, the holding period is considered from the date of allotment of shares.

Cross Border Movement – Allocation

ESOPs introduce their own set of cross border complications. At the employee level, India taxes ESOP perquisites on exercise as salary and capital gains on subsequent sale, when employees work across borders during the grant to vest period, a multicounty allocation becomes necessary.

In case of cross border assignments, close coordination between the finance, payroll, and mobility teams becomes essential. Grant, vesting, and exercise dates must be tracked with precision, and perquisite taxation should be allocated based on the proportion of days the employee has worked in India versus globally during the vesting period, with the India sourced portion subjected to payroll withholding at the time of exercise.

Indian tribunals have endorsed this proportionate taxation approach, most notably in case of ***Robert Arthur Keltz***[12], where the Delhi ITAT held that only the portion of the ESOP benefit linked to services performed in India during the vesting period is taxable in India, even if vesting and exercise occurred in India. The Tribunal emphasised that ESOP benefits accrue over the entire vesting period and must be taxed in line with where employment services were rendered. For mobility programs, that proportionate allocation approach is indispensable, and payroll teams must capture grant to vest day counts accurately across assignments.

11. *Fair market value of share is prescribed under Rule 3(8) of the Income tax Rules 1962. In the case of listed shares, it is the average price on stock exchange and in case of unlisted share, the value determined by the merchant banker.*
12. *Assistant Commissioner of Income-tax, Circle -48(1) v. Robert Arthur Keltz [2013] 35 taxmann.com 424 (Delhi - Trib.)*



Reporting of ESOPs

Resident taxpayers need to disclose ESOP of foreign parent company under foreign asset schedule in the Income tax return. The non-disclosure of foreign assets in the tax return could lead to penalty and prosecution under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015. The fFinance minister in the Union Budget 2026 has introduced the Foreign Assets of Small Taxpayer – Disclosure Scheme (FAST-DS), a one-time scheme for voluntary disclosure of unreported foreign assets or income by paying prescribed fees as may be applicable with immunity from penalty and prosecution under Black Money Act. The resident taxpayers who have not reported the ESOPs must take benefit of this scheme to avoid any adverse implications under Black Money Act.

Conclusion

Global mobility today triggers nuanced tax exposures from PE risks and reimbursement characterisation to GST on secondment and multi jurisdiction ESOP taxation. The principles from recent Indian rulings reinforce that taxability now hinges on economic substance and precise factual patterns. A robust governance framework around contracts, location tracking and ESOP allocation is essential to manage compliance and avoid disputes.

"The opinions expressed herein are our personal views and do not necessarily reflect the positions, strategies, or opinions of my employer or any affiliated entity."

■

" Failure will never overtake me
if my definition to succeed is strong enough. "

Dr. A.P.J. Abdul Kalam

VIRTUAL PRESENCE, REMOTE WORK AND TAX NEXUS



Prerna Peshori

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Overview

This article examines the fundamental shift in international tax nexus from physical work presence to virtual presence and WFH scenarios. The article evaluates the impact of virtual presence on different types of PE – fixed place PE, service PE and agency PE. A primary focus is placed on the ***OECD 2025 Update to the Model Tax Convention****, which introduces a new two-part framework for assessing PE risks in the era of cross-border remote work – the "50% working time" benchmark and the "commercial reason" test. The article further scrutinizes recent Indian judicial interventions, specifically the Delhi High Court's rejection of the "virtual service PE" theory in Clifford Chance, reinforcing the necessity of a physical footprint under current treaty language.*

The post-pandemic world has irrevocably altered the landscape of work. What began as a forced experiment during COVID-19 lockdowns has crystallised into a permanent structural shift — remote work, hybrid models, and "work from anywhere" policies are now entrenched features of global employment.

The structural foundations of international taxation, established nearly a century ago by the League of Nations, were centred on the requirement of a physical presence for the assertion of taxing rights by a source state to tax the business profits of a foreign enterprise. However, the evolution of global economy, characterized by rapid digitalization and the decoupling of business activity from physical locations, has fundamentally challenged the established framework of nexus principles. The evolution of virtual presence and the widespread adoption of cross-border remote work have necessitated a radical re-evaluation of nexus principles.



Remote Work and the Modernization of Permanent Establishment Risks

The central question confronting tax policymakers is: when an employee sits in one country and performs services for an employer or clients in another, where should the profits be taxed?

The business profits can be taxed in the source country only when there is Permanent Establishment (PE). The traditional nexus requirement as per Article 5 of the OECD Model Tax Convention, necessitates a fixed place of business, a dependent agent, or a sustained service presence to trigger taxation of foreign enterprise in the source state.

The global shift toward remote work has resulted not only in personal tax implications but also significant tax risks for multinational employers. When an employee works from a country other than the one where their employer is based, it can trigger a PE for the employer in the home country of the employee.

The presence of the employee in different jurisdiction can trigger fixed place PE, service PE or dependent agency PE. The implications for each of these have been discussed in the ensuing paragraphs.

1. Constitution of Fixed Place PE (Home Office PE)

The home office of the employee can trigger a fixed place if the following conditions are satisfied:

- The employee carries out the business of the non-resident employer from the home
- The home office is 'at the disposal' of the foreign enterprise - e.g., the enterprise requires the employee to work from there, provides equipment, or reimburses specific home office costs, implying a right to use or consistent use for business.
- There is a degree of 'permanence' to this arrangement i.e. work from home is not temporary or intermittent.
- Core business activities and not merely preparatory or auxiliary are carried on through this home office i.e. if the activities are in the nature of support functions, then the exclusion under Article 5(4) would be applicable, and there would not be any PE.

Judicial Rulings on Home Office constituting fixed place PE

The question of whether a home office constitutes a fixed place PE has not yet been judicially tested in India.

There are certain international rulings in this context.

a) Danish Tax Council Ruling [TS-741-FC-2020(DEN)]

Danish Tax Council held that a Danish national working from his home in Denmark as Head of Sales and Business Development due to Covid-19 constituted a PE of his German employer in Denmark as the employee's work was to market and sell a German company's products to European customers in Denmark.

b) Danish Tax Council Ruling in Sproger (UK Co.) [TS-303-FC-2021(DEN)]

Danish Tax Council had ruled that in a case where the employee was

performing his duties from home office in Denmark due to personal reasons, did not constitute the PE for the UK employer as the employee performed only internal marketing and sales role with a view to support the business, and was not responsible for financial, sales or strategic work. Referring to the job description of employee, the Danish Council observed that the UK employer did not require interacting with clients or signing contracts in Denmark but pertained to monitoring the market and providing internal support to colleagues. It further ruled that the employee did not play a significant role in conclusion of contracts for or on behalf of the UK employer, thus would not constitute dependent agent PE.

c) *Danish Tax Council in XYZ Co. [TS-278-FC-2021(DEN)]*

In another ruling, Danish Tax Council assessee-company (a non-resident in Denmark) does not have a permanent establishment in Denmark through its sole employee given that the employee's work was of helping and preparatory in nature.

d) *Danish Tax Council in Sporger [TS-510-FC-2022(DEN)]*

The Danish Tax Council had ruled that the home office constituted PE in a case where employee of German Company uses around 40%-50% of the working time to perform work in Denmark, as the significant part of this work was performed from the Employee's home office. It was observed that employee's task was to develop and the Nordic (including Danish) market, contacting with new potential dealers and that the German Company had a business interest in having the employee located in Denmark near its customers.

OECD Commentary on Home Office constituting PE

a) *OECD Commentary 2017*

The OECD Commentary 2017 para 18 provided that individual's home office should not directly constitute PE simply because that location is used by the employee.

If the home office is used on a continuous basis for carrying on business activities for an enterprise and the enterprise has required the individual to use that location to carry on the enterprise's business (e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office), the home office may be considered to be at the disposal of the enterprise.

The OECD Model 2017 update was framed when the home office concept was not prevalent. The structural shift in working patterns and home office becoming a permanent norm, required OECD to issue a detailed guidance on home office resulting in PE. On 19 November 2025, the OECD released the 2025 Update to the Model Tax Convention, the first comprehensive revision in nearly eight years.

b) *OECD Commentary 2025 Update*

The OECD Commentary 2025 Update has introduced 2 test to determine if the home office constitutes a place of business – 50% threshold test and commercial reason test.



The OECD Commentary 2025 provides that a home office shall constitute PE if:

i. It must be fixed place of business i.e. it should have certain degree of permanence and should be used on continuous basis i.e. activities carried out by an individual should not be occasional or intermittent. Merely use of home by an individual to carry out the business of employer shall not result in PE.

ii. **The Quantitative Threshold (The 50% Rule):**

A home office or other remote location is generally not considered a place of business if an employee works from that location for less than 50% of their total working time over any 12-month period commencing or ending in the fiscal year concerned. The formal employment agreements may be referred to ascertain the working time, provided they are in consonance with the actual conduct.

The OECD further clarifies that in circumstances where a place is used to perform the activities of the enterprise on a recurrent basis over several years, each period of time during which the place is used needs to be considered in combination with the number of times during which that place is used over a number of years.

iii. The Commercial Reason Test: Qualitative Assessment

For arrangements where an employee exceeds the 50 percent threshold, the determination of a PE depends on whether the employer has a "commercial reason" for the individual's presence in that country. A commercial reason exists when the employee presence serves a genuine business purpose for the enterprise—such as facilitating relationships with local customers, managing regional suppliers, or accessing a specific geographic market, interactions to facilitate different time-zones and that employee facilitates such engagement. The commercial reason may exist if the employee did not have the home in that jurisdiction, the employer would have rented some other premises. The intermittent activities or occasional visits shall not constitute the commercial reason. Further, mere presence of the customers or suppliers in the home country of employee shall not result in establishment of commercial reason for the use of home office by the employer.

The OECD clarifies that the home or the other relevant place does not necessarily have some productive character.

Crucially, the OECD clarifies that allowing an employee to work remotely solely for personal convenience, talent retention, or cost savings (e.g., reducing office space overhead) does not constitute a valid commercial reason. In such cases, the home office is not considered to be "at the disposal" of the employer, and thus no PE is created.

Views on the OECD 2025 Update

i. This update provides much-needed predictability in remote working situations by moving away from hypothetical "at disposal" test toward a factual assessment of time and purpose.

ii. The erst-while at disposal test was not suitable in the context of the work from home scenarios as the home may not technically be at the disposal of the Non-resident employer. By providing a commercial reason test, the OECD has focussed on substance over the form approach i.e. the test reflects on role of employee in advancing the business of employer, whether the functions performed by employee are core business functions or are support functions, whether the employee is acting as establishing the foot print of employer in its home country.

iii. The Commercial reason test prevents the constitution of PE in scenarios when remote work is driven purely by employee convenience or talent retention or mere presence of customers or suppliers in the home country of employee are incidental. However, in scenarios where the suppliers/customers or associate enterprises are based in home country of employee and the employee is required to serve them, it creates a high burden of proof for the taxpayer to demonstrate why the employee was working from home. If an employee provides "time zone coverage" or interacts with local clients continously, the location becomes "at the disposal" of the enterprise because it facilitates business, regardless of

whether the employer pays for the home office. Where the employee makes visits to client are on an intermittent and incidental basis, there is no commercial reason for him to carry out activities related to the business of non-resident employer (Example E of OECD Commentary). Therefore, it becomes necessary for the multinational enterprises to maintain the clear description of policies in case of WFH set-ups as to what shall be the role of the employees, what shall be the functions performed and how their presence in a particular country would facilitate their business in that country.

iv. The introduction of the 50% working time benchmark can be viewed as a vital "safe harbor" that provides much-needed predictability in the "work-from-anywhere" era. The OECD has attempted to eliminate the actions of tax authorities to allege home office constituting the PE even in occasional circumstances, which may just create the administrative and compliance burdens. However, the OECD has highlighted that one needs to look into actual conduct and the contractual arrangements if it aligns with actual conduct. This would require the MNEs from "paper-based" compliance to active workforce tracking.

India's Divergent Position

India does not accept the 50% working-time threshold or the commercial-reason requirement. Instead, Indian tax authorities continue to apply a broader interpretation of the "at disposal" test, potentially creating a higher PE risk for companies with India-based remote workers.

The India's reservation serves as an interpretative value but is not binding unless the reservations were incorporated in the tax treaties[1].

Home office as PE in case of consultants working from home

The OECD Commentary provides that where an individual is the only person, or the primary person, conducting the business of an enterprise, eg a consultants where she carries on most of the business activities of her own consulting enterprise from an office set up in her home, home office constitutes a place of business of the enterprise.

This shall have impact on the businesses led by founders, one person LLCs, partnership firms, where the partners or the members carry out the core business functions from their home.

2. Remote working triggering Service PE

Many Indian DTAAs include a 'service PE' clause (e.g., Article 5(3)(b) or 5(6)(a)). This deems a PE to exist if an enterprise furnishes services, including consultancy services, through employees or other personnel physically present in India for a period exceeding a specified duration (e.g., six months in any 12-month period, or 90 days for India-USA DTAA).

1. *Kolkata tribunal in the case of Right Florists (P.) Ltd. had held that the reservations on the OECD Commentary are relevant only to the extent that OECD Commentary and cannot be used as evidence of India's intentions when interpreting a tax treaty, unless the treaty text itself adopts or aligns with the OECD position [2013] 32 taxmann.com 99 (Kolkata - Trib.)*

The OECD Commentary does not provide any guidance on the remote working or virtual presence triggering the service PE.

Judicial Rulings on Service PE

a) Supreme Court in the case of ***Morgan Stanley***[2] was a pivotal ruling in the context of Service PE, wherein the Supreme Court had observed that Article 5(2)(l) applies in cases where the MNE furnishes services within India and those services are furnished through its employees. It held that the Stewardship activities that ensures that the quality control and the output meets the requirements of the foreign entity (customer) is to protect the interest of the foreign entity and shall not result in PE.

   This ruling was in the context of where the employees were furnishing the services physically in the source state.

b) Delhi High Court in the case of ***Clifford Chance***[3] rejected the notion of a "virtual service PE" under existing DTAAs where the services were provided by the employees virtually to the customers more than 90 days. The court examined Article 5(6)(a) of the India-Singapore DTAA, which stipulates that a PE is created if an enterprise furnishes services "within" a Contracting State through employees for more than 90 days.

c) The revenue department argued that rapid digitization allows companies to provide continuous services without a physical presence, thus establishing a virtual PE. However, the court ruled that the term "within" implies a physical footprint. It held that virtual service delivery from outside India cannot be counted toward the threshold. Furthermore, the court emphasized that days spent by employees in India on vacation or for business development (non-billable activities) must be excluded from the calculation.

This ruling reinforces a fundamental principle of treaty interpretation that taxability must follow the express language of the bilateral agreement. Until a DTAA is specifically renegotiated to include virtual or digital service provisions, physical presence remains the determinative factor for a Service PE.

3. Remote working triggering Agency PE

Article 5(5) of DTAAs typically provides for an agency PE if a person (other than an independent agent) habitually exercises an authority to conclude contracts in the name of the enterprise, or plays a principal role leading to the conclusion of contracts in India or habitually maintains stock for delivery. A dependent agent working remotely from India, if meeting these criteria, could still constitute an agency PE.

4. Preparatory and Auxiliary Activities (Article 5(4))

DTAAs exclude activities of a preparatory or auxiliary character from constituting a PE. Even in the context of remote setup, where

2. *[2007] 162 Taxman 165 (SC)*
3. *[2025] 181 taxmann.com 254 (Delhi)*

the activities are support functions or are preparatory in nature, the PE shall not be constituted. The OECD Commentary 2025 notes that if the activities carried out from home office are merely incidental, the home office shall not constitute the PE. However, if the activities are integral to the core business, or if the overall activity resulting from combining fragmented operations is not preparatory/auxiliary (as per MLI anti-fragmentation rules), this exception will not apply.

Practical Guidance for Businesses and Professionals

Risk Assessment Framework

Given the evolving and fragmented global landscape, businesses with cross-border remote work arrangements should adopt a structured approach to managing tax nexus risk:

- ***Maintain records with respect to roles and responsibilities of employees:*** The employers needs to identify the employees working in key roles (heads, senior managers, CFOs) who perform the core functions, their visits to particular locations of customers/suppliers, functions carried out, time spent.

- ***Setting clear WFH policies and procedures:*** The employers needs to keep proper policies in respect of WFH i.e. whether these are allowed to provide flexibility, personal reasons, sick days and that whether these policies are temporary.

- ***Apply jurisdiction-specific analysis:*** Do not rely solely on OECD safe harbours. Assess local PE rules, enforcement practices, and any reservations to the OECD Commentary — particularly for India, which has rejected the 50 percent threshold and the commercial threshold.

Record-Keeping Imperatives

The OECD Update 2025 highlights the importance of meticulous record-keeping by the multinational enterprises. The taxpayer's ability to produce time-stamp sheets, leave records from internal systems, and declarations regarding the nature of activities performed during physical presence in India was instrumental in the favourable outcome. Businesses should maintain:

- Remote working policy duly highlighting that the same has been allowed temporarily and given to provide flexibility

- Evidence that remote work was driven by personal convenience rather than business necessity, where that is the case

- Working records of the employees with respect to number of days they have worked from home

- Clear job descriptions duly highlighting the functions performed by the employees, the roles assigned to employees

- Records of the commercial purpose (or absence thereof) for remote work in each jurisdiction

■

PLACE OF EFFECTIVE MANAGEMENT: CORE LEGAL PRINCIPLES, JUDICIAL PRECEDENTS, AND THE INTERPLAY WITH PERMANENT ESTABLISHMENT



Bhakti Vaidya

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Overview

Indian tax authorities and the evolution of Indian tax laws have been consistently advocating the principle of substance over form. In light of same, determination of the tax residency of an entity is an important step, as it defines the basis and scope of taxation. The concept of place of effective management serves as the primary test for determining a company's tax residency under Indian domestic law and tax treaties.

The article traces the history and legislative incorporation of the POEM principle into the Indian tax framework. It further goes on to highlight the core legal and interpretational principles governing POEM, with particular emphasis on the guidance issued by the Central Board of Direct Taxes and the judicial principles laid down by Indian and foreign courts. The discussion focuses on identifying where key management and commercial decisions necessary for the conduct of the company's business as a whole are, in substance, made.

The article also explores the interesting interplay between POEM and the concept of permanent establishment clarifying how the two tests operate in distinct yet overlapping contexts.

Introduction

'Place of Effective Management' (POEM) is a key concept in international taxation, which serves as the mechanism to determine the tax residency of a company. It is specifically relevant today where globalisation has blurred international borders, enabling businesses to structure their operations across multiple jurisdictions. In such a landscape, determining the tax residency of the company becomes both complex and critical. POEM helps identify the place where a company is actually controlled and managed, thereby assisting in determining which jurisdiction should get the taxing rights.

POEM helps identify the place where a company is actually controlled and managed, thereby assisting in determining which jurisdiction should get the taxing rights.



Historical context and relevance of POEM

The taxation of income depends fundamentally on the residential status of the person. Prior to its amendment by the Finance Act, 2015, the Indian domestic law considered a foreign company a tax resident of India only if its control and management were situated wholly in India during the relevant year. This allowed scope for tax avoidance for companies, who could attempt to artificially escape the residential status under these provisions by shifting insignificant or isolated events related with control and management outside India.

To address these concerns, the corporate residency test was amended from the control and management being wholly in India to the place of effective management of the company and the POEM based residency parameter was introduced with effect from 1 April 2017, aligning India's domestic law to the internationally accepted standards.

Under the provisions of the Income-tax Act, 1961 (Act), section 6(3) of the Act (section 6(10) of the Income-tax Act, 2025), dealing with residential status of companies provides that a company is said to be resident in India in any previous year if

(i) It is an Indian company; or

(ii) Its POEM is in India

Under the Income-tax Act, 2025, similar to the Income-tax Act, 1961, POEM is defined as *"the place where key management and commercial decisions necessary for the conduct of business of the company as a whole are, in substance, made."*

Under the Act, a foreign company would be treated as an Indian tax resident if key management and commercial decisions are in substance, taken from India. In such a scenario, the company is treated as an Indian resident for tax purposes, and its global income, not merely income sourced from India, becomes subject to taxation in India.

The CBDT guidelines provide that the determination of the POEM is a fact-based exercise and the overarching principle is that of substance over form.

Most tax treaties entered into by India incorporate the concept of "place of effective management" as a tie-breaker rule to resolve cases of dual corporate residence and thereby prevent double taxation. The concept is specifically recognised in Article 4 (Resident) of the OECD Model Tax Convention on Income and on Capital and Article 4 of the United Nations Model Double Taxation Convention between Developed and Developing Countries, both of which provide that, in cases of dual residence, a company's residence may be determined by reference to its place of effective management.

Accordingly, the introduction of the POEM test marks a conscious move towards 'substance-over-form' principles for corporate residency, in line with global tax principles and tax treaties.

Guidance on determination of POEM issued by tax authorities

To provide practical guidance on the application of POEM, the Central Board of Direct Taxes (CBDT) issued a series of circulars in 2017[1] which lay down the criteria for determining a company's POEM.

At the outset, the CBDT provided a threshold that the POEM guidelines would not apply to a foreign company having turnover or gross receipts of INR 50 crore or less in a financial year.

The CBDT guidelines provide that the determination of the POEM is a fact-based exercise and the overarching principle is that of substance over form. It is not determined merely by the place of incorporation, location of board meetings on paper, or routine administrative functions. The focus for determining POEM must be on where key management and commercial decisions necessary for the conduct of the business as a whole are actually made.

Both the CBDT guidelines, as well as the commentary to the OECD model tax convention clarify that though a company may have multiple places of management, it can have only one place of effective management at a given point in time. Further, since residence is determined separately for each financial year, POEM must also be evaluated year by year.

1. *Circular No. 6 of 2017 dated 24 January 2017 and Circular No. 8 of 2017 dated 23 February 2017*

The process of determination of POEM would be primarily based on whether or not the company is engaged in active business outside India.

1. *Whether the company has active business outside India:*

   A foreign company is presumed not to be resident in India if it is engaged in active business outside India (ABOI). A company is said to be engaged in ABOI if:

   (a) Passive income (royalties, dividends, capital gains, interest, rent) is less than 50% of total income;

   (b) Less than 50% of total assets are situated in India;

   (c) Less than 50% of total employees are in India or are resident in India; and

   (d) Payroll expenses incurred on Indian employees are less than 50% of total.

   If all these conditions are met, POEM is presumed to be outside India, unless the tax authorities establish otherwise.

2. *Determination of POEM where the company does not have ABOI*

   If a company does not satisfy the ABOI test, a more detailed examination is required. The CBDT prescribes a two-stage process:

   a. Identification and determination of the decision makers, who actually makes the key management and commercial decisions necessary for running the company's business as a whole.

   b. Determination of the place where these decisions are, in substance, taken.

The guidelines also clarify that the place where these management decisions are taken would be more important than the place where such decisions are implemented.

Some of the guiding principles laid down by CBDT for determining the POEM are as follows:

- The place where the company's board regularly meets and makes decisions can be considered as the POEM, provided that the company's board retains and exercises its authority to govern the company, and does, in substance, make the key management and commercial decisions necessary for the conduct of the company's business.
- Where the board has delegated the authority to make key management and commercial decisions for the company to the senior management or any other person, and does nothing more than ratify such decisions, then the POEM would be the place where such senior management or other persons make those decisions.
- If the company's board has delegated some or all authority to an executive committee consisting of members of the senior management, the location where the members of such committees are based, and where that committee

develops and formulates the key strategies and policies for approval of the board, will be relevant.

- The company's head office location is often a strong indicator of POEM. If senior management and their support staff operate from a single location that is publicly presented as the headquarters, that place is likely to be the head office. Although, where management is highly decentralised and no clear head office can be identified, this factor carries limited weight.

- With technology permitting virtual meetings, decision makers no longer need to be physically present in one location. As a result, the formal venue of board meetings may not reflect where key decisions are actually made. In such situations, the usual residence of directors or the majority of decision-makers becomes an important factor in determining the POEM.

- In cases of circular resolutions, relevant factors include how frequently this method is used, the nature of decisions made, and the location of the persons involved. Instead of merely looking at the proposer of a decision, past practices and actual conduct need to be examined to identify who truly holds and exercises decision making authority, and his location.

- Decisions reserved for shareholders under company law, such as the sale of substantial assets, liquidation, etc, are generally not relevant for determining POEM. However, if shareholders restrict the board's authority to the extent that real decision-making power is removed, their role may amount to exercising effective management.

- Routine operational decisions undertaken by junior or middle management are not relevant for POEM purposes as they relate to day-to-day business oversight. In contrast, key management and commercial decisions involve strategic direction and policy-level determinations affecting the enterprise as a whole.

The primary principle remains that the determination of POEM is to be based on all relevant facts related to the management of the company, and is not to be determined on the basis of isolated facts that by itself do not establish effective management.

Interplay between place of effective management and permanent establishment

Where the POEM of a foreign company is in India, it is deemed to be a tax resident in India and the global income of the company is taxable in India at the rates applicable to a foreign company (ordinarily at 35% plus applicable surcharge and cess). Where the POEM of the company is not in India, or where the POEM provisions do not apply on account of the turnover being less than INR 50 crore, only income received, accruing or arising (or deemed to accrue or arise) in India would be subject to tax in India.

A common question arises that if an overseas entity has turnover of less than INR 50 crore and/or POEM does not trigger under Indian tax law, can there still be exposure to constituting a Permanent Establishment (PE) in India?

In this regard, it is relevant to note that a foreign company which is not a tax resident

of India or exempt from the applicability of the POEM provisions and guidelines, could still be subject to tax in India with respect to income it earns in India through a business connection or PE in India.



While POEM determines residential status and determines taxability as a resident as discussed above, PE determines the extent of source-based nexus and taxation for non-residents. In essence, POEM determines whether the company is resident in India and PE considers that if the company is not a resident, does it still have a taxable business presence in India.

Even where a foreign company is not resident in India (i.e., POEM is outside India/POEM guidelines are not applicable), it may still be taxable in India if it carries on business through a business connection in India under domestic law or PE under the applicable DTAA.

A PE typically refers to a fixed place of business (say branch, office), a dependent agent, or the furnishing of services through group entities or personnel, through which business activities are carried out. If a PE exists in India, the profits attributable to the PE are taxable in India. The global income of the company remains outside the Indian tax net and the taxation is limited to the business profits, connected with the Indian operations. POEM determines whether a foreign company becomes subject to comprehensive residence-based taxation in India. In contrast, PE operates as a nexus rule, permitting India to tax only those profits attributable to business activities carried out within its territory by a non-resident enterprise. Thus, PE does not alter residence; it merely creates a taxable presence for a non-resident.

Key Indian and foreign jurisprudence on POEM

While POEM as a concept was introduced in India from 1 April 2017, internationally, both domestic laws across the globe as well as tax treaties, and the OECD and UN model

tax convention, have long recognised the principles of POEM for a test of corporate residency.

One of the landmark decisions globally with regard to corporate residency, is the decision of the House of Lord's in the case of ***De Beers Consolidated Mines Ltd v. Howe [1906] A.C. 455 (H.L.) (Eng.)*** which has been referred to in various jurisdictions across the globe, including in various judicial precedents by Indian courts in the context of 'control and management'. In the said case, the South African company was held to be resident of United Kingdom as the London office controlled key management decisions establishing that for tax purposes, a company resides where its real business is carried on, specifically where central management and control abide, not merely where it is incorporated.

While De Beers lays down some of the founding principles with regard to corporate residency, below are a couple of other decisions from across the globe that provide useful guidance on POEM:

- In ***R.A. Hewitt & Sons Ltd. v. The Queen 2000 DTC 2441 (TCC),*** the Canadian tax court examined the POEM of a Bahamian subsidiary. Although the company was formally incorporated in the Bahamas, the Court focused on where central management and control was actually exercised. Evidence showed that key strategic, financial, and commercial decisions were made in Canada by the parent's executives, while the Bahamian directors had a largely formal role and the subsidiary lacked independent operational substance. Applying a substance-over-form approach, the Court held that the subsidiary's real business was effectively run from Canada, making its POEM, and therefore its tax residence, Canadian. The decision emphasizes that mere incorporation in a low-tax jurisdiction, without genuine managerial autonomy and commercial substance, is insufficient to establish foreign tax residence when effective control lies elsewhere.

- On the other hand, the Italian Supreme Court in case of Agusta Holding BV (decision no. 14527/2019) held that the place of effective management is where managerial activities are actually carried out and where directors' meetings are held, and not solely where directors are tax resident. It also held that merely managing shareholdings is consistent with a holding company's nature and should not be considered as a presumptive element to qualify a company fictitiously constituted abroad.

It is therefore critical to note that the determination of POEM is inherently factual, requiring a case-by-case analysis of substance over form.

Given POEM's relatively recent introduction in the domestic tax law in India, most jurisprudence in India is with regard to POEM under the DTAA, or on the 'control and management' test of residency. The Hon'ble Supreme Court in the case of ***Mansarovar Commercial Private Limited (294 Taxman 513)*** held that the term "management and control" of a company means where the head, seat and the directing power of the business affairs lie. It is not merely theoretical or de jure control and power, but de facto control and power actually exercised in the course of the conduct and management of the affairs of the company. Further, the domicile and

registration of company is not relevant and the determinate test is where sole right to manage and control of company lies.

Further, while evaluating the entitlement of non-residents to tax treaty benefits under the applicable DTAA, the tax authorities have often sought to evaluate whether the 'control and management' / effective management of such entity is in the country of residence / incorporation.

In the recent decision of the Hon'ble Supreme Court in the case of ***AAR v. Tiger Global International II Holdings (182 Taxmann.com 375)*** in the context of treaty eligibility, the Court has noted the concept of POEM. While the decision ruled on a different subject matter and context, it reinforces a substance-over-form approach and underscores the continued relevance of POEM in assessing corporate residence and treaty claims, more-so in the context of structures, where the control and management of the foreign company is with shareholders or persons in another jurisdiction.

There have also been multiple decisions on POEM by Indian tribunals in the context of shipping companies.

In the case of ***Interworld Shipping Agency LLC v. DCIT (189 ITD 213),*** a United Arab Emirates (UAE) incorporated company in the business of international shipping, claimed exemption from tax in India relying on the India-UAE DTAA, which was denied on the basis that the company was effectively controlled by a Greek national and was thus, not managed wholly from the UAE. The Mumbai Tribunal noted that the assessee had a valid UAE incorporation, operated from UAE for multiple years and employed expatriate staff with work permits and the key managerial person, although a Greek national, had resided in UAE for over 300 days. The Tribunal held that POEM was in UAE and the entity had bona fide business operations, and granted the benefits under the India-UAE DTAA.

In the case of ***Pearl Logistics & Ex-IM Corporation v. ITO, International Taxation (80 taxmann.com 217),*** the Rajkot Tribunal held on the basis of various documents produced by the assessee such as TRC, passport of the director to prove residency of the director, proof of Danish registration, that since all significant decisions were effectively taken in Denmark and the business was operating from Denmark, the POEM was in Denmark and allowed the benefits under the India-Denmark DTAA.

On the other hand, in the case of ***DCIT v. Bay Lines International (172 taxmann.com 857),*** the benefits of Article 8 (Shipping and air transport) were denied to a company incorporated in Mauritius on the basis that the POEM of the company was neither in Mauritius or in India and was in a third country (i.e. UAE). Hence, the benefits of Article 8 were not available in such case. The Mumbai Tribunal noted that of the four directors of the company, two were in Mauritius and two in UAE, but the shareholding was entirely with the two directors in UAE. It noted that key management decisions were made from Dubai, where the controlling shareholders and principal decision-makers were based. In this scenario, the income of shipping business could be taxed where it maintained a permanent establishment. This was in line with the Mumbai tribunal's decision in the case of the same assessee (Bay Lines Mauritius) in a prior assessment year (91 taxmann.com 110) where similar observations

were made and benefit under the treaty was denied. The judgment also relied on the principle set out in Klaus Vogel's commentary as per which if the effective management of a company was not situated in one of two contracting states but was in a third state, the benefits of Article 8 would not be available.

A similar principle was established in the case of ***ARC Line (Mauritius) v. DCIT (180 ITD 659)***, where assessee-company, incorporated in Mauritius, was engaged in business of shipping and claimed income from shipping activities as exempt taking support of Article 8 of DTAA entered into between India and Mauritius. The Mumbai Tribunal held that though the company was registered in Mauritius since the major policy decisions were taken at UAE, effective management of assessee was neither in Mauritius nor in India but in a third country, and the assessee was not entitled for the DTAA benefit claimed by it.

The POEM guidelines provide useful guidance on structuring the decision-making processes of foreign entities to mitigate residency exposure and it is necessary that it is backed by appropriate documentation and conduct.

Conclusion

In light of the evolving international tax landscape, shaped by the implementation of the OECD's BEPS action plans, the multilateral instrument, and the introduction of general anti-avoidance rules, the shift from form to substance is no longer aspirational but imperative. Corporate residency must now be determined on a substantive evaluation of where key management and commercial decisions are in fact made, requiring a careful and comprehensive factual inquiry.

The POEM guidelines provide useful guidance on structuring the decision-making processes of foreign entities to mitigate residency exposure and it is necessary that it is backed by appropriate documentation and conduct. As jurisprudence continues to develop, POEM is expected to remain an important consideration in international tax structures and the primary determinant for corporate residency and taxation.

■

" Once your mind stretches to a new level
it never goes back to its original dimension. "

Dr. A.P.J. Abdul Kalam

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Overview

With the advent of the New Economic Policy of 1991 and as part of globalization, many foreign investors entered the Indian market in the 1990s and early 2000s which led to an integration of domestic companies into multinational entities and consequent surge in the intra-MNE transactions. Whilst the growing involvement of multinational groups in India's economic activities gave the economy a much-needed boost, it came with its share of challenges.

One such challenge was in the form of capital erosion and profit shifting as multinational groups often manipulated intra-group pricing to artificially reduce the profits reported by their Indian entities, thereby significantly eroding the tax revenues.

This necessitated the introduction of 'Transfer Pricing regulations' – a statutory framework which could monitor the intra-group transactions and ensure the computation of reasonable, fair and equitable profits and tax in India in respect of such intra-group transactions.

*This article traces the trajectory of **Indian Transfer Pricing jurisprudence** from the post-1991 era of globalization to the modern mandates of Income-tax Act, 2025. It specifically analyses **three critical "litigative minefields"**: the shifting definition of Associated Enterprises, the collision of conflicting regulatory regimes such as FEMA, Customs, and Tax, and the ever-evolving rigorous scrutiny of Intra-Group Services.*

I. Introduction

The introduction of Chapter X under the Income-tax Act, 1961 ("ITA 1961") viz. the 'Transfer Pricing regulations' via the Finance Act, 2001, marked a turning point in India's tax history, designed to prevent profit shifting and ensure fair taxation in transactions within multinational groups. Over the past twenty years, this regulatory landscape has matured significantly, shaped by a continuous cycle of statutory amendments and robust judicial scrutiny.

This article delves into the relevant provisions of ITA 1961, its history and the nuances surrounding certain critical facets of transfer pricing litigation.

II. Associated Enterprise – a tumultuous past and an uncertain future

Background

The basic premise of Chapter X of ITA 1961 is that "any income arising from an international transaction entered into between two or more associated enterprises shall be computed having regard to the arm's length price."

While almost each term mentioned above has seen some form or the other of litigation, one of the most controversial topic in transfer pricing jurisprudence is the interpretation of "associated enterprise". This term assumes importance as it is only such international transactions which are entered into between the 'associated enterprises', that would be subjected to the provisions of Chapter X.

The term 'associated enterprise' is defined under section 92A of the ITA 1961 which is divided into two sub-sections.

— Sub-section (1) thereof *(which is infact in line with sub-paragraphs 1(a) and 1(b) of Article 9 of the OECD Model Tax Convention*) provides that two enterprises are 'associated enterprises' if one of the enterprises participates directly or indirectly in the management, control, or capital of the other or if the same persons participate directly or indirectly in the management, control, or capital of both enterprises (viz. if both enterprises are under common control).

— Section 92A(2) on the other hand, originally provided that two enterprises shall also be deemed to be associated enterprises if, at any time during the previous year, the enterprises satisfied one of the thirteen criteria specified in the said section.

Sub-section (2) was then retrospectively amended by Finance Act, 2002 to clarify that the mere fact of participation by one enterprise in the management or control or capital of the other enterprise, or the participation of one or more persons in the management or control or capital of both the enterprises would not make them associated enterprises, unless the criteria specified in sub-section (2) are fulfilled[1]. It is in light of this amendment that the interpretation of 'associated enterprise' has led to litigation before the Courts.

Controversies settled in litigation

One of the first cases where section 92A was examined in depth was in the decision of ***Diageo India (P.) Ltd***[2], where the Hon'ble Mumbai Tribunal held that the definition of 'associated enterprise' contained in section 92A(1)(a) and (b) is the "basic rule" and in terms of this basic rule, whether one enterprise controls the decision making of the other or whether decision making of two or more enterprises are controlled by same interests, these enterprises are required to be treated as 'associated enterprise'. The Tribunal further held that all clauses of deeming fiction set out in section 92A(2) are only illustrations of the manner in which the de facto control on decision making exists, which are required to be interpreted in a manner so as to make them workable.

1. *Explanatory Memorandum to Finance Bill 2002*
2. *[2011] 13 taxmann.com 62 (Mumbai)*

The foregoing principle that – sections 92A(1) and (2) of ITA 1961 are required to be read together and both the sub-sections cannot be read independently, has yet again been followed by the Hon'ble Special Bench of Tribunal in the case of TBEA Shenyang Transformer Group Company Limited

In the subsequent decision of ***Kaybee (P.) Ltd v. ITO***[3], the Hon'ble Mumbai Tribunal has categorically held that sub-section (1) of section 92A is "not subjected to" sub-section (2), which in turn is a deeming fiction that enlarges the scope and meaning of expression 'associated enterprise' provided under sub-section (1) of section 92A. The Tribunal hence concluded that if the conditions provided in clause (a) and (b) of section 92A(1) are independently satisfied, then the two enterprises would be treated as associated enterprises. From this decision, it may be inferred that so long as conditions of section 92A(1) are satisfied, provisions of section 92A(2) need not be looked at.

However, a contrary view was expressed in the case of ***Page Industries Ltd v. DCIT***[4] wherein the intention of the 2002 amendment (*supra*) was taken into consideration and it was unequivocally held by the Hon'ble Bangalore Tribunal that in order to constitute relationship of an 'associated enterprise', the parameters laid down in both sub-sections (1) and (2) of section 92A should be fulfilled. The Tribunal went on to further hold that interpreting the aforesaid provisions in any other manner whatsoever would render them otiose. This ruling was also followed by the Hon'ble Ahmedabad Tribunal[5] which held that as long as the provisions of one of the clauses in section 92A(2) are not satisfied, even if an enterprise has a de facto participation in capital, management or control over the other enterprises, the two enterprises cannot be said to be associated enterprises. It may be appreciated that over the years, both the above-mentioned decisions have been approved by the respective High Courts[6] and SLPs filed by the revenue authorities dismissed by the Supreme Court[7].

The foregoing principle that – sections 92A(1) and (2) of ITA 1961 are required to be read together and both the sub-sections cannot be read independently, has yet again been followed by the Hon'ble Special Bench of Tribunal in the case of TBEA Shenyang Transformer Group Company Limited[8]. Recently, a connected issue arose for adjudication in ***Neovantage Innovation Park Private Limited v. ITO***[9]. In this case, the legislative intent of using the expression "at any time" in section 92A(2) was elaborately discussed and it was held that the fulfilment of conditions of section 92A(2) may happen either before or after the relevant transactions.

To summarize, as on date under the ITA 1961, when an assessee has participated in control, capital or management of the other enterprise in terms of section 92A(1), the assessee would not be treated as an 'associated enterprise' of

3. *[2015] 43 ITR(T) 234 (Mumbai)*
4. *[2016] 71 taxmann.com 172 (Bangalore - Trib.)*
5. *ACIT v. Veer Gems [2017] 77 taxmann.com 127 (Ahmedabad - Trib.)*
6. *PCIT v. Page Industries Ltd. [2021] 431 ITR 409 (Karnataka); PCIT v. Veer Gems [2018] 407 ITR 639 (Gujarat)*
7. *Special Leave to Appeal (C) No(s). 11465/2021; SLP (Civil) Diary No(s). 37719 of 2017*
8. *ITA No. 581/Ahd/2017, order dated November 11, 2024*
9. *ITA Nos. 923 And 924/Hyd/2024, order dated September 10, 2025*

such other enterprise unless the conditions set out in one of the clauses of section 92A(2) are satisfied at any time during the year – before or after entering into the transaction.

Expectations from future

With the primary aim to simplify the language and remove redundant provisions, Income-Tax Bill, 2025 ("IT Bill 2025") was introduced in Lok Sabha on February 13, 2025, which sought to replace ITA 1961. The IT Bill 2025 essentially retained the existing provisions of ITA 1961, albeit with a simplified language.

Clause 162 of IT Bill 2025 defined 'associated enterprise' in a similar fashion as that to section 92A of ITA 1961, except for one glaring difference viz. change in the language of sub-section (2). The opening words of section 92A(2) reads as "*For the purposes of sub-section (1)…..*" which has been held by the Courts to be read together with sub-section (1) in order to determine the existence of 'associated enterprise'. On the other hand, sub-clause (2) of clause 162 of the IT Bill 2025 starts as "*Without affecting the generality of the provisions of sub-section (1)….*". These wordings, though meant to be simple to understand, would have redefined the already settled position of law on this aspect i.e. giving rise to yet again the old interpretation that both sub-clauses of clause 162 are to be read independently of each other.

Having regard to the possible litigation which may arise as a result of the altered language, the Select Committee in its report presented to Lok Sabha on July 21, 2025, inter alia, recommended to reinstate the earlier phrase "for the purposes of sub-section (1)" in the opening line of sub-clause (2) of clause 162 of the IT Bill 2025 in place of the proposed phrase "Without affecting the generality of the provisions of sub-section (1)".

Under Income-tax Act, 2025 ("ITA 2025") enacted on August 21, 2025, section 162 was completely revised such that the clauses in the erstwhile section 92A(2) have now been subsumed under section 162(1) while simultaneously making all but one clause mutually exclusive from the condition of one enterprise exercising *de facto* participation in capital, management or control over the other enterprise. Only clause (a) of section 162(1) now requires satisfaction of the condition of one enterprise exercising direct or indirect participation in the capital, management or control over the other enterprise. As a sequitur, clauses (b) through (l), which enumerate scenarios such as advancing of loan, provision of guarantee, supplying of raw material, usage of technical know-how owned by another enterprise, etc. would now have to pass the 'AE' test even without any participation in the capital, management or control.

To explain with an example, under ITA 1961, if a Foreign Bank advances a loan to an enterprise i.e. Company A such that it constitutes minimum 51% of the book value of the total assets of the company, the said Foreign Bank would become the AE of Company A only when the condition of direct or indirect participation in capital, management or control is also fulfilled [section 92A(2)(c) r.w.s. 92A(1)]. However, now as per clause (b) of section 162(1) of ITA 2025, what appears is that the Foreign Bank, even without any direct or indirect participation in the management or control or capital, would become the AE of Company A if the loan advanced to it constitutes minimum 51% of the book value of its total assets. If this interpretation is indeed true, the Indian banking industry faces a staggering new reality: thousands of routine lending relationships and guarantees arrangements scattered globally could overnight be reclassified as 'AE' transactions!

A similar difficulty may be faced by a manufacturer sourcing 90% of its raw materials from a single vendor—whether driven by decades of trust, competitive pricing, or logistical convenience—automatically creating an AE relationship [section 162(1)(g) of ITA 2025]. Even the global procurement of crude oil for refineries could inadvertently trigger these provisions. In monopolistic or highly concentrated industries, businesses that are forced to source nearly all their raw materials from a single dominant player would now find that player identified as an 'AE'. This would create a paradoxical situation where a purely arms-length, 'take-it-or-leave-it' commercial relationship with a monopolist is treated as an AE transaction for tax purposes – for both the supplier and buyer.

Therefore, under ITA 2025, ostensibly the commercial threshold alone would be enough. This shift would definitely lead to the bizarre reality where third-party lenders or vendors may become AEs overnight based purely on balance sheet fluctuations and the volume of business, regardless of participation or lack thereof in the management, capital and control. Constant monitoring of asset portfolios and supply chains is now a compliance necessity to identify "accidental" AEs that previously wouldn't have qualified!

If one goes by the intent of ITA 2025, then despite the way in which section 162 has been worded, the dual condition viz. control/management/capital coupled with the other conditions contained in the respective clauses would have to be satisfied for an enterprise to be considered as an 'AE'. However, if one simply goes by the language of section 162(1), it appears that the condition of control/management/capital is restricted qua the clause of holding of shares carrying not less than 26% of voting power and not the remaining 11 clauses – clauses (b) to (l). Given these altered provisions, has the legislature purposefully widened the ambit of 'AE' or should the interpretation continue to be guided by the Court precedents?

Another interesting aspect is that because the DTAA's criteria for direct or indirect participation in management, capital, or control may be more favourable than section 162 of ITA 2025, it is debatable whether taxpayers can use these treaties to move entirely outside the ambit of Transfer Pricing provisions.

Conclusion

Whilst the jurisprudence on this issue seemed to have been fairly settled under the ITA 1961, the differing language used in the new and simplified ITA 2025 may lead to its own set of litigation – the one thing which was sought to be avoided under the new ITA 2025 – thereby pushing everyone into a new era of uncertainty.

III. Valuations and Limits prescribed by other laws – whether an implicit safe harbour in the benchmarking exercise?

Background

The cross-border transactions entered into with AEs compel satisfaction of not only the arm's length principle under ITA 1961 but also compliance with other laws such as Foreign Exchange Management Act, 1999 ("FEMA") and Customs Valuation:

— Transfer Pricing under ITA 1961 prevents base erosion and profit shifting in intra-group transactions by ensuring that the transactions are carried out at a price determined between unrelated parties i.e. at 'arm's length price';

— Under the Customs law, the import transactions between related parties are subjected to an investigation by the Special Valuation Branch to ensure that the declared values for imported goods reflect true market conditions, thereby preventing undervaluation and safeguarding revenue;

— While facilitating seamless international trade, FEMA acts as a gatekeeper for India's capital accounts, ensuring that external commercial borrowings and cross-border payments remain within statutory safeguards against illicit activity.

Although these frameworks govern distinct domains, their intersection significantly influences the pricing, regulatory posture, and tax liability of cross-border transactions. This often creates a compliance paradox: adherence to one statute may not invariably ensure reciprocal compliance with the others. Classic instances of this paradox include royalty payments, ECB interest rates and Customs valuation.

Litigative history of Conflicting Regulatory Mandates

As regards royalty payments, the upper limit of which is governed by FEMA (erstwhile FERA / FIPB), the Tribunal in ***SKOL Breweries Ltd. v. ACIT***[10] has held that FDI policy permitting certain percentage of payment of royalty is only for remittance of amount in foreign exchange and therefore, such permission given in an entirely different context and purpose cannot be considered as relevant for determination of ALP under provisions of ITA 1961.

On a similar footing, it was held that the rates of payment of royalty approved by the RBI or by the FIPB (relying upon the rates allowed by RBI under automatic route) would not become *per se* or conclusively or *ipso facto* ALP rates. Both of the legislations operate into different fields. The whole thrust of the income tax proceedings and transfer pricing regulations is to ensure that taxable profit earned by an Indian entity are not shifted to foreign tax jurisdiction without payment of legitimate share of tax due in India. Therefore, independent exercise of determination of ALP is needed to be done to find out if payment of royalty has been done in line with arm's length price or not[11]. This principle finds place in the decision of Delhi High Court[12] wherein it has been held that the grant of permission by RBI for payment of royalty is not sacrosanct as the purposes for which the permission is given is totally different than the ITA 1961.

However, in ***DCIT v. Owens Corning Industries (India) (P.) Ltd***[13], the Tribunal held that RBI approval of royalty rates itself implies that payments are at arm's length; hence, transactions made under royalty agreement approved by RBI are at arm's length. In other decisions as well, it has been held that approval of RBI for royalty could be a reasonable CUP input and thus, impliedly, the royalty payments were at ALP[14].

10. *[2013] 29 taxmann.com 111 (Mumbai - Trib.)*
11. *A.W. Faber Castell (India) (P.) Ltd. v. DCIT [2017] 81 taxmann.com 35 (Mumbai); Gruner India (P.) Ltd. v. DCIT [2016] 159 ITD 772 (Delhi - Trib.); LG Electronics India (P.) Ltd. v. ACIT [2015] 153 ITD 591 (Delhi - Trib.)*
12. *CIT v. Nestle India Ltd. [2011] 337 ITR 103*
13. *[2014] 51 taxmann.com 276 (Hyderabad - Trib.)*
14. *DCIT v. Invida India Pvt. Ltd [2024 (6) TMI 96] (Ahmd. ITAT); Thyssenkrupp Industries India Pvt Ltd v. DCIT [ITA No. 1886/Mum/2017, order dated March 27, 2023]; SI Group-India Ltd. v. DCIT [2016] 68 taxmann.com 158 (Mumbai - Trib.); ACIT v. Dow Agrosciences India (P.) Ltd [2016] 76 taxmann.com 124 (Mumbai - Trib.)*

Even though in the realm of royalty payments there have been divergent views as regards the adoption of RBI rates in the computation of ALP, interestingly, such is not the case when it comes to adoption of RBI prescribed maximum all-in-cost ceilings on the External Commercial Borrowings ("ECBs").

Therefore, the treatment of royalty payments under TP remains unsettled due to two conflicting perspectives. The first asserts that RBI and Income-tax frameworks serve separate purposes, requiring independent TP benchmarking regardless of external approvals. The second argues that RBI-sanctioned rates should inherently meet the ALP criteria. Until this conflict is resolved, taxpayers must navigate a landscape of high uncertainty and dual-compliance requirements!

Even though in the realm of royalty payments there have been divergent views as regards the adoption of RBI rates in the computation of ALP, interestingly, such is not the case when it comes to adoption of RBI prescribed maximum all-in-cost ceilings on the External Commercial Borrowings ("ECBs").

In the undermentioned decisions[15] rendered by co-ordinate benches of the Tribunal, it has been consistently held that following the guidelines of RBI appears to be the correct approach for benchmarking the interest on ECBs availed or provided to the AEs. The Tribunal in ***DCIT v. Geodesic Ltd***[16] has also observed that the RBI prescribed all-in-cost ceiling rate would ideally be sufficient enough to cover the premium warranted to bridge the gap between a secured and unsecured loan and hence, would be a suitable benchmark. This principle has since received the blessing of the Karnataka High Court in ***CIT v. GE India Technology Centre (P.) Ltd***[17], which has held that the approval given by RBI with regard to rate of interest is a relevant factor while determination of the rate of interest.

The benchmarking of import transactions by adopting valuation carried out by custom authorities has also long been a point of contention, centred on two diverging legal theories. In Panasonic India (P.) Ltd[18], it has been categorically held that Customs valuation and Chapter X of the ITA 1961 (which is a self-contained code) serve altogether different purposes and as different criteria are being used in both the laws, the customs valuation cannot be used as a 'guiding factor' for the TPO while making adjustment on account of ALP. In another case as well[19], the Tribunal has held that valuations made by the Customs authority on the import of raw material for the purpose of levy of Customs duty should not be taken as a proper comparable for the reason that the purpose of valuation by the Customs authority is to determine undervaluation and by its very nature, it would not fit with the scheme of TP analysis under the ITA 1961. Even in Fuchs Lubricants (India) (P.) Ltd[20], the Tribunal has held that the value of raw material imported accepted

15. *[2017] 80 taxmann.com 58 (Hyderabad - Trib.); [2017] 87 taxmann.com 62 (Bangalore - Trib.); [2025] 174 taxmann.com 427 (Hyderabad - Trib.); [2025] 175 taxmann.com 577 (Hyderabad - Trib.); (ITA-TP Nos.130 & 447/Hyd/2022, order dated January 21, 2026)*
16. *[2015] 62 taxmann.com 383 (Mumbai - Trib.)*
17. *[2021] 125 taxmann.com 168 (Karnataka)*
18. *[2011] 43 SOT 68 (Delhi)*
19. *Mobis India Ltd v. DCIT [2014] 61 SOT 40 (Chennai - Trib.)*
20. *[2014] 44 taxmann.com 284 (Mumbai - Trib.)*

by the custom authorities cannot be accepted as the ALP for the ITA 1961. These rulings underscore the clear divide between customs valuation and TP rules, noting their divergent purposes and separate evaluation standards.

In contrast, in the undernoted cases[21], the customs data being Government notified data has been duly accepted so as to provide a reasonable basis for arriving at comparable prices, especially where the taxpayer is unable to furnish any comparable data apart from its own internationally generated price. This inconsistency places taxpayers in a difficult position – managing divergent standards for the same imported goods and thus, signals a potential need for higher judicial clarification.

Interestingly, the OECD Transfer Pricing Guidelines 2022 highlight that while the ALP is a "common thread" for both tax and customs, the underlying methodologies often pull taxpayers in opposite directions. To resolve this structural friction, the OECD recommends that administrations synchronize their insights. By combining Customs' real-time transaction data with robust TP documentation, authorities can reduce inconsistencies, ultimately leading to a more streamlined and certain environment for international trade.

In a significant development for cross-border businesses, the long-standing structural friction between Income-tax and Customs regulations has finally gained high-level recognition in the Economic Survey 2025-26[22]. The Survey underscores that India's integration into 'Global Value Chains' is contingent upon reconciling these 'parallel regulatory worlds.' By breaking down the silos between Transfer Pricing and Customs Valuation, the government acknowledges that a unified methodology, anchored in the Arm's Length Principle, is the key to safeguarding revenue while slashing the transaction costs and litigation, thereby enhancing transparency in cross-border trade.

Conclusion

To truly facilitate 'Ease of Doing Business', a collaborative and converged regulatory framework must be developed. Reconciling the disparate requirements of tax, customs and foreign exchange laws would provide much-needed clarity, reduce the friction of multi-compliance and ensure that regulatory hurdles do not stifle international investment. By aligning the standards of ITA 1961/2025, Customs law and FEMA, a more predictable environment can be fostered which balances investor certainty with the expansion of cross-border trade, ultimately easing the compliance burden and mitigating protracted tax litigation.

IV. The "Rendition-Need-Benefit" Paradox: Navigating the Minefield of Intra-Group Services

Background

Given the broad institutional setup of modern MNEs, the centralization of services – ranging from HR and IT to strategic management – is a cornerstone of operational efficiency. While the taxpayer views these as essential support functions, the Revenue often perceives them as a tool for base erosion. Unlike raw

21. *[2023] 150 taxmann.com 392 (Delhi - Trib.); [2019] 112 taxmann.com 90 (Mumbai - Trib.); [2014] 42 taxmann.com 400 (Delhi – Trib.); [2011] 12 taxmann.com 355 (Chennai)*
22. *Paras 4.47 to 4.49 of Chapter 4 – 'External Sector: Playing the Long Game'*

materials or finished goods, you cannot see, touch, or easily weigh the value of an "intra-group service" (IGS). This intangibility is exactly why the Tax Authority remains its fiercest critic. The core of the litigation lies in the "Rendition-Need-Benefit Test" for which taxpayers are increasingly required to demonstrate – whether or not the services were actually rendered? what is the "proof of receipt of service"? whether an independent enterprise would have paid for them in a similar context? whether cost for similar services already form part of the P&L?

Legacy of continuing litigation

The litigation surrounding the issue of IGS may be said to have emerged over a decade ago when on one hand, the Bangalore Tribunal[23] upheld the TPO's decision, emphasizing a "benefit-centric" approach, requiring taxpayers to prove that management fees resulted in commensurate commercial gains. On the other hand, the Mumbai Tribunal[24] held that determination of ALP should be focused on what an independent entity would pay for the service, regardless of the eventual benefit.

The Delhi High Court[25] eventually curtailed the TPO's authority to value services at "Nil" based on a lack of perceived benefit. Following this principle, in certain decisions[26], it has been held that 'benefit test' cannot be considered as a pre-requisite to justify the ALP of a transaction where a taxpayer has received certain services from its AE. Similarly, it has also been held[27] that demonstration of receipt of services by way of agreement, invoices, email communications, etc. have to be considered *de hors* the 'benefit test'.

However, recent rulings suggest that the burden of proof has reached an all-time high. Tribunal benches require a deep-dive into the documentation maintained for the transaction of IGS. Taxpayers can no longer rely on "generic" documentation like inter-company agreements or simple invoices[28] as these are viewed as "insufficient to prove the actual receipt of specific services". Success in recent Tribunal cases[29] has hinged on granular transparency, where in order to fulfil the "rendition-need-benefit" test, evidences in the form of process note of cost allocation and backup working thereof, timesheet of

Tribunal benches require a deep-dive into the documentation maintained for the transaction of IGS. Taxpayers can no longer rely on "generic" documentation like inter-company agreements or simple invoices as these are viewed as "insufficient to prove the actual receipt of specific services".

23. *ITA No. 352/Bang/2009*
24. *[2011] 13 taxmann.com 82 (Mumbai)*
25. *EKL Appliances (345 ITR 241); Cushman & Wakefield (India) Pvt. Ltd. (46 taxmann.com 317)*
26. *Merck Ltd. v. Dy. CIT (179 TTJ 121) (Mum.); Regus Business Centre (P.) Ltd. v. ITO (118 taxmann.com 203) (Mum.); DCIT v. US Technology Resources (P.) Ltd. (97 taxmann.com 490) (Cochin Trib.); UT Worldwide India (P.) Ltd. v. DCIT (103 taxmann.com 422) (Mumbai - Trib.)*
27. *Metalsa India Pvt Ltd (ITA No. 449/Del/2019); Jones Lang LaSalle Property Consultants (India) (P.) Ltd. v. ACIT (113 taxmann.com 270) (Delhi - Trib.); Corning Technologies India (P.) Ltd. v. DCIT (132 taxmann.com 72) (Delhi - Trib.); Henkel Chembond Surface Technologies Ltd. v. ACIT (125 taxmann.com 68) (Mumbai - Trib.)*
28. *O.C. Tanner India Pvt. Ltd v. DCIT (ITA No. 5785/MUM/2024); OSG (India) Pvt. Ltd. v. DCIT [2026 (2) TMI 362]*
29. *IAC International Automotive India Pvt. Ltd (ITA No. 749/PUN/2022); Sempertrans India (P.) Ltd. [2025] 180 taxmann.com 632 (Pune - Trib.); FCB Ulka Advertising Pvt. Ltd [2019] 109 taxmann.com 70 (Mumbai - Trib.)*



the AE employees rendering the services and service-specific email communications were provided.

Path for future – documentation is the key to survive the "triple test"

Interestingly, to drive home the aspect of intangibility of IGS in the nature of day-to-day advisory and proof of its rendition, the Hyderabad Tribunal in TNS India (P.) Ltd[30] had drawn a parallel to the role of an anaesthesiologist in a surgery – *"providing a concrete evidence with reference to the services in the nature of specific activities is difficult, like proving the role of an anesthesian in an operation conducted by a surgeon."*

Despite this acknowledgment of intangibility, the need of the hour for taxpayers is a rigorous adherence to the "triple test" of "rendition-need-benefit". It is now imperative to maintain an extensive evidentiary trail. This ranges from foundational documents – such as basic agreement, invoices and cost allocations – to granular data including detailed cost structure of the AE, email correspondences demonstrating scope and nature of services, details of AE's personnel and their qualifications to establish commercial necessity of AE support. Ultimately these records must demonstrate that a tangible benefit has been derived by the Indian taxpayer from the IGS, ensuring alignment with Rule 10D of IT Rules, 1962 (proposed Rule 84 of IT Rules 2026) and the OECD Transfer Pricing Guidelines 2022.

■

30. *[2015] 152 ITD 123 (Hyderabad - Trib.)*

DIGITAL TAXATION AND EQUALISATION LEVY TRANSITION



Shikha Gupta

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Overview

With the withdrawal of the Equalization Levy, India's digital taxation relies again on domestic law, particularly SEP, along with characterization of payments as royalty, FTS, or business profits. Treaty limitations — notably the absence of recognition for virtual PEs and narrower definitions of royalty/FTS — mean many digital transactions may remain untaxed. Taxpayers must carefully analyze income, treaty applicability, PE exposure, and withholding obligations, amid interpretational uncertainties. Until global frameworks like OECD Pillar One or the UN's Article 12B are widely implemented, digital taxation will continue to navigate the complexities and gaps between evolving business models and existing treaty structures.

I. Introduction

The withdrawal of the Equalization Levy ("EL") shifts the taxation of digital transactions back to the core provisions of domestic law, particularly Significant Economic Presence ("SEP"). While the SEP provisions are broad in scope, their practical application is significantly tempered by India's Double Taxation Avoidance Agreements ("DTAAs").

Most treaties do not recognize a purely virtual Permanent Establishment ("PE") in the absence of physical presence or a dependent agent. As a result, the domestic expansion of nexus rules through SEP does not automatically translate into treaty-based taxing rights.

Digital transactions must also first be carefully characterized as royalty or fees for technical services (FTS), where applicable, before examining their taxability under the SEP provisions. Delineating the character of the transaction as royalties/FTS or business profits is also fraught with debate. Cloud



computing and similar digital models typically grant access to software or infrastructure without transferring rights in copyright or proprietary equipment. a distinction that is critical for characterization under treaty law. The narrower treaty definitions of royalty and FTS often result in digital transactions not being taxable in India.



That said, the conclusion that income is taxable or not taxable is not automatic. Taxpayers must undertake a rigorous analysis: characterizing the income, evaluating treaty applicability, assessing PE exposure, and determining consequential withholding tax obligations. Each step involves interpretational complexities and remains susceptible to litigation.

Modern digital business models driven by data, user participation, platform economics, and increasingly artificial intelligence operate seamlessly across borders, whereas existing DTAAs remain rooted in physical presence-based concepts. The gap between economic reality and treaty architecture continues to widen. Taxpayer documentation practices and value chain analyses have also struggled to keep pace with these transformations.

The gap between economic reality and treaty architecture continues to widen. Taxpayer documentation practices and value chain analyses have also struggled to keep pace with these transformations.

The OECD/G20 Inclusive Framework's Pillar One, particularly Amount A, if fully implemented, seeks to address some of these structural tensions by allocating a portion of residual global profits of in-scope multinational enterprises to market jurisdictions. Whether and how this framework achieves practical and political consensus will significantly shape the next chapter of digital taxation. The UN Model Tax convention (2021) introduced Article 12B specifically for "Income from Automated Digital Services" which includes cloud computing. However, this article is not yet widely adopted in India's DTAAs. The UN has also formed an Intergovernmental Negotiating Committee on the UN Framework Convention on International Tax Cooperation and ongoing deliberations on Workstream II deals with "taxation of income derived from the provision of services in an increasingly digitalized and globalized economy"

Until such global consensus-based mechanisms are fully implemented, digital taxation will continue to operate within the constraints and controversies of existing domestic law and treaty frameworks.

The broad realm of digital economy

When we talk about the "digital economy," we are really talking about economic activity built on internet connectivity. That connectivity is the core enabler—it allows goods, services, and even intangible products to be delivered remotely, whether in a B2B or B2C context.

The challenge becomes even more complex when we consider how large multinational technology companies operate. Their business models are geographically distributed.

One of the earliest and most visible elements of the digital economy is e-commerce, i.e., buying and selling of goods and services through websites and online platforms. This includes transactions involving physical goods, as well as services such as professional or legal advisory services delivered online.

Beyond e-commerce, the digital economy also includes cloud computing. Cloud computing refers to the delivery of computing resources such as servers, storage, databases, networking, software, analytics, and intelligence, over the internet, commonly described as "the cloud." Instead of owning and maintaining physical infrastructure or installing software locally, users can access these resources remotely, on demand. Over the past decade, the cloud landscape has evolved significantly. It began with defined service models—Software as a Service (SaaS), Platform as a Service (PaaS), and Infrastructure as a Service (IaaS)—and has now expanded into a broader "Everything as a Service" (XaaS) model.

Modern e-commerce itself depends heavily on cloud computing. Online retailers use cloud hosting to scale rapidly during peak demand, such as flash sales day, without investing in on-site servers. They also rely on big data tools and analytics engines to enable targeted marketing. In this sense, cloud computing is not separate from e-commerce but a key enabler.

Fear of Base Erosion and Profit Shifting

At this point, one might reasonably ask: what exactly is so concerning about the digital economy from a tax perspective?

The concern stems from a long-standing belief that digital business models can generate substantial revenue from a jurisdiction without maintaining any meaningful physical or substantive presence there and yet avoid taxation in that jurisdiction. In other words, value can be extracted from a market without triggering traditional taxing rights. This disconnect creates concerns around what is commonly referred to as "base erosion."

Traditional international tax rules were designed around tangible presence such as factories, offices, personnel. Cloud-based services, however, are intangible, remotely delivered, and often automated.

The challenge becomes even more complex when we consider how large multinational technology companies operate. Their business models are geographically distributed. Servers and data centres may be located in one country, development teams in another, intellectual property owned in a third, and users spread across multiple jurisdictions. Yet all of these elements are seamlessly integrated to deliver a single digital service.

Ambiguity in classification and sourcing rules can result in compliance challenges, exposure to double taxation, and unexpected tax liabilities across multiple jurisdictions.

This multi-jurisdictional structure makes it extremely difficult to determine where value is actually created. In a typical cloud transaction, where is the product or service "sold" from? Is it where the headquarters is located? Where the software was developed? Where the relevant data centre is situated? Or where the end user accesses the service? Each answer could potentially point to a different taxing jurisdiction.

Moreover, the digital value chain is far more dynamic and complex than that of a traditional brick-and-mortar business. Value creation may involve multiple supply-side factors—intellectual property (including software), technological infrastructure, human capital, and data—alongside demand-side factors such as user participation and market access. Determining how to allocate value among these components is inherently challenging.

Digital transactions also tend to be bundled. A physical product may be integrated with embedded software, e.g. in case of medtech products. Multiple cloud services—such as Software as a Service (SaaS) and Platform as a Service (PaaS)—may be offered together under a single contract.

All of the above contribute to the risk of base erosion. In this context, transfer pricing especially issues relating to choice of comparables and methodology also becomes a critical concern. Multinational enterprises can, through strategic allocation of intellectual property ownership, infrastructure and intercompany licensing arrangements, shift profits to low-tax jurisdictions and minimise overall tax liability.

The lack of clarity does not only create risks for governments—it also creates uncertainty for businesses. Ambiguity in classification and sourcing rules can result in compliance challenges, exposure to double taxation, and unexpected tax liabilities across multiple jurisdictions.

Demise of Equalization Levy in India

India introduced the EL in 2016 as a unilateral, interim response to the OECD's Base Erosion and Profit Shifting ("BEPS") Action Plan 1, which addresses the tax challenges arising from the digital economy. This levy was India's way of ensuring that digital businesses earning revenue from India contributed to the tax base, even in the absence of a physical presence.

The EL was structured as a separate and independent levy. With the EL as originally implemented, complex characterization disputes on whether a payment should be treated as royalty or Fees for Technical Services and need to determine the existence of a PE were obviated. However, amendments (effective retroactively from April 1, 2020) clarified that if income is classified as royalty or FTS, it is exempt from the 2% EL to avoid double taxation. This amendment also reopened the characterization debate.

The levy was always seen as a temporary measure, intended to operate until a global consensus-based solution under the OECD/G20 Inclusive Framework's Pillar One was implemented.

The levy operated in two distinct forms:

- A 6% levy on specified services, primarily covering online advertising services.

- A 2% levy on e-commerce supply or services.

Further, Section 10(50) of the Income-tax Act, 1961 provided an exemption for income that was chargeable to EL, thereby ensuring that such income was not taxed again under normal income-tax provisions. However, the DTAAs did not provide relief for EL effectively making it a cost, that was passed on to the customer.

However, this regime has now been phased out. The 2% EL on e-commerce supply or services ceased to apply from August 1, 2024 and the 6% levy on specified services from April 1, 2025.

The withdrawal of the EL along with the corresponding withdrawal of the exemption under Section 10(50) fundamentally changes the tax landscape for cross-border digital services.

With the EL no longer in force, taxation of digital income reverts to the general provisions of the Act. This ensures that India continues to assert taxing rights over digital transactions, effectively bridging the gap until Pillar One is fully implemented at a global level.

At the same time, this shift will not alleviate the interpretational and classification challenges under domestic law and treaty jurisprudence.

Resurgence of Significant Economic Presence

When we examine India's post-EL framework, the concept of SEP assumes central importance.

SEP was introduced as an expanded definition of "business connection" through Explanation 2A to Section 9(1)(i) of the Income-tax Act, 1961 ("Act") by the Finance Act, 2020, with effect from April 1, 2022. Through this amendment, the legislature sought to move beyond the traditional physical presence test and embed a digital nexus rule within domestic law.

Under Explanation 2A, SEP of a non-resident is triggered in two circumstances:

1. Any transaction of goods, services, or property with a person resident in India, including the provision of download of data or software in India. Rule 11UD(1) prescribes a monetary threshold of payments exceeding INR 2 crores.

2. Systematic and continuous soliciting of business activities or engagement with users in India. Rule 11UD(2) prescribes a user threshold of 3 lakh users.

The scope of this provision is deliberately expansive. The statute clarifies that SEP may be constituted irrespective of whether the agreement is entered into in India, whether the non-resident has a place of business in India, or whether services are rendered in India. In other words, physical nexus is no longer determinative under domestic law. Some of the terms used in Explanation 2A are not defined and hence ambiguous leading to ambiguity and potential overlap. For example, what would constitute "systematic and continuous soliciting"? Also consider the overlap between "provision of download of

Despite the definitional ambiguity, the charging provision incorporates an attribution safeguard. The second proviso to Explanation 2A makes it clear that only such income as is attributable to the activities or transactions referred to in Explanation 2A shall be deemed to accrue or arise in India.

data of software in India" covered under SEP and "right to use computer software" covered under section 9(1) (vi) on royalty.

Despite the definitional ambiguity, the charging provision incorporates an attribution safeguard. The second proviso to Explanation 2A makes it clear that only such income as is attributable to the activities or transactions referred to in Explanation 2A shall be deemed to accrue or arise in India. Further, Explanation 3A — which seeks to cover digital advertising and data-related income expressly provides that its scope extends to situations involving SEP.

This proposed exemption also mitigates the risk of a fixed place PE being attributed to the foreign enterprise on the basis that the Indian data centre infrastructure is considered to be at its disposal or under its control.

It is equally important to recognise the treaty dimension. SEP is a domestic law construct. Where the non-resident is entitled to the benefits of a DTAA, the definition of PE under the relevant treaty would generally prevail to the extent it is more beneficial. Most Indian DTAAs require some form of physical presence or dependent agent to constitute a PE. Since treaties do not presently incorporate the concept of SEP, business profits of a non-resident resident of a treaty jurisdiction would generally not be taxable in India solely on the basis of SEP, in the absence of a traditional PE.

Judicial rulings appear to support this position. In ***Clifford Chance Pte Ltd [2025] 181 taxmann.com 254 (Delhi) and Ernst and Young LLP [2026] 192 taxmann.com 362 (Delhi),*** the Delhi High Court indicated that, in the absence of explicit "Virtual PE" language in a DTAA, such concepts cannot readily be read into the treaty framework.

The ITAT in ***ACIT vs. International Taxation vs. Booking.Com B.V. [2026] 183 taxmann.com 201 (Delhi - Trib.),*** addressed the issue of a Netherlands-based company operating a digital platform for online accommodation reservations. The Assessing Officer alleged a fixed place PE and dependent agent PE in India. However, the Tribunal held that since the assessee had no physical place of business, agent, personnel, or equipment in India, and transacted on a principal-to-principal basis, the commission income was not taxable in India.

Based on the foregoing discussion, while the assertion of an SEP or a PE may bring a foreign enterprise within India's taxing jurisdiction, another complex question lies in the attribution of profits to such SEP or PE. This exercise is fraught with conceptual and practical challenges, largely due to the absence of international uniformity in attribution methodologies.

At the heart of the difficulty is the divergence in approaches. The OECD's Authorized OECD Approach (AOA), grounded in the separate entity and arm's length principles, contrasts sharply with formulary apportionment models that allocate profits based on predetermined allocation keys. The lack of consensus between these frameworks creates uncertainty not only in cross-border application but also in domestic administrative practice.

Profit attribution in a digital economy context further compounds these challenges. Determining the extent to which value is created through user participation, data exploitation, or remote digital infrastructure introduces questions that traditional PE-based attribution principles were not originally designed to address.

It is now widely acknowledged by both taxpayers and policymakers that this is an

area requiring greater clarity and coherence. Without a more harmonized and predictable framework, disputes are likely to arise not merely on the existence of SEP or PE, but on the quantum of profits that may reasonably be brought to tax in India.

The discussion on SEP and PE would not be complete without a mention of the Finance Bill, 2026 that proposes to grant an exemption to foreign companies in respect of income accruing or arising in India, or deemed to accrue or arise in India, by way of procuring services from specified data centres located in India. This proposed exemption also mitigates the risk of a fixed place PE being attributed to the foreign enterprise on the basis that the Indian data centre infrastructure is considered to be at its disposal or under its control.

The characterization conundrum: Business Profits, Royalties or Fees for Technical Services

While we have examined the concepts of SEP and PE in the earlier discussion, another persistent challenge in digital taxation lies elsewhere — in determining the true character of the underlying transaction.

Section 9(1)(vi) of the Income-tax Act, 1961 deems income by way of royalty to accrue or arise in India. The definition of "royalty" under Explanation 2 to Section 9(1)(vi) was retrospectively amended by the Finance Act, 2012 with effect from June 1, 1976. Following the insertion of Explanations 4, 5, and 6, the domestic law definition has been significantly expanded — particularly Explanation 4 (concerning use of software) and Explanation 6 (concerning digital transmission processes). Given that most digital business models rely heavily on proprietary software, platforms, algorithms, and embedded intellectual property, there is an inherent risk that payments for such services may fall within the wide ambit of "royalty" under domestic law.

However, where a Double Taxation Avoidance Agreement (DTAA) applies and its definition of "royalty" is narrower than that under domestic law, the DTAA definition will prevail to the extent it is more beneficial. Most treaty definitions require a transfer of copyright or the right to use copyright.

A pivotal development in this regard was the Supreme Court's ("SC") ruling in ***Engineering Analysis Centre of Excellence (P) Ltd v. CIT [2021] 125 taxmann.com 42 (SC).*** The Court held that payments made by Indian end-users or distributors to non-resident software manufacturers or suppliers for resale or use of computer software under End User Licensing Agreements do not constitute royalty for the use of copyright. The critical distinction drawn was between transfer of a copyrighted article and transfer of rights in copyright itself. Where only the copyrighted article is supplied, without conferring copyright rights, the payment would not qualify as "royalty" under the DTAAs. This principle has since been relied upon in numerous ITAT and High Court rulings and extended to cases involving payments for online advertisement space[1] and even subscription fees[2] for access to overseas databases.

A similar characterization issue arises under Section 9(1)(vii), which defines "fees for

1. *Commissioner of Income-tax vs. International Taxation vs. Urban Ladder Home Decor Solutions (P.) Ltd. [2025] 171 taxmann.com 549 (Karnataka)*
2. *Deputy Commissioner of Income-tax vs. Ovid Technologies Inc. [2025] 176 taxmann.com 557 (Delhi)*

technical services" as consideration (including lump sum consideration) for the rendering of managerial, technical, or consultancy services, including the provision of technical or other personnel. In the digital context, this raises important questions. Services such as technical support for digital platforms, data analytics, specialized consultancy relating to digital marketing strategies, or certain cloud computing services, particularly where human technical intervention is involved, may potentially fall within the FTS framework. That said, where the applicable DTAA contains a "make available" clause, the scope may be significantly narrowed, as the recipient must be enabled to independently apply the technical knowledge or skill.

Characterization debates remain highly fact-specific. The examples below illustrate the evolving jurisprudence but should not be treated as settled principles. Outcomes may vary depending on the specific DTAA involved and the precise contractual and factual matrix, for example, whether licences are exclusive or non-exclusive, whether commercial exploitation rights are granted, or whether access is provided to proprietary data, specialized knowledge, or technical experience.

Payments for web hosting services such as AWS data transfer or Amazon Simple Storage Services have also generally been held not to constitute royalty. In such cases, the foreign service provider uses its own infrastructure and intellectual property to render standardized services, without transferring any rights in equipment or intellectual property to the customer. There is no alienation of rights, no transfer of technical know-how, and no grant of rights for commercial exploitation.

Similarly, payments for online advertising space have not typically been regarded as royalty under treaty provisions. Mere use of a digital platform does not amount to use of copyright, as no copyright rights are parted with. The Bangalore Tribunal[3] has also held that even where advertisers access patented tools or software to display and publish advertisements, such payments do not constitute royalty in the absence of transfer of copyright, following the principles laid down in Engineering Analysis. This matter is currently pending adjudication at the Karnataka High Court and may involve a nuanced examination of facts.

More recently, in ***Commissioner of Income Tax v. Salesforce.com Singapore Pte. Ltd. [2025] 175 taxmann.com 751 (SC),*** the Supreme Court dismissed the Special Leave Petition filed by the Revenue against High Court rulings which had held that subscription fees for cloud-based Customer Relationship Management (CRM) services were not taxable as royalty or FTS. The reasoning was that customers merely accessed the software without any transfer of copyright or physical access to equipment.

Similarly, payments for data services have been held not to fall within the limb "information concerning industrial, commercial, or scientific experience" where the Indian entity received only final compiled information for internal use, without access to proprietary methodologies, algorithms, or technical processes. Restrictions on duplication, resale, alteration, or onward dissemination further reinforced the characterization as not being royalty. An earlier judgement by Karnataka High Court in the case of ***Commissioner of Income Tax***

3. *Deputy Commissioner of Income-tax vs. Google India (P.) Ltd. [2022] 143 taxmann.com 302 (Bangalore - Trib.)*

vs (International Taxation) vs Wipro Ltd [2011] 16 Taxmann.com 275 (Karnataka) had held otherwise and may need to be re-evaluated in the wake of SC's Engineering Analysis decision. Also, conclusions could differ where the database involves sharing of valuable customer database and commercial experience.

Payments to foreign companies for transponder services have been held not to constitute royalty under the limb "use of or right to use of a process," notwithstanding that "process" under domestic law includes satellite transmission (uplinking, amplification, conversion, and downlinking of signals). The decisive factor was that the foreign enterprise retained full ownership, control, and operation of the satellite and related infrastructure, while the Indian customer merely availed a standard facility without any possessory rights or control. Additionally, the process was not regarded as a "secret" process under the DTAA.

Turning specifically to FTS, although Section 9(1)(vii) is widely worded, courts have consistently emphasized that services which are standard, automated, or rendered without human intervention would generally not qualify as "managerial," "technical," or "consultancy" services. The element of specialized human involvement remains crucial. Furthermore, under many Indian DTAAs containing a "make available" clause, the service must enable the recipient to apply the technical knowledge, experience, skill, or processes independently. Absent such transfer of enduring capability, the payment would fall outside the FTS definition under the treaty.

Clearly, the characterization of digital payments continues to be a dynamic and evolving area.

Tax Deducted at Source and Disallowance

Section 195 of the Act is the foundational provision governing tax deduction at source ("TDS") on payments made to non-residents. The obligation to deduct tax under Section 195 does not arise merely because a payment is made to a non-resident. The trigger is that the sum must be "chargeable to tax" in India. The determination of chargeability requires a careful application of the provisions of the Act, read together with the relevant DTAA, where applicable. In terms of Section 90(2) of the Act, the taxpayer is entitled to apply whichever provision, domestic law or treaty, is more beneficial. Thus, TDS compliance in cross-border digital transactions necessarily begins with a substantive tax analysis.

In practical terms, TDS obligation will depend upon several interlinked factors: the characterization of the payment (whether royalty, fees for technical services, or business profits), the applicability of a DTAA, the determination of taxability under the relevant treaty article, and the appropriate base and rate for withholding. An incorrect position on characterization can therefore cascade into a withholding default.

Where payments are characterized as royalty or FTS to non-residents, Section 115A becomes relevant. Under domestic law, such income is generally taxable at 20% (plus applicable surcharge and cess). However, most Indian DTAAs provide for a concessional rate on royalty or FTS typically 10% or 15%. Where treaty conditions are satisfied, that lower treaty rate would apply for TDS purposes.

The position becomes more complex where income is characterized as "business profits." If a PE is constituted under the applicable DTAA, or where no DTAA exists, tax would apply at the general corporate

tax rate applicable to foreign companies or non-resident individuals or firms. From a withholding perspective, this presents a practical difficulty: determining profits attributable to a business connection or PE in India is a nuanced and often contentious exercise. Expecting the payer to accurately compute attributable profits at the withholding stage adds a layer of compliance complexity.

Judicial rulings have consistently clarified that TDS obligations are intrinsically linked to taxability. The Supreme Court in ***CIT v. GE India Technology Centre (P.) Ltd. [2010] 187 Taxman 110 (SC)*** unequivocally held that the obligation to deduct tax under Section 195 arises only where the payment is chargeable to tax in India. In other words, Section 195 does not create a withholding obligation in the absence of chargeability.

However, where no tax is deductible by virtue of a DTAA (for example, in the absence of a PE or where the payment does not qualify as royalty or FTS under the treaty), the payer must nevertheless ensure robust documentation. This typically includes obtaining a valid Tax Residency Certificate (TRC) and other documentation such as Form 10F and no-PE confirmation from the non-resident.

Where TDS is applicable, non-compliance can have significant repercussions. The deductor may be treated as an "assessee in default" under Section 201, liable for interest under Section 201(1A) as well as penalty. Additionally, the related expenditure may be disallowed under Section 40(a)(i), thereby increasing the payer's taxable income.

Conclusion

With the withdrawal of the EL, the analytical focus shifts squarely to the interplay between domestic law provisions — particularly SEP, royalty, and FTS — and the applicable Double Taxation Avoidance Agreements.

Given the delay in the implementation of Pillar One and the on-going deliberations at the UN, businesses must closely track both domestic legislative developments and international tax reform efforts. The prevailing environment demands a granular, transaction-specific evaluation of income characterization, treaty eligibility, PE exposure, and consequential TDS compliance. In this transitional phase, judicial precedents assume heightened importance, providing critical guidance on characterization, nexus, attribution, and withholding obligations.

At a policy level, there remains no perfect equilibrium between simplicity and doctrinal precision in taxing the digital economy. Any sustainable framework must be multilaterally agreed, mitigate double taxation, and appropriately balance demand-side contributions (users and data) with supply-side factors (infrastructure, capital, and intellectual property). It must also reconcile the destination-based logic of indirect taxation with the source- and residence-based foundations of income tax, provide objective mechanisms for determining the taxable base and applicable rates, and remain adaptable to rapidly evolving digital and AI-driven business models.

Until such global coherence is achieved, digital taxation will continue to operate within a framework that demands technical rigor, robust documentation, and continuous strategic reassessment by taxpayers alongside administrative clarity and responsiveness from revenue authorities.

■

TREATY INTERPRETATION IN CROSS-BORDER DIVIDEND TAXATION



Jinal Jain

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Overview

This article analyses key interpretational issues in the taxation of cross-border dividends under India's tax treaty framework. Dividend taxation lies at the intersection of domestic income-tax law and bilateral conventions, requiring careful examination of characterisation, allocation of taxing rights and treaty entitlement.

The discussion traces the evolution of India's Dividend Distribution Tax (DDT) regime and the controversy arising from its interaction with tax treaties. The Bombay High Court's ruling in Colorcon Asia is examined as a significant judicial development, together with its subsequent implications.

The article also considers broader interpretational questions involving the treaty characterisation of buy-back transactions. It further analyses the role of beneficial ownership and the operation of Most Favoured Nation (MFN) clauses in determining treaty relief.

The article concludes that cross-border dividend taxation demands a structured analysis of domestic characterisation, treaty text and anti-abuse safeguards.

1. Introduction

The taxation of cross-border dividends lies at the intersection of domestic income-tax law and bilateral tax treaties. A dividend, in its classical sense, represents a distribution of profits by a company to its shareholders. In common parlance, dividend is income in the hands of the shareholder.

Under standard treaty principles (Article 10 of the OECD/UN Models), the Residence State has the primary right to tax dividend income, while the Source State (where the distributing company is resident) is also granted a concurrent but limited right, typically subject to a specified rate cap and conditions such as beneficial ownership.

Interpretational issues arise when domestic tax provisions of the Source State interact with treaty rules. Questions have arisen, for instance, on whether India's erstwhile Dividend Distribution Tax (DDT) was a tax on company profits or on shareholder dividend income for treaty purposes. Similar

Interpretational issues arise when domestic tax provisions of the Source State interact with treaty rules.



complexities arise in distinguishing buy-back distributions from dividends. The application of independent treaty concepts like beneficial ownership and MFN clauses further illustrate the complexity of treaty interpretation in dividend taxation.

Accordingly, treaty interpretation in dividend taxation requires a careful analysis of domestic characterisation, treaty allocation of taxing rights, and autonomous treaty principles to ensure consistency with international obligations.

This article examines certain nuanced aspects of these interpretational challenges in cross-border dividend taxation.

2. The Dividend Distribution Tax Regime and the Treaty Interface

2.1. Legislative Background

India's approach to dividend taxation has witnessed a cyclical evolution between two competing models, the classical system and the DDT regime. Under the classical system, dividend income was taxed in the hands of the shareholder. In contrast, the DDT regime, introduced by the Finance Act, 1997 through insertion of section 115-O of the Income-tax Act, 1961, shifted the incidence of tax to the distributing company by imposing an additional income-tax on dividends declared, distributed or paid.

Although withdrawn in 2002 and reintroduced in 2003 for administrative convenience, the DDT regime continued with modifications, including introduction of grossing-up provisions, until its abolition by the Finance Act, 2020, which restored shareholder-level taxation.

2.2. The DDT–DTAA Rate Controversy

The DDT regime, though now repealed, generated significant controversy in cross-border contexts. The core issue was whether DDT u/s 115-O applied independently of treaty limitations or was subject to the concessional rate on dividends under the relevant tax treaty.

The dispute centred on the character of DDT, whether it was a tax on the distributing company's profits or, in substance, a tax on shareholder's income collected at the company level. This distinction directly impacted treaty applicability and led to refund claims for DDT paid in excess of treaty caps. The dispute culminated in divergent rulings[1], leading to the Special Bench decision in Total Oil India[2], before being authoritatively addressed by the Bombay High Court in Colorcon Asia[3].

2.3. The Bombay High Court's Ruling in Colorcon Asia

In Colorcon Asia, the assessee, an Indian company and wholly owned subsidiary of a UK resident company, paid dividends to its UK parent and discharged DDT u/s 115-O. It sought an advance ruling on whether the tax rate could be restricted to 10% under Article 11 of the India–UK DTAA. The Board for Advance Rulings (BAR) rejected the claim, holding that DDT was outside the scope of the DTAA.

Allowing the appeal, the Bombay High Court set aside the BAR ruling and held as follows:

- ***DDT is a tax on dividend income of the shareholder:*** The Court held that DDT u/s 115-O is an additional income-tax in respect of dividend income. Though the statutory liability to pay rests on the company, in pith and substance it is a tax on dividends, i.e., income of the shareholder.

- ***Legislative history confirms administrative shift of incidence:*** On a conjoint reading of the Memorandum to the Finance Bills (1997, 2003 and subsequent amendments), the Court observed that the shift of tax incidence to the company was for administrative convenience and did not alter the substantive character of dividend as shareholder income.

- *DDT qualifies as "income-tax" under the* ***DTAA:*** Being an income-tax within the meaning of section 2(43) and referable to section 4 of the Act, DDT falls within Article 2 of the India–UK DTAA, which covers income-tax and any identical or substantially similar taxes.

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1. *Giesecke & Devrient (India) (P.) Ltd. v. ACIT CIT [2020] 120 taxmann.com 338 (Delhi Trib.), DCIT v. Indian Oil Petronas (P.) Ltd [2021] 189 ITD 490 (Kol Trib); Intertek India (P.) Ltd. v. ACIT [2025] 176 taxmann.com 186 (Delhi - Trib.)*
2. *DCIT v. Total Oil India (P.) Ltd. [2023] 149 taxmann.com 332 (Mum-Trib) (SB)*
3. *Colorcon Asia (P.) Ltd. v. JCIT [2025] 181 taxmann.com 301 (Bom HC)*

- ***Article 11 applies based on nature of income***: Where the payment qualifies as "dividend" under Article 11(3) and is paid by an Indian resident company to a UK resident beneficial owner, Article 11(2) limits India's taxing right to 10%. The applicability of Article 11 depends on the nature of income, not on the identity of the person remitting the tax.

- ***Section 90(2) ensures treaty override:*** Since section 90(2) mandates that treaty provisions prevail where more beneficial, DDT cannot be levied in excess of the rate permitted under Article 11 of the DTAA.

- ***Godrej & Boyce distinguished;*** Tata Tea followed: The Court distinguished Godrej & Boyce Mfg. Co. Ltd.[4] as arising in the context of section 14A and relied on Tata Tea Co. Ltd.[5], which recognised DDT as a tax on dividend income.

- The ruling of the BAR was set aside. The assessee was held entitled to restrict the tax rate on dividends distributed to its UK parent to 10% under Article 11 with liberty to the Revenue to gross up the tax in accordance with law.

2.4. Post Colorcon developments

With the abolition of DDT by the Finance Act, 2020 and the restoration of the classical system, dividends are now taxed in the hands of shareholders and subject to withholding u/s 195 in case of non-residents. Consequently, the Colorcon controversy does not arise prospectively. However, for assessment years prior to 2020-21, the ruling retains substantial relevance.

The ratio of Colorcon has found early acceptance at the tribunal level. In *Sophos Technologies*[6], the Ahmedabad Bench applied the High Court's reasoning and restricted DDT to the treaty rate. Similarly, in *Mitsui Kinzoku Components*[7], the Delhi Bench granted relief by applying the dividend article of the relevant DTAA.

The Revenue has, however, continued to contest the correctness of Colorcon and has reportedly sought reference of the issue to a larger Bench of the Bombay High Court. Independently, a Special Leave Petition has been filed before the Supreme Court against the judgment, which is stated to be listed for initial hearing in March 2026.

2.5. Structural and Interpretational Considerations

While the matter presently remains sub-judice, certain structural and interpretational issues continue to merit examination in the broader debate on DDT and treaty application.

(i) Absence of Deeming Clause similar to Indo-Hungary DTAA

The Indo-Hungary DTAA contains an express deeming provision to the effect

4. *Godrej &Boyce Mfg. Co. Ltd. v. CIT [2010] 328 ITR 81 (Bom HC)*
5. *UOI v. Tata Tea Company Limited [2017] 398 ITR 260 (SC)*
6. *Sophos Technologies (P.) Ltd. v. DCIT [2026] 183 taxmann.com 87 (Ahmd Trib.)*
7. *Mitsui Kinzoku Components India (P.) Ltd. v. CIT(A) [2026] 183 taxmann.com 659 (Delhi Trib.)*

that where a company resident in India pays dividends, the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and shall not exceed the specified percentage of the gross dividend.

No comparable clause exists in the India–UK DTAA or other Indian treaties. The absence of such an express deeming fiction raises the question whether treaty rate limitation was intended to extend to a company-level levy such as DDT in the absence of specific language treating distributed profits as shareholder taxation.

(ii) Scope of Article 2 – Taxes Covered

Article 2 of the India–UK DTAA covers "income-tax including surcharge thereon" and extends to "any identical or substantially similar taxes" imposed after the date of signature, subject to notification between the competent authorities.

An argument may arise as to whether DDT, introduced after the treaty, qualifies as a substantially similar tax and whether the procedural requirement of notification assumes relevance in determining treaty coverage.

(iii) Structure of Article 11 of Indo-UK DTAA – Whether treaty benefit confined to Recipient?

A textual reading of Article 11 may suggest that the treaty benefit is intended for the recipient of dividend income:

No comparable clause exists in the India–UK DTAA or other Indian treaties.

- "Dividends paid… to a resident of the other Contracting State may be taxed in that other State."
- Source State taxation is limited only if the "beneficial owner" of the dividends is a resident of the other Contracting State
- "Dividends" are defined as "income" from shares.
- Article 11 does not apply where the "beneficial owner" has a permanent establishment in the Source State and the holding is effectively connected with such PE.

These elements arguably indicate that Article 11 is structured around the taxation of the shareholder's income. The extent to which such a framework accommodates a levy imposed on the distributing company, albeit in respect of dividend income, remains a point of interpretational analysis.

(iv) Juridical vs. Economic Double Taxation

Tax treaties are generally directed at mitigating juridical double taxation, i.e., taxation of the same income in the hands of the same person in two States. Under the DDT regime, dividend income was exempt in the hands of shareholders u/s 10(34). Consequently, there was arguably no juridical double taxation of the shareholder.

The issue therefore arises whether the treaty was intended to extend relief in circumstances involving only economic double taxation, and whether extending the treaty benefit to the company distributing dividends was within the contemplation of the contracting States.

(v) Dual Character of Section 115-O

A textual reading of section 115-O, independent of the rationale of administrative convenience, reflects features supporting both characterisations:

Indicative of tax on distributed profits of the company

- Sub-section (1) describes DDT as an "additional income-tax" and as "tax on distributed profits."
- Sub-section (1A) allows reduction of dividend received from domestic or foreign companies before computing DDT.

Indicative of tax on shareholder's income:

- Sub-section (2) requires payment of DDT even where no income-tax is payable on the company's total income.
- Sub-section (1B) provides for grossing up of dividend for computing DDT.
- Sub-section (4) treats DDT as final tax in respect of the amount declared, distributed or paid as dividends.

The distinction between dividend and buy-back assumes importance in cross-border taxation because treaty allocation of taxing rights depends on the character of the income.

These dual features reflect the hybrid nature of DDT and form the core of the interpretational divide that animated the DDT versus DTAA rate controversy.

3. BuyBack versus Dividend – Treaty Characterisation

The distinction between dividend and buy-back assumes importance in cross-border taxation because treaty allocation of taxing rights depends on the character of the income. While a dividend is a distribution of profits, a buy-back involves the company purchasing its own shares resulting in extinguishment of shareholder rights.

Under domestic law, the tax treatment of buy-back has shifted over time, at different stages being taxed as capital gains in the hands of shareholders, then subject to company-level levy (Buy-Back Tax), then being taxable as deemed dividend and now reverting to capital gains in hands of shareholder. In case of foreign shareholders, the critical issue is how the payment is characterised under the relevant treaty article.

Most Indian treaties define "dividends" as income from shares, participating rights and other corporate rights which are subjected to the same taxation treatment as income from shares under the laws of the distributing State. This extended definition creates interpretative space where buy-back payments represent accumulated profits. The question that arises

is whether consideration received on buy-back constitutes income from shares or other corporate rights or proceeds from alienation of shares.

The OECD Commentary offers interpretative guidance:

- Paragraph 31 of Article 13 recognises that where shares are redeemed or capital is reduced, the excess of proceeds over par value may be treated by the State of the company as a distribution of accumulated profits rather than capital gains.

- Paragraph 28 of Article 10 clarifies that distributions treated as dividends under domestic law may fall within the dividend article, even if arising on redemption of shares. At the same time, the Commentary notes that distributions that effectively reimburse capital and reduce membership rights are normally not regarded as dividends.

Therefore, treaty characterisation depends on:

- Whether domestic law treats the payment as dividend;

- Whether the payment represents distribution of accumulated profits;

- Whether the transaction results in reduction of shareholding or extinguishment of rights;

- The wording of the specific treaty definition.

The buy-back question mirrors the DDT controversy in a structural sense: both involve domestic tax design affecting treaty characterisation. The key enquiry remains whether the income falls within Article 10 (Dividend) or Article 13 (Capital Gains).

- If characterised as dividend, source taxation may be capped under Article 10.

- If characterised as capital gains, taxing rights may allocated under Article 13 (subject to specific treaty clauses).

Ultimately, the characterisation of buy-back proceeds under a treaty must be determined by a careful reading of the treaty text along with the domestic law and the substance of the transaction, as it directly governs the treaty entitlement, allocation and limitation of taxing rights between the contracting States.

4. Beneficial Ownership

The concept of "beneficial ownership" is central to treaty-based dividend taxation. Most Indian tax treaties, following Article 10 of the OECD and UN Model Conventions, restrict the source State's right to tax dividends to situations where the recipient is the "beneficial owner" of such income.

The term "beneficial owner" is not defined in tax treaties. The concept was introduced in the 1977 OECD Model to counter treaty-shopping arrangements. The OECD Commentary does not offer a positive definition; instead, it explains what does not constitute beneficial ownership. Agents, nominees and conduit companies acting as fiduciaries or administrators are not regarded as beneficial owners where their right to use and enjoy the income is constrained by a contractual or legal obligation to pass it on. The emphasis is therefore on "dominion and control" over the income and a purposive interpretation aligned with the object of preventing abuse.

International jurisprudence has consistently endorsed this substance-based approach. In ***Indofood International Finance Ltd. v. JP Morgan Chase Bank (2006 EWCA Civ 158),*** the English Court of Appeal held that the beneficial owner is one who enjoys the "full privilege" of directly benefiting from the income. In ***Prévost Car Inc. v. The Queen (2008 TCC 231),*** the Canadian court recognised beneficial ownership where the intermediary retained discretion over the dividend and was not legally bound to pass it on. Similarly, in ***Golden Bella Holdings Ltd***.[8], the Mumbai Tribunal emphasised exclusive possession, control and freedom to utilise income without obligation as key determinants.

In practice, the enquiry is fact-intensive. Indicative factors in determining beneficial ownership include:

(a) Right to use and enjoy the income, unconstrained by any contractual or legal obligations i.e. dominion and control over the income; power of disposal of income;

(b) Absence of obligation to pass on the passive income;

(c) Direct recipient of income does not act as an agent, nominee or conduit company acting as a mere fiduciary or administrator;

(d) Organisation structure of the company and business activities of the members;

(e) Funding of investments (own funds or borrowed funds);

(f) Ownership of the property (say, shares) and rights therein (say, voting rights in the shares);

(g) Ability of parent to exert significant influence over management and activities of subsidiaries;

(h) Substantive business activity and presence of office, assets, employees, etc.;

(i) Assumption of risks viz foreign exchange risk, counter party risk, shareholder's risk, etc.

(j) Examination of legal and contractual documents; etc.

5. Most Favoured Nation Clause

Certain Indian tax treaties (e.g., with the Netherlands, France and Switzerland) contain Most Favoured Nation (MFN) clauses in their Protocols. These clauses inter alia provide that if India subsequently enters into a treaty with a third State (which is a member of the OECD member) granting a lower rate of tax on dividends, the same concessional rate shall apply under the earlier treaty.

India's treaties with Lithuania, Colombia and Slovenia prescribed a 5% dividend tax rate. Although these countries were not OECD members at the time of signing their treaties with India, they became members subsequently, giving rise to interpretational disputes.

The controversy centred two principal issues:

8. *Golden Bella Holdings Ltd v. DCIT (Intl Taxn) [2019] 109 taxmann.com 83 (Mum Trib)*

(i) Automatic application vs. notification – Whether the reduced rate or scope applies automatically upon India signing a more favourable treaty, or whether a separate notification u/s 90 of the Income-tax Act, 1961 is required.

(ii) OECD membership timing – Whether the third State must be an OECD member at the time of signing the original treaty or whether subsequent OECD accession suffices.

In Nestle SA[9], the Supreme Court held that a notification u/s 90 is necessary to operationalise MFN benefits and that the third State must be an OECD member at the time of entering into the treaty with India for the MFN clause to apply. The Central Government earlier clarified the same position in Circular No. 3/2022 dated February 03, 2022, regarding the applicability of MFN clauses.

Following this ruling, the Swiss competent authority, which had earlier accepted extension of the lower dividend rate under the MFN clause of the Indo-Switzerland DTAA, suspended the unilateral application of the MFN benefit with effect from 1 January 2025, reverting to the original treaty rate.

Separately, India and France have recently signed an amending protocol to the tax treaty introducing a split dividend tax rate of 5% (for shareholding of at least 10%) and 15% in other cases. The protocol is presently pending entry into force.

6. Conclusion

Cross-border dividend taxation reflects the delicate interface between domestic tax design and treaty allocation of taxing rights. Issues such as DDT, buy-back characterisation and MFN clauses ultimately turn on treaty interpretation and the proper classification of income under the relevant article.

However, treaty relief is not automatic. Conditions such as beneficial ownership, Limitation of Benefits (LOB) clauses and the Principal Purpose Test (PPT) act as substantive safeguards.

Accordingly, dividend taxation under treaties requires careful analysis of characterisation, allocation of taxing rights, treaty entitlement and anti-abuse standards, so as to ensure coherence with international treaty obligations.

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9. *AO (Intl Taxn) v. Nestle SA [2023] 458 ITR 756 (SC)*

" In a conflict between the heart and the brain, follow your heart. "

Swami Vivekanand

SELECT FOREIGN COURT DECISIONS IN INTERNATIONAL TAXATION AND THEIR RELEVANCE FOR INDIA



Isha Raman

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Overview

This article examines three foreign court decisions in international taxation and evaluates their relevance in India. It analyses the differentiation by the UK Court of Appeal of place of effective management as a treaty tie-breaker from the UK residence test. A comparison is drawn to how India interprets place of effective management under Section 6(3)(ii) of the Income Tax Act, 1961 and the related CBDT guidance, and the risks of collapsing this into the tie-breaker understanding. It also looks at how the Irish Court of Appeal understood "liable to tax" in the context of fiscally transparent LLCs, in contrast to Indian courts. Lastly, this article analyses the interaction between the mutual agreement procedure and domestic remedies in light of the Full Federal Court of Australia decision. It draws parallels to how, in India, both remedies are pursued simultaneously and how stays on domestic proceedings are generally permitted. It also highlights the relevance of the Australian decision if India decides to adopt mandatory binding arbitration in the future.

With the evolution of international tax, domestic tax systems no longer operate in a silo. Especially, in the context of OECD and G20 initiatives, international tax has become increasingly dialogic. While, tax is a sovereign power, courts across the world sometimes deal with similar issues such as residence, treaty interpretation and royalty characterisations to name a few. Comparative engagement in understanding how foreign courts interpret similar issues gives Indian practitioners insight into parallel questions and encourages critical thinking beyond the confines of domestic law.

In light of current jurisprudence, namely Justice Pardiwala's concurring opinion in Tiger Global[1], there has been an emphasis on national tax sovereignty. He cautions against external influences on domestic policy making

In light of current jurisprudence, namely Justice Pardiwala's concurring opinion in Tiger Global, there has been an emphasis on national tax sovereignty.

1. *Authority for Advance Rulings vs. Tiger Global International II, III, IV Holdings Civil Appeal Nos. 262, 263 and 264 of 2026 (SC).*



through other nations or international bodies. However, comparative engagement does not have to be seen as a dilution of sovereignty. On the contrary, informed engagement allows for a more holistic understanding of tax which courts may either adopt or reject.

This article outlines certain key foreign court rulings on international tax alongside their relevance in Indian tax jurisprudence.

A. *Geoffrey Richard Haworth & Ors. v HMRC*[2]*:* Place of Effective Management ("PoEM") as a Treaty Tie-Breaker

In this case (***"Haworth"***), the UK Court of Appeal examined the interpretation of PoEM under Article 4(3) of the UK-Mauritius Double Tax Avoidance Agreement (**"DTAA"**).

Facts: In the early 2000s, three long-standing family trusts held substantial shareholdings in two companies that were to be merged and listed on the London Stock Exchange. Anticipating significant capital gains tax upon disposal of the shares, the settlors implemented a tax planning arrangement. The existing UK-resident trustees were replaced with Mauritius-resident trustees for a limited period during which the shares were disposed of. The UK trustees were to be reappointed within the same tax year. It was argued that during the relevant period, the trusts would be treated as resident in Mauritius under Article 4 of the DTAA which would give Mauritius taxing rights over the capital gains under Article 13(4) of the DTAA.

2. *Geoffrey Richard Haworth, Ian Lenagan and SG Kleinwort Hambros Trust Company Ltd v HMRC [2025] EWCA Civ 822 (CA).*

HM Revenue & Customs (**"HMRC"**) stated that the trusts' PoEM remained in the UK, hence, gains arising from the disposal of the shares were taxable in the UK.

Issue: The key issue before the Court of Appeal was the question was whether PoEM under Article 4(3) of the DTAA could be equated with the UK law residence concept of central management and control (**"CMC"**).

Finding: The court dismissed the taxpayers' appeal and upheld HMRC's position. It held that PoEM under Article 4(3), a tie-breaker, cannot be treated as interchangeable with CMC, a domestic residence test. While CMC determines whether an entity is resident in the UK and may result in dual residence, PoEM under the treaty must yield a single answer. It therefore requires a holistic evaluation of where effective management is exercised across jurisdictions, not a mere one-country inquiry on where formal decision-making occurs.

The court emphasised that POEM must be interpreted in its international context and in light of the object and purpose of the treaty. Applying this approach, the court concluded that the trusts' PoEM remained in the UK during the relevant period and the capital gains were taxable there.

Relevance in India

This article does not comment on the avoidance issue, as the case concerned a pre-GAAR period in the UK. The relevance of

The court dismissed the taxpayers' appeal and upheld HMRC's position. It held that PoEM under Article 4(3), a tie-breaker, cannot be treated as interchangeable with CMC, a domestic residence test.

Haworth for India lies in its articulation of PoEM as a treaty concept, distinct from the domestic understanding of residence.

Several of India's tax treaties similarly, use PoEM as a tie-breaker for persons other than individuals. The complexity, particularly for companies, in the Indian context arises from the co-existence of a domestic concept of PoEM under Section 6(3)(ii) of the Income Tax Act, 1961 ("ITA") as well. India therefore, has two distinct PoEM frameworks:

(i) PoEM for determining tax residence of a company under domestic law; and

(ii) PoEM for resolving dual residence under a treaty.

Under Section 6(3) of the ITA, a company is resident in India if it is either an Indian company, or if its PoEM is in India. PoEM under the ITA is defined as the place where, in substance, the key management and commercial decisions necessary for the conduct of the business as a whole are made[3]. This is read with the Central Board of Direct Taxes circular on PoEM guiding principles (**"PoEM Circular"**) which lays out certain objective tests to determine PoEM[4].

3. *Explanation to Section 6(3)(ii) of the Income Tax Act, 1961.*
4. *Central Board of Direct Taxes, Circular No. 06 of 2017 dated 24 January 2017 (Place of Effective Management Guidelines). The PoEM Circular provides the guiding principles to determine if a non-resident has a place of effective management in India. Under these principles, relevant factors such as operations, decision-making, situs of board of directors and their meetings, employees or agents should not be in India. It applies to companies whose turnover or gross receipts exceed INR 50 crore in a financial year.*

In paragraph 4 of the PoEM Circular, acknowledges that India recognises PoEM as a tie-breaker rule in treaties. Interestingly, the succeeding sentence sets out that the guiding principles for PoEM are set out in the following paragraphs[5]. This sequencing may suggest to some that these are guiding rules for the tie-breaker as well as domestic residence. This concern is especially relevant since PoEM was introduced into the ITA in 2015 by the Finance Act, after India had multiple treaties with partners where PoEM was the treaty tie-breaker.

Further, Article 3(2) of most Indian treaties provides that where a term is not defined in a treaty, it shall, "unless the context otherwise requires", have the meaning it has under the domestic law of that State for the purposes of the taxes to which the Convention applies. It may be argued by some that the definition of PoEM in the ITA would be able to be applied in a treaty context. In this context, an additional question arises as to whether the domestic definition of PoEM encompasses only the explanation under the ITA or also the tests set out in the PoEM Circular. That, however, is a broader enquiry.

Regardless, this is precisely the kind of situation in which "context would otherwise require" since, this risks a circular interpretation of residence, India would be unable to break a tie when both its initial and subsequent tests are the same. As Haworth sets out, a tie-breaker cannot be reduced to a one-country inquiry. If each Contracting State were simply to reapply its domestic residence test, the tie-breaker clause would be rendered obsolete.

Though tie-breaker disputes frequently arise in the context of individuals, dual residence cases involving companies have been relatively limited in India. Individual tie-breaker cases would not be able to provide meaningful guidance on the issue discussed here, as the tests for individuals differ materially to the residence criteria under the ITA.

Prior to the introduction of PoEM in the ITA, ***Saraswati Holding Corpn. Inc. v. Deputy Director of Income-tax***[6] set out that domestic residence tests and treaty tie-breaker rules operate in distinct spheres. However, post-introduction, it must be noted that there is a risk that it may be argued that PoEM for treaty purposes must align with the domestic framework, including the PoEM Circular. However, Haworth cautions against collapsing a treaty tie-breaker into a domestic residence test. The function and context of the treaty provision must remain central to the analysis.

B. *Susquehanna International Securities Ltd & Ors v. Revenue Commissioners*[7]: Fiscally transparent companies and interpretation of "Liable to Tax"

In this case (***"Susquehanna"***), the Irish Court of Appeal considered whether a fiscally transparent US LLC qualified as a "resident" under Article 4 of the Ireland-US DTAA.

5. *"4. Place of effective management' (POEM) is an internationally recognised test for determination of residence of a company incorporated in a foreign jurisdiction. Most of the tax treaties entered into by India recognises the concept of 'place of effective management' for determination of residence of a company as a tie-breaker rule for avoidance of double taxation. The guiding principles to be followed for determination of POEM are enumerated in the following paragraphs."*
6. *ITA Appeal No. 5619/Del/2004.*
7. *[2025] IECA 123.*

Facts: The taxpayers were Irish companies whose ultimate parent was a US LLC. They sought to claim group relief under Section 411 of the Irish Taxes Consolidation Act 1997, which limited such relief to EU /EEA resident companies. The taxpayers contended that, by virtue of Article 25(4) of the DTAA on non-discrimination, they could not be subjected to more burdensome treatment than EU /EEA resident companies.

Under US federal tax law, the US LLC was treated as a "disregarded entity." It was not subject to tax in its own right, instead, its profits were taxed directly in the hands of its US-resident individual owners. The LLC was owned by six Delaware S-corporations, which were in turn owned by five US nationals. This structure was central to the dispute, since the LLC bore no federal income tax liability at its hands.

Issue: The core issue before the court was whether the US LLC was "liable to tax" in the US within the meaning of Article 4 of the DTAA so as to qualify as a "resident of a Contracting State." If the LLC was not liable to tax, the taxpayers would be unable to invoke the anti-discrimination protection under Article 25(4).

Finding: The court held that the US LLC was not "liable to tax" in the US. Though it was incorporated and managed there, it was outside the charge of federal income tax as it had not elected corporate tax treatment. In its view, the phrase "liable to tax" required actual legal exposure to tax in the hands of the entity itself. Since the US LLC was not a treaty-resident, the taxpayers could not rely on Article 25(4).

Relevance in India

In Susquehanna, the Irish Court of Appeal adopted an interpretation that diverged from the approach taken by the Delhi Tribunal in ***General Motors Company USA v. ACIT***[8] on the meaning of "liable to tax." One of the principal differences lay in the method of treaty interpretation. The Irish court adopted a textual reading of the provision and held that, in the absence of ambiguity or absurdity, there was no basis to resort to broader interpretive tools. By contrast, Indian courts in similar contexts have used a more purposive approach, particularly in cases involving fiscally transparent entities.

For example, in ***Linklaters LLP v. ITO***[9], albeit in the context of a partnership, the Indian courts applied this purposive approach to Article 4. The interpretation proceeded on the basis that fiscal domicile must be understood reasonably and in light of the title of the article[10]. It found that it would be absurd to conclude that a person could exist without any fiscal domicile. Thus, so long as a jurisdiction retained the right to tax, the test of fiscal residence was treated as satisfied. This reasoning was subsequently followed in General Motors[11] in relation to a US LLC.

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8. *ITA No. 2360/Del/2022.*
9. *ITA No. 4896/Mum/03.*
10. *See para 75 of Linklaters LLP v.ITO, supra note 8, "It is a well-known Latin legal maxim that "A rubro ad nigrum" which means, literally, from red to the black... This Latin maxim implies that in the process of interpreting a statute, one must start from the title and interpret the text of the provision with reference to its title. The same approach must hold good for interpretation of a tax treaty as well, because that is where contextual interpretation has an even greater role to play. Viewed thus, the purpose of article 4 is ascertainment of fiscal domicile of a person…It is only elementary that no man can be without a domicile."*
11. *General Motors Company USA v. ACIT, supra note 7.*

While India has thus adopted a broader and more substance-oriented understanding of "liable to tax" in the context of fiscally transparent entities, the Irish Court in Susquehanna adhered to a more textual approach.

The second difference lay in the understanding of "liable to tax" in India and Ireland. The Irish court did distinguish between being "subject to tax" and being "liable to tax," and it did not appear to treat actual payment of tax as the decisive factor. However, its primary concern was the conflation of "potential legal liability" with "actual legal liability," which it treated as distinct from the "subject to tax" versus "liable to tax" dichotomy. The Court emphasised that, where the LLC had elected to be treated as fiscally transparent, there was no abstract or independent legal liability at the level of the entity itself.

Linklaters[12] emphasised that the right of a jurisdiction to tax is sufficient to satisfy the test of "liable to tax," whether or not that right is exercised. The Irish court, however, drew a distinction as to whether a US LLC could be regarded as comprehensively taxed where the tax was imposed (i) in the hands of a different person and, (ii) in a different legal character. On (i) it was argued that the treaty does not suggest that benefits attach to income rather than to persons who meet the residence requirement. In contrast, in ***Herbert Smith Freehills LLP v. ACIT***[13], which concerned an LLP, it was emphasised that it is immaterial at whose hands the tax is imposed, provided the income is taxed in the resident state. This reasoning was also referred to in *General Motors*[14]. On (ii) the Irish court reasoned that the character of the tax had shifted, from corporation tax at the hands of the LLC to individual income tax at the hands of the members. In its view, once the nature of the liability changes in this manner, it cannot be said that the LLC's liability to tax remains the same.

While India has thus adopted a broader and more substance-oriented understanding of "liable to tax" in the context of fiscally transparent entities, the Irish Court in Susquehanna adhered to a more textual approach. The divergence ultimately turns on whether treaty residence depends on the existence of a jurisdictional right to tax, or on actual legal liability to tax in the hands of the entity itself. The contrast reflects differing conceptions of how far treaty interpretation may accommodate fiscal transparency.

However, recent jurisprudence in India suggests that the analysis may not remain static. In *Tiger Global*[15], albeit in the context of avoidance, the Court appeared to attach weight to whether the income in question was in fact liable to tax in the State of residence. Although the case arose in a different setting, the reasoning implicitly considered the outcome of taxation at the hands of the assessee as relevant to treaty applicability. If this line of reasoning develops further, Indian courts may increasingly scrutinise whether a fiscally transparent entity bear actual tax liability,

12. *Linklaters LLP v.ITO, supra note 8.*
13. *ITA No. 5760/Del/2016.*
14. *General Motors Company USA v. ACIT, supra note 7.*
15. *See para 49 of Authority for Advance Rulings vs. Tiger Global International II, III, IV Holdings Civil Appeal Nos. 262, 263 and 264 of 2026 (SC).*

rather than relying solely on the existence of a jurisdictional right to tax.

C. *Oracle Corporation Australia Pty Ltd v. Commissioner of Taxation*[16]: MAP and Domestic Remedies

Facts: In this case (**"Oracle"**), the Federal Court of Australia considered the interaction between domestic remedies and the mutual agreement procedure (**"MAP"**) under Article 26 of the Australia-Ireland DTAA, read with Articles 16 and 19 of the multilateral instrument (**"MLI"**). The dispute arose from the alleged failure to withhold tax on payments made under a software distribution agreement between Oracle Australia and its Irish affiliate. The Australian tax authorities contended that the payments constituted royalties under the DTAA.

The taxpayer invoked MAP proceedings between Australia and Ireland. Meanwhile, the Australian tax authorities issued a decision on the taxpayer's objection to penalties imposed for failure to withhold. Under Article 19(2) of the MLI, a competent authority may suspend MAP where issues are pending before a court or tribunal. However, under Australian procedural law, the taxpayer was required to file an appeal within 60 days to preserve its domestic appellate rights. Once such an appeal was filed, domestic proceedings would be regarded as commenced, enabling the competent authority to suspend MAP. The taxpayer was therefore placed in a position where preserving domestic remedies risked jeopardising the MAP process.

Issue: The issue before the court was whether domestic proceedings should be stayed in order to permit the MAP to proceed, as per the taxpayer's preference. The primary judge had refused to grant a stay on public interest grounds since Australian tax authorities argued that the characterisation of software payments as royalties was a matter of broader importance and that judicial determination would provide guidance to other taxpayers and address international friction with the US on this issue.

Findings: On appeal, the court granted the stay and set aside the decision of the primary judge. The court held that the structure of the DTAA and the MLI contemplates that taxpayers may have recourse to both domestic remedies and MAP, though not concurrently. Forcing a taxpayer to abandon one avenue in order to preserve the other would undermine the accessibility of MAP as a remedy. The court further held that the Commissioner's public interest arguments were insufficient to deny the stay.

Relevance in India

While Oracle was a landmark decision in Australia encouraging taxpayers to avail MAP as a remedy, the position in India is procedurally different. In India, domestic remedies and MAP may be pursued simultaneously. Most Indian treaties use the phrase "irrespective of domestic remedies". This has been interpreted to mean that domestic proceedings and MAP are not alternatives. MAP is typically invoked alongside domestic remedies, and domestic proceedings are often initiated preventatively[17].

Under Indian treaties, there is no provision enabling the tax authorities to compel

16. *[2025] FCAFC 145.*
17. *See paras 42 and 43 of the OECD, BEPS Action 14: Making Dispute Resolution Mechanisms More Effective - MAP Peer Review Report, India (Stage 2).*

The Central Board of Direct Taxes has issued guidance on MAP, which clarifies that a taxpayer may pursue MAP and domestic appellate remedies concurrently.

the assessee to abandon MAP, unlike the procedural tension that arose in Oracle. MAP may even be initiated after the finalisation of domestic proceedings. The Central Board of Direct Taxes has issued guidance on MAP, which clarifies that a taxpayer may pursue MAP and domestic appellate remedies concurrently[18]. That said, once the ITAT passes a final order on the issue that is the subject of MAP, the Indian competent authority will ordinarily be bound by that decision, and discussions at the MAP stage would be confined to just correlative relief.

Indian courts have also granted stays in certain circumstances where MAP has been initiated. The ***Motorola Solutions India (P.) Ltd. v. Commissioner of Income Tax, Faridabad***[19] decision demonstrates how this operates in practice. Where MAP proceedings were pending and the tax demand was fully secured by a valid bank guarantee, courts and tribunals stayed recovery proceedings to protect the treaty process. However, this case concerned the suspension of recovery where revenue was secured, and did not conclusively settle the broader question of the interaction between MAP and domestic remedies.

Further, rule 44H of the Income Tax Rules, 1962 provides that acceptance of a MAP resolution must be accompanied by proof of withdrawal of appeal in respect of the same subject matter. The Indian framework therefore permits parallel initiation, but requires finality at the stage of resolution.

Australia had adopted mandatory binding arbitration under Article 19 of the MLI, by contrast, India has consistently and emphatically prioritised national tax sovereignty. If India were to adopt Article 19 arbitration in the future, there is a risk that Oracle-type tensions may emerge. However, as binding arbitration becomes prominent in international tax practice, Oracle offers instruction on the judicial attitude for managing such a tension.

■

18. Central Board of Direct Taxes, Instruction No. 02 of 2022 dated 10 June 2022 (Guidance on Mutual Agreement Procedure).
19. ITA No. 222/2014.

"Do one thing at a Time, and while doing
it put your whole Soul into it to the exclusion of all else."

Swami Vivekanand

TRANSACTION TAX ISSUES IN BUSINESS REORGANIZATIONS – LAW, PRACTICE AND GAPS





Sonia Agrawal *Aadya Selvamani*

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Overview

India's transaction ecosystem has expanded significantly, driven by sustained inbound investment, increasing outbound acquisitions, active domestic restructurings, and the rise of reverse flip transactions. While corporate law has evolved to facilitate complex reorganizations, the income tax framework continues to exhibit gaps between statutory design and commercial practice. These gaps become particularly pronounced as transaction structures grow in scale, complexity, and duration.

A key area of uncertainty concerns tax neutrality for fast track demergers. Although fast track routes are recognised under corporate law, the income tax definition of "demerger" remains linked to tribunal approved schemes, creating ambiguity where reorganizations are otherwise compliant. The Government's position that tax neutrality is unavailable in the absence of judicial supervision increases litigation risk and raises concerns for transactions already implemented.

The article also examines challenges in allocating cost of acquisition in demergers, where a literal interpretation of "net worth" may distort outcomes, and highlights asymmetries in cross border reorganizations. Further, internal group mergers involving step down subsidiaries raise technical issues where statutory conditions assume commercially redundant share issuance.

Unresolved questions around the timing and taxability of contingent consideration continue to generate disputes, while acquisitions of listed shares expose buyers to unintended tax consequences due to signing to closing price movements under anti abuse provisions. Overall, the discussion underscores the need for statutory clarity that aligns taxation with economic substance, thereby reducing uncertainty and transactional friction.

1. Background and framework

1.1 India has emerged as one of the most active jurisdictions globally for inbound investment, outbound expansion and domestic corporate restructuring. This transaction intensity is reflected across foreign direct investment (FDI), overseas direct investment (ODI), cross border mergers including reverse flips, start up funding, public market exits etc.



1.2 From an inbound perspective, India recorded FDI inflows[1] of USD 81.04 billion in FY 2024–25, representing a 14% increase over FY 2023–24 and underscoring sustained foreign investor confidence despite global volatility. Parallel to inbound investment, Indian corporates have become increasingly active outbound acquirers, using overseas mergers, acquisitions and group reorganizations as tools for global expansion, technology acquisition and market access. RBI data indicates that India's outbound direct investment rose sharply in FY 2024–25, with financial commitments crossing USD 40 billion[2], driven primarily by equity infusions and overseas acquisitions.

1.3 In recent years, India has also witnessed a discernible increase in "reverse flip" transactions, where Indian startups that had earlier shifted their holding structures overseas (typically to the US or Singapore for capital raise or overseas listing purposes) are re domiciling their parent entities back to India, largely to align with domestic capital markets and IPO ambitions. These restructurings involve significant transaction tax considerations, particularly where the reverse flip is implemented through share swaps or inbound mergers.

However, as deal structures have evolved in scale, complexity and timing, mismatches between commercial practice and tax design have become increasingly visible.

1.4 Against this backdrop of sustained inbound capital, growing outbound ambition and active domestic capital markets, transactions and business reorganizations have become central tools for value creation in India.

2. Transaction Tax issues

2.1 Indian laws recognize multiple pathways for the transactions such as schemes of arrangement, share and asset transfers, slump sales, cross border mergers, swap of shares, capital restructuring, etc. each of which interacts with the tax framework in distinct ways. While the

1. *Source: Press Information Bureau (PIB), Government of India press release dated 27 May 2025 issued by the Ministry of Commerce & Industry.*
2. *Source: India Brand Equity Foundation website (Ministry of Commerce and Industry)*

Companies Act, 2013 focuses on enabling efficient restructuring of corporate entities, the Income tax Act, 1961 ("the Act") seeks to balance tax neutrality for reorganizations with safeguards against tax abuse. The Act seeks to accommodate the transactional intensity by granting tax neutrality to specified reorganizations which fulfil prescribed conditions. However, as deal structures have evolved in scale, complexity and timing, mismatches between commercial practice and tax design have become increasingly visible. The objective of the article is to highlight some of such tax issues which arise in the context of a highly active transaction ecosystem where the consequences of ambiguity, asymmetry or procedural rigidity are magnified by deal volumes and values.

2.2 Fast track demerger and tax neutrality

2.2.1 Corporate reorganizations in India are implemented either through a tribunal approved scheme route or, through a simplified 'fast track' route for eligible companies. Under the Companies Act, 2013, schemes of arrangement (including mergers and demergers) are typically undertaken through the National Company Law Tribunal (NCLT) process.

2.2.2 In parallel, section 233 of the Companies Act provides a Central Government / Regional Director approval route for specified classes of reorganizations, referred to as 'fast track' mergers / demergers.

2.2.3 The Ministry of Corporate Affairs ("MCA") has progressively expanded the fast track framework from start up combinations to enable reverse flip combinations involving a foreign holding company and its Indian wholly owned subsidiary, and most recently in September 2025 by widening the set of unlisted / group combinations that can use the fast track route.

2.2.4 From an income-tax perspective, tax neutrality for corporate reorganisations is achieved through a coordinated set of sections operating at the company, shareholder and asset level. Broadly, neutrality is implemented through: (i) exemption provisions that treat specified transactions as not constituting a "transfer", (ii) continuity rules that preserve cost, written-down value and period of holding, and (iii) clawback mechanisms in some cases that withdraw neutrality if prescribed statutory conditions are breached.

2.2.5 In the context of a demerger, the definition of "demerger" under section 2(19AA) of the Act (section 2(35) of the ITA 2025[3]) sets out various conditions such as transfer of all assets and liabilities of an undertaking on a going concern basis at book values, continuity of shareholding, issuing of shares by the resulting company on proportionate basis etc. One of the express condition for demerger tax neutrality is that demerger should be under the specified provisions of Companies Act (i.e. section 391 to 394 of Companies Act, 1956 which correspond to section 230 to 232 of Companies Act, 2013) – i.e. a court / tribunal approved scheme of arrangement under the Companies Act. This definitional linkage thus

3. *Income Tax Act, 2025*

contemplates that a demerger that is implemented in accordance with the Companies Act scheme framework, and that satisfies the conditions in section 2(19AA) (section 2(35) of ITA 2025), is eligible for tax neutrality through a combination of provisions, including section 47(vib) (section 70(1)(j) of the ITA 2025) (company level exemption), section 47(vid) (section 70(1)(k) of ITA 2025) (shareholder level exemption) and section 56 (section 92 of ITA 2025) (exemption from gift tax for any sum of money or property received).

2.2.6 By contrast, in the case of a merger (amalgamation), while tax neutrality is similarly intended in principle, the statutory drafting is less cohesive. The Act defines "amalgamation" in section 2(1B) (section 2(6) of the ITA 2025), and neutrality is extended through various provisions. However, unlike section 2(19AA) (section 2(35) of the ITA 2025), the definition of "amalgamation" does not expressly anchor itself to a specific supervisory route under the Companies Act.

2.2.7 Although corporate law treats fast track mergers and demergers as reorganizations within the same simplified approval architecture, tax neutrality for fast track demergers has been contentious because the tax definition of 'demerger' has historically been drafted with reference to section 391 to 394 of the Companies Act, 1956 (correspond to section 230 to 232 of the Companies Act, 2013) and these provisions provide for court/tribunal approved schemes. This creates a practical mismatch, i.e. a transaction of fast-track demerger may be fully compliant under the company law but may face tax uncertainty solely due to the chosen corporate route i.e. fast track route.

2.2.8 In this regard, it is interesting to note that a view exists that section 233 of the Companies Act 2013 is a sub-set of section 230 to 232 and it does not have any independent existence. Accordingly, fast track demerger should qualify for tax neutrality. To get certainty, in the Parliamentary Select Committee process for the Income tax Bill, 2025, stakeholders specifically requested that the definition of 'demerger' be amended to explicitly cover fast track demergers. The Ministry of Finance ("MoF") did not accept this suggestion. MoF's stated that, 'the fast-track demerger is not made tax neutral because that is not supervised by any court or tribunal. This is done by the taxpayer themselves. Whatever is under the supervision of NCLT, is made tax neutral as it was in the earlier law. Hence, there is no change in the policy'.

This creates a practical mismatch, i.e. a transaction of fast-track demerger may be fully compliant under the company law but may face tax uncertainty solely due to the chosen corporate route i.e. fast track route.

2.2.9 Given the MoF's stated position, fast track demerger availing tax neutrality could be litigative. It may also raise questions on whether MoF position hampers past demergers that have already been concluded prior to such comments. In such a situation, taxation of such fast-track demergers then may need to be evaluated based on ordinary taxation principles to determine whether in absence of the specific exemption, could there be an income that may

be brought to charge? Arguably, the demerged company can contend that it has not received any consideration to be taxed while the resulting company can contend that it has discharged the consideration for the net assets received. As regard shareholders, it can be contended that it has not transferred any shares of the demerged company and receipt of shares issued by the resulting company dent the value of original shares held in the demerged company, thus such receipt of shares in resulting company is not without any consideration triggering gift taxation.

2.2.10 As regards fast-track mergers, basis literal reading of section 2(1B) of the Act (section 2(6) of the ITA 2025) a fast-track route merger appears to get covered by the provisions of tax neutrality. It would be interesting to see if MoF's stated position in the context of fast-track demerger is applied to the fast-track mergers whereas plain and simple language of section 2(1B) (section 2(6) of the ITA 2025) does not make any reference to the Companies Act.

2.3 Determination of cost of acquisition of shares in resulting company and demerged company

2.3.1 In a demerger, the resulting company typically issues its shares to the shareholders of the demerged company and such shareholders also continue to hold the shares in the demerged company. Accordingly, cost of such shares received by the shareholders in pursuance to the demerger as well as cost of existing shares in the demerged company needs to be determined. In this regard, section 49(2C) of the Act (Sr no. 14 of section 73(1) of the ITA 2025) adopts a formula based approach for allocating the cost of acquisition of shares received pursuant to a demerger, linking it to the ratio of the net book value of assets transferred to the net worth of the demerged company. While the statute does not define "net book value", a purposive and commercially consistent interpretation suggests that it should be understood as the book value of net assets, i.e., assets reduced by accumulated depreciation and associated liabilities. In contrast, the term "net worth" is expressly defined as given below:

"*Explanation*.—For the purposes of this section, "net worth" shall mean the aggregate of the paid up share capital and general reserves as appearing in the books of account of the demerged company immediately before the demerger."

On a strict construction, the definition of net-worth is confined only to paid up share capital and general reserves. Considering the same, the issue under discussion is whether the term 'net worth' as per the provision of section 49(2C) of the Act (Sr no. 14 of section 73(1) of the ITA 2025) needs to be given literal meaning or the logical or purposive meaning by including securities premium, retained earnings/ profit and loss balance and other reserves in denominator, as the case may be. Applying the narrow meaning of 'net-worth' in all cases may distort the cost allocation formula under the provision, as it could result in an unrealistic comparison between the value of assets transferred and the demerged company's net worth, leading to an disproportionate allocation of cost to the resulting company's shares. To avoid such unintended outcomes, a purposive

and logical interpretation suggests that the components used in computing net worth should be broadly aligned with the net book value of assets immediately prior to the demerger and thus security premium, profit and loss balance etc. may be considered to be forming part of the net-worth. While there is no direct judicial precedent on section 49(2C) (Sr no. 14 of section 73(1) of the ITA 2025) on this issue, prevailing market practice in implemented demergers appears to favour this logical approach.

2.4 Cross border reorganizations

2.4.1 Cross border reorganizations are often undertaken to simplify group structures, align legal ownership with operating reality, and enable investments or exits.

2.4.2 Indian tax law provides specific exemptions for certain overseas amalgamations / demergers involving Indian assets, but the framework has evolved in a piecemeal manner and does not always provide symmetrical relief at both company and shareholder levels.

2.4.3 The issue typically arises where an Indian shareholder holds shares in a foreign company, and that foreign company amalgamates into another foreign company. The shareholder receives shares of the foreign amalgamated company in lieu of shares of the foreign amalgamating company. There is no explicit shareholder level exemption in India for such share for share substitution in an overseas amalgamation.

2.4.4 During the Select Committee exercise for Income-tax bill 2025, stakeholders sought a specific exemption for an Indian shareholder in such cases. The MoF's stated that providing such an exemption may result in tax avoidance and leakages and is not feasible, also noting the absence of an oversight mechanism.

2.5 Merger of a step down subsidiary into the holding company – ambiguity on exemption for shareholder

2.5.1 Group simplification often involves the merger of a step down subsidiary into a holding company (a collapse of intermediate layers). The shareholder level exemption in section 47(vii) (section 70(1)(f) of the ITA 2025) is designed to ensure that a shareholder who merely swaps shares as part of a scheme of amalgamation is not taxed, provided the consideration is in the form of shares of the amalgamated company. The provision also contains an express carve out where the shareholder itself is the amalgamated company.

2.5.2 In a step down subsidiary merger into the holding company, issuance of shares to the holding company may be legally or commercially meaningless (for example, where the holding company already indirectly owns the amalgamating company, and the shares are cancelled on merger). This raises a technical question on whether the 'issue of shares' condition embedded in section 47(vii) of the Act (section 70(1)(f) of the ITA 2025) can be said to be satisfied, and if not, whether shareholder level neutrality is denied solely due to legal impossibility / redundancy of issuing shares.

2.5.3 A targeted clarification stating that section 47(vii) (section 70(1)(f) of the ITA 2025) relief is not denied merely because share issuance to the holding company is impossible or redundant in an internal

group merger, provided there is no cash / other consideration and continuity conditions are otherwise met could help providing certainty and reducing litigation in economically neutral group simplifications.

2.6 Taxability of contingent consideration

2.6.1 In acquisition transactions, a portion of the consideration may be structured as contingent or deferred, commonly linked to future performance, regulatory outcomes, or milestone based achievements. From a commercial standpoint, such structures are intended to bridge valuation gaps and allocate risk between the parties. However, the tax treatment of such consideration remains unsettled and there are conflicting judicial precedents.

2.6.2 Under the Act, capital gains are generally computed with reference to the "full value of consideration" received or accruing as a result of the transfer. Where consideration is contingent or indeterminate at the time of transfer, uncertainty arises on whether taxation should occur upfront based on an estimated value, or only upon crystallisation or receipt of such consideration. Conflicting interpretations have resulted in disputes on both the timing and quantum of taxation.

2.6.3 The absence of a clear statutory rule creates practical difficulties, particularly where contingent consideration ultimately does not materialise or materialises at a value significantly different from initial estimates. Taxing such amounts upfront may result in taxation of notional income, while deferring taxation until crystallisation

Under the Act, capital gains are generally computed with reference to the "full value of consideration" received or accruing as a result of the transfer.

raises questions on period of holding and characterisation.

2.6.4 Statutory clarity to this effect may help align taxation with commercial outcomes and reduce disputes arising from mechanically applying capital gains provisions to inherently uncertain consideration structures.

2.7 Acquisition of listed company shares

2.7.1 Certain tax provisions conceptually sound with avowed policy / intention but may produce unworkable outcomes when applied to complex balance sheets, stressed businesses, or multilayered transactions. In such cases, the issue is not one of legislative intent, but of computational design which does not accommodate commercial reality. This is particularly evident in transactions involving restructuring of indebted businesses, internal reorganisations, or transfers of undertakings where book values, historic costs, and economic value diverge significantly. Mechanical application of computational provisions in such cases can result in outcomes that do not reflect economic gains or losses, thereby increasing litigation risk and transactional friction.

2.7.2 A particularly acute manifestation of signing–closing mismatches arises in acquisitions of listed company shares, especially where transactions are subject to regulatory approvals, mandatory open-offer obligations under Securities and Exchange Board

of India (SEBI) regulations, or other closing conditions.

2.7.3 Section 56(2)(x) of the Act (section 92(2)(m) of the ITA 2025) provides that where shares are acquired for a consideration lower than their fair market value ("FMV"), the difference may be taxed in the hands of the acquirer as "income from other sources". In the context of shares of a listed company, the lowest trading price as on the date of share transfer (Closing Date) is considered as benchmark FMV as per section 56(2)(x) of the Act read with Rule 11UA of the Income-tax Rules, 1962 (section 92(2)(m) of the ITA 2025 read with Rule 57 of Draft Income-tax Rules, 2026). While the provision is conceptually designed as an anti-abuse measure, its application to listed share acquisitions raises practical challenges when there is a time gap between deal signing and completion.

2.7.4 In listed transactions, the acquisition price is typically fixed at signing, reflecting negotiated control premiums, strategic considerations, and regulatory pricing norms. However, between signing and closing:

- market prices may fluctuate materially;
- mandatory open offer processes may defer completion by several months; and
- regulatory or shareholder approvals may further extend transaction timelines.

2.7.5 As a result, by the time shares are actually transferred, the prevailing market price, which may be used as a proxy for FMV, may differ significantly from the negotiated acquisition price. This can trigger exposure under section 56(2)(x) (section 92(2)(m) of the ITA 2025) for the buyer, notwithstanding that the price was commercially agreed, regulatorily compliant, and not designed to extract value without consideration. The absence of statutory recognition of such timing differences places transaction parties in a position where commercially inevitable delays may carry unintended tax consequences.

3. Concluding remarks

3.1 The issues highlighted above reflect a broader structural theme within the tax framework, where outcomes may, at times, turn not on the economic substance of a transaction, but on procedural form, timing, and supervisory architecture. This is not to suggest an absence of intent to provide clarity. On the contrary, recent legislative and policy developments demonstrate a conscious effort by the Government to engage with stakeholder feedback, invite recommendations, and refine the law to enhance certainty and administrability.

3.2 In this context, continued dialogue between industry and the Government assumes particular importance. As transaction structures evolve and deal timelines become more complex, a shared awareness of prevailing market practices and the contours of existing provisions is critical, especially given the quantum of value and risk typically involved. While the pursuit of clarity and certainty remains an ongoing process, its effectiveness will depend equally on responsive policymaking and informed engagement by stakeholders operating at the intersection of law and commerce. ■

SUPREME COURT



Keshav B. Bhujle
Advocate

1 GROUP M MEDIA INDIA (P) LTD. VS. DY. CIT (INTERNATIONAL TAX) (2025) 483 ITR 593 (BOM): 2023 SCC ONLINE 2740: (2024) 336 CTR 270 (BOM): A. Y. 2018-19: DATE OF ORDER 18/12/2023

S. 244A of ITA 1961 and Ss. 164(i), 165, 166 and 168(1) of Finance Act, 2016

Equalisation levy — Refund — Interest on refund — Refund granted as excess Equalisation levy paid by assessee after three years — Obligation on Department to pay interest as compensation for use and retention of money collected in excess — Department's contention that statute does not provide for payment of interest on refund of equalisation levy not tenable — High Court directed the Department to pay interest at the rate of six per cent from April 1 of the year following the financial year in which excess payments made by assessee till date of actual refund

The petitioner assessee has been availing of "specified services" as defined in clause (i) of section 164 of the Finance Act, 2016, which came into force with effect from April 1, 2016. Section 164 of the Finance Act, 2016 ((2016) 384 ITR (Stat) 1) provides in clause (i), unless the context otherwise requires, "specified service" means online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government on this behalf.

For the A. Y. 2018-19, the petitioner filed its statement of specified income originally on June 26, 2018, disclosing the total consideration for specified services at ` 3,99,41,76,889 and equalisation levy thereon at ` 23,96,50,668. After declaring the total levy paid of ` 23,96,50,670, a refund of ` 4,23,60,940/- was claimed by the assessee.

By an intimation/order u/s. 168(1) of the Finance Act, 2016, the Department determined the amount of refund at ` 4,23,60,940. However, in spite of the request by the assessee refund was not given. Therefore, the assessee filed a writ petition alleging that there is a failure on the part of the respondents to release the undisputed refund due and determined by the respondents themselves in the intimation/order issued u/s. 168(1) of the Finance Act, 2016 ((2016) 384 ITR (Stat) 1) for the F. Y. 2017-2018 corresponding to the A. Y. 2018-2019, despite reminders sent and for a direction to the respondents to refund an admitted amount of ` 4,23,60,940 plus interest thereon. After filing the writ petition, the Department gave

the refund of the amount but refused to give interest on the refund.

The Bombay High Court allowed the petition and held as under:

"i) The issue that remains to be decided in this petition is whether the petitioner was entitled to interest on the amount refunded.

ii) The stand of the Revenue is interest is not provided for refund of amounts deposited under the equalisation levy, and, therefore, the question of payment of any interest does not arise.

iii) When the collection is illegal, there is a corresponding obligation on the Revenue to refund such amount with interest inasmuch as they have retained and enjoyed the money deposited.

iv) In ***Union of India vs. Tata Chemicals Ltd. [(2014) 363 ITR 658 (SC); (2014) 6 SCC 335; (2014) 3 SCC (Civ) 553; 2014 SCC OnLine SC 176; (2014) 43 taxmann.com 240 (SC).***] the apex court also held that refund due and payable to the assessee is debt owed and payable by the Revenue.

v) In the present case, it is not in doubt that the petitioner was entitled to a refund of ` 4,23,60,940 because the amount was paid after the petition was filed. Since the excess amount has been paid over by the petitioner on various dates during the F. Y. 2017-2018, in our view, the refund ought to have been processed and paid latest by July 31, 2018. The interest, therefore, of course, will become payable from April 1, 2018, if we apply the principles prescribed in section 244A of the Act. The amount, as noted earlier, has been paid only on August 21, 2023. Consequently, we are of the view that the petitioner is entitled to interest on this amount of ` 4,23,60,940 from April 1, 2018, up to August 21, 2023, at the rate of six per cent. per annum, which is the rate prescribed u/s. 244A of the Act.

vi) This order shall be given effect to, and the interest shall be paid over on or before February 15, 2024. If not paid, with effect from February 16, 2024, the rate of interest payable will be at nine per cent. per annum until the date of payment.

vii) This will be in addition to other proceedings to hold the Department and concerned officers to be in wilful disobedience of the orders passed by this Court. The difference of three per cent (nine per cent. - six per cent.) will be recovered from the Officer who will be responsible to have the interest paid."

2 BAX INDIA VENTURES PVT. LTD. VS. CPC 2026 (2) TMI 319 BOM.: DATE OF ORDER 02/02/2026

Ss. 143(1) of ITA 1961

Intimation u/s. 143(1) — Adjustment to the return of income — First proviso — Mandatory in nature — No adjustment to be made unless an opportunity is given to the assessee — No prior opportunity to the assessee before making adjustment — Intimation u/s. 143(1) is liable to be quashed and set-aside

The Assessee company filed its return of income u/s. 139(8A) and claimed the benefit of a lower rate of tax as per section 115BAA of the Income-tax Act, 1961. Along with the return filed u/s. 139(8A), the assessee also filed Form 10-IC, which was mandatory as per section 115BAA of the Act. However, the Assessee's claim was denied, and an adjustment was made in the Intimation order u/s. 143(1)(a) of the Act.

The Assessee challenged the said Intimation order by way of writ petition before the High Court on the ground that the assessee was not given prior intimation about the proposed adjustment and therefore the Intimation order passed u/s. 143(1)(a) of the Act was not sustainable and ought to be set-aside.

The contention of the Department was that the present case was that of denying the beneficial rate of tax to the assessee and not that of adjustment to the total income or loss, and therefore, there was no need to provide an opportunity to the assessee. Further, since the assessee had failed to file the return of income along with Form 10-IC by the due date mentioned u/s. 139(1), the tax was correctly levied at the normal rate of tax.

The Bombay High Court allowed the petition of the assessee and held as follows:

"i) Admittedly, no intimation was given to the assessee as contemplated in the first proviso to Section 143(1)(a). The first proviso, in our opinion, is clearly mandatory in nature, as it clearly stipulates that no adjustment 'shall be made' unless an intimation is given to the assessee of such adjustment either in writing or in electronic mode. Once this is a mandatory provision, no Intimation order u/s. 143(1)(a) can be passed, making any adjustment in the Return of Income filed by the assessee, unless such proposed adjustment is first intimated to the assessee and he has been given a chance to respond thereto.

ii) In the facts of the present case, no intimation as contemplated under the first proviso to Section 143(1)(a) was ever issued to the Petitioner. This is an undisputed fact. On this ground alone, the Intimation order dated 1st December, 2025, issued u/s. 143(1)(a) is liable to be quashed and set aside.

iii) We are unable to agree with the submission of the learned Advocate appearing on behalf of the Revenue that this exercise would be an exercise in futility because, in the facts of the present case, admittedly, Form 10-IC was not filed by the due date. There could very well be a case where, after belatedly filing a return and belatedly filing Form 10-IC, and before the Intimation order is passed u/s. 143(1)(a), the Petitioner could have obtained an order seeking condonation of the delay in filing Form 10-IC u/s. 119(2)(b) of the Act. This could possibly be the response that the assessee may give to the CPC in respect of the notice issued under the first proviso to Section 143(1)(a) and contend that the proposed adjustment ought not to be made. It is therefore incorrect to suggest that the intimation proposing an adjustment, as contemplated under the first proviso to Section 143(1)(a), would be an exercise in futility. Once we find that the said provision is mandatory in nature, the same has to be complied with by the Revenue. The Revenue cannot decide in which case it would be futile and in which case it would not.

iv) The Department is free to issue a notice to the assessee as contemplated under

the first proviso to Section 143(1)(a) as well as take the response of the Petitioner, if any, into consideration, and only thereafter pass a fresh Intimation order as contemplated u/s. 143(1)(a)".

3 NUZIVEEDU SEEDS LTD. VS. CCIT TS-150-HC-2026(TEL.) A.YS.: 2012-13 AND 2013-14: DATE OF ORDER 30/01/2026

Rule 29 of the Income Tax Appellate Tribunal Rules, 1963

Power of Tribunal — Admission of additional evidence — Rule 29 of ITAT Rules, 1963 — Admission only at the instance of the Tribunal — Parties to the appeal are not entitled as a matter of right to produce additional evidence — Order of the Tribunal allowing the admission of additional evidence held to be in gross violation of the procedure contemplated under Rule 29 — Order of the Tribunal liable to be set-aside

The assessee, a public limited company, engaged in the research, production and sale of hybrid seeds and crops. In the scrutiny assessment for A. Y. 2012-13 and 2013-14, additions and disallowance was made u/s. 10(1) and section 14A of the Act.

On appeal before the CIT(A), the appeal of the assessee was partly allowed, wherein the addition made u/s. 10(1) of the Act was deleted, and the disallowance made u/s. 14A of the Act was confirmed. Against the order of the CIT(A), cross appeals were filed by the assessee and the department. The Tribunal remanded the matter to the Assessing Officer with the direction to examine the nature of business of the assessee and, if the nature of business, i.e. whether agriculture or not and also to recompute the disallowance depending upon the determination of the nature of the business of the assessee.

During the pendency of the appeal before the Tribunal, a search was conducted at the business premises of the assessee, wherein certain incriminating material was found. Thereafter, notice u/s. 153A of the Act was issued. Pending appeal before the Tribunal, the Department filed an application before the Tribunal for admission of additional evidence to bring on record before the Tribunal, the alleged incriminating material/documents found during the course of search. Despite the assessee's opposition to admitting the incriminating material as additional evidence, the Tribunal allowed the application. On the basis of the said documents, the Tribunal concluded that the addition u/s. 10(1) was not sustainable and remanded the matter to the AO as regards the disallowance u/s. 14A of the Act was concerned.

On appeal before the High Court, the assessee challenged the order of the Tribunal on the ground that the Tribunal was not justified in invoking Rule 29 of the ITAT Rules, 1963 and in accepting the additional evidence since Rule 29 expressly prohibits the department from bringing on record such additional evidence. Further, the assessee also challenged the order of the Tribunal on the ground that the Tribunal was not justified in taking into account the evidence of proceedings u/s. 153A of the Act as the proceedings u/s. 153A is separate and the same could not be relied upon in an appeal before the Tribunal.

The Telangana High Court decided the appeal in favour of the assessee and held as follows:

"i) A perusal of Rule 29 of the Rules makes it clear that the very foremost words of the Rule explicitly provide that the parties to an appeal are not entitled, as a matter of right, to produce additional evidence, either oral or documentary, before the Tribunal. The Rule further makes it clear that it is the Tribunal alone, which is competent to direct either party to produce any witness to be examined or affidavit to be filed or may allow such evidence to be adduced.

ii) Rule 29 of the ITAT Rules, abundantly makes it clear that neither of the parties to the appeal can independently file additional evidence, either oral or documentary and it is only the Tribunal on its own can direct either of the parties to produce any documents or witness or any affidavit to be filed for determination of the dispute and if the income tax authorities decide the case without giving sufficient opportunity to the assessee either on the points specified or not specified, the Tribunal may, for reasons to be recorded, permit the production of such evidence by the assessee. The words envisaged in Rule 29, therefore leaves no scope for either the Revenue or the assessee to file applications to adduce evidence as a matter of right. Only the learned ITAT alone is empowered to direct either of the parties to produce additional evidence, and only in cases where there is a total denial of giving sufficient opportunity to the assessee, the assessee has got a right to file such an application seeking permission to adduce additional evidence.

iii) The learned ITAT exceeded in its jurisdiction and acted in gross violation of Rule 29 by allowing the application filed by the Revenue in a routine manner and remanding the matter to the Assessing Authority for fresh determination.

iv) The judgments relied upon by the department were distinguishable on the ground that in those cases, the discretion of the Tribunal was exercised to admit additional evidence for substantial causes or where the evidence could not be produced before the lower authorities due to genuine difficulties, such as non-retrievability of emails or documents. The Tribunal, in those cases, acted after determining that the evidence was necessary for proper adjudication. Further, many of those judgments arose under different statutory provisions, such as Order XLI Rule 27 and or other laws, and did not specifically consider Rule 29 of the Rules, as that falls for consideration in the instant case. None of the judgments expressly held that either party could file an application for additional evidence as a matter of right under Rule 29

v) In the instant case, the application filed by the Revenue as a matter of right was allowed by the learned ITAT, without proper appreciation of Rule 29, which is impermissible in law. We are of the considered view that the impugned orders of the learned ITAT are in gross violation of procedures contemplated under Rule 29 of the Rules and the learned ITAT exceeded its jurisdiction and thus, the impugned orders are liable to be set aside."

4 PRINCIPAL CIT VS. BRITANNIA INDUSTRIES LTD. (2025) 346 CTR 242 (CAL.): A. Y. 2018-19: DATE OF ORDER 09/07/2025

S. 263 of ITA 1961

Revision — Erroneous and prejudicial order — Lack of proper enquiry — Initiation of 263 at the instance of the AO cannot be done — Finding of the Tribunal well founded — Reliance upon notes submitted by the assessee before the AO — Cannot be stated that the AO did not consider all the factors and accepted the plea of the assessee and completed assessment — CIT is required to consider the explanation offered and take a decision — Failure to render any finding by CIT — Revision u/s. 263 not sustainable

The scrutiny assessment for A.Y. 2018-19 was completed u/s. 143 of the Income-tax Act, 1961, by an order dated 22/03/2021. Subsequently, notice u/s. 263 of the Act was issued requiring the assessee to show cause why the assessment order should not be treated as erroneous or prejudicial to the interest of the revenue. The assessment order was sought to be revised on, inter alia, the applicability of section 56(2)(x) to the acquisition of leasehold land and building and the disallowance of claim u/s. 43B in relation to reversal or write back of provision for liabilities. Though the assessee filed a response objection to the revision of the assessment order, the Principal Commissioner passed an order u/s. 263 setting-aside the assessment order and directing the Assessing Officer to pass the order afresh after considering the issues on which revision was sought to be made.

Against the said order of revision, the assessee filed an appeal before the Tribunal, which was allowed.

The Calcutta High Court dismissed the appeal of the Department and held as follows:

"i) A reading of s. 263 of the Act would clearly show that unless and until the twin conditions are satisfied, the assessment order should be erroneous and it should be prejudicial to the interest of Revenue, the power under s. 263 of the Act cannot be invoked. Apart from that, the statute mandates that the Principal CIT should inquire and be satisfied that the case warrants the exercise of its jurisdiction under s. 263 of the Act, and such satisfaction should be manifest in the show-cause notice which is issued under the said provision.

ii) The Tribunal considered the factual position and found that out of the five issues which were raised in the show-cause notice issued u/s. 263 of the Act, except for three issues, the explanation offered by the assessee in respect of the other issues was accepted by the Principal CIT. Furthermore, on facts, it is clear that the Principal CIT invoked its jurisdiction u/s. 263 of the Act at the instance of the Assessing Officer, which was incorrect. Therefore, the finding of the learned Tribunal that the Principal CIT could not have invoked its power u/s. 263 of the Act, solely based upon the reference made by the Assessing Officer, is well founded.

iii) As regards the merits of the case, i.e. regarding the applicability of section 56(2)(x) to the transaction of purchase of land by the assessee from Bombay

Dyeing & Manufacturing Company Ltd., it is undisputed that all the facts were placed before the AO and they were also disclosed in the notes of the tax audit report and the notes to the computation of income filed along with the return of income and those were scrutinised by the Assessing Officer. In fact, the learned Tribunal has extracted the relevant portion of the notes filed by the assessee before the Assessing Officer. Therefore, it cannot be stated that the Assessing Officer did not take into account all the factors and had accepted the plea of the assessee and completed the assessment. Therefore, the Principal CIT to invoke its power under s. 263 of the Act has to apply its mind to the audit report and record its satisfaction that the twin conditions required to be complied with under s. 263 of the Act have not been satisfied. Therefore, the Tribunal was fully justified in holding that the Principal CIT could not have invoked its power under s. 263 of the Act. Though in the show-cause notice it is alleged that these aspects were not taken into consideration by the Assessing Officer, curiously enough, in the order passed u/s. 263 of the Act dated 29/03/2023, the Principal CIT states that the Assessing Officer has not considered these aspects during the course of assessment; he has not made any inquiry on the issue nor did he issue any questionnaire in this regard and also held that the assessee in its reply dated 13/03/2023 did not contradict these facts. This finding rendered by the Principal CIT in its order is factually incorrect and the outcome of total non-application of mind. Therefore, the finding rendered by the learned Tribunal is fully justified.

iv) As regards the disallowance of the claim u/s. 43B in relation to reversal or write back of provision for liability, the Principal CIT, while passing the order u/s. 263 of the Act miserably failed to render any finding despite the fact that the assessee placed reliance on the decision in the case of Principal ***CIT vs. Eveready Industries India Ltd.*** and, accordingly, set aside the order passed by the Assessing Officer with a direction to the Assessing Officer to examine whether the decision in the case of Eveready Industries India Ltd. would be applicable to the case of the assessee or not after giving due opportunity of being heard to the assessee. The manner in which the Principal CIT has dealt with this issue is wholly untenable, and, therefore, the learned Tribunal was justified in setting aside the order passed by the Principal CIT on that score. Tribunal was right in allowing the assessee's appeal and setting aside the order passed by the Principal CIT."

5 RAMESH MADHUKAR DEOLE VS. PRINCIPAL CIT (2025) 483 ITR 802 (BOM): 2024 SCC ONLINE BOM 5145: A. Y. 2018-19: DATE OF ORDER 18/11/2024

Ss. 54F, 142(1) and 264 of ITA 1961

Revision of order u/s. 264 — Power of Commissioner — Assessee filed return in wrong Form and later corrected claiming exemption u/s. 54F — Assessee's CA failed to respond to notice u/s. 142(1) resulting in passing of assessment order ex parte, making additions — Revision application u/s. 264 filed before Principal CIT with all materials — Principal CIT accepted assessee's case on merits in

order, but rejected revision application as not maintainable — Rejection based solely on earlier failure to respond to notice during assessment proceedings — Power of Commissioner u/s. 264 wide to remedy bona fide mistakes — Earlier non-compliance with notice cannot render subsequent revision application not maintainable — Order rejecting revision application quashed and matter remanded to Principal CIT

For the A. Y. 2018-2019, the assessee filed the return of income in the wrong Form and subsequently filed the corrected return of income under ITR-3, wherein he claimed deductions and exemptions from capital gains u/s. 54F of the Income-tax Act, 1961. The Assessee's Chartered Accountant failed to respond to the notice u/s. 142(1) of the Act. Consequently, the Assessing Officer passed an ex parte assessment order u/s. 143(3) making additions.

Therefore, the assessee filed a revision application u/s. 264 of the Act, praying for the deletion of additions. The petitioner submitted all materials in that regard. The Principal Commissioner accepted the assessee's case on merits but rejected the revision application as not maintainable solely on the ground that the assessee had failed to produce certain materials in response to the notice u/s. 142(1) during the assessment proceedings.

The assessee filed a writ petition challenging the order of rejection. The Bombay High Court allowed the writ petition and held as under:

"i) The Principal Commissioner of Income-tax should not have rejected the petitioner's revision application as not maintainable. We are of the clear opinion that the cause in the present case warranted that the revision be decided on merits and more particularly considering the case of the petitioner, which although was noticed in paragraph 6 of the impugned order, was not taken to its logical conclusion, merely on an erroneous presumption in law that the revision is not maintainable for a reason that the petitioner had failed to produce certain materials in response to notice u/s. 142(1) of the Act. In our opinion, there is a manifest error on the part of the Principal Commissioner of Income-tax in coming to such a conclusion to hold the revision not maintainable in the facts of the present case.

ii) The impugned order dated March 24, 2023, is quashed and set aside. The petitioner's revision application is remanded to the Principal Commissioner of Income-tax to be decided in accordance with law and an appropriate order be passed thereon within a period of three months from today."

6 PRINCIPAL CIT VS. GOLDSUKH DEVELOPERS (P) LTD. (2025) 483 ITR 715 BOM): 2023 SCC ONLINE BOM 3282: (2024) 2 MAH LJ 32: A. Y. 2014-15: DATE OF ORDER 10/07/2023

S. 245D of ITA 1961

Settlement Commission — Settlement of cases — Rectification of order of settlement u/s. 245D(6B) — Period of limitation — Application beyond six months of order — Barred by limitation —Petition of the Revenue was dismissed

The Respondent assessee had filed an application before the Settlement Commission for settlement, and the application of the assessee came to be disposed of by an order dated September 20, 2016, wherein the assessee's application was allowed u/s. 245D(4) of the Income-tax Act, 1961.

The said order was challenged by the Revenue by way of a writ petition on February 10, 2017. The challenge in the petition was on the ground that there was a failure on the part of the assessee to make a full and true disclosure of income. The assessee raised a preliminary objection on the ground that the said order was passed by consent of both the Revenue (petitioner) and the assessee (respondent No. 1).

It was the petitioner's case in the said writ petition that the settlement recorded by the Commission on the consent of the parties is to be ignored because that did not reflect the correct position. It was the case of the Revenue that it had consistently opposed the application of respondent No. 1 for settlement in view of the alleged failure to make full and true disclosure of income.

The High Court dismissed the petition on June 21, 2018 holding that it was not open to the Revenue to challenge the correctness of the fact recorded in the said order by the Commission, particularly when it was not even remotely the case of the Revenue that the consent was given/made on a wrong appreciation of law. The Court of course held that the remedy for the Revenue would be to move the Commission to correct what, according to the Revenue, was an incorrect recording of consent in the impugned order.

Following this, the Revenue (petitioner) filed an application u/s. 245D(6B) on November 22, 2018, to the Settlement Commission to rectify. By the impugned order dated January 15, 2019, the Commission dismissed the application of the petitioner. The Commission came to the conclusion that even if it excluded the time spent pursuing the writ petition from February 10, 2017, to June 21, 2018, the rectification application had been filed beyond the six months' period stipulated in section 245D(6B) and was thus barred by limitation.

The Revenue filed another writ petition challenging this order. The Bombay High Court dismissed the petition and held as under:

"i) We find no error in the finding of the Commission.

ii) Though it was not argued before us and we would keep it open to decide in a proper case, we have our own reservations as to whether the grievance raised by the petitioner before the Commission and in the said writ petition that the consent as recorded was not given would qualify to be a "mistake apparent from the record" which is the only thing the Commission may rectify."

■

HIGH COURT



Jitendra Singh
Advocate

Radha Halbe
Advocate

Harsh Shah
Advocate

1 RAJ RAYON INDUSTRIES LTD. VS. PR. CIT [2026] 183 TAXMANN.COM 458 (BOMBAY)

Revision - section 264 of the Income Tax Act 1961 - communication received from CPC treating the return as invalid under section 139(9) of the Act is an order revisable under section 264 of the Act.

Facts

For the Assessment Year 2022–23 under consideration, the assessee filed its return of income declaring total loss of ` 45.47 crores. Subsequently, a notice dated 14.12.2022 was issued under section 139(9) by the CPC, stating that the return filed by the assessee is defective on the ground that the assessee had disclosed gross receipts under the head "Profits and gains of business or profession" exceeding ` 10 crores, however, it's books of account is not audited as per the provisions of section 44AB of the Act. The assessee responded to the said notice and explained that its turnover during the assessment year under consideration was below ` 10 crores and, therefore, there is no requirement to get its accounts audited under section 44AB of the Act. However, the CPC rejected the explanation of the assessee and issued a communication under section 139(9) of the Act treating the return as invalid without addressing the explanation furnished. Aggrieved by the said action, the assessee filed a revision application before the Commissioner under section 264 of the Act. The Commissioner, by the impugned order, held that the declaration of the return as invalid under section 139(9) of the Act did not constitute an order amenable to revision under section 264 and dismissed the revision petition as not maintainable.

The assessee being aggrieved by the order of Ld. Commissioner, approached the Hon'ble Bombay High Court under Article 226 of Constitution of India challenging the order passed under section 264 of the Act.

Ruling of the High Court

Hon'ble Bombay High Court is pleased to allow the writ petition filed by the assessee by observing that the Ld. CIT has completely misdirected himself when he held that declaring the assessee's Return as invalid [by the CPC] is not an order as contemplated under Section 264 of the Act. In fact, Ld. CIT referred to the definition of the word 'order' to be a mandate, precept, command or authoritative direction. Despite noting the aforesaid definition (in the dictionary), Ld. CIT went on to hold that the so-called

communication addressed by the CPC to the assessee was not an order as contemplated under Section 264 of the Act. Hon'ble Court further held that a declaration given under Section 139(9) of the Act is clearly an order which is revisable under Section 264 of the Act. It is certainly a mandate, or at the very least, an authoritative direction.

2 ZAZSONS EXPORTS (P.) LTD. VS. ACIT [2026] 183 TAXMANN.COM 285 (ALLAHABAD)

Reassessment - Section 148 of the Income Tax Act 1961 - assessee carrying on the activity of manufacturing shoes and finished leather – purchase of hides and skins - names of sellers and mandi details recorded in the books - assessee's assessment was finalized under section 143(3) of the Act accepting the claims made in the return - reopening of assessment after 3 years from the end of impugned assessment year on the basis of audit objection alleging that the details of the sundry creditors were not established as their PAN and address not disclosed - unjustified.

Facts

The assessee before the Hon'ble Allahabad High Court was engaged in the business of manufacture of shoes and finished leather, from raw goat hides and skins. The assessment for the assessment year 2017-18 under consideration was finalised under section 143(3) of the Act after due examination of records. Subsequently, after the passage of three years from the end of relevant assessment year an audit objection was raised alleging that sundry creditors amounting to approximately ` 28.96 crores were not duly substantiated, as their addresses and PAN particulars had not been furnished. The Ld. AO objected to the audit objections and maintained the position adopted by him in the original assessment. However, he issued a notice under section 148A(b) of the Act alleging escapement of income. The assessee duly objected to the issuance of notice under section 148A(b) of the Act, however, the Ld. AO passed the order under section 148A(d) of the Act and concluded that income had escaped assessment in relation to the outstanding amounts payable to sundry creditors from whom raw hides and skins were purchased. Ld. AO also issued notice under section 148 of the Act for the relevant assessment year 2017-18.

The assessee being aggrieved by the notice issued under section 148 of the Act challenged the same before the Hon'ble Allahabad High Court.

Ruling of the High Court

Hon'ble High Court was pleased to allow the writ petition filed by the assessee by observing that under the scheme of section 40A read with Rule 6DD, it was lawful to make cash payments exceeding ` 10,000 per person per day for purchase of, inter alia, raw hides and skins. To the extent such expenditure was not liable to disallowance, a recognised business practice had developed whereby manufacturers of leather purchased hides and skins in cash within the statutory limits. Thus, as the law permitted such cash payments and did not prescribe any specific books of account to be maintained for such transactions, assessee was entitled to arrange its affairs in accordance with its commercial needs. In the present case, the assessee had recorded the names and details of the sellers/

creditors and the Mandis from which they operated, and these were available in the books during the regular assessment. At the stage of initiation of reassessment, no objective material had been relied upon to doubt the correctness of these details. The Assessing Officer had not conducted any meaningful enquiry to question the physical existence of the sellers. The Court further held that the absence of PAN and address particulars of the sellers had to be viewed in light of there being no statutory mandate requiring the assessee to maintain such particulars. In the absence of a pre-existing legal obligation, no adverse inference regarding the non-existence of sundry creditors could be drawn solely on account of non-furnishing of PAN and address details. At best, the omission might have given rise to suspicion in the mind of the Assessing Officer, which ought to have been examined during the regular assessment proceedings. Reassessment could not be resorted to in the absence of cogent material clearly indicating that any part of the sundry credits was non-genuine. Hence, permitting reassessment in the absence of such material would amount to allowing a fishing expedition by the Revenue. Although the amended law no longer required recording of "reasons to believe," the existence of objective material remained an equally, if not more, essential precondition for assuming jurisdiction to reassess. In the facts of the case, the Court concluded that no valid satisfaction could have arisen suggesting escapement of income. The belief of escapement appeared to be founded merely on an audit objection, which the Ld. AO had initially refuted but later acted upon. The reassessment proceedings were thus held to be without jurisdiction. The possibility of what might emerge from a detailed enquiry was irrelevant at the stage of assumption of jurisdiction.

3 KWATRA BUILDERS VS. CCIT [2026] 183 TAXMANN.COM 332 (TELANGANA)

Interest for default in furnishing return/ payment of advance tax - Section 234A of the Income Tax Act 1961 - Waiver petition – Original assessment set aside and income reduced in reassessment – Tax paid in full – Challenge confined to levy of interest – Interest compensatory and mandatory in nature – Subsequent cooperation irrelevant – Financial hardship not a ground for waiver.

Facts

The assessee's premises were subjected to survey action under section 133A of the Act. Subsequently, reassessment proceedings were initiated against the assessee for assessment years 1992-93 to 1998-99 by issuance of notices under section 148 of the Act. The original assessments proceedings were culminated in determination of total income at ` 25.09 lakhs. On further appeal, the Appellate Tribunal remitted the matter back to Ld. AO. In the set aside proceedings, fresh reassessment orders were passed reducing the assessed income to ` 16.11 lakhs. The assessee accepted the revised determination and paid the resultant tax liability to avoid further litigation. However, the assessee was aggrieved by the action of the department in levying interest under sections 234A, 234B and 234C amounting to ` 12.42 lakhs. The assessee filed an application before the Chief Commissioner of Income Tax seeking waiver of interest by invoking section 119(2)(a) on the ground that

the returns had been filed prior to completion of reassessment and that interest ought not to have been computed up to the date of reassessment. However, Chief Commissioner declined the request for waiver, holding that the returns were filed only after issuance of notices under section 148 and therefore lacked voluntariness. It was also observed that there was a marked difference between the income originally returned and the income ultimately assessed. The case was thus found to fall outside the scope of the CBDT Circular governing waiver of interest.

The assessee being aggrieved by the above order, challenged the same before the Hon'ble Telangana High Court under Article 226 of Constitution of India.

Ruling of the High Court

Hon'ble Telangana High Court rejected the petition filed by the assessee and upheld the view of the Chief Commissioner by observing that the CBDT Circular issued under section 119(2)(a) circumscribes the discretion to waive interest to specified contingencies, such as delay caused by seizure of records, unforeseen accrual of income after the due date for advance tax, retrospective legislative or judicial developments, or genuine inability to file returns followed by voluntary compliance before detection. The assessee's case did not satisfy any of these conditions. Further, the return was filed after notice under section 148 was issued pursuant to survey action and there was substantial variation between income originally returned and finally assessed.

Thus, rejection of waiver of interest under sections 234A, 234B and 234C read with section 119(2)(a) is justified, as such statutory and compensatory interest could not be waived merely on subsequent cooperation or financial hardship.

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1 EDELWEISS CROSSOVER OPPORTUNITIES FUND VS. ITO [ITA NO. 7439/MUM/2025 DATED 03.02.2026] [AY 2023-24]

Section 10(23FBA) r.w.s 115UB- Category- II AIF – Scheme forming part of a registered fund is eligible for exemption despite such scheme operating under a separate PAN

Facts of the Case

Edelweiss Crossover Opportunities Fund, a scheme launched under Edelweiss Alternative Investment Opportunities Trust (a SEBI-registered Category II Alternative Investment Fund), filed its return for AY 2023-24 declaring Nil income and claimed exemption under section 10(23FBA) read with section 115UB on income passed through to investors. The Ld AO observed that the SEBI registration was in the name of the parent Trust and not in the name of the assessee scheme, which had a separate PAN, and therefore denied the exemption treating the scheme as an independent entity not qualifying as a registered investment fund. The Ld. AO consequently taxed the surplus reflected in the profit and loss account and added ` 16.63 crore as business income, being the difference between book surplus and income distributed to investors. The assessee contended that under SEBI AIF Regulations a single registered trust can operate multiple schemes, separate PANs are obtained only for administrative purposes and the income had already been taxed in investors' hands. Specifically, the assessee submitted that while the profit and loss account reflected a higher book surplus, the taxable income passed to investors was lower because it factored in the statutory cost inflation adjustments available under section 48 of the Act. The assessee further clarified that these securities were held as "Investments" rather than stock-in-trade, and the Revenue failed to bring on record any material to demonstrate that these gains arose from a business activity. The Ld. CIT(A) upheld the assessment order, leading to appeal before the Hon'ble ITAT.

Held

The Hon'ble ITAT held that exemption under section 10(23FBA) cannot be denied merely because the scheme possesses a separate PAN while SEBI registration stands in the name of the parent AIF trust. The Hon'ble ITAT observed that the Income-tax Act itself recognizes schemes operating under an investment fund and that a separate PAN is only an administrative identifier and does not establish a separate legal investment fund.

Since the assessee scheme was floated under a SEBI-registered Category II AIF trust, it was eligible for pass-through taxation under section 115UB and the exemption under section 10(23FBA) claimed was allowable. Consequently, the addition relating to denial of exemption was deleted. The Hon'ble Tribunal further observed that the income retained its character as capital gains within the pass-through framework. Accordingly, the appeal of the assessee was allowed.

2 TATA CHEMICALS LTD. VS. DCIT [ITA NO. 7912/MUM/2019 DATED 04.02.2026] [AY 2015-16]

Section 36(1)(iii) – Interest on borrowings utilized for making equity investment in a wholly owned subsidiary out of commercial expediency is allowable.

Facts of the Case

The assessee is a flagship company actively engaged in the core business of manufacturing of chemicals, fertilizers, and food additives. During the assessment proceedings for the year under consideration, the Ld. AO scrutinized the financial statements and noted that the assessee had claimed an interest expenditure of ` 16,84,65,779/- under section 36(1)(iii) of the Act. This interest was paid on borrowings which were specifically utilized for making an equity investment in its wholly owned foreign subsidiary, namely Homefield Pvt. UK Ltd. The primary commercial objective behind funding this subsidiary was for acquiring the Brunner Mond Group.

The Ld AO was of the view that since the investment has been made strategically for acquiring a controlling interest and expanding the corporate structure, it is inherently in the nature of a capital investment. Consequently, the Ld. AO concluded that the interest liability on such borrowings is not an allowable revenue deduction, either under section 36(1)(iii) as well as under section 57(iii) of the Act. The Ld AO relied on the decision in the case of ***CIT vs. Amritaben Shah (238 ITR 777) (Bombay HC)***. Accordingly, the Ld. AO made a complete disallowance of ` 16,84,65,779/-. Aggrieved by the draft assessment order, the assessee raised objections, but the Ld. Dispute Resolution Panel (DRP) upheld the disallowance, which led to filing of an appeal before the Hon'ble ITAT.

Held

The Hon'ble ITAT on facts observed that the assessee made the investment in the subsidiary company with a view to acquire and retain controlling interest therein. The Hon'ble ITAT having regard to the provisions of section 36(1)(iii) and associated judicial precedents, observed that the crucial issue which requires examination is whether the capital so invested forms part of an asset which is directly and integrally employed in the business operations so as to generate business income assessable under the head "Profits and gains of business or profession". Considering the same, the Hon'ble ITAT held that permitting deduction of interest expenditure against business income, when the corresponding investment yields income assessable under entirely different heads, would be contrary to the fundamental scheme and principles governing computation of income under the Act. Accordingly, the Hon'ble ITAT concluded that deduction

under section 36(1)(iii) of the Act is not permissible. In respect of the alternative plea that deduction should be allowed under the provisions of section 57(iii), the Hon'ble ITAT held that issue stands covered against the assessee in light of the Hon'ble Bombay High Court decision in the case of ***Amritaben Shah (238 ITR 777***), wherein it has been categorically held that interest incurred on borrowed funds utilised for acquiring controlling interest in a company is not allowable as a deduction under section 57(iii). Accordingly, the appeal on this ground was dismissed.

3 MUKESH CHANDAN VS. ITO [ITA NO. 3003/MUM/2023 DT. 26.02.2026] [AY 14-15]

Section 44AD/43CA – Higher Value of Property Considered for Turnover u/s 44AD - No separate addition u/s 43CA - If Assessee opts for Sec. 44AD presumptive tax & accepted by Revenue

Facts of the Case

Assessee is engaged in the building and development business and has filed his return. During the period, he sold a flat for ` 45,00,000, though the official stamp duty valuation (the government's estimated value) was ` 58,23,600. Assessee chose presumptive taxation under Section 44AD, a "presumptive" scheme where a business pays tax on a fixed percentage of its total turnover rather than calculating exact profits and losses. Assessee actually used the higher stamp duty value (` 58.23 lakh) as his "turnover" base. However, the Assessing Officer (AO) took a different approach. While accepting the presumptive tax filing, the AO also added the ` 13,23,600 difference (between the sale price and the government value) as a separate, extra addition to the assessee's income under Section 43CA. CIT(A) also dismissed the appeal of the assessee and therefore, appeal was filed before Hon'ble ITAT.

Held

Hon'ble ITAT held that a necessary corollary is that once the presumptive scheme is accepted, business income is not to be recomputed by importing individual computation provisions in a piecemeal manner, because the very purpose of section 44AD is to replace the normal computation by a deeming rule. Any attempt to apply selected provisions to enhance profits, while simultaneously retaining the presumptive computation, results in an impermissible hybrid computation not contemplated by the Act. Both section 44AD and section 43CA are deeming provisions operating in the field of computation. When two deeming provisions overlap, we must harmonise them in a manner that gives effect to both, avoids double counting, and preserves the integrity of the statutory scheme. On a harmonious construction, the correct approach is as follows:

i. If the assessee's business income is being computed under section 44AD, then "turnover or gross receipts" becomes the base for deeming profits.

ii. If section 43CA is attracted, its effect can, at best, be to determine the appropriate "turnover/gross receipts" for the

purpose of section 44AD, by adopting the stamp duty value in place of stated consideration.

iii. Once turnover is so adopted and presumptive profits are computed as a percentage thereof, there is no further scope to make a separate addition of the differential amount, because the business profits stand statutorily determined under section 44AD on the adopted turnover.

Section 43CA can influence the base (turnover) for section 44AD, but it cannot be used to create a second layer of taxation over and above presumptive profits, unless the Assessing Officer first rejects or displaces the applicability of section 44AD and proceeds to compute income under normal provisions. If the Assessing Officer's case was that section 43CA must apply independently, then the proper course would have been to determine business profits under normal provisions by adopting stamp duty value as consideration and thereafter compute profits in the regular manner. That is not what has been done. The Assessing Officer has retained section 44AD presumptive computation and additionally made a separate adjustment under section 43CA. This produces an impermissible hybrid computation. Hence, on above basis it was held that addition u/s 43CA would result in double addition under a hybrid computation approach which is contrary to the intent of the law and therefore the addition u/s 43CA was directed to be deleted. Accordingly, the appeal of the assessee was allowed.

4 SATISHCHANDRA JAGDISHCHANDRA GUGALE VS. ITO, WARD-14(5) PUNE [ITA NO. 1821/PUN/2025 (PUNE TRIB)] (AY: 2014-15)

Section 54F - Deduction to be allowed even if not deposited in Capital Gains Account Scheme before ROI filing date – real intention is investment into residential house with stipulated timelines

Facts

The assessee filed his return of income for AY 2014-15 declaring income of ` 17.18 lakh. During the relevant year, he sold a plot of land on 18.03.2014 for ` 3.21 crore. Subsequently, on 25.02.2015, he purchased a residential flat for ` 4 crore and claimed deduction under Section 54F of the Income tax Act.

The Assessing Officer noticed that the assessee had deposited only ` 2.25 crore in the Specified Capital Gains Account Scheme and failed to deposit whole consideration before furnishing return of income. The AO therefore calculated capital gain of ` 3.16 crore and taxed 91.45 lakhs being the balance of capital gain not deposited in specified bank account before furnishing return of income. The assessment was completed under section 143(3) determining total income at ` 1.08 crore. The CIT (A)/NFAC upheld the addition. Aggrieved, the assessee filed an appeal before ITAT.

Held

Before the Hon'ble Tribunal, the AR challenged the disallowance and submitted that the entire sale consideration of ` 3.21 crore had been invested in the purchase of a residential flat within the prescribed period under section 54(1) of the Act. It was contended that since the whole of the consideration had already been invested

within one year from the sale of the original asset in purchase of residential flat, the real intention of legislature was fulfilled and deduction under section 54F needed to be allowed. On the other hand, the DR contended that, as per Section 54F of the Act the assessee was required to deposit whole of the consideration in Capital Gain Account Scheme before furnishing return of income.

The Hon'ble Tribunal held that it was a fact that the whole of the sale consideration was invested in purchase of residential house within the prescribed period. The Tribunal agreed to the reliance placed on the decision of the Karnataka High Court in ***CIT vs. K. Ramchandra Rao***, wherein it was held that Section 54 (4) is attracted only where the capital gains are not utilized for purchase or construction within the stipulated period and that when the entire consideration is actually invested within time, the requirement of deposit in the Scheme would not defeat the claim. It was held that since the real intention is to invest into a residential house and not just a deposit into the capital gains account scheme, the assessee is entitled to get deduction under section 54F.

5 ACIT VS. VENUS PORTFOLIO & FINANCE PVT. LTD. [ITA NO. 4024/MUM/2025 DT. 23.02.2025] [AY 16-17]

Section 68- Identity, Creditworthiness & Genuineness of the Lenders explained – Loans are repaid in subsequent years – No addition can be made as loans repaid

Facts of the Case

Assessee had taken loans from 3 parties during the year. In Assessment, additions was made on account that Identity, Creditworthiness & Genuineness are not explained by the assessee and thereby addition was made u/s 68. Before CIT(A), assessee explained the Identity, Creditworthiness & Genuineness of all the parties and it was also submitted that loans are repaid in the subsequent years. On basis of loans being repaid in subsequent years, CIT(A) allowed the appeal and deleted the addition. Being aggrieved by the same, department has filed appeal before the Hon'ble ITAT.

Held

Hon'ble ITAT held that assessee has proved Identity, Creditworthiness & Genuineness of all the 3 lenders. It is an undisputed fact that loans are repaid in the subsequent years. Reliance was made on ***Rajuram Savaji Purohit vs. ITO (Mum. ITAT – 169 taxmann.com 18***) wherein it was held that no addition can be made if loans are repaid. Further reliance was also laid upon Bombay HC and Gujarat HC decisions. Further it was held that nothing has been brought on record by the AO to suggest that the loans are unaccounted money channelized through alleged lenders and also no new facts/circumstances/documents have been placed by the DR. On above basis, CIT(A) order was sought to allowed and additions were confirmed to be deleted. Appeal filed by the Department was dismissed.

6 GEDALIA MULTITRADING PVT. LTD VS. NFAC/ITO-12(2)(1), MUMBAI [ITA NO. 6056/MUM/2025 (MUMBAI TRIB)] (AY: 2018-19)

Section – 147 - Reopening u/s 148 quashed for non- supply of material under new regime – re-assessment proceedings void as information was not given to the assessee.

Facts

The case of assessee was reopened u/s 148 and notice u/s 148A (b) was issued on 11.03.2022 accompanied only by annexure containing the reasons recorded. The report of enquiry and the materials that were considered for reopening the assessment were not provided. A screenshot of the ITBA portal showed that only the notice was issued without any annexure being attached thereto.

Held

Before the Hon'ble Tribunal the AR challenged the reopening assessment u/s 148 of the new regime on the ground that the procedure prescribed u/s 148(b) of the Act, as well as principles of natural justice were violated in as much as the assessee was not provided with the information and material required to be furnished u/s 148A(b) of the Act and in the absence of such material, the assessee was precluded from filing an effective reply to the show cause notice and, thus, the entire procedure under the new provisions of Section 148A of the Act is bad in law. On the other hand, the DR submitted that along with the issue of notice u/s 148A(b) the reasons recorded had been annexed and that the same was sufficient for the assessee to furnish a reply.

The Tribunal noted that no material was supplied to the assessee though material was available with the Ld. AO and only gist of information was shared through reasons recorded. The Hon'ble Tribunal observed that the materials forming the basis of reopening were indeed to not supplied to the assessee, though the same were available with the AO. Only gist of some information was provided by way of screen shots in reasons recorded. It was held that, it is an admitted legal position that the materials forming the basis of reopening have to be supplied in terms of the new provisions of the Act, failing which, the assessee is precluded from filing an effective response. While holding so, the Tribunal relied on the decision in case of Hon'ble Supreme Court in ***Union of India vs. Ashish Agarwal reported in (2022) 444 ITR 1 (SC)*** and held that the notice issued u/s 148 of the Act under the new regime is bad in law as the order passed u/s 148A(d) was passed without providing proper opportunity to the assessee to represent its case. However, it was kept open to the Revenue to proceed in the matter from the stage of notice u/s 148A(b) of the Act by supplying the relevant material, subject to the issue of limitation.

7 DHEERAJ TOLARAM TALREJA VS. ITO [MA NO. 293 (MUM) OF 2024] (AY: 2020-21)

Miscellaneous application u/s. 254(2) – non-adjudication of certain specific grounds – complete facts to adjudicate ground, considered in the hearing - internal inconsistency between reasoning and operative directions is a mistake apparent from record.

Facts

The assessee filed a Miscellaneous Application (MA) under Section 254(2) seeking rectification of mistakes apparent from the record in the Tribunal order dated 25.10.2024 passed in ITA No. 3359/Mum/2024 for AY 2020-21. The grievance of the assessee was that, although the Hon'ble Tribunal had elaborately recorded the factual background regarding residential status, period of stay in India, applicability of section 6(6), the claim of Resident but Not Ordinarily Resident (RNOR) status, passport copies and summary of stay, it failed to render any categorical finding on Ground No. 1 relating to correct residential status. Consequently, Ground Nos. 2,3 and 4 relating to non- chargeability of income from house property from Singapore and proportionate salary income from Singapore also remain unadjudicated.

It was the assessee's case that such omissions and inconsistencies constitute mistakes apparent from record warranting rectification under section 254(2) of the Act. Further, although the Tribunal observed that foreign tax credit cannot be denied solely on account of a delay in filing Form No. 67, it nevertheless remanded the matter to the Assessing Officer without recording clear and consistent findings on the underlying principle. This has resulted in an apparent inconsistency between the reasoning adopted and the operative directions issued.

Held

It was held that, the Tribunal had comprehensively recorded the factual matrix concerning the assessee's residential status. The order included the duration of the assessee's stay in India, the applicability of section 6(6) of the Act, and the contention that he qualifies as a Resident but Not Ordinarily Resident (RNOR). The Tribunal also noted that the assessee had originally filed his return declaring himself as a Resident and Ordinarily Resident (ROR), but later revised it upon identifying the error.

However, the Tribunal **failed to render a categorical finding** on Ground No. 1 concerning the correct determination of the assessee's residential status for the relevant assessment year. Consequently, Grounds No. 2, 3, and 4, relating to the taxability of Singapore house property income and proportionate salary income earned in Singapore, remained unadjudicated. These grounds are intrinsically linked to the determination of residential status and were duly supported by material on record, including detailed computations in the paper book. The Tribunal is obligated to decide every ground raised before it, and failure to do so constitutes a rectifiable mistake under Section 254(2) of the Act.

Regarding the denial of foreign tax credit (FTC) for non-filing of Form No. 67 within the due date under section 139(1), the Tribunal observed that such denial is **not justified solely on account of delay**. The Tribunal recorded that the assessee had filed Form No. 67 along with the return under section 139(4) before processing of the return, and that the credit was denied without affording

an opportunity of hearing. Judicial precedents, including decisions of the High Court and coordinate benches, consistently hold that filing of Form No. 67 is directory and not mandatory, and that FTC cannot be denied solely due to delayed filing. The Tribunal further noted that AY 2020-21 fell during the pandemic period when statutory timelines were extended, and that the subsequent amendment to Rule 128(9), recognizing revised returns, was clarificatory and retrospective in nature. Despite these findings, the Tribunal remanded the matter to the Assessing Officer without rendering a clear and consistent conclusion on the directory nature of Form No. 67 or the allowability of FTC in principle. This created an internal inconsistency between the reasoning in the body of the order and the operative directions, amounting to a **mistake apparent on the face of the record**, rectifiable under Section 254(2).

The actual computation of eligible FTC, however, is contingent upon determination of the assessee's correct residential status and the extent of income chargeable to tax in India. Accordingly, while the legal position regarding Form No. 67 is conclusively settled, quantification of FTC must follow adjudication of residential status and consequential taxability. In these circumstances, the mistakes pointed out by the assessee in the appellate order dated 25.10.24 are apparent from the record. The rectification sought does not entail a review on merits but is confined to correcting omissions and inconsistencies within the permissible scope of section 254(2) of the Act.

The Tribunal rectified it's earlier order and restored the specified issues to the file of the Assessing Officer with the directions: The AO shall first determine the correct residential status under section 6(6). Thereafter, the AO shall adjudicate the taxability of Singapore house property income and proportionate salary income in accordance with section 5(1) and the applicable DTAA. The AO shall re-examine the claim of foreign tax credit, keeping in view the settled legal position that Form No. 67 is directory in nature, and grant eligible credit in accordance with law. The remand was expressly limited to these issues.

8 AMBUJA CEMENTS LIMITED VS. PCIT [ITA NO. 3474/MUM/2025, DATED 05/02/2026] [AY 2019-20]

Section 263 – Revision order upheld as Ld. AO failed to conduct proper inquiries on Section 14A disallowance and accommodation entries; Explanation 2(a) applicable

Facts of the Case

The assessee's assessment was completed under section 143(3) r.w.s. 144B of the Act determining total income at ` 14,82,47,32,193/-. On examination of assessment records, the learned Principal Commissioner of Income-tax (Ld. PCIT) observed that the learned Assessing Officer (Ld. AO) failed to verify certain material issues while completing the assessment. The assessee earned exempt income of ` 274,21,78,924/- during the year but considered disallowance of ` 1,82,21,867/- under section 14A of the Act. It was noticed that the assessee had Strategic Investments of ` 11,813.76 cr., on which no proportionate disallowance was computed as per Rule 8D. The Ld. PCIT opined that correct disallowance should have been ` 118.13 cr., resulting in a short disallowance

of ` 116.30 cr. Further, information from the INSIGHT portal of the Department showed that the assessee had received accommodation entries from Shri Dilip Chotalal Patel, linked to Shri Robin Goenka of Sankalp Group. A search in the said group on 30.10.2018 revealed incriminating evidence and a list of beneficiaries, including the assessee. However, the Ld. AO made no enquiry on this issue. In view of these lapses, the Ld. PCIT held the assessment order to be erroneous and prejudicial to the interests of the Revenue and passed an order under section 263 setting it aside. The assessee appealed before the Hon'ble ITAT and contended that the Ld. AO inquired into the issue of 14A disallowance, sought explanation, in response of which the assessee placed on record its computation alongwith an expert's report and hence, it is a case of due application of of mind. In respect of the accommodation entries, the assessee argued that the notice under section 263 was not appended with any material whatsoever which establishes any such alleged transaction and even the order was passed on a system-generated flag without sharing supporting material or corroborative evidence with the assessee.

Held

The Hon'ble ITAT upheld the revision order passed by the Ld. PCIT under Section 263 of the Act. The Hon'ble ITAT regarding Section 14A issue observed that the Ld. AO had merely issued a specific query calling for details and accepted the assessee's suo motu disallowance based on an Expert report without seeking further clarification or independently testing the computation method under Rule 8D. The Hon'ble ITAT emphasized that it was incumbent on the Ld. AO to examine the third-party report in light of the Hon'ble Supreme Court ruling in the case of ***Maxopp Investment Ltd. vs. CIT [2018] 402 ITR 640 (SC)***, which decided the issue of strategic investment in favour of the Revenue for the purposes of computation of disallowance under section 14A r.w. Rule 8D. Accepting a mere ` 1.82 cr. disallowance on exempt income exceeding ` 274 cr. against investments of ` 11,813 cr. without verification demonstrates a clear case of lack of any inquiry worth the name. Regarding the accommodation entries, the information revealing the assessee as a recipient of accommodation entries was available on the INSIGHT portal following a search action on the Sankalp Group. The Ld. AO failed to take note of this vital piece of information which was very much available with him at the time of assessment proceedings. The Hon'ble ITAT held this was also clearly a case of "no inquiry". The Hon'ble ITAT further held that in the facts of the present case, the deeming provisions of Explanation 2(a) to Section 263 (introduced w.e.f. 01.06.2015) are clearly applicable, as the order was passed without making inquiries or verifications which should have been made. Relying on various judicial precedents including the decision of the Hon'ble Courts in ***Ram Pyari Devi Saraogi [1968] 67 ITR 84 (SC), Tara Devi Aggarwal [1973] 88 ITR 323 (SC), and CIT v Paville Projects Private Limited [2023] (453 ITR 457) (SC),*** the Hon'ble Tribunal applied the principle that where the Assessing Officer accepts contention without inquiry whatsoever, the order is erroneous and prejudicial to the interest of the Revenue. The Hon'ble ITAT further noted that the Ld. PCIT merely directed the Ld. AO to examine the issues in detail, make proper enquiries, and make additions "if required" after granting an opportunity of being heard to the assessee. Thus, no prejudice was caused to the assessee's right to a fair hearing. Accordingly, the assumption of jurisdiction under section 263 was held to be valid in law, and the appeal of the assessee was dismissed.

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CASE LAW UPDATE



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Advocate

I. TREATY BENEFITS

TREATY BENEFITS – ALLOWED

1 DCIT (IT)-2 VS. THOGARCHEDU SUBHA SRI [2026] 183 TAXMANN.COM 481 (HYDERABAD - TRIB.) IT APPEAL NO.1058 (HYD) OF 2025 [AY. 2023-24]-FEBRUARY 11, 2026

Where assessee, a US tax resident, was denied DTAA relief solely due to delayed electronic filing of Form 10F and TRC, since neither section 90 nor Rule 21AB prescribes any time limit for filing, such procedural lapse was curable, and once filed, Form 10F would relate back to claim made in return and, thus, denial of DTAA benefit was unjustified [India – US DTAA]

Assessee, a non-resident and tax resident of USA, filed her return claiming beneficial tax rates under DTAA. However, while processing return, CPC denied benefit of DTAA on ground of non-filing of Form No. 10F, and recomputed tax under normal provisions, raising a demand. Assessee subsequently filed Form No. 10F along with TRC during rectification proceedings under section 154. Revenue contended that due date under section 139(1) was 31-07-2023 whereas Form 10F was filed electronically only on 26-08-2024 and furnishing Form 10F was a mandatory precondition for DTAA benefits. The Tribunal held that from a combined perusal of section 90 and rule 21AB, it was evident that no time limit had been prescribed either under Act or rules for filing said form. Further, Form 10F did not create right to claim DTAA benefit; it only facilitated verification of information. Thus, delay in filing Form 10F was a curable procedural defect, and once form was furnished, same would relate back to claim of DTAA benefit made in return of income. ***[CIT (IT-4), Mumbai vs. Reliance Telecom Ltd. [2021] 133 taxmann.com 41/ [2022] 440 ITR 1/284 Taxman 517 (SC) and Principal CIT vs. Wipro Ltd. [2022] 140 taxmann.com 223/446 ITR 1/288 Taxman 491 (SC) distinguished]***

TREATY BENEFITS – DENIED

2 HAREON SOLAR SINGAPORE (P.) LTD. VS. DEPUTY CIT, IT [2026] 183 TAXMANN.COM 125 (DELHI - TRIB.) – TS-112-ITAT-2026 (DEL) - IT APPEAL NO. 2226 (DELHI) OF 2024 [AY. 2020-21]-JANUARY 30, 2026

Where assessee, a Singapore company, was 100 per cent subsidiary of Hong Kong company whose ultimate parent was in China, and it had no real and continuous business activities in Singapore, exemption of capital gains on transfer of shares and CCDs of Indian company under India–Singapore DTAA was not available and capital gains were taxable in India. (India – Singapore DTAA)

Assessee, a Singapore company, subscribed to equity shares and CCDs of an Indian company in 2015 and transferred them in June 2019, claiming exemption of capital gains under section 90 read with Articles 13(4A) and 13(5) of India–Singapore DTAA. Assessee furnished Singapore TRC and asserted satisfaction of Article 24A LOB. AO denied DTAA benefit treating assessee as shell/conduit entity lacking commercial substance and taxed capital gains in India. The Tribunal noted that assessee was 100 per cent subsidiary of Hong Kong company whose ultimate parent was in China; it had no employees or operational expenditure; and bank account was operated by signatories resident in USA and Taiwan. It concluded that since assessee had no real and continuous business activities in Singapore and control and management was exercised outside Singapore, it was merely interposed to obtain treaty benefit and capital gains on transfer of equity shares/CCDs were taxable in India [***Fullerton Financial Holdings Pte. Ltd. vs. ACIT [2025] 180 taxmann.com 241 (Mumbai - Trib.) distinguished***]

II. PERMANENT ESTABLISHMENT

SUBSIDIARY

1 CIT, IT 3 VS. SIEMENS MOBILE COMMUNICATION SPA [2026] 183 TAXMANN.COM 385 (SC) - SLP (CIVIL) DIARY NO(S). 756 OF 2026†JANUARY 27, 2026

Revenue's SLP dismissed against order of High Court that where assessee, an Italian company supplying telecom equipment, had an Indian subsidiary and onshore services of installation, testing and maintenance and income from marketing and promotional activities were carried out by such subsidiary and offered to tax in India, assessee did not have a permanent establishment in India in form of its subsidiary under article 5 of DTAA between India and Italy and no profits could be attributed to it (India – Italy DTAA)

Assessee, a foreign company engaged in business of supplying telecommunication equipment, had an Indian subsidiary, SPCNL - Assessee's role was limited to supply of hardware components from Italy, with sales concluded, title transferred and consideration

received outside India - Onshore services of installation, testing and maintenance and income from marketing and promotional activities were carried out by SPCNL and offered to tax in India - High Court held that Tribunal was justified in holding that assessee did not have a permanent establishment in India in form of its Indian subsidiary under article 5 of DTAA and that no profits could be attributed - Therefore, revenue's appeal on said issue could not have been entertained - Whether court was not inclined to interfere with impugned order passed by High Court and, thus, SLP was to be dismissed [***SLP dismissed against CIT, IT vs. Siemens Mobile Communication SPA [2026] 182 taxmann.com 852 (Delhi)***].

DAPE-INDIAN BRANCH

1 GENERAL REINSURANCE AG VS. ASSISTANT CIT (IT) [2026] 183 TAXMANN.COM 337 (MUMBAI - TRIB.) – TS-151-ITAT-2026(MUM) - IT APPEAL NOS. 887, 2447, 2448 AND 4691 (MUM) OF 2022 - [AY.S 2018-19 TO 2021-22] -JANUARY 30, 2026

Where assessee, a German company engaged in reinsurance, negotiated and finalized reinsurance contracts were negotiated, concluded and serviced entirely outside India prior to operationalisation of India Branch, thus, there existed no business connection in India under section 9(1)(i) nor there existed a PE in India within meaning of Article 5(1) and 5(5) of India-Germany DTAA to bring to charge, income attributable to India Branch in respect of direct business of assessee (India – Germany DTAA)

Assessee, a German company, was engaged in providing reinsurance services globally. It had an Indian wholly owned subsidiary, GSSMPL, providing market intelligence and administrative support - GSSMPL discontinued operations in August 2017 and went into liquidation - Meanwhile, assessee obtained an approval from IRDAI for establishing its India Branch which commenced its operation with effect from 1-8-2017, subjected to regulations of IRDAI. AO opined that there was a real and intimate connection between assessee's direct business and activities in India by GSSMPL, thereby constituting a business connection under section 9(1)(i). He further concluded that India Branch functioned as a DAPE by exercising indirect authority to negotiate/enter into contracts. He, thus, held that premiums earned by assessee from various reinsurance contracts with Indian insurance companies were taxable in India as profits attributable to a PE under Article 7. Tribunal noted that reinsurance contracts on which assessee had received reinsurance premium were negotiated and finalised prior to 1-8-2017, i.e., before operationalisation of India Branch. All risks underwritten under these contracts had originally commenced prior to 1-8-2017 and were serviced by assessee directly as and when adverse insurable event arose. Further, Indian branch was a part and parcel of Assessee and not a separate legal person, and therefore the question of Indian branch being an agent of Assessee did not arise. The Indian branch had no involvement in Assessee's direct business segment, therefore no income from Assessee's direct business was attributable to the Indian branch as the Indian branch did not negotiate and finalize the reinsurance contracts for the period prior to Aug 1, 2017, given the same were executed

by the Assessee outside India. Thus, there existed no business connection in India under section 9(1)(i) nor there existed a PE in India within meaning of Article 5(1) and 5(5) of India-Germany DTAA to bring to charge, income attributable to India Branch in respect of direct business of assessee.

III. BUSINESS PROFITS

COMMISSION

1 ASSISTANT COMMISSIONER OF INCOME-TAX, CENTRAL VS. INTAS PHARMACEUTICALS LTD. [2026] 183 TAXMANN.COM 697 (AHMEDABAD - TRIB.) - IT APPEAL NO. 1842 (AHD) OF 2024 -AY 2016-17 -FEBRUARY 24, 2026

Where commission was paid to non-resident agents rendering services entirely outside India and having no permanent establishment or business connection in India, such commission was not chargeable to tax in India and no obligation to deduct tax under section 195 arose; consequently, disallowance under section 40(a)(i) was not warranted

Assessee paid commission to non-resident agents for procuring export orders. AO disallowed expenditure for non-deduction of tax under section 195 alleging income was taxable in India. Tribunal in earlier year held that non-resident agents rendered services entirely outside India and had no PE or business connection in India; hence commission was not chargeable to tax and section 195 was not attracted. Thus, following earlier year, the Tribunal in the impugned year deleted the disallowance under section 40(a)(i). [***ACIT vs. Intas Pharmaceuticals Ltd. [2025] 174 taxmann.com 867 (Ahmedabad - Trib.)/ITA Nos. 222 & 281/Ahd/2021 - order dated 21.05.2025 followed***]

2 BOOKING.COM B.V. VS. ACIT, IT [2026] 183 TAXMANN.COM 201 (DELHI - TRIB.)- IT APPEAL NO. 2033 (DELHI) OF 2025 [AY. 2018-19] -FEBRUARY 6, 2026

Where assessee, a Netherlands-based company, operated an online accommodation booking platform hosted outside India and earned commission as an intermediary on a principal-to-principal basis without any place of business, agent, personnel or equipment in India, since AO failed to establish existence of a fixed place or dependent agent PE, commission income would not be taxable in India

Assessee, a Netherlands based company, operated a digital platform for online accommodations reservations. Platform was hosted outside India and enabled accommodations to list room availability and set prices independently using a self-service tool. Assessee acted as an intermediary/aggregator between bookers and accommodations and earned commission from accommodation based on

a pre-arranged percent of booking value. AO held that assessee had fixed place PE in India in form of dependent agents and accommodations. Accordingly, AO brought to tax entire commission receipts from India. Tribunal noted that assessee had no place of business, agent, personnel or equipment in India. Further, assessee did not have any dependent agent in India and transacted with accommodation on principal-to-principal basis. Thus since AO failed to discharge onus of establishing assessee's fixed place PE in India and to attribute earning of commission income to such alleged fixed place PE, impugned order was set aside [***Formula One World Championship Ltd. vs. CIT [2017] 80 taxmann.com 347 (SC)/[2017] 248 Taxman 192 (SC)/[2017] 394 ITR 80 (SC) followed***]

ATTRIBUTION OF PROFITS AND DEDUCTIONS

1 TRAVELPORT INTERNATIONAL OPERATIONS LTD. VS. DEPUTY CIT, IT [2026] 183 TAXMANN.COM 586 (DELHI) – TS-149-HC-2026 (DEL)

Entire Commission paid by UK Company (providing electronic distribution services) to Indian agents (68 % of revenue) must be deducted from attributed revenue to PE (15% of revenue) (notwithstanding the resultant loss) - for withholding tax purposes (India - UK DTAA)

Petitioner, a UK company, was engaged in providing electronic global distribution services through a computer reservation system to airlines. It received booking-related amounts in India and paid commission to Indian agents. It applied under section 197 seeking a lower/nil withholding certificate. Competent authority issued a certificate prescribing TDS at 1.6% on total receipts including both India POS (above receipts) and non-India POS receipts (POS i.e. point of service). As regards as regards India POS receipts, in impugned order, competent authority accepted that 15% of total receipts was revenue attributable to petitioner's Indian PE and that 68% of receipts was paid as commission to its Indian agent. However, while computing profits for withholding purposes, competent authority deducted only a part of commission by allowing 15% of 68% commission (instead of full 68%) against 15% revenue attribution, and on that basis mandated withholding at 1.6%. The High Court held that 15% of total receipts was revenue attributable to assessee's Indian PE (as held by Supreme Court in assessee's case in ***DIT vs. Travelport Inc. [2017] 398 ITR 593 (SC)***) and entire commission paid to Indian distribution agents was to be deducted against such attributed revenue. Therefore, impugned order and certificate u/s. 197 were to be quashed. As regards non-India POS, the Court held that since for prior years, AO had raised demands on income from non-India POS & appeals filed by assessee before CIT(A) were pending, withholding should be confined to proportion of non-India POS receipts in total revenue and a fresh certificate at 0.5% should be issued.

IV. DIVIDENDS

REFUND OF DDT IN EXCESS OF RATE UNDER DTAA

1 SOPHOS TECHNOLOGIES (P.) LTD. VS. DEPUTY CIT [2026] 183 TAXMANN.COM 87 (AHMEDABAD - TRIB.) [29-01-2026] - IT APPEAL NO. 466 (AHD.) OF 2025 [AY. 2016-17] -JANUARY 29, 2026

Where assessee-company paid DDT at 20.36 per cent on dividends distributed to UK resident shareholders, since DTAA rate under Article 11 was 10 per cent and excess DDT was paid owing to inadvertent application of section 115-O, AO was directed to restrict DDT to 10 per cent and grant refund of excess DDT paid (India – UK DTAA)

Assessee-company paid dividends to its UK resident shareholders and discharged DDT at 20.36 per cent under section 115-O. Assessee claimed that tax on such dividends ought to have been restricted to 10 per cent under Article 11 of India–UK DTAA and sought refund of excess DDT paid. Tribunal noted that section 115-O prescribed DDT at 20.36 per cent whereas DTAA provided lower rate of 10 per cent on dividends. Since assessee had inadvertently computed DDT liability by applying rate prescribed under section 115-O instead of lower rate of tax as provided in DTAA, AO was directed to charge DDT only to extent of 10 per cent invoking Article 11 of DTAA and refund of excess DDT paid by assessee was to be granted [***Colorcon Asia (P.) Ltd. vs. Jt. CIT [2025] 181 taxmann.com 301 (Bombay) followed.***]

V. INTEREST

INTEREST PAID BY FOREIGN BANK'S INDIAN BRANCH TO HO

1 AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD. VS. DEPUTY COMMISSIONER INCOME-TAX [2026] 183 TAXMANN.COM 592 (MUMBAI - TRIB.) – IT APPEAL NO. 7487 (MUM) OF 2018 [AY. 2014-15] -FEBRUARY 12, 2026

Interest paid by assessee-bank's Indian branch to its head office/overseas branches was not taxable in India (India – Australia DTAA)

Considering the facts of the case and the decision of the Special Bench in the case of ***Sumitomo Mitsui Banking Corporation vs. DDIT [2012] 19 taxmann.com 364 (Mumbai) (SB) [2012] 136 ITD 66 (Mum) (SB)***, the Tribunal held that interest paid by ANZ Mumbai was not income in the hands of the head office/overseas branches of assessee and thus, not chargeable to tax. Further, while Explanation 1 to section 9(1)(v) states that interest paid by a PE in India to the head office or any other PE shall be chargeable to tax in India, the provisions of the said section are applicable only with effect from 1-4-2016, i.e., from AY. 2016-17 and onwards.

INTEREST ON INCOME TAX REFUND

1 GENERAL REINSURANCE AG VS. ASSISTANT CIT (IT) [2026] 183 TAXMANN.COM 337 (MUMBAI - TRIB.) – TS-151-ITAT-2026(MUM) - IT APPEAL NOS. 887, 2447, 2448 AND 4691 (MUM) OF 2022 -[AY.S 2018-19 TO 2021-22] -JANUARY 30, 2026

Where assessee, a German company, received interest under section 244A on income-tax refund and offered same to tax at rate of 10 per cent as per article 11 of DTAA, treaty rate being capped at 10 per cent was inclusive of surcharge and cess, and thus tax could not exceed that rate (India – Germany DTAA)

The Tribunal held as above by following a number of precedents [***Sunil vs. Motiani [2013] 33 taxmann.com 252 (Mumbai)/[2013] 59 SOT 37 (Mumbai), DIC Asia Pacific Pte. Ltd. vs. Asstt. DIT [2012] 22 taxmann.com 310 (Kolkata), Deputy DIT (IT) vs. BOC Group Ltd. [2015] 64 taxmann.com 386 (Kolkata - Trib.)/[2016] 156 ITD 402 (Kolkata - Trib.) and Dy. CIT vs. Marubeni Corporation [2022] 139 taxmann.com 458 (Mumbai - Trib.) followed***]

PENALTY

1 DEPUTY CIT (IT) VS. DZ BANK INDIA REPRESENTATIVE OFFICE [2026] 183 TAXMANN.COM 139 (MUMBAI - TRIB.) [04-02-2026] - IT APPEAL NOS. 1158 TO 1161 (MUM) OF 2025 CO NOS. 206 TO 209 (MUM) OF 2025 [AY.S 2008-09, 2009-10, 2010-11 AND 2014-15] -FEBRUARY 4, 2026 (INDIA – GERMANY DTAA)

Where AO levied penalty on assessee, a German bank operating through a liaison office in India, alleging furnishing of inaccurate particulars in respect of interest and commitment fee income, but quantum proceedings held such income taxable at concessional rate under Article 11 of the DTAA and accepted assessee's non-filing based on section 115A(5), and dispute was merely interpretational regarding taxability and rate of tax, CIT(A) rightly deleted penalty.

VI. ROYALTY

SOFTWARE

1 CIT, IT 3 VS. SIEMENS MOBILE COMMUNICATION SPA [2026] 183 TAXMANN.COM 385 (SC) - SLP (CIVIL) DIARY NO(S). 756 OF 2026†JANUARY 27, 2026

SLP dismissed against order of High Court that where assessee received consideration as licensing fee for right to use software, such amount was not taxable as royalty under India-Italy DTAA and hence not chargeable to tax in India (India -Italy DTAA)

High Court held that in view of ***Engineering Analysis Centre of Excellence (P.) Ltd. vs. CIT [2021] 125 taxmann.com 42/281 Taxman 19/432 ITR 471 (SC)/(2022) 3 SCC 321*** consideration for licensing fee for right to use of software was not taxable as 'Royalty' within definition of 'Royalty' under article 13 of DTAA and as defined in Explanation 2 to section 9(l)(vi). Revenues SLP was dismissed [SLP dismissed against ***CIT, IT vs. Siemens Mobile Communication SPA [2026] 182 taxmann.com 852 (Delhi)***]

2 FINANCIAL AND RISK ORGANISATION LTD. VS. INCOME-TAX OFFICER IT [2026] 183 TAXMANN.COM 603 (DELHI) – TS-182-HC-2026(DEL) - W.P. (C) NO. 17641 OF 2025 CM APPL. 72869 OF 2025 -FEBRUARY 10, 2026

Where assessee, UK based company, provided subscription-based information and software products, and Indian distributors paid consideration for onward distribution, since an earlier Tribunal finding in a group entity's case under identical facts found such receipts were not royalty, competent authority could not disregard this precedent, and should have issued a NIL withholding certificate on similar facts (India – UK DTAA)

Assessee, a UK based company, was engaged in providing subscription-based information and software products. It had entered into a non-exclusive distribution agreement with two Indian companies, namely, RIPL and RITSPL on a principal-to-principal basis. Under the said agreement, RIPL and RITSPL purchased assessee's products for distribution in India and paid consideration to assessee in accordance with distribution agreement. Assessee filed an application under section 197 for issuance of 'NIL' rate certificate on ground that its receipts were not taxable in India under Act and India-UK DTAA. However, AO issued a certificate prescribing 15 per cent tax withholding. High Court noted that Tribunal in case of one of group company of assessee had recorded a finding that payment of distribution fees did not amount to royalty. It held that since no fact or striking feature distinguishing facts of instant case vis-a-vis case of group company of assessee had been brought on record, AO should not take a view other than what had been taken by Tribunal. Since finding of subject transactions amounting to 'royalty' was based upon conjectures and surmises and no concrete reasoning had been provided for

same, impugned tax withholding certificate was set aside and a certificate at NIL rate was directed to be issued [***Engineering Analysis Centre of Excellence (P.) Ltd. vs. CIT [2021] 125 taxmann.com 42/281 Taxman 19/432 ITR 471 (SC)] followed***]

DATABASE – SUBSCRIPTION FEES

1 BAIN & COMPANY, INC VS. DEPUTY/ASSISTANT COMMISSIONER OF INCOME -TAX [2026] 183 TAXMANN.COM 674 (DELHI - TRIB.) - IT APPEAL NO. 1105 (DEL) OF 2025 -AY 2022-23 -FEBRUARY 18, 2026

Where assessee received subscription fees for granting access to online platform, same did not constitute royalty under section 9(1)(vi) or article 12(3) of India–USA DTAA as no copyright was transferred [India – USA DTAA)

Assessee maintained NPS Prism Platform and received subscription fees from two Indian customers for access to that platform. AO treated subscription fees as royalty under section 9(1)(vi) and article 12(3) of India–USA DTAA. Tribunal held that since granting access to database did not amount to transfer of copyright and copyright remained with assessee, subscription fees did not constitute 'royalty' and were not taxable in India.

PAYMENTS FOR INTERNATIONAL CARD NETWORK SERVICES

1 FIRSTRAND BANK LTD. VS. ASSISTANT CIT [2026] 183 TAXMANN.COM 530 (MUMBAI - TRIB.) - ITA NO. 2502 (MUM) OF 2022 [AY. 2018-19] -FEBRUARY 12, 2026

Where assessee made payments for international card network services and AO disallowed same under section 40(a)(i) treating them as royalty/FTS, since at time of payment, binding jurisdictional High Court precedent held similar payments not taxable under DTAA, a subsequent AAR ruling could not create withholding obligation -disallowance was deleted (India – Singapore DTAA)

Assessee-bank made payments to entities incorporated in Singapore for use of their network services .AO held that such payments were in nature of royalty / FTS under section 9(1)(vi) and article 12 of India–Singapore DTAA and, relying on AAR ruling disallowed same under section 40(a)(i) for non-deduction of tax at source. Tribunal held that disallowance under section 40(a)(i) was not warranted in absence of a contemporaneous withholding obligation under section 195, to be determined having regard to section 9(1)(vi) and article 12 of India–Singapore DTAA. Since at time of payment, binding decision of jurisdictional High Court in Citibank N.A. v. DIT (IT) [2016] 66 taxmann.com 373 (Bom.) had held that similar payments were not taxable in India under applicable DTAA, and the AAR ruling was delivered after relevant previous year and had not attained finality, assessee had no obligation to withhold tax and disallowance under section 40(a)(i) was deleted.

OIL EXPLORATION – MINING PROJECTS

1 PGS GEOPHYSICAL AS VS. INCOME-TAX DEPARTMENT, IT [2026] 183 TAXMANN.COM 613 (DELHI) - W.P.(C) NO. 9678 OF 2025-FEBRUARY 20, 2026

Where assessee, a Norwegian company, provided 2D/3D seismic survey services to ONGC for offshore oil exploration and was subjected to 7 per cent TDS under section 44DA treating receipts as Royalty/FTS, since AO failed to consider earlier High Court ruling in assessee's own case wherein it was held that such services fall within expression 'mining projects or like projects' under section 9(1)(vii) and receipts would be taxable under section 44BB, impugned order and certificate under section 197 was to be set aside and matter was to be remanded back

Assessee, a non-resident company incorporated in Norway, was engaged in business of providing geophysical services to the oil and gas industry. Pursuant to a Letter of Award, it entered into a contract with ONGC to provide 2D/3D broadband seismic data acquisition in eastern offshore of India. Assessee was to receive a substantial amount pursuant to aforesaid LOA. Assessee filed an application under section 197 seeking issuance of a certificate for a lower rate of withholding tax on estimated receipts. AO noted that assessee had a project office in India and that services provided were in nature of Royalty/FTS and thus income from these activities were covered under section 44DA. He, accordingly, issued a certificate and order directing TDS to be deducted at a rate of 7 per cent. It was noted that in assessee's own case, High Court held that prospecting for or extraction or production of mineral oil could be termed as mining operations, and consequently, expression 'mining projects or like projects' as occurring in Explanation 2 of section 9(1)(vii) would also cover rendering of services such as seismic surveys carried out in connection with exploration of oil and natural gas. High Court in assessee's own case held that, thus, consideration for activity of 2D/3D seismic survey in connection with exploration of oil, carried out by assessee could not be construed as FTS. Since impugned order did not show that AO had considered binding judgment in assessee's own case and had also not given any reasoning for concluding that receipts were in nature of Royalty, impugned order and certificate under Section 197 were set aside. [***PGS Exploration (Norway) AS vs. ADIT [2016] 68 taxmann.com 143/[2016] 383 ITR 178/239 Taxman 333 (Delhi) and Oil & Natural Gas Corporation Ltd. vs. CIT [2015] 59 taxmann.com 1/233 Taxman 495/376 ITR 306 (SC) followed***]

TRANSPONDER SERVICE

1 INCOME-TAX OFFICER (IT) VS. BENNETT COLEMAN & CO LTD. [2026] 183 TAXMANN.COM 133 (MUMBAI - TRIB.)[30-01-2026] - IT APPEAL NO. 7523 (MUM) OF 2025[AY. 2020-21] -JANUARY 30, 2026

Where assessee-company entered into an agreement with a UK company for availing satellite transponder services for up-linking and down-linking of television signals

for broadcasting its channels in India, transponder service fees paid by assessee to said UK company did not constitute royalty under Article 13 of India-UK DTAA

Assessee, engaged in television broadcasting, entered into agreement with Intelsat UK for availing satellite transponder services for up-linking and down-linking of television signals for broadcasting its channels in India - It made periodic payments to Intelsat UK towards transponder service fees - As an abundant caution, it withheld tax on a grossed-up basis but maintained that payments were not chargeable to tax in India under Act or India-UK DTAA, and after remitting tax, it filed an appeal under section 248 denying liability to deduct tax - Revenue contended that Explanation 6 to section 9(1)(vi), inserted by Finance Act, 2012 with retrospective effect, deemed satellite transmission to be a process and, since term "process" was not defined in India-UK DTAA, domestic law meaning be applied via Article 3(3), rendering said payments as royalty and requiring deduction under section 195 - Whether expression "process" in treaty must be read as "secret process" and unilateral amendments to domestic law, including Finance Act, 2012, cannot be read into a tax treaty unless treaty itself is amended bilaterally - Held, yes - Whether payments for satellite transponder services constitute consideration for services and not royalty - Held, yes - Whether, therefore, transponder service fees paid by assessee to Intelsat UK did not constitute royalty under Article 13 and assessee was not liable to deduct tax at source under section 195. [***Pr. CIT vs. NEO Sports Broadcast (P.) Ltd. [2019] 107 taxmann.com 17/264 Taxman 323 (Bombay) and Income-tax Officer (IT) vs. Bennett Coleman & Co. Ltd. [2026] 182 taxmann.com 365 (Mumbai - Trib.) followed***]

VII. FEES FOR TECHNICAL SERVICES

NO FTS CLAUSE IN DTAA (INDIA – UAE DTAA)

1 YOUCLOUD DMCC VS. DEPUTY CIT, IT [2026] 183 TAXMANN.COM 284 (DELHI - TRIB.) - R/SPECIAL CIVIL APPLICATION NO.7905 OF 2024 -FEBRUARY 6, 2026

Where assessee, a tax resident of UAE, received certain amount from an Indian company for providing messaging services but it claimed to have provided such services in UAE to a client on behalf of a branch office of Indian company in Dubai, since department had not given any finding on claim of assessee to have dealt with Branch office in Dubai, matter was to be remanded back to AO for denovo framing of assessment (India – UAE DTAA)

Assessee, a UAE based company, was engaged in business of system integrator in providing messaging service to mobile network operators in UAE. It received certain amount as fee for technical services from an Indian company, namely, Comviva. Assessee claimed that it was dealing with branch office of Comviva in UAE and was rendering services to its UAE client, namely, Etisalat, on behalf of Comviva branch office in Dubai. Thus, services were rendered by assessee outside India and utilized/consumed outside

India. Accordingly, assessee did not offer same to tax in India on plea that it did not have any PE in India and since there was no FTS clause in India-UAE DTAA, said receipts were to be treated as business profits. However, AO opined that since contract and/or purchase orders were issued by Comviva, in India, said income was to be brought to tax in India. Tribunal noted that department had not given any finding on claim of assessee to have dealt with Branch office in Dubai of Comviva, India and/or that Branch office in UAE of Comviva, India which got contract and executed contract for Etisalat, UAE. Thus, there was dispute between rival parties in appreciation of facts itself. Merely because purchase order was issued by Comviva, India in favour of assessee would not make said income taxable in India. Since source of income was to be seen and it was not examined by authorities below in proper perspective, matter was to be remanded back to AO for denovo framing of re-assessment. [***Commissioner of Customs (Import) vs. Dilip Kumar & Company [2018] 95 taxmann.com 327/ 69 GST 239 (SC) Followed***.]

MANAGEMENT/ADMINISTRATIVE SUPPORT/CORPORATE CHARGES/ ALLOCATED EXPENSES/MARKETING SUPPORT

1 SOLVAY SPECIALITIES INDIA (P.) LTD. VS. ASSISTANT CIT, IT [2026] 183 TAXMANN.COM 570 (GUJARAT) – TS-153-HC-2026(GUJ) - R/ SPECIAL CIVIL APPLICATION NO.7905 OF 2024 -FEBRUARY 6, 2026

Where petitioner made remittances to a company of Singapore under a service agreement and was treated as assessee in default for non-deduction of TDS on grounds of inadequate invoice descriptions, but AO failed to examine whether services 'made available' technical knowledge as per Article 12(4) of India-Singapore DTAA, such order was legally unsustainable [(India – Singapore DTAA)

Petitioner-company paid service charges to one, Solvay Singapore, a non-resident, for services rendered by it. As per agreement, Solvay Singapore was to render services in nature of communication, finance, general management, legal, information technology, etc. to petitioner. Petitioner did not withhold TDS on service charges paid to Solvay Singapore. AO (TDS) passed an order under section 201 holding that service charges paid to Solvay Singapore were in nature of 'fees for technical services' as per article 12(4) of India-Singapore DTAA, and, hence, TDS was required to be deducted under section 195. High Court noted that impugned order passed by AO declaring petitioner as an assessee in default, relied primarily on alleged inadequacy of invoice descriptions and AO (TDS) had not examined provisions of Section 9(1)(vii) read with Article 12(4) of India-Singapore DTAA. Since AO (TDS) had failed to examine that services rendered by petitioner would fall within definition of 'fees for technical services' only if service provider, Solvay Singapore, 'makes available' technical knowledge and skill to petitioner, enabling petitioner to independently utilize such technical expertise in providing services to others, impugned order was legally unsustainable.

2 AECOM INTERCONTINENTAL HOLDINGS UK LTD. VS. ASSISTANT CIT [2026] 183 TAXMANN.COM 692 (DELHI) -TS-171-HC-2026(DEL) - W.P.(C) 14299/2025, CM APPL. 58549/2025 & CM APPL. 7329/2026 -2026-02-04

Where assessee provided corporate and management support services to its AE and, in preceding year, High Court between same parties had directed issuance of a nil-rate withholding certificate for identical services, Competent Authority, while acting under section 197, was bound to follow said decision and could not take a contrary view merely on ground of proposed SLP or principle that each AY. is separate; consequently, nil-rate certificate was to be issued

The petitioner provided corporate and management services to its Indian AE (AECOM India Pvt. Ltd.). It applied for a Section 197 NIL withholding certificate on 12.03.2025. The AO issued a certificate at 15% on 19.08.2025. For the same services and same AE, the Delhi High Court had already granted NIL rate in W.P.(C) 10843/2024 (20.05.2025). Despite being informed, the AO ignored the binding judgment, citing a proposed SLP (which had not been filed). The High Court set aside the AO's order dated 19.08.2025 refusing a NIL withholding certificate under Section 197 to AECOM Intercontinental Holdings UK Ltd., holding that the officer had ignored a binding earlier judgment of the same Court granting a NIL rate for the identical transaction with the same Indian AE, and had offered no new facts or reasoning to justify deviation. The Court criticised the Department's reliance on a proposed (but unfiled) SLP, condemned the prolonged delay that defeated the purpose of Section 197, and noted that the petitioner had suffered nearly eleven months of unwarranted 15% TDS. It directed issuance of a NIL certificate within 15 days and instructed CBDT to fix systemic issues in the Section 197 software so that revised certificates can be issued pursuant to court orders without requiring fresh applications.

3 BAIN & COMPANY, INC VS. DEPUTY/ASSISTANT COMMISSIONER OF INCOME -TAX [2026] 183 TAXMANN.COM 674 (DELHI - TRIB.) - IT APPEAL NO. 1105 (DEL) OF 2025 -AY 2022-23 -FEBRUARY 18, 2026

Where assessee, a US tax-resident company, rendered management consultancy services to Indian affiliate, receipts were not taxable as FIS under article 12(4)(b) of India–USA DTAA since 'make available' condition was not satisfied (India -USA DTAA)

Assessee, a US tax-resident company, engaged in management consulting and support services, rendered management consultancy services to its wholly owned Indian affiliate and received about ` 86.80 crores. AO treated consultancy receipts as taxable in India holding them to be ancillary or subsidiary to enjoyment of rights/information under a royalty agreement and thus taxable as FIS. Tribunal held that since nature of services such as client engagement, market research, strategic research and planning did not fall within technical services and even assuming they were consultancy services, essential 'make available' condition under article 12(4)(b) was not satisfied as no technical knowledge, skill or know-how was made

available to enable independent performance. Thus, the receipts were not taxable as FIS. [***Bain & Company, Inc. vs. Dy. CIT, Int. Taxation IT Appeal No. 1620 (Del) of 2022, dated 12-10-2023 followed***]

4 GENERAL REINSURANCE AG VS. ASSISTANT CIT (IT) [2026] 183 TAXMANN.COM 337 (MUMBAI - TRIB.) – TS-151-ITAT-2026(MUM) - IT APPEAL NOS. 887, 2447, 2448 AND 4691 (MUM) OF 2022 [AY.S 2018-19 TO 2021-22] -JANUARY 30, 2026

Where India Branch remitted amounts to, assessee, its German HO towards allocation of IT and management expenses, since they were governed by Article 7 and relevant DTAA protocol provisions, such payments would not be taxable in India as FTS under section 9 and Article 12 of India–Germany DTAA (India – Germany DTAA)

Assessee, a German company, was engaged in providing reinsurance services globally. It had an Indian wholly owned subsidiary, GSSMPL, providing market intelligence and administrative support. Subsequently, an India Branch of assessee was set up, subjected to regulations of IRDAI. During relevant AY., Indian Branch made payments to assessee, i.e., its Head Office, towards allocation of IT cost and other management expenses. AO treated India Branch as a resident in India. He, thus, held that payments made by India Branch to HO (assessee) were payments by a resident to a non-resident and were, thus, covered within scope of FTS under section 9(1)(vii)(b). Tribunal held that under Article 12(5) of India-Germany DTAA, if beneficial owner of FTS was a resident of Germany and had a PE in India, and said FTS was connected to that PE, income would be taxed either under Article 7 as 'business profits' or Article 14 as 'independent personal services'. Furthermore, as per protocol to India-Germany DTAA, income derived by a resident of Germany from inter alia, income from technical services exercised in Germany in connection with a PE situated in India shall not be attributed to that PE. Thus, said amount was not taxable in India as FTS under section 9 and Article 12 read with Article 7 and Protocol to India-Germany DTAA.

PROFESSIONAL SUPPORT FEES

1 BAIN & COMPANY, INC VS. DEPUTY/ASSISTANT COMMISSIONER OF INCOME-TAX [2026] 183 TAXMANN.COM 674 (DELHI - TRIB.) - IT APPEAL NO. 1105 (DEL) OF 2025 -AY 2022-23 -FEBRUARY 18, 2026

Where assessee provided professional support services to Indian affiliate, consideration received could not be taxed as FIS under article 12(4)(b) of India–USA DTAA in absence of fulfillment of 'make available' condition (India – USA DTAA)

Assessee, a US tax-resident company, provided professional support services to its Indian affiliate under a Support Services Agreement and received about ` 47.99 crores. AO treated receipts as FIS under article 12(4). Tribunal noted that assessee had been providing support services to

Indian affiliate since 2010, yet Indian affiliate continued to avail services, indicating no transfer of technology or know-how enabling independent performance. Since AO had failed to establish fulfillment of 'make available' condition under article 12(4)(b), consideration for support services could not be treated as FIS. [***Bain & Company, Inc. vs. Dy. CIT, Int.Taxation IT Appeal No. 1620 (Del) of 2022, dated 12-10-2023 followed***]

UPFRONT/FACILITATION FEES

1 CIT VS. TVS MOTOR COMPANY LTD. [2026] 183 TAXMANN.COM 591 (MADRAS) – TS-148-HC-2026(MAD) - T.C.(A). NO. 330 OF 2011-JANUARY 5, 2026

Where assessee paid upfront fees to UK and Singapore entities for facilitating ECB and did not deduct tax at source, since there was no 'make available' of technical knowledge by payees to enable assessee to independently obtain ECB in future, payments were not taxable in India under relevant DTAAs, and disallowance under Section 40(a)(i) was not warranted (India – Singapore DTAA & India – UK DTAA)

The assessee paid upfront/arrangement fees to Asia Pacific Investments PLC, UK and Regional Capital Pte Ltd, Singapore for facilitating ECB and did not deduct tax at source under section 195, treating the sums as business profits of non-residents not taxable in India in the absence of a PE. The AO held that the services rendered for facilitating ECB were technical/managerial in nature and taxable as FTS, and accordingly disallowed the expenditure under section 40(a)(i) for non-deduction of TDS. CIT(A) found that remittances were for technical services rendered by two payees in facilitating availment of External Commercial Borrowings (ECB) by assessee and, thus, such consideration was liable to deduction of tax at source. However, he noted that both DTAAs contain 'make available' clause as per which, remittances would be liable to tax only if, in addition to rendition of technical services, technology relating to those services had itself been made available to payer/assessee. Since know-how relating to technical services had not been transferred to assessee, he deleted disallowance made by AO. Tribunal held that since expertise of payees had not been made available to assessee so as to enable assessee to obtain ECB without assistance of payee henceforth, and in future, more beneficial of position between domestic and treaty law would be available to assessee and, thus, remittances were not liable to tax in India under DTAAs. [***Union of India vs. Azadi Bachao Andolan [2003] 132 Taxman 373 /263 ITR 706 (SC) followed***]

SAAS (SOFTWARE AS A SERVICE)

1 BRANCH METRICS INC VS. DEPUTY CIT, INTERNATIONAL TAX [2026] 183 TAXMANN.COM 466 (DELHI) - W. P. (C) NO. 17222 OF 2025 CM APPL. NO. 70857 OF 2025 -JANUARY 29, 2026

Where assessee, a non-resident company, engaged in business of providing Software as a Service (SaaS) based products/offerings to Indian customers claimed that service provided by it to Indian company did not amount to FTS/FIS, since competent authority had not considered judgments which assessee had cited and had simply picked up findings of AO recorded in assessment orders for relevant years, competent authority was directed to issue a certificate under section 197 at 2 per cent rate equal to equalization levy (India – USA DTAA)

Petitioner/assessee, a non-resident, was engaged in business of providing software as a Service (SaaS) based products/offerings to Indian customers under a contract/End User License Agreement (EULA) and an order form between Indian customers and petitioner. Competent authority passed an order followed by issuance of certificate whereby it required its counterpart in India to deduct tax at rate of 15 per cent on payments made to and credited to petitioner. Petitioner filed instant writ petition and submitted that services rendered by it did not fall within ambit of Fees for Included Services (FIS) or Fees for Technical Services (FTS) as defined under Act and India-US treaty. It was noted that competent authority had not considered application and judgments which petitioner had cited and had simply picked up findings of AO recorded in assessment orders for relevant years. Thus, competent authority was to directed to issue a certificate under section 197 at 2 per cent rate equal to equalization levy which petitioner had been paying upto 31.3.2025.

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Petitioner/assessee, a non-resident, was engaged in business of providing software as a Service (SaaS) based products/offerings to Indian customers under a contract/End User License Agreement (EULA) and an

order form between Indian customers and petitioner. Competent authority passed an order followed by issuance of certificate whereby it required its counterpart in India to deduct tax at rate of 15 per cent on payments made to and credited to petitioner. Petitioner filed instant writ petition and submitted that services rendered by it did not fall within ambit of Fees for Included Services (FIS) or Fees for Technical Services (FTS) as defined under Act and India-US treaty. It was noted that competent authority had not considered application and judgments which petitioner had cited and had simply picked up findings of AO recorded in assessment orders for relevant years. Thus, competent authority was to directed to issue a certificate under section 197 at 2 per cent rate equal to equalization levy which petitioner had been paying upto 31.3.2025.

PAYMENTS FOR INTERNATIONAL CARD NETWORK SERVICES

1 FIRSTRAND BANK LTD. VS. ASSISTANT CIT [2026] 183 TAXMANN.COM 530 (MUMBAI - TRIB.) - ITA NO. 2502 (MUM) OF 2022 [AY. 2018-19] -FEBRUARY 12, 2026

Where assessee made payments for international card network services and AO disallowed same under section 40(a)(i) treating them as royalty/FTS, since at time of payment, binding jurisdictional High Court precedent held similar payments not taxable under DTAA, a subsequent AAR ruling could not create withholding obligation -disallowance was deleted (India – Singapore DTAA)

Note : See case no 1 under same sub-heading under ROYALTY.

OIL EXPLORATION – MINING PROJECTS

1 PGS GEOPHYSICAL AS VS. INCOME-TAX DEPARTMENT, IT [2026] 183 TAXMANN.COM 613 (DELHI) - W.P.(C) NO. 9678 OF 2025- FEBRUARY 20, 2026

Where assessee, a Norwegian company, provided 2D/3D seismic survey services to ONGC for offshore oil exploration and was subjected to 7 per cent TDS under section 44DA treating receipts as Royalty/FTS, since AO failed to consider earlier High Court ruling in assessee's own case wherein it was held that such services fall within expression 'mining projects or like projects' under section 9(1)(vii) and receipts would be taxable under section 44BB, impugned order and certificate under section 197 was to be set aside and matter was to be remanded back.

Note : See case no 1 under same sub-heading under ROYALTY

VIII. CAPITAL GAINS

TREATY BENEFITS DENIED

1 HAREON SOLAR SINGAPORE (P.) LTD. VS. DEPUTY CIT, IT [2026] 183 TAXMANN.COM 125 (DELHI - TRIB.) – TS-112-ITAT-2026(DEL) - IT APPEAL NO. 2226 (DELHI) OF 2024 [AY. 2020-21]-JANUARY 30, 2026

Where assessee, a Singapore company, was 100 per cent subsidiary of Hong Kong company whose ultimate parent was in China, and it had no real and continuous business activities in Singapore, exemption of capital gains on transfer of shares and CCDs of Indian company under India–Singapore DTAA was not available and capital gains were taxable in India (India – Singapore DTAA)

Note : See case no 1 under Treaty Benefits - denied

IX. DEPENDENT PERSONAL SERVICES

SERVICE RENDERED BY NRI OUTSIDE INDIA – SALARY RECEIVED IN INDIA

1 KAUSHAL GANPATBHAI PATEL VS. INCOME-TAX OFFICER, WARD-1 (IT), AHMEDABAD [2026] 183 TAXMANN.COM 532 (AHMEDABAD - TRIB.) – TS-157-ITAT-2026(AHD) - IT APPEAL NO. 434 (AHD) OF 2025 -[AY. 2019-20] -FEBRUARY 9, 2026

Where assessee, non-resident, earned salary for services rendered outside India which was received in his NRE account in India, since assessee was in lawful right to receive this money at place of employment and deposit of same in NRE bank account in India was only an application of salary received outside India, such salary did not tantamount to receipt of salary income in India and was not liable to tax in India by virtue of section 5(2)(a)

Assessee, a non-resident, was employed with a company in Seychelles. He earned salary for services rendered outside India which was received in his NRE account in India. AO treated same as taxable in India as per provisions of section 5(2)(a). Tribunal held that assessee was in lawful right to receive this money, as an employee, at place of employment and constructive receipt of salary took place at place of rendering employment and deposit of same in NRE bank account in India was only an application of salary received outside India. Therefore, salary received by assessee in his NRE Account did not tantamount to receipt of salary income in India and was not liable to tax in India by virtue of section 5(2)(a) [***Arvind Singh Chauhan vs. ITO, 42 taxmann.com 285 (Agra - Trib.) followed***]

EXCHANGE OF INFORMATION

INDIA – HONG KONG DTAA

1 PR. CIT VS. SANJAY JAIN [2026] 183 TAXMANN.COM 129 (DELHI) - ITA NOS. 38, 41, 43, 34, 36 AND 37 OF 2026 CM APPL. NOS. 4177, 4178, 4253, 4254, 4256 AND 4257 OF 2026 -JANUARY 22, 2026

Where, following search in AMQ group, AO made FT&TR reference seeking Hong Kong information for AY. 2017-18, since India–Hong Kong DTAA effective 30-11-2018 permitted exchange only for subsequent fiscal years, such reference was impermissible and no limitation extension under Explanation (ix) to section 153B was available (India -Hong Kong DTAA)

A search was conducted at premises of an entity known as AMQ group on 27-2-2017. On basis of material found during said search, proceedings were taken against assessee. Prescribed period of limitation for passing assessment order (as case related to search) was 31-12-2018; however, before such date, on 4-12-2018 AO made a reference to Foreign Tax and Tax Research Division (FT&TR). High Court that authorities at Hong Kong never provided desired information to AO. Consequent to reference made to FT&TR, limitation for passing assessment order got extended up to 31-12-2019 by virtue of clause (ix) of explanation to section 153B. CIT(A) affirmed addition made by AO by way of his order dated 30-1-2024. Tribunal relying upon judgment of High Court in case of ***Pr. CIT, Central -1 vs. Smt. Sneh Lata Sawhney [2025] 174 taxmann.com 593 (Delhi)*** allowed appeal filed by assessee. High Court held that reference made to FT&TR was improper and impermissible in eye of law and therefore, AO could not get advantage of extension of limitation period by a year, as provided in clause (ix) of explanation to section 153B. (Thus Revenue's appeal against Tribunal order holding the assessment order to be time barred was dismissed)

X. FOREIGN TAX CREDIT (FTC)

DELAY IN FILING FORM 67

1 REAL TIME DATA SERVICES (P.) LTD. VS. PRINCIPAL CIT [2026] 183 TAXMANN.COM 701 (DELHI) - W. P. (C) NOS. 959, 960, 961 OF 2024 CM APPL. NOS. 3939, 3941, 3943 OF 2024 -FEBRUARY 13, 2026

Where assessee claimed Foreign Tax Credit but failed to furnish Form No. 67 by due date prescribed under rule 128, such credit could not be denied merely on account of this procedural lapse, delay being technical / venial in nature; Principal Commissioner, while exercising revisional jurisdiction under section 264, ought to have condoned such delay. [***Vijay Gupta vs. CIT [2016] 68 taxmann.com 131/238 Taxman 505/386 ITR 643 (Delhi) /2016 SCC OnLine Del 1961 followed***]

2 DHEERAJ TOLARAM TALREJA VS. INCOME-TAX OFFICER [2026] 183 TAXMANN.COM 551 (MUMBAI - TRIB.) - MA NO. 293 (MUM) OF 2024 [AY. 2020-21] -JANUARY 30, 2026

Delay in filing Form No. 67, being directory and not mandatory, cannot by itself justify denial of foreign tax credit, which must be examined on merits after determination of residential status and income chargeable to tax in India. Matter remanded.

INCORRECT AY MENTIONED IN FTC CLAIM

1 SHIPIJ RATHORE VS. INCOME-TAX OFFICER [2026] 183 TAXMANN.COM 647 (INDORE - TRIB.) - IT APPEAL NO. 557 (INDORE) OF 2025 -[AY - 2021-22] -FEBRUARY 19, 2026

Where assessee e-filed Form 67 for claiming Foreign Tax Credit but selected an incorrect assessment year inadvertently, and claimed identical credit figures in both forms with no duplication, lapse was purely technical and did not prejudice claim, so denial of FTC solely due to such procedural error was not justified and assessee was entitled to relief under section 90/90A

The Tribunal held as above by following ***Asha Rani Pandya vs. DCIT/ACIT [IT Appeal No. 176(Ind) of 2024, dated 28-06-2024***]

FTC DENIED DUE TO NON – IMPLEMENTATION OF DRP DIRECTIONS – APPROPRIATE REMEDY IS RECTIFICATION OF ASSESSMENT

1 TATA CHEMICALS LTD. VS. DEPUTY CIT [2026] 183 TAXMANN.COM 164 (MUMBAI - TRIB.)[04-02-2026] - IT APPEAL NO. 7912 (MUM.) OF 2019 [AY. 2015-16] -FEBRUARY 4, 2026

Where foreign tax credit was not granted due to non-implementation of DRP directions rather than denial on merits, appropriate remedy available to assessee was rectification of assessment order and AO was required to examine such rectification application in accordance with law and DRP directions

Assessee sought credit of foreign tax withheld though not claimed in return. DRP directed AO to verify and allow credit if income was taxed in India, but credit was not granted in final assessment. Tribunal held that dispute related to non-implementation of DRP direction in final assessment order and not denial on merits and thus appropriate remedy was to seek rectification under Act. Since assessee had not availed of such remedy, AO was to examine and dispose of rectification application in accordance with law and in conformity with directions already issued by DRP. Matter remanded.

WHERE PROFITS OF OVERSEAS BRANCHES ARE TAXED IN INDIA – APPROPRIATE RELIEF IS THROUGH FTC MECHANISM

1 BANK OF INDIA VS. ASSISTANT CIT -2(1)(2) [2026] 183 TAXMANN.COM 429 (MUMBAI - TRIB.) - IT APPEAL NO.1451,1452,1547 AND 1548 (MUM) OF 2023 [AY. S 2016-17 AND 2018-19] -JANUARY 30, 2026

Profits of overseas branches situated in DTAA countries was includible in total income in India. Such income was required to be computed under the Income-tax Act and not under tax laws of respective foreign jurisdiction - Relief was available only through foreign tax credit mechanism

Assessee, a public sector bank, claimed exclusion under section 90 of profits of overseas branches situated in DTAA countries from total income in India. AO included such profits in total income. CIT(A) upheld inclusion. Tribunal held that in view of Notification dated 28-8-2008 issued under section 90(3), profits of overseas branches located in DTAA countries were liable to be included in total income in India and relief was admissible only by way of foreign tax credit under respective DTAAs. Though the assessee had claimed foreign tax credit in respect of taxes paid / withheld overseas on foreign branch income and other specified foreign incomes, AO did not allow credit for want of jurisdiction-wise details correlating foreign taxes with underlying incomes. The Tribunal held that foreign tax credit in respect of taxes paid by foreign branches in treaty countries was to be allowed subject to assessee furnishing requisite particulars, establishing absence of double claim, and verification of admissibility under respective DTAAs, with AO to compute admissible credit jurisdiction-wise as per treaty provisions. Thus, foreign tax credit in respect of taxes withheld on dividends from foreign subsidiaries / associates and taxes paid by branches in non-treaty countries was to be allowed subject to verification of relevant facts and law under section 91. [Matter remanded]

XI. OTHERS

REVISION U/S 263 - TO DENY TREATY BENEFITS - IN RESPECT OF CAPITAL GAINS EXEMPTION UNDER INDIA – MAURITIUS DTAA

1 SANDSTONE INVESTMENT PARTNERS I VS. DEPUTY COMMISSIONER OF INCOME-TAX - (IT) [2026] 183 TAXMANN.COM 699 (DELHI - TRIB.) – TS-254-ITAT-2026(DEL)- IT APPEAL NO. 1158 (DELHI) OF 2022 - [AY- 2017-18] -FEBRUARY 25, 2026

Where assessee, a Mauritius based company, holding valid TRC and having no PE in India, earned long-term capital gains on sale of listed shares through recognised stock exchange and paid STT and Assessing Officer accepted claim of exemption under

section 10(38) and Article 13(4) of India–Mauritius DTAA after detailed enquiry and necessary verification, Commissioner was not justified in invoking section 263 alleging lack of enquiry, treaty shopping etc.

The Tribunal held as above by following ***Malabar Industries Co. Ltd. vs. CIT [C.A. No. 3646 of 1993, dated 10-2-2000***]

ROYALTY - TDS APPEARING IN FORM 26AS OF NEXT AY- ADDITIONAL EVIDENCE

1 HASBRO SA VS. DEPUTY CIT (INTERNATIONAL TAX) [2026] 182 TAXMANN.COM 696 (DELHI - TRIB.)[21-01-2026]- IT APPEAL NO. 2842 (DELHI) OF 2025 [AY. 2020-21] -JANUARY 21, 2026

Where assessee, a Switzerland based company, offered royalty income to tax and claimed TDS credit which was denied merely because corresponding TDS appeared in Form 26AS of next AY., and assessee sought admission of additional evidence under Rule 29 to establish correct year of accrual, in absence of any mala fide and since tax was already deposited, additional evidence was admitted and matter was remanded to AO for verification and grant of lawful TDS credit

Assessee, a Switzerland based company, earned royalty income and offered it to tax, claiming TDS credit. However, TDS credit was not granted, resulting in a demand. CIT(A) upheld order on ground that corresponding TDS appeared in Form 26AS for AY. 2021-22, with no royalty or TDS entries in Form 26AS for AY. 2020-21, and held that basis for offering royalty in AY. 2020-21 was not clear.

Assessee filed an application under Rule 29 seeking admission of additional evidence - It was noted that tax had already been deposited by assessee and relevant documents were not produced during assessment proceedings due to *bona fide* belief that material had already been brought on record before CIT(A). Since nothing *mala fide* had been alleged or brought on record on part of assessee for not producing additional evidence / relevant evidence in support of royalty income being earned for relevant AY., additional evidence sought to be filed was admitted by the Tribunal and matter was restored to file of AO to consider the same and after verification of claim of assessee, allow deduction of TDS amount as per law. [***Matter remanded] [Om Shanti Realtors vs. ITO [2024] 165 taxmann.com 679 (Mum-Trib) followed***]

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"An eye for an eye will only make the whole world blind"

Mahatma Gandhi

GST





CA Naresh Sheth *CA Jinesh Shah*

A. DECISIONS BY HIGH COURT

1 NIKET BIPINBHAI PATEL VS. ASSISTANT COMMISSIONER (A.E.) CGST-CENTRAL EXCISE VADODARA-II COMMISSIONERATE [CIVIL APPLICATION NO. 18068 OF 2025] – GUJARAT HIGH COURT

Facts and issues involved

Petitioner is an individual who has acquired leasehold rights over a Gujarat Industrial Development Corporation (GIDC), Ankleshwar plot from Syngenta India Limited and is engaged in the business of undertaking sub-plotting activities and subsequently transferring the leasehold rights of such sub-plots to various purchasers.

Petitioner is a Non-Resident Indian (NRI) residing in the USA and has obtained GST registration solely for the purpose of discharging GST liability on the transfer of leasehold rights of GIDC sub-plots. For transferring these rights, the petitioner is required to pay various charges to GIDC. GIDC levies GST on these charges. Petitioner has duly availed the corresponding Input Tax Credit (ITC).

During F.Y. 2022-23, the petitioner sold two plots and discharged GST liability of ` 3.60 crores in July 2022 and ` 2.97 crores in September 2022 but inadvertently availed and utilized ITC of ` 38,60,608/-, which was subsequently reversed through Form DRC-03 dated 11.04.2023. The respondent department conducted a spot visit, alleging that the petitioner had availed ITC on invoices issued by GIDC, which was purportedly in the nature of blocked credit under Section 17(5)(d) of the GST Act.

The respondent subsequently issued an intimation of liability under Section 74(1) of the GST Act calling upon the petitioner to pay ` 98,11,678/- along with applicable interest and penalty by alleging that the petitioner had availed and utilized ITC in contravention of Section 17(5)(d).

Hence, petitioner has preferred present writ as to whether the respondent has issued show cause notice under Section 74(1) without jurisdiction and whether the respondent authority has misinterpreted the provisions of Sections 17(5)(d) of the GST Act.

Petitioner's submissions

The impugned notice is without jurisdiction as the petitioner's activities of selling the

GIDC Plots would not attract the provision of Section 17(5)(d) of the GST Act". It is not the case of the respondent that the petitioner has committed any fraud or made any wilful misstatement or any suppression of fact, which would attract the provision of Section 74(1) of the GST Act. Accordingly, the penal provisions are not attracted in the present case.

The allegation levelled by the petitioner of availing and utilising ITC is also baseless and devoid of merits. Though the petitioner availed ITC on charges levied by GIDC, the credit thereof has never been utilised for payment of output GST and still continues to remain unutilised in the electronic credit ledger and the respondent has blocked the very same amount.

The entire GST on the transfer of sub-plots has been discharged in cash and even the ITC of ` 38,60,608/- which was inadvertently utilised in July 2022, was duly reversed through Form DRC-03 dated 11.04.2023, which demonstrate that the petitioner had paid the entire output GST liability in cash.

Discussions by and Observations of High Court

High Court observed that a plain and simple reading of provision of Section 17(5)(d) of the GST Act exposits that the apportionment of credit and blocked credit relates to the goods or services or both by a taxable person for the purpose of construction of any immovable property. The Court highlighted that the legislative intent is clear that the bar on credit applied exclusively to construction related expenditure.

The Court noted that the respondent has not established that the petitioner has undertaken any construction activity whatsoever and apart from transferring the leasehold rights in GIDC Plot, is also accordingly, undertaking the construction activities. Therefore, the provision of Section 17(5)(d) of the GST Act would not even remotely apply to the petitioner. Hence, the allegation of availing block credit by resorting to the provision of Section 17(5)(d) of the GST Act, is uncalled for and there is a complete non-application of mind on behalf of the respondent.

Further, the Court stated that in the instant case there is neither fraud nor wilful misstatement nor any suppression of facts at the end of the petitioner in availing the ITC or the same is wrongly availed. It has not been denied by the respondent that, the petitioner had, though utilised the ITC of ` 38,60,608/- in the month of July 2022 but accordingly he has reversed through Form DRC-03 dated 11.04.2023. Thus, the petitioner has paid the entire output of GST liability in cash. Hence, the question of resorting to Section 74 of the GST Act is also uncalled for.

On both these counts, the action of the respondent is without jurisdiction and in fact the respondent authority has misinterpreted and misapplied the statutory provisions which calls for interference of this Court and hence the petitioner cannot be relegated to further remedy of facing proceeding, which does not satisfy the statutory pre-requisite.

Decision of the High Court

Writ petition succeeds. The impugned notice dated 28.10.2025 issued by the respondent under Section 74(1) of the GST Act is quashed and set-aside.

B. RULINGS BY GST APPELLATE TRIBUNAL

1 STERLING & WILSON (P.) LTD. VS. COMMISSIONER, ODISHA, COMMISSIONERATE OF CT GST [2026] 183 TAXMANN.COM 374 – GSTAT NEW DELHI

Facts and issues involved

Appellant is engaged in the business of engineering, procurement and construction (EPC) services and is duly registered under the Goods and Services Tax laws. For the Financial Year 2018-19, the appellant had declared an output tax liability of ` 31,36,18,763/- in GSTR-1, whereas the liability declared in GSTR-3B was ` 31,09,12,131/-, resulting in an alleged short disclosure of tax liability amounting to ` 27,06,634/-. The 1st Appellate Authority, after examining the records including GSTR-1, GSTR-3B, GSTR-9 and GSTR-9C filed by the Appellant for the year 2018-19, determined the tax demand of ` 27,06,634/-, interest of ` 15,84,248/- and reduced the penalty to ` 2,70,664/-. The Appellate Authority held that there is no establishment of any intention of the taxpayer to evade tax by act of fraud or suppressing the facts to evade tax as the appellant has disclosed the same in debit/credit notes supported with invoices duly accounted for in books of account but did not disclose it in periodical returns. Accordingly, the adjudication was converted from Section 74 to Section 73 of the OGST/CGST Act, 2017".

Appellant's submissions

The demand of tax and interest sustained is erroneous in law and facts. The Appellate Authority erred in upholding tax liability merely on account of return mismatch without verifying reconciliation records. Once absence of intent to evade tax was admitted, entire proceedings under Section 74 ought to have been dropped. The levy of interest and penalty is unsustainable as the issue is reconciliatory and revenue neutral. Such difference arose due to issuance of credit notes and adjustment of advances pertaining to different tax periods which could not be amended in GSTR-1 due to system constraints. At that time, the returns were being made manually and online system of filling returns etc. were not fully operational. The Proper Officer i.e. the Deputy Commissioner of CT and GST did not find any suppression, misrepresentation or fraudulent misstatement to attract Section 74 of the CGST/SGST Act".

Respondent's submissions

Appellant failed to reconcile the mismatch between the tax liability declared in Form GSTR-1 and the tax discharged in Form GSTR-3B in the manner prescribed under the CGST/OGST Act, 2017. Statutory returns filed under the Act are self-assessed declarations and any variation therein must be duly explained and corrected within the framework of law.

The explanations advanced by the Appellant regarding credit notes, advances, and prior period adjustments were not supported by contemporaneous statutory compliance and were raised belatedly at the appellate stage. The scrutiny revealed multiple discrepancies including: (a) Non-amendment of GSTR-1. (b) Non reconciliation in Annual return and audit Return i.e. GSTR 9 and 9(C) respectively. (c) Credit notes issued beyond timelines under Section 34(2). (d) Failure to establish reversal

of ITC by recipients where credit notes were claimed resulting in risk of unjust enrichment. (e) Several claims relating to prior periods / pre-GST issues which could not be adjusted in GST returns.

Taxation statue calls for strict interpretation. Issues not raised before the lower fora cannot be permitted to be raised for the first time at the appellate stage, especially in second appeals.

Discussions by and observations of GSTAT

The argument advance by the Revenue that the Tribunal cannot go into the question of fact is not sustainable and it is held that in exercise of Jurisdiction under Section 112 read with Rule 112 has power to examine question of facts also and it is the last adjudicating forum on questions of facts.

First Appellate authority has accepted that the appellant has disclosed the transaction in Debit / Credit notes and are supported with invoices duly accounted in books of Account. But his fault was that he did not disclose the transactions in the periodical returns matching with total liability in annual returns correctly. The only mistake which has been found with the appellant is that he has not reflected the debit / credit notes which has been duly accounted in books of account in its periodical returns. And that he did not prove the ITC passed to the recipients by the Appellant are utilized.

Every honest taxpayer should be protected and if it is held, he has no intention of evading tax by submitting wrong data or misinformation or fraudulent misinformation having intended to evade tax then he should be given a proper hearing before saddling him with penalties and interest. Where any Appellate Authority / Appellate Tribunal / Court concludes that the notice issued under section 74(1) is not sustainable for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax has not been established, the proper officer shall determine the tax payable. It cannot be done by the First Appellate Authority or the Tribunal. CGST / SGST Act is relatively new Act and professionals may not be thorough in the filing returns at the relevant period, together with fact that at that particular time most of returns were being filed manually and the technique of auto-population and full online filling was not operational to fullest extent as it is now. There were chances of human error.

Decision of GSTAT

The order passed by the learned Proper Officer and the order passed by the First Appellate Authority, as far as it relates to treating the case as Section 73 of the CGST / SGST Act are concerned, cannot be sustained and accordingly is set aside. The matter is remanded back to learned Proper Officer for re-consideration of matter giving liberty to the Appellant to file appropriate amendment petition.

The case shall be re-considered as one under Section 73 of the CGST Act and after affording a reasonable opportunity of hearing, producing documents and seeking amendment (amendment must be filled withing 30 days from the publication of this judgment) shall be considered on merits by the learned proper officer.

2 DG ANTI PROFITEERING, DIRECTOR GENERAL OF ANTIPROFITEERING, DGAP VS. AJ ENTERPRISES – [[2026] 183 TAXMANN.COM 602] – GSTAT NEW DELHI

Facts and issues involved

Respondent is a registered supplier of restaurant services and has been operating a 'Subway' franchise outlet at Amanora Mall, Pune, Maharashtra. An application was filed before the Standing Committee on Anti-Profiteering alleging that the Respondent had indulged in profiteering in contravention of Section 171 of the CGST Act, despite reduction of the GST rate on restaurant services from 18% to 5% (without input tax credit) with effect from 15.11.2017.

The DGAP issued a notice to the Respondent calling upon it to show cause as to whether the benefit of reduction in GST rate had been passed on to the recipients by way of commensurate reduction in prices. The dispute in the present matter is whether the respondent indulged in profiteering by increasing the base prices of its products despite reduction in the GST rate from 18% to 5% with effect from 15.11.2017, thereby failing to pass on the benefit of such rate reduction to the recipients by way of commensurate reduction in prices, as required under Section 171 of the CGST Act.

Respondent's (taxpayer) submissions

Owing to operational and commercial challenges, the Respondent has since closed its outlet at Amanora Mall, Pune. Respondent periodically revised its menu prices, in response to input cost inflation, market dynamics, and consistent with operational guidance from Subway India.

The Respondent had increased the base price of its products by approximately 13% on average, whereas the loss of ITC alone ranged between 10% to 11%. Minimum cost incurred by the Respondent had increased by approximately 12.69% comprising incremental royalty, increased advertisement contribution, enhanced lease rent, and higher commission payable to online aggregators.

Further, the present proceedings are barred by limitation as a period of more than five years has elapsed, which is the limitation prescribed under Section 74 of the CGST Act. DGAP has arbitrarily selected the period of investigation from 15.11.2017 to 30.09.2019 for computation of the alleged profiteering amount, without considering the legitimate price revisions.

Also, interest cannot be levied for any period prior to the introduction of the statutory provision enabling imposition of interest under Rule 133(3)(c) of the CGST Rules.

Discussions by and observations of GSTAT

The anti-profiteering provisions are in the nature of beneficial legislation aimed at protecting the interests of the consumers and ensuring that the commensurate benefit of rate reduction or input tax credit is ultimately passed to the consumer. The time limit of six months prescribed under Rule 133 of CGST Rules are directory in nature. Therefore, the present proceedings are not barred by limitation.

Admittedly, the Respondent increased the base price of 6" Aloo Patty and 6" Hara Bhara Kabab on 15.11.2017. The increase in base prices of the aforesaid products coincided with the very date on which reduced rate of tax of 5% became effective. The Respondent has failed to substantiate such price increases with cogent evidence. In absence of such

cogent evidence, the presumption goes against the respondent, and it indicate that prices were increased by them arbitrarily without passing on the benefit to the consumers.

The Respondent's action of increasing the base price on the very same date on which the notification reducing rate of tax came into force indicates that respondent has wilfully increase the basic price to maintain the same MRP that existed till 14.11.2017.

The provision of imposition of 18% interest on the profiteered amount shall come into force only to those cases which call after the notification on the amending (Fourth) Rule came into force, i.e. 28.06.2019.

Decision of GSTAT

Respondent had indulged in profiteering by not passing on the benefit of reduction of rate of tax to the consumers by way of commensurate reduction in prices in terms of Section 171 of the CGST Act. The report of the DGAP dated 14.10.2022 is accepted.

Respondent shall be liable to pay interest under Rule 133(3)(c) of the CGST Rules from 28.06.2019 till the date the profiteered amount as calculated by the DGAP is deposited. The penalty prescribed under the above Section cannot be imposed on Respondent retrospectively as provisions of Section 171(3A) of the CGST Act have come into force w.e.f. 01.01.2020.

Respondent is directed to deposit the profiteered amount along with the interest @18% from 28.06.2019 to 30.09.2019. 50% shall be deposited in the Central Consumer Welfare fund and remaining 50% shall be deposited in Maharashtra Consumer Welfare fund.

C. RULINGS BY APPELLATE ADVANCE RULING AUTHORITY

1 GAIL (INDIA) LIMITED [2026-TIOL-03-AAAR-GST] – ODISHA AAAR

Facts and issues involved

Appellant is a Maharatna Public Sector Undertaking of the Government of India engaged in the business of transmission of natural gas through an extensive cross-country pipeline network across India. Appellant is authorised by the Petroleum and Natural Gas Regulatory Board (PNGRB) for laying cross-country pipelines forming part of the National Gas Grid.

For the execution of Mumbai – Nagpur – Jharsuguda pipeline project, the appellant has procured the following:

- pipes and pipe fittings, and
- works contract services for construction and laying of underground cross-country pipelines and paid applicable GST on such procurements.

Appellant did not initially avail ITC due to ambiguity surrounding the expression pipelines laid outside the factory premises appearing in the explanation to Section 17 of the CGST Act, 2017. Accordingly, the Appellant sought an Advance Ruling before the Odisha AAR on the admissibility of ITC on goods and services used for construction of underground pipelines.

The Odisha AAR, vide Order dated 23.07.2025, ruled that ITC on such pipelines is inadmissible as they do not qualify as plant and machinery and are hit by Section 17(5)(c) and 17(5)(d) of the CGST Act.

Appeal to AAAR and appellant's submissions: Aggrieved, the Appellant preferred an appeal before the Odisha AAAR and submitted as under:

- In terms of Section 16(1) of the CGST Act, ITC is available on goods and services used in the course or furtherance of business, and transmission of gas is not possible without pipelines.
- Pipelines should be treated as plant and machinery, since they are apparatus/ equipment used for making outward taxable supply of gas transmission services.
- The exclusion of pipelines laid outside the factory premises should not apply to the appellant, as it is a service provider and not engaged in any manufacturing activity and therefore does not have a "factory".
- Underground pipelines are movable property, as they can be relocated without damage and are not permanently attached to earth.
- Restrictions under Section 17(5)(c) and (d) would not apply where assets qualify as plant and machinery.

Discussion by and Observations of AAAR

Odisha AAAR examined the statutory provisions and factual matrix and made the following key observations:

- ***Cross-country pipelines are immovable property:***

  Applying principles from the General Clauses Act and Transfer of Property Act, the Authority held that underground pipelines are attached to earth with the intention of permanent beneficial enjoyment. The acquisition of right of user under the Petroleum & Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 further indicates permanence.

- ***ITC under Section 16 is subject to Section 17 restrictions:***

  Even if goods or services are used in the course or furtherance of business, ITC is not available where expressly restricted under Section 17(5).

- ***Pipelines do not qualify as plant and machinery:***

  The explanation to Section 17 specifically excludes "pipelines laid outside the factory premises". The Authority held that pipelines exist to transport gas from processing terminals (factories) to end users and therefore are pipelines laid outside factory premises.

- ***Service provider argument rejected:***

  The Authority noted that gas undergoes processing (e.g., regasification of LNG) at terminals which qualify as factories. The pipelines laid thereafter are outside such factory premises.

- ***Pipelines cannot be equated with apparatus or machinery:***

  In common parlance, pipelines are distinct from apparatus or machinery. Attempting to include pipelines within these terms would distort their ordinary meaning.

- ***Blocked credit provisions squarely applicable:***

  ITC on works contract services for construction of immovable property is blocked under Section 17(5)(c), and ITC on goods/services used for construction of immovable property on own account is blocked under Section 17(5)(d).

Ruling of AAAR

The Odisha AAAR rejected the appeal and held that:

- ITC is not admissible on procurement of pipes and work contract services used for construction and laying of underground cross-country pipelines.
- Such pipelines constitute immovable property and do not qualify as Plant and machinery.
- The restrictions under Section 17(5)(c) and 17(5)(d) of the CGST Act, 2017 are squarely applicable.

2 THERMO FISHER SCIENTIFIC INDIA PVT LTD [2026-TIOL-02-AAAR-GST] – ODISHA AAAR

Facts and issues involved

Appellant is engaged in pan-India trading of analytical and laboratory equipment and is registered under the CGST Act in both Maharashtra (Head Office) and Odisha. Appellant provides repair and maintenance services to customers in Odisha under Annual and Comprehensive Maintenance Contracts (AMC/CMC) with all contracts, invoicing and inventory management handled by the Head Office in Maharashtra.

To ensure timely service, especially for critical sectors like healthcare, the appellant deploys Field Services Engineers (FSEs) in Odisha who are employees of the company. AMC plan covers cost of service whereas CMC plan covers cost of service including the cost of spare parts that may need to be replaced. The Appellant does not maintain any stock in Odisha, except for a temporary storage of leftover spare parts under the CMC plan, which is shipped to FSE's location and billed to Customer's location and all the stocks of the appellant are stored the Appellant's HO at Bhiwandi, Maharashtra.

Appellant sought an advance ruling on the following questions:

1. Whether the repair and maintenance services provided by the Head Office in Maharashtra through Filed Service Engineers for maintenance contracts with customers in Odisha constitute a place of business in Odisha?
2. Whether the temporary storage of spare parts and tool kit at Applicant's location constitute a place of business?
3. Whether Applicant's location would constitute "fixed establishment"?
4. If the answer to question (a), (b) and (c) is No, whether the Applicant is required to take GST registration in Odisha?

To all these questions, the AAR passed the ruling as affirmative.

Appeal to AAAR and appellant's submissions: Aggrieved, the Appellant preferred an appeal before the Odisha AAAR and submitted as under:

- Appellant does not enter into any such contracts with the customers located in Odisha. The tax invoices for AMC/CMC services are raised by the HO and the consideration against these services is received by HO.
- The FSEs are employees of the company and are deployed by the HO. The Appellant does not independently employ or contract with the FSEs.
- The supply of repair and maintenance services is deemed to have been made at the time of agreeing to provide the services. The tax liability is thus crystallized at the time of receipt of consideration and issuance of an invoice by the HO in Maharashtra.
- Mere presence of FSEs in Odisha or the temporary holding of tool kit or trunk stock (unused spare parts, generally returned to the HO within 27 days) does not alter the place of supply of the replacement parts.
- Retaining unused spare parts is a matter of practical necessity to avoid the cost and delay of returning small, unused parts to Maharashtra, especially when further service calls may be anticipated. This practice is not indicative of the Appellant 'ordinarily carrying on business' or maintaining a warehouse or godown in Odisha rather it is a transient incidental arrangement.
- Appellant argued that the AAR erred in invoking clause (c) of definition of 'place of business' u/s. 2(85) of the CGST Act wherein the authority appears to have concluded that the presence of FSEs in Odisha, is tantamount to HO carrying business through an agent in the State. They emphasized that FSEs stationed in Odisha are not agents of the HO in any sense contemplated by the Act, rather they are employees of the company, acting strictly under the instructions and control of the HO.
- The arrangement is purely for operational efficiency and does not qualify as fixed establishment.
- Appellant placed reliance on several case laws including ***Pachaiammal vs Hindustan Co-operative Insurance Society Ltd., Municipal Council of Cocanada v. 'Clam' Line Steamers, Ltd., T & D Electricals, and M/s. Konkan Railway Corporation Limited*** to support their stance that registration is required where contracts are made and from where the supply is made.

Discussion by and Observations of AAAR

Appellate Authority analyzed the definitions of 'Place of Business', 'Location of Supplier of Services', and 'Fixed Establishment'.

- ***On Place of Business & Location of Supplier:***

  AAAR observed that all the agreements are made between the HO of the Appellant which is located in Maharashtra and the customers in Odisha. So, there is no transaction between the Appellant (treating them as a different entity from the HO) and the

customers in Odisha. Furthermore, the FSEs of the Appellant Company provide service to the customers on the direction of the HO and there is no separate administrative set up of the Appellant Company in Odisha. Thus, it transpires that the location of the supplier, in this case is in Maharashtra and not in Odisha. So, it appears the business is carried on from their HO.

- ***On Temporary Storage:***

  AAAR noted that under CMC plans, unused spare parts, if any, are returned by the FSE to the mother warehouse within 27 days or at most 60 days of issue. The authority concluded that the stock which is referred to by the Appellant are the leftover spare parts retained by the FSEs after service visit. Therefore, the goods retained by the FSE of the Appellant are not trading rather incidental in nature. Since invoices are issued and consideration is received by the HO, no books of account are maintained by the Appellant in Odisha separately.

- ***On FSEs as Agents:***

  AAAR examined the definition of 'Agent' under Section 2(5) of the CGST Act. It held that FSEs provide services as employees of the company. That does not tantamount to providing services on behalf of the appellant. The FSEs do not enter into any contracts/agreements directly with the customers. If the HO of the Appellant terminates any agreement, the FSE services are also no longer available. Therefore, the FSEs which work as the service engineers of the Appellant company cannot be termed as 'agent'. Thus, the services do not constitute a 'Place of Business'.

- ***On Fixed Establishment:***

  Analysing section 2(50) of CGST Act, the AAAR noted that 'Fixed Establishment' is exclusively for the supplier of services and related to the place other than the registered place. Since the Appellant operates from their HO in Mumbai with all agreements and financial transactions being made from the HO and the post-sale service provided by the appellant can also be met with other FSEs located elsewhere in India, the authority found that the permanence of the appellant in the State of Odisha is not noticed.

- ***On Registration Requirement:***

  Regarding Sections 22 and 24 of the CGST Act, the AAAR noted that a person is liable to be registered in the State or Union Territory from where he/she is making the taxable supply. The AAAR observed that all transactions of the appellant are made from their Head Office located in Maharashtra. No separate transactions are made from the appellant in Odisha. The services provided by the appellant to the customers of Odisha are made through their Field Services Engineers (FSEs) placed in Odisha. Therefore, no separate registration is required.

Ruling of AAAR

Appellate Authority allowed the appeal filed by appellant by setting aside the order of AAR.

■

SERVICE TAX





CA Rajiv Luthia

Keval Shah
Advocate

1 BUREAU OF INDIAN STANDARDS VS. COMMISSIONER OF GST AND CENTRAL EXCISE, CHENNAI (2026) 39 CENTAX 372 (TRI.-MAD)

Facts of the Case

- The appellant, the Bureau of Indian Standards (BIS), is a statutory body that issues "Hallmark" quality certifications for jewellery through approved centres and collects royalties for this activity. Between 2004 and 2012, the Department issued nine Show Cause Notices (SCNs) demanding service tax on these royalties, classifying them as "intellectual property services". In 2013, BIS filed a declaration under the Voluntary Compliance Encouragement Scheme (VCES) for tax dues covering the period of July 2012 to December 2012, which followed the introduction of the "negative list" tax regime.

- The Designated Authority rejected the declaration under the second proviso to Section 106(1) of the Finance Act, 2013, which prohibits declarations on the "same issue" if a notice or order had been issued for a prior period.

Arguments by Appellants

- The appellant argued that the "issue" in the pre-negative list period (up to June 2012) was legally distinct from the post-negative list period (starting July 2012). They contended that for the earlier period, the dispute was whether BIS held an "intellectual property right" that fit the specific definition under Section 65(105)(zzr).

- Conversely, for the VCES period, the issue was taxability under the new **"catch-all" definition of "service"** in Section 65B(44), where the specific nature of the right was a **"non-issue"** because any activity for consideration was taxable unless exempted [7, 10]. Consequently, they argued the legal bar for "same issue" did not apply.

Arguments of the Department

- The Department maintained that the underlying subject matter the non-payment of service tax on royalty charges remained identical across both periods. They argued that there had been no change in the nature of the service involved; the only difference was that the service fell under a specific head prior to July 2012 and a general description thereafter. Because the appellant had

been issued notices regarding these same royalty payments since 2007, the Department concluded they were defaulters on the same issue and thus barred from the VCES benefit.

Decision of the Hon'ble Tribunal

- The Tribunal allowed the appeal in favor of the assessee, ruling that the rejection of the VCES declaration was erroneous. The Tribunal held that the "issue" was indeed different because the statutory charging provisions had fundamentally changed.
- It noted that in the earlier regime, taxability depended on meeting a specific definition of "intellectual property service," whereas the new regime taxed the activity of providing a service for consideration regardless of its specific nomenclature. Therefore, the legal questions involved were not the "same," and the VCES declaration was maintainable.

2 PROTECTWELL SECURITY SERVICES VS. COMMISSIONER OF CENTRAL GOODS & SERVICES TAX, NOIDA [(2026) 39 CENTAX 22 (TRI.-ALL)]

Facts of the Case

- The appellant, Protectwell Security Services, is a registered provider of manpower supply and security services. For the 2016-17 financial year, the Department identified a mismatch of approximately ` 69.06 lakhs between the gross receipts reported in the appellant's Income Tax Return/26AS and their ST-3 (service tax) returns.
- Based on this differential, the Department issued an SCN demanding approximately ` 10.36 lakhs in tax, invoking the extended period of limitation by alleging "willful suppression". The lower authorities confirmed the demand, interest, and penalties, stating the appellant failed to provide sufficient documents like agreements or invoices to prove tax was paid by the recipients.

Arguments of the Appellant

- The appellant argued that for manpower and security services during FY 2016-17, the entire tax liability rested on the service recipient under the Reverse Charge Mechanism (RCM)** pursuant to Notifications 30/2012-S.T. and 7/2015-S.T.
- They contended that the recipients had indeed discharged the tax and they had provided evidence of this. Furthermore, they argued the demand was time-barred, as they held a bona fide belief that no liability arose for the service provider under RCM, and mere non-payment does not constitute an intent to evade tax.

Arguments by Department

- The Department (as reflected in the lower orders) argued that the appellant had willfully suppressed their taxable value from the Department, which was only unearthed through Income Tax data.
- They maintained that the appellant was liable for the short-payment because they failed to maintain proper records

or provide information during the audit. The Commissioner (Appeals) further noted that in the absence of complete agreements and invoices, the claim that the services were subject to RCM could not be verified.

Decision of the Hon'ble Tribunal

- The Tribunal set aside the impugned order and allowed the appeal in favor of the assessee. The Tribunal held that under the law for FY 2016-17, the liability to pay service tax for security and manpower services rested solely on the recipient, not the provider.
- Crucially, the Tribunal ruled that even if the recipient failed to pay, the tax cannot be demanded from the service provider.
- Additionally, the court found that the extended period of limitation was unsustainable because the appellant had a bona fide ground to believe they were not liable; mere non-payment, without evidence of a deliberate act to evade tax, does not justify the five-year limitation period.

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STATEMENT AS PER PRESS AND REGISTRATION OF BOOKS ACT
Form IV
(*See* Rule 8)
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I, Kishor Vanjara, hereby, declare that the particulars given above are true to the best of my knowledge and belief.

Date: 10th March, 2026

Kishor Vanjara
Signature of the Publisher

CASE LAW UPDATE



CS Makarand Joshi

Companies Act

M/S AVIAT NETWORKS (INDIA) PRIVATE LIMITED

Scheme of arrangement between M/s Aviat Networks (India) Private Limited and its respective shareholders (NCLT New Delhi Bench) Order dated 15th March, 2023

Facts of the case

- M/s Aviat Networks (India) Private Limited (hereinafter called the company), filed an application under Section 230(1)(b) of the Companies Act, 2013 (the Act) seeking approval of a Scheme of Arrangement proposing:
  - Writing off accumulated losses of ` 44.61 crore against paid-up share capital,
  - Paying off excess paid-up share capital to shareholders at a premium of ` 10 per share, and
  - Reduction of paid-up share capital from ` 61.89 crore to ` 5 crore.
- The company obtained consent from its 2 equity shareholders holding 100% equity share capital and 2 of its unsecured creditors. Further, the company did not have any secured creditors, hence there was no question of obtaining consent from secured creditors.
- The Company had accumulated losses and its net worth had been substantially eroded in previous years. Also, the statutory auditor of the company highlighted the following points:
  - Long outstanding dues payable to overseas group entities.
  - Pending non-compliance proceedings under FEMA initiated by the Enforcement Directorate and
  - An ad-hoc provision made in the financial statements due to uncertainty.
- The Tribunal directed the Company to establish maintainability of the application under Section 230 of the Act observing that the proposal was a "reduction of capital".

Petitioner's arguments

On being questioned by the Tribunal with respect to filing a petition under section 230 and not under section 66, the petitioner company argued that:

- Section 230 is a complete code permitting the reorganization of share capital.
- Reduction of capital can be part of a scheme under Section 230.
- Separate compliance under Section 66 is not required if the reduction forms part of the arrangement.
- The Company had shareholders and creditors' consent.
- The Company would remain solvent post reduction.

Observation of Tribunal

The Tribunal itself has made certain observations against the petition, which are as under:

- The proposed scheme solely aimed at the reduction of share capital and payout to shareholders, and did not involve any kind of merger, demerger, or transfer of assets / liabilities.
- The company failed to file an affidavit disclosing the pendency of the investigation as required under Section 230(2)(a).
- Also the company had pending FEMA issues and outstanding overseas liabilities as disclosed in the audit report by the statutory auditor.
- The scheme proposed by the company Proposed cash outflow despite financial stress.

Held

After making the above observations, the Honourable Tribunal held as under:

- By no legal interpretation merely writing off of accumulated losses and paying off Share Capital not required by the company can fall within the ambit of Sections 230-232 in view of specific provisions of Section 66 of the Act to deal with transactions in the nature of reduction of Capital.
- Only the reduction of capital cannot be done in the garb of Section 230 as Section 66 of the Act makes a specific provision for the reduction of share capital simplifier without it being part of any scheme of Compromise and Arrangement.
- Section 230 cannot be used as a substitute for Section 66 to bypass the prescribed capital reduction procedure.
- The Company had failed to show how the proposed scheme of reduction of share capital falls under the meaning of Compromise or Arrangement to get it covered under the provisions of Section 230-232 of the Act.
- It is sufficient to conclude that the grounds urged by the Applicant Company lack merit, as both matters are clearly covered under Section 66(1)(b)(i) and Section 66(1)(b)(ii), which prescribe the manner for reduction of share capital.
- Accordingly, the application being devoid of merits was dismissed.

SEBI

BOMBAY DYEING AND MANUFACTURING CO. LTD. & ANR. (APPELLANTS) VS. SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

In the matter of the *Bombay Dyeing and Manufacturing Co. Ltd. & Anr. (Appellants)* vs. *Securities and Exchange Board of India (SEBI)* Before the Securities Appellate Tribunal (SAT), Mumbai Order dated: January 16, 2026

I. Facts of the Case

- The Bombay Dyeing and Manufacturing Company Limited (BDMCL/Noticee 1) is a listed entity and the flagship company of the Wadia Group, primarily engaged in real estate, polyester, and textiles.

- As of March 29, 2012, Noticee1 reduced its shareholding in its group company, SCAL Services Ltd. (SCAL/Noticee 2), from 49% to 19% by selling a 30% stake to another group entity, Bombay Dyeing Real Estate Company Limited (BDRECL).

- Between March 2012 and March 2014, Noticee1 entered into 11 Memoranda of Understanding (MoUs) with Noticee 2 for the bulk sale of 325 flats in its "Project One ICC" and "Project Two ICC" in Dadar, Mumbai.

- Noticee 1 recognized revenue of ` **2,492.94 crore** and a Profit Before Tax (PBT) of ` **1,302.20 crore** from these MoUs between FY 2011-12 and 2017-18. This accounted for **56% of Noticee 1's total real estate revenue** and **56% of its total profit** during that period.

- During the period when these MoUs for ` 3,033 crore were signed, Noticee2 had a net worth of only ` 2.90 crore (FY 2011-12) and transitioned into a **negative net worth** from FY 2012-13 through 2018-19.

- While Noticee1 recognized nearly ` 2,500 crore in revenue, it admitted to SEBI that it had actually received only ` **186 crore** from Noticee2, representing a mere **7.46% of the recognized revenue**.

- In February 2019, pursuant to an NCLT order, the real estate business of Noticee2 was demerged and subsequently merged back into Noticee1 with effect from July 1, 2018.

- Following a complaint from an investor, Mr. Rohit Mansukhani, SEBI investigated the transactions for the period FY 2011-12 to FY 2018-19. SEBI alleged that the MoUs were **"sham" transactions** designed to artificially inflate Noticee1's profits and mislead investors.

- In October 2022, SEBI passed orders imposing market bans on the Wadia family and the company, alongside various monetary penalties, leading to the appeal before the SAT.

II. Contentions of SEBI

- **Genuineness and Commercial Substance of the 11 MoUs:** SEBI contended that Noticee 1 orchestrated a **fraudulent scheme** by executing 11 unregistered and inadequately stamped MoUs with Noticee 2 to book **fictitious revenue of ` 2,492.94 crores** and an operating profit

of ` 1,302.20 crores. SEBI argued these were **sham arrangements** because they were signed between 2012 and 2014, a period when the Bombay High Court had **stayed construction** on the projects. SEBI further noted that Noticee 2, a company with a **negative net worth** and no real estate experience, paid only **7.46% (` 186 crores)** of the total transaction value (` 3,033 crores). SEBI alleged Noticee 2 acted as a mere "conduit" because it recorded these as "commission income" rather than "purchases," indicating no genuine transfer occurred.

- **Compliance vs. Accounting Standards for Consolidation: SEBI's Argument:** SEBI alleged that Noticee 1 strategically reduced its stake in Noticee 2 from 49% to **19% on March 29, 2012**, specifically to **circumvent the requirement to consolidate** Noticee2's financial statements. SEBI argued that despite the 19% shareholding, Noticee 1 exercised **"significant influence"** and *de facto* control over Noticee2 as per **Accounting Standard 23 (AS-23)**. SEBI maintained that under AS-23, "material transactions" and "interchange of managerial personnel" are evidence of significant influence, mandating consolidation to prevent the inflation of the parent company's profits.

- **Applicability of PFUTP Regulations and Proof of Fraud:** SEBI argued that the dissemination of **materially misstated financial statements** constitutes a fraudulent practice likely to influence investor decisions. SEBI relied on the **"fraud on the market theory,"** suggesting that artificial profits lure gullible investors, thereby violating PFUTP Regulations. They maintained that **2019 and 2020 amendments** to the PFUTP Regulations were merely **clarificatory**, reinforcing SEBI's existing power to treat financial manipulation as fraud.

- **Corporate Control and "Lifting the Veil": SEBI** argued for **lifting the corporate veil**, claiming Noticee 1 exercised **absolute control** over Noticee 2 through a web of group companies (Pentafil, Archway, BDRECL) and shared resources. SEBI pointed out that Noticee 2 shared Noticee 1's registered office and telephone numbers without paying rent, and its directors were employees of other Wadia Group companies who received no separate remuneration from Noticee 2. Noticee 1 even provided **"comfort letters"** to lenders like DHFL to help the cash-strapped Noticee 2 secure loans to pay Noticee1.

- **Due Diligence of Audit Committee and CFOs:** The **Independent Directors (IDs)** on the Audit Committee failed to exercise due diligence and independent judgment. They were charged with failing to assess Noticee 2's capacity as a bulk purchaser or questioning the payment deferrals and rent-free office space granted to Noticee 2. The **CFOs** were charged with issuing **inaccurate certifications** that the financial statements were "true and fair" despite the non-consolidation of Noticee 2.

III. Contentions of Noticee 1 and 2 (BDMCL & SCAL)

- **Genuineness and Commercial Substance of the 11 MoUs –** It was argued that the MoUs were **bona fide, legally enforceable commercial transactions** for the bulk sale of 325 flats. They pointed to **Clause 4** of the MoUs, which explicitly transferred "all risk and rewards" to the purchaser from the date of execution. Noticee 1 maintained that similar MoUs were signed with **unrelated third parties**

(e.g., Accord Holding, Mandhana), and the terms were consistent with industry practice for bulk traders. They explained that construction stays are common industry bottlenecks and do not invalidate commercial agreements. Noticee 2 emphasized its **proven track record**, having successfully traded 100 flats for Noticee1 's "Springwell" project previously. They argued the "percentage completion method" (AS-7) required revenue recognition based on stage-wise milestones regardless of immediate cash flow.

- **Compliance vs. Accounting Standards for Consolidation:** Noticee 1 argued that the shareholding reduction was a lawful act performed **before the Companies Act, 2013**, was even enacted. Throughout the investigation, Noticee 2 did not meet the **20% statutory threshold** required to be an "associate company" under Section 2(6) of the Act. Noticee 1 asserted that **statutory provisions must prevail over Accounting Standards** in case of a conflict. They contended that since they did not meet the legal definition of an associate, there was no statutory obligation to consolidate financials or disclose Noticee 2 as a related party.

- **Applicability of PFUTP Regulations and Proof of Fraud:** There was **no "dealing in securities"**—a prerequisite for a PFUTP violation—as the transactions involved immovable real estate. They noted that SEBI found **no evidence of actual share price impact**, market manipulation, or unlawful gains by promoters. Furthermore, they challenged the **retrospective application** of the 2019/2020 PFUTP amendments to conduct that occurred between 2011 and 2014, arguing that substantive changes to liability cannot be applied backward.

- **Corporate Control and "Lifting the Veil": Noticees' Counter-:** SEBI failed to recognize the **principle of separate legal entity**. They contended that it is common and lawful for group companies to share premises or have common directors to minimize overhead. They argued that the corporate veil can only be pierced in cases of **proven impropriety**, which was not demonstrated here, as the transactions were transparently disclosed in the "Notes to Accounts" of their audited financials.

- **Due Diligence of Audit Committee and CFOs: Noticees':** The Independent Directors and Chief Financial Officer argued they relied on **audited financial statements** and professional advice from expert statutory auditors. They noted that the auditors themselves were **exonerated by SEBI**, and if the professionals found no misrepresentation, the non-executive directors cannot be held liable for negligence. They maintained their actions were aligned with professional advice and that the non-consolidation was a **deliberate, legally-advised accounting decision** based on the 19% stake.

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IV. The Tribunal delivered a split verdict on January 16, 2026, resulting in the **setting aside** of the SEBI orders by a 2:1 majority.

Majority View (Technical Members)

Their key findings were:

- **No Fraudulent Intent:** SEBI failed to establish that the 11 Memoranda of Understanding (MoUs) with Noticee 2 were part of a "fraudulent scheme."

- **Genuineness of Transactions:** The MoUs related to real estate projects where flats

were actually constructed and sold to third-party buyers. The majority noted that since the ultimate sales were genuine, the MoUs could not be termed shams.

- **Compliance with Accounting Standards:** The revenue recognition followed **Accounting Standard-7 (AS-7)**. A disagreement between a regulator and a company over accounting treatment does not automatically constitute fraud under PFUTP Regulations.

- **No Investor Harm:** SEBI provided no evidence of a "price-impact" analysis or that investors were induced to trade based on the allegedly inflated figures. Additionally, promoter shareholding remained stable or increased, contradicting the theory of a "pump and dump" scheme.

- **Inordinate Delay:** The Tribunal flagged a **9-year delay** by SEBI in issuing show-cause notices, which prejudiced the appellants' defense.

Dissenting View (Presiding Officer)

The Presiding Officer, dissented and voted to **uphold** SEBI's orders.

- **"Extended Arm" Theory:** He argued that Noticee 2 Services was merely an "extended arm" of Bombay Dyeing, designed to circumvent consolidated financial reporting.

- **Deceitful Conduct:** The transactions were structured in a "deceitful manner" to book artificial profits of ` **1,302.20 crore**, which could lure "gullible investors."

- **Proposed Penalty:** It was recommended to dismiss the appeals and imposed additional costs of ` **50 lakh** and ` **10 lakh** payable to the Investor Protection Fund.

Final Direction

The Tribunal directed SEBI to **refund any penalties** already paid by the appellants within **four weeks.**

IBC

MR. SUNIL KUMAR KABRA - APPELLANT VS. CHANDRASHEKHAR B. PANCHAL AND ORS RESPONDENT

In the matter of Mr. Sunil Kumar Kabra - Appellant v/s Chandrashekhar B. Panchal and Ors Respondent in the order passed by the National Company Law Tribunal dated January 12, 2026

Facts of the Case

- The State Bank of India (SBI) filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) against Archon Engicon Limited, the Corporate Debtor (CD) on default of in the repayment of its credit facilities. The National Company Law Tribunal (NCLT) admitted the application on September 7, 2021, and initiated the Corporate Insolvency Resolution Process (CIRP).

- Initially, an Interim Resolution Professional (IRP) was appointed, who was later replaced by Mr. Sunil Kumar Kabra as the Resolution Professional (RP).

Following a resolution by the Committee of Creditors (CoC) to liquidate the company, Mr. Sunil Kumar Kabra was appointed as the Liquidator on February 20, 2023.

- During the CIRP, a transaction audit was conducted for the period spanning Financial Years 2020-21 and 2021-22.
- The CoC appointed **Pipara & Co. LLP** to conduct a transaction audit covering the period from April 1, 2019, to September 7, 2021. The audit report dated March 7, 2022, identified significant outflows to related parties by CD:
  - Significant unsecured loans and advances to its Directors, Key Managerial Personnel (KMP), and their relatives (Respondents).
  - FY 2020-21: Total advances of approximately ` 1.13 Crores, of which only around ` 43.31 Lakhs were returned.
  - FY 2021-22: Further outflows were noted to the same related parties.
- The Liquidator filed an application (IA 329 of 2022) under Sections 43 and 44 of the IBC, seeking directions for the Respondents to return the outstanding sums to the CD's account, alleging these were preferential transactions.

Arguments of the Applicant

- The Liquidator argued that the advancement of unsecured loans to related parties within the "look-back period" constituted a preference under Section 43(2). By giving these loans, the CD favoured related parties over other creditors (like SBI).
- Further, contended that u/s 44 of the IBC, the court has the power to direct the reversal of such transactions to restore the financial position of the CD for the benefit of all stakeholders.
- The Liquidator relied heavily on the Transaction Audit Report, which provided a specific breakdown of fund outflows to each Respondents including Directors.

Arguments of the Respondents

- It was argued that basic accounting principles have not been applied. The application has been filed without essential documentation and backup and lacks a financial foundation. Without the records, the conclusions u/s 43 cannot be drawn.
- They argued that the application u/s 43 r/w 44 is not maintainable and the reliance was placed on the incorrect period, incomplete records, admitted audit some transactions limitation and absence of accounting documents. The loans and advances fall outside the scope of the preferential transactions.
- A primary defence was that these transactions did not meet the criteria for preferential transactions as they were part of the ongoing financial affairs/ operations of the company rather than an intent to defraud or prefer.
- It was further denied that the transactions were preferential in the legal sense, disputing the Liquidator's classification of the fund movements.

Held

- It was observed that the advancement of unsecured loans and funds to directors

and their relatives during the "look-back period" constituted a clear preference. It was observed that these transactions occurred within the statutory two-year window for related parties, effectively siphoning liquidity during the company's "twilight zone."

- By receiving these funds, the Respondents were placed in a significantly more beneficial position than they would have occupied under Section 53 of the IBC liquidation waterfall, effectively bypassing legitimate secured creditors

- NCLT applied the "but-for" test, noting that had these funds remained with the CD, they would have been available to satisfy the priority claims of financial creditors. This aligns with the Supreme Court's ruling in *Anuj Jain, IRP for Jaypee Infratech Limited v. Axis Bank Limited (2020)*, which mandates that transactions disturbing the order of priority in favour of related parties are avoidable.
- The payments were not a part of the company`s "ordinary course of business" or "regular financial affairs." And stated:
  - Moving company funds to personal accounts or family-owned entities without a clear, documented commercial justification (such as a board resolution or a reciprocal service agreement) does not qualify as the "ordinary course of business."
  - "Ordinary Course" refers to transactions consistent with the standard industry practice of a healthy going concern. Transferring assets to insiders while defaulting on bank interests and statutory dues is, by definition, an "extraordinary" act of siphoning.
  - Such transactions are precisely the type of "avoidable transactions" the IBC aims to reverse to prevent the depletion of the liquidation estate.

- In case of NCLAT ***Arun Chadha v. Ramesh Kumar Suneja*** – it was stated that the advancement of unsecured financial benefits to directors without safeguards inherently disadvantages the body of creditors. The NCLT concluded that the impugned transactions satisfy all three requirements of Section 43:
  - the transfer of property,
  - the benefit to a related party, and
  - the distortion of the statutory priority of distribution.

- Further, the NCLT held that the **burden to establish exceptions lies on the Respondents**. Since they failed to specify which sub-clauses applied or produce supporting documents, their defence was rejected.

- The NCLT dismissed complaints about the audit report being based on "available records," noting that since the **Respondents were in control of the CD**, the failure to provide more comprehensive documentation rested with them.

- The applicability of Section 43 depends on the "effect" of the transaction (disturbing the order of priority) rather than its accounting treatment as an "asset," and it upheld the validity of the Transaction Audit Report while noting that the Respondents failed to provide evidence establishing any statutory exceptions under Section 43(3) of IBC. ■

FEMA – UPDATES AND ANALYSIS





CA Hardik Mehta *CA Tanvi Vora*

In this article, we have discussed recent amendments made in FEMA through Notifications, Circulars, Master Directions, Press Notes & Press Releases.

A. Update to Lending and Borrowing Provisions under FEMA

1. Regulatory Overhaul of Lending and Borrowing Provisions under FEMA – Key Amendments Introduced

The RBI has issued the Foreign Exchange Management (Borrowing and Lending) (First Amendment) Regulations, 2026 dated 9th February 2026 which have been published in the official gazette on 16th February 2026.

The amended regulations have largely rationalised the ECB framework by expansion of eligible borrower and recognised lender base, rationalisation of borrowing limits and restrictions on average maturity period, removal of restrictions on the cost of borrowing for ECBs, review of end-use restrictions and simplification of reporting requirements.

In view of the amendments to Foreign Exchange Management (Borrowing and Lending) Regulations, the following changes have been undertaken:

a) *Para 1 to 12 of Master Direction* – External Commercial Borrowings, Trade Credits and Structured Obligations is deleted;

b) *Para 2 of Master Direction* – Borrowing and Lending transactions in Indian Rupee between Persons Resident in India and Non-Resident Indians/ Persons of Indian Origin is deleted; and

c) *Part I of FAQs on External Commercial Borrowings (ECB) and Trade Credits* is deleted.

The Foreign Exchange Management (Borrowing and Lending) (First Amendment) Regulations, 2026 Notification has:

1) **Amended Regulation 6(B)(vi) of FEMA 3(R)/2018:** The erstwhile Regulation permitted a person resident in India, other than a company, to borrow in

Indian Rupees from an NRI or an OCI relative outside India, subject to conditions specified by the Reserve Bank from time to time. The amended Notification FEMA 3(R)/2018 was notified on 17th December 2018 in suppression of the earlier FEMA 3 and FEMA 4 and the 'terms and conditions' applicable to Regulation 6(B)(vi) were not notified therein. Hence its application was not possible.

Now, the amended regulation provides that an Individual resident in India is permitted to borrow in INR from any NRI or a OCI relative subject to terms and conditions which are clearly prescribed therein. The conditions under the regulation requires that the loan amount must be received through inward remittance or by debit to the lender's NRE, NRO, FCNR(B) or SNRR account and the borrowing is required to be on a non-repatriation basis i.e. repayment of principal and interest permitted only to the lender's NRO account.

(***Comments***: *A clear promulgation of the terms and condition was a need of the hour since its absence was making this regulation impractical to apply. Now that the conditions are available, Individuals may borrow from NRIs or OCI relatives without the fear of FEMA. It should be noted, the end use conditions inserted in Regulation 3A shall apply to this borrowing as well. However, the erstwhile conditions (prior to 2018) w.r.t. 3 years limit and limit on interest percentage have not been prescribed under the new regulation.*)

2) Inserted New Regulation 3A

The following end-uses are restricted under the Revised Regulations:

a. In the business of chit fund or Nidhi Company

b. Transacting in listed or unlisted securities, except for transactions undertaken by an Indian entity for corporate actions such as merger, demerger, amalgamation, arrangement, or acquisition of control in accordance with the Act

c. Agricultural or plantation activities (exceptions exist for controlled-condition cultivation, seed development, aquaculture, and allied services, plantations in tea, coffee, rubber, cardamom, palm oil and olive oil)

d. Real estate business or construction of farmhouses with specified exceptions for industrial parks, construction-development projects, infrastructure activities, and own-use properties)

e. On-lending for any of the purposes for which funds cannot be borrowed and utilised in this regulation

f. Repayment of a domestic INR loan: (i) which was availed for an end-use restricted under this regulation or (ii) which is classified as a non-performing asset (NPA) as per the applicable prudential norms

g. Trading in TDR.

(***Comments***: *It should be noted that the end use restrictions are application to all forms of borrowing under FEMA 3(R)/2018 and not merely to the ECB provisions in Schedule I since it is inserted as Regulation 3A to the main regulation FEMA 3(R)/2018.*

The permitted activities (for which ECB proceeds may be utilised) under real estate business is broadened to specifically include purchase, sale and lease (not amounting to transfer) of land or immovable property for specific purposes listed in the definition. Notably, the borrower is also permitted to use the borrowed funds to purchase/ lease commercial or residential properties for own use of the borrower.

Transactions in listed or unlisted securities are now permitted where the objective of the acquisition is to acquire controlling stake rather than minority shareholding. Further, financing for mergers, demergers, amalgamations and distressed acquisitions under IBC and SARFAESI will now be permitted but for strategic purpose and not short-term gains.)

3) Amendments to ECB Framework

A summary of the key changes introduced under the new ECB Framework are given hereunder:

a) *Transition Provisions*: The amendments have prospective application, and the existing ECBs i.e. where a Loan Registration Numbers is already obtained will continue to be governed by the old framework. However, reporting requirements for both existing and new ECBs should comply with the timelines prescribed under the New Regulations.

b) *Expansion of Borrower and Lender Base:*

Eligible borrowers now include:

- Any person resident in India that is incorporated, established or registered under a Central or State Act as long as they are eligible to borrow under their respective laws. Individuals are not permitted.

- Entities under a restructuring scheme or corporate insolvency resolution process (CIRP) where the plan permits borrowing are also permitted to raise ECB (subject to appropriate reporting).

- The amendment now allows Limited Liability Partnerships (LLPs) as eligible borrowers for raising ECBs.

- The suggestions made by various stakeholders to specifically include trusts including REITs and InvITs as eligible borrowers has not been specifically included in the out and left to interpretation.

(***Comments***: The linkage to FDI which was present in the erstwhile regime has now been removed under the revised Regulations. Further, with respect to entities who have an ongoing investigation under FEMA subject to disclosure of such investigation under Form ECB1. The erstwhile regulations also permitted the same, however, intimation by AD bank to the investigation agency regarding such investigation has been done away with.

Recognised lenders now include the following:

- all person's resident outside India

- overseas branches/subsidiaries of entities whose lending business is regulated by RBI

- financial institutions or their branches in International Financial Services Centre (IFSC).

Additionally, ECBs from a related party (as defined under the Companies Act, 2013) will be permitted so long as such transaction is carried out on an arm's length basis.

(***Comments***: The scope of recognised lenders has been significantly broadened to include all persons resident outside India. Individuals resident outside India, including NRIs, are now expressly permitted to act as recognised lenders without the requirement of qualifying as foreign equity holders by holding 25% shareholding thereby removing the "foreign equity holder" condition. Lenders are no longer restricted to FATF or IOSCO compliant jurisdictions, thereby widening the geographical sourcing of funds. Branches and subsidiaries of Indian banks, which were previously permitted to lend only foreign currency denominated ECBs, are now also allowed to extend INR-denominated ECBs.)

c) *Forms of Borrowing:* Forms of Borrowing includes – any form of commercial borrowing arrangement involving payment of interest (if any) (by whatever name called) and repayment of principal. ECB specifically includes borrowings through instruments such as Foreign Currency Convertible Bonds and Foreign Currency Exchangeable Bonds.

The regulations also provide a list of funds raised that would not be treated as ECB to include:

- Trade Credit with maturity upto 3 years;
- Export Advance
- Investment under Debt Instruments (as defined and included in FEM (Debt Instruments) Rules, 2019)
- Convertible Notes
- Investment from FVCIs in Debt Instruments (as defined and included in FEM (Debt Instruments) Rules, 2019)

Funds received from a person resident outside India against issuance of preference shares or debentures that are not fully and mandatorily convertible into equity are also treated as ECB.

(***Comments***: The forms of borrowing under the erstwhile and extant ECB provisions has largely remained the same with specific clarification on items that don't form part of ECB.)

d) *Higher Borrowing Thresholds*: The ECB borrowing limit has been enhanced from the earlier cap of USD 750 million limit to the higher of:

- Outstanding ECB upto USD 1 billion; or
- Total outstanding borrowing (external as well as domestic) upto 300% of net worth of the borrower as per the latest audited financial statements

No ECB limits shall be applicable to eligible borrowers regulated by financial sector regulators.

e) *Standardized Minimum Average Maturity Period ('MAMP'):* A uniform Minimum Average Maturity Period (MAMP) of three years has been prescribed across all categories of borrowers and end-uses. However, a MAMP of 1 to 3 years is available to manufacturing sector borrowers, provided their outstanding ECB exposure does not exceed USD 150 million.

Further, MAMP requirement shall not apply in specified situations, including:

- Conversion of ECB (including FCCBs/FCEBs) into non-debt instruments
- Repayment out of proceeds of non-debt instruments;
- Permissible refinancing;
- Lender's debt waiver; and
- Closure, merger, acquisition, resolution, or liquidation of either the lender or the borrower.

(***Comments***: The ECB provisions have changed from multiple MAMPs depending on the borrower, lender or the end use to a single MAMP. The provisions specifically clarify the need for compliance with MAMP condition is not required the situations listed above.)

f) *New Currencies for Borrowing:* An eligible borrower may now raise ECBs in any foreign currency or INR and are not restricted to just freely convertible currencies. Borrowers can convert ECBs in one foreign currency to another foreign currency, INR-denominated ECBs to foreign currency (which was restricted earlier) and vice versa.

(***Comments***: Conversion of INR ECB to FCY ECB which was earlier expressly prohibited is now also permitted.)

g) *Removal of all-in cost ceiling*: The concept of all-in cost ceiling has now been removed. It has been replaced with 'cost of borrowing' viz. prescribed to be in line with prevailing market conditions, subject to satisfaction of AD Bank. Further, prepayment charges and penal interest shall also be in line with prevailing market conditions. ECBs from related parties shall be repaid on arm's length basis. Earlier the all-in-cost that was based on a spread over the ARR/benchmark.

(***Comments***: In case of transactions with related parties, the borrowing costs must not only be in line with prevailing market conditions but also on an arm's length basis. For ECBs with an average maturity of less than three years, the cost must remain within the Trade Credit cost ceiling prescribed under these regulations.)

h) *Receipt of ECB proceeds:* For the purpose of parking of funds, the provisions provide two categories of ECB proceeds based on their intended use in India:

- INR expenditure in India: Proceeds must be credited to an INR account with the designated AD bank by the end of the month following receipt. Pending utilisation, funds may be parked in unencumbered fixed deposits of up to one year with that bank.

- Foreign currency expenditure: Proceeds may be credited to an FCY account in India or outside India. Pending utilisation outside India, funds may be invested in unencumbered fixed deposits or unencumbered debt instruments with original maturity up to one year.

(***Comments***: Same as earlier, ECB cannot be drawn down without obtaining LRN. The most significant amendment apparent from the revised ECB framework under receipt of ECB and debt servicing (r.w. amendment to definition of ECB) provides that ECB's may now also be availed from the NRO/NRE account of an eligible lender.)

A.P. (DIR Series) Circular No. 22 dated 16th February 2026 | Notification No. FEMA 3(R)(5)/2026-RB 9th February 2026 | FAQs on External Commercial Borrowings (ECB) and Trade Credits | Master Direction – Borrowing and Lending transactions in Indian Rupee between Persons Resident in India and Non-Resident Indians/Persons of Indian Origin | Master Direction – External Commercial Borrowings, Trade Credits and Structured Obligations

2. Reporting under Foreign Exchange Management Act, 1999 – Returns pertaining to External Commercial Borrowing (ECB)

In view of the amendments to FEMA 3(R)/2018, the reporting requirements under the ECB framework have also been overhauled. Form ECB has been renamed Form ECB 1. Similar to the erstwhile processes, borrowers are still required to submit Form ECB 1 for obtaining LRN. Drawdown of ECB is permitted only after obtaining LRN.

Revised Form ECB 1 is required for reporting any change in previously reported ECB parameters/information within 7 days from the end of the month of change.

Form ECB 2 is required for reporting receipt of ECB proceeds and debt servicing, within seven calendar days from the end of the month in which the proceeds were received or debt servicing was undertaken. The framework provides that any event or transaction that alters the outstanding borrowing under an LRN are to be reported in 'Form ECB 2.'

Guidelines for untraceable borrower have been amended to designate a borrower as untraceable if such borrower fails to submit any of the specified return(s) for four consecutive quarters or more after the quarter in which a drawdown or debt servicing was scheduled to be made as per the last reported 'Form ECB 1' and after completion of such 4 quarters, AD bank is satisfied that:

i. neither the borrower nor its auditor(s)/ director(s)/promoter(s) were reachable

or responsive despite multiple attempts of communication undertaken and documented by the bank; and

ii. borrower was not found to be operative at the registered office address as per the records available with the bank.

In such case, AD bank shall inform the RBI as well as the Directorate of Enforcement

A.P. (DIR Series) Circular No. 23 dated 18th February 2026 | Master Direction – Reporting under Foreign Exchange Management Act, 1999

(Comments: The amended ECB provisions suggests that ECB 2 has now been modified to an event based reporting i.e. within seven calendar days from the end of the month in which drawdown or debt-servicing occurs. However, the form still lists utilisation details as one of the items required in ECB 2. Clarification on reporting frequency from RBI would be welcome. Interestingly, Chartered Accountant/Company Secretary signatures required in erstwhile Form ECB and ECB 2 are no longer required as per the revised ECB form formats.)

B. Foreign Exchange Management (Export and Import of Currency) (Amendment) Regulations, 2026

In terms of Regulation 6 of Notification No. FEMA 6(R)/2015-RB, a person is permitted to bring foreign exchange from any place outside India without any limit. Such person is permitted to bring without any declaration to Customs Authorities upto aggregate value of the foreign exchange in the form of currency notes, bank notes or traveller's cheques brought in by such person at any one time does not exceed US$ 10,000 (US Dollars ten thousands) or its equivalent and/or the aggregate value of foreign currency notes brought in by such person at any one time does not exceed US$ 5,000 (US Dollars five thousands) or its equivalent.

In case of amounts in excess of the above amounts, the person is required to declare the same to Custom authorities in Currency Declaration Form (CDF). *Vide* this amendment, RBI has now notified the Form CDF.

Notification FEMA 6 (R)/(5)/2026-RB dated 23rd February 2026

(*Comments*: As per the instructions in Form CDF, passengers should produce this form to a bank authorised to deal in foreign exchange or money changer at the time of conversion of foreign exchange into Indian rupees or reconversion of rupees into foreign exchange. However, in case of visitors to India, in case they do not wish to encash all the foreign exchange declared they should retain the form with them for production to the Customs at the time of their departure from India to enable them to take with them the unutilised balance.)

C. Press Note No. 1 (2026 Series) issued by Department for promotion of Industry and Internal Trade – Review of Foreign Direct Investment (FDI) policy on Insurance Sector

The Consolidated FDI policy of 2020 has been amended with the following changes:

1) Sectoral cap for Insurance Companies has been increased from 74% to 100%.

2) Insurance intermediaries now also includes managing general agents and insurance repositories.

3) An insurance company having foreign investment is now required to have any one of Chairperson of its Board, Managing Director or its Chief Executive Officer to be resident Indian citizen. The earlier requirement of majority of directors and KMP to be resident Indian citizen is removed.

4) In case of insurance intermediaries, conditions for prior permission for repatriating dividend and limitations regarding payments to foreign group companies is removed.

Other conditions remain unchanged.

DPIIT F. No 5(3)/2021-FDI Policy dated 9th February 2026

(*Comments*: The amendment is expected to increase capital inflows in the insurance sector. The relaxation of leadership requirements is a welcome change from the stringent regulatory overshight while still requiring atleast one leadership position to be a resident Indian citizen.

While PN1 has amended the FDI Policy, with effect from February 5, 2026, NDI Rules have not yet been amended to reflect the enhanced thresholds. Consequently, corresponding revision will be required amend Schedule I of NDI Rules to align the sectoral cap, entry route and conditions with the new landscape of the Indian insurance industry.) ■

" Be the change that you wish to see in the world. "

Mahatma Gandhi

BEST OF THE REST





Rahul Hakani
Advocate

Niyati Mankad
Advocate

1 UNION OF INDIA VS. LARSEN & TOUBRO LTD. – JUDGMENT DATED FEBRUARY 27, 2026 PASSED IN SPECIAL LEAVE PETITION (CIVIL) NO. 14989 OF 2023 [2026 INSC 203]

Arbitration and Conciliation Act, 1996 — Ss. 28(3), 31(7)(a) & (b) — Interest — Contractual bar — Clauses 16(3) & 64(5) of GCC — Pre-award/pendente lite interest — Where contract expressly provides that "no interest will be payable... on amounts payable to the contractor under the contract" and further bars interest till date of award — Held, arbitral tribunal being creature of contract cannot award pre-award/pendente lite interest even by terming it "compensation" — Party autonomy under S. 31(7)(a) prevails — However, post-award interest under S. 31(7)(b) stands on distinct footing and is not subject to contractual exclusion unless award otherwise directs.

Facts

The dispute arose from a turnkey contract dated 27-1-2011 between Union of India (North Central Railway) and L&T for modernization of Jhansi Workshop. The project, initially to be completed by 18-7-2012, was extended ten times till 30-11-2015. Disputes arose regarding delayed payments, price variation, final bill, etc. Arbitration was invoked under Clause 64 of the GCC. The Arbitral Tribunal awarded ` 5.53 crores to L&T with post-award interest @ 12% p.a., while rejecting a separate claim for pendente lite interest. The Union challenged the award under Ss. 34 and 37, contending that Clauses 16(3) and 64(5) barred grant of interest. Both the Commercial Court and the High Court upheld the award, leading to appeal before the Supreme Court.

Issues

A. Whether the Arbitral Tribunal was justified in awarding pre-award/pendente lite interest, by way of compensation, while passing the award in favour of the respondent-claimant, and more particularly in view of Clause 16(3) and Clause 64(5) of the GCC?

B. Whether the AT is justified in awarding post-award interest in favour of the respondent-claimant?

C. Whether the courts below committed any error while dealing with Issue (A) and Issue (B) referred hereinabove while exercising powers under Ss. 34 and 37 of the Act?

Held

Allowing the appeal in part, the Court held that Ss. 28(3) and 31(7)(a) of the 1996 Act subordinate the arbitrator's power to the terms of the contract. Clause 16(3) expressly barred interest on "amounts payable to the contractor under the contract", and Clause 64(5) prohibited interest till the date of award. The expression "amounts payable" is of wide amplitude and cannot be cut down by ejusdem generis. Reliance was placed on ***Union of India vs. Manraj Enterprises [(2022) 2 SCC 331], Union of India v. Bright Power Projects (India) (P) Ltd. [(2015) 9 SCC 695], Sree Kamatchi Amman Constructions v. Railway Administration [(2010) 8 SCC 767],*** and ***Chittaranjan Maity vs. Union of India [(2017) 9 SCC 611]***, holding that where contract bars interest, arbitrator lacks jurisdiction to award pre-award or pendente lite interest even under guise of compensation. Decisions under the 1940 Act such as ***Raveechee & Co. vs. Union of India [(2018) 7 SCC 664]*** and ***Ambica Construction vs. Union of India [(2017) 14 SCC 323]*** were distinguished.

However, post-award interest is governed by S. 31(7)(b), which operates independently of party autonomy. Relying on ***R.P. Garg vs. Chief General Manager, Telecom Department [2024 SCC OnLine SC 2928],*** it was held that post-award interest flows statutorily unless expressly excluded. Further, placing reliance on ***Gayatri Balasamy vs. M/s. ISG Novasoft Technologies Limited [(2025) 7 SCC 1]***, the Court held that courts retain power to modify the rate of post-award interest under S. 31(7)(b), since such interest is future-oriented and subject to statutory standards.

Accordingly, while pre-award/pendente lite interest was set aside, the grant of post-award interest was upheld but the rate was reduced from 12% p.a. to 8% p.a. from the date of award till realization.

2 BHAGYALAXMI CO-OPERATIVE BANK LTD. VS. BABALDAS AMTHARAM PATEL (D) THROUGH LEGAL REPRESENTATIVES & OTHERS - JUDGMENT DATED FEBRUARY 27, 2026, PASSED IN CIVIL APPEAL NO.3200 OF 2016 [2026 INSC 205]

Contract Act, 1872 — Ss. 133 & 139 — Discharge of surety — Variance in terms of contract without surety's consent — Cash credit facility enhanced without consent of guarantors — Held, surety discharged only as to transactions subsequent to variance — Liability not absolute extinction — Surety liable to extent originally guaranteed — S. 139 inapplicable absent impairment of eventual remedy — High Court erred in holding surety either liable for entire debt or not at all — Appeal allowed

Facts

Respondent No. 6 obtained a cash-credit facility of ` 4,00,000 from the Appellant-Bank. Respondent Nos. 1 and 2 executed

contracts of guarantee as sureties for the said amount. The borrower allegedly withdrew amounts far in excess of the sanctioned limit. Upon default, the Bank filed Lavad Suit seeking recovery of ` 26,95,196.75. The Board of Nominees decreed the claim against the principal borrower but dismissed the suit against the sureties. On appeal, the Gujarat State Co-operative Tribunal held the sureties liable to the extent of ` 4,00,000 with interest. The High Court, in writ jurisdiction, set aside the Tribunal's order holding that sureties could either be liable for the entire loan or not at all, placing reliance on Section 139 of the Contract Act. The Bank preferred appeal before the Supreme Court.

Issues

1. Whether the liability of the sureties was governed by Section 133 or Section 139 of the Indian Contract Act, 1872?

2. Whether permitting the principal debtor to withdraw amounts in excess of the sanctioned limit discharged the sureties completely?

3. Whether liability of a surety can be bifurcated between the originally guaranteed amount and the excess amount advanced without consent?

Held

Allowing the appeal, the Court held that the case is governed by Section 133 of the Indian Contract Act, 1872 and not Section 139. Under Section 133, "any variance, made without the surety's consent... discharges the surety as to transactions subsequent to the variance." The discharge is not absolute but confined to subsequent transactions. The sureties were liable to the extent of ` 4,00,000 with applicable interest, being the amount originally guaranteed, but stood discharged regarding excess withdrawals. Section 139 was inapplicable as there was no impairment of the sureties' eventual remedy against the principal debtor. The Court relied upon S***tate of Maharashtra vs. Dr. M.N. Kaul (AIR 1967 SC 1634), State Bank of India vs. M/s Indexport Registered (1992) 3 SCC 159, Syndicate Bank vs. Channaveerappa Beleri (2006) 11 SCC 506, H.R. Basavaraj vs. Canara Bank (2010) 12 SCC 458, Radha Kanta Pal vs. United Bank of India Ltd.,*** and ***Bishwanath Agarwala vs. State Bank of India.*** The High Court's view that liability must be entire or nil was contrary to Section 133 and was set aside.

3 TORRENT POWER LTD. VS. ASHISH ARJUNKUMAR RATHI & ORS., JUDGMENT DATED FEBRUARY 27, 2026 PASSED IN CIVIL APPEAL NOS.11746-11747 OF 2024 [2026 INSC 206]

Insolvency and Bankruptcy Code, 2016 — Ss. 30, 31, 61(3), 62 — Commercial wisdom of CoC — Scope of judicial review — "Material irregularity" by RP — Clarifications sought post-submission of resolution plan — Held, where RP acts strictly on instructions of CoC and seeks clarifications from all resolution applicants uniformly, such conduct does not constitute "material irregularity" under S. 61(3)(ii) — Clarifications explaining existing terms without altering NPV or commercial offer

do not amount to modification of resolution plan — Approval of plan by 100% CoC vote, affirmed by NCLT and NCLAT, not open to interference — Concurrent findings not to be disturbed unless ex facie arbitrary, perverse or contrary to statute — Commercial wisdom of CoC non-justiciable except within limited statutory parameters

Facts

SKS Power Generation (Chhattisgarh) Ltd. underwent CIRP pursuant to admission of a Section 7 application. Seven resolution applicants, including Torrent, Vantage, Jindal and Sarda Energy and Minerals Limited (SEML), submitted plans. After inter-se bidding governed by a Process Note dated 13.04.2023, the CoC sought clarifications from all applicants via email dated 08.05.2023. SEML furnished responses on 10.05.2023. In its 31st meeting, the CoC approved SEML's plan with 100% vote share. The RP filed an application under Section 30(6) for approval, which was allowed by the NCLT under Section 31(1). Appeals by unsuccessful applicants were dismissed by the NCLAT. The plan stood implemented. Aggrieved applicants approached the Supreme Court under Section 62.

Issues

1. Whether clarifications furnished by SEML regarding (a) treatment and replacement of bank guarantees and (b) option of upfront payment, resulted in enhancement or modification of its Resolution Plan?

2. Whether, after approval by NCLT and NCLAT and subsequent implementation of the Resolution Plan, interference was permissible under Section 62 of the IBC?

Held

The appeals were dismissed.

The Court held that Sections 61(3) and 62 of the IBC strictly circumscribe appellate interference. An appeal against approval of a resolution plan lies only on grounds specified in Section 61(3). The only ground urged was "material irregularity" under Section 61(3)(ii). However, the RP had merely acted upon directions of the CoC in seeking clarifications from all applicants. Such conduct could not, "by any stretch of imagination", constitute material irregularity. To hold otherwise would indirectly subject commercial decisions of the CoC to judicial review, contrary to the scheme of the Code.

On merits, the Court found that SEML's clarification regarding BGs did not enhance its offer; its plan always contemplated treatment of the full margin money of ` 180.05 crores. The response dated 10.05.2023 only clarified release of margin money relating to specific BGs and did not amount to fresh infusion beyond the plan. Similarly, with respect to ` 240 crores, the plan already provided a deferred payment with NPV of ` 240 crores and an option to receive upfront payment. The clarification merely confirmed that no further discounting would apply. There was no change in NPV or commercial terms.

Reiterating the doctrine of commercial wisdom as laid down in ***Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta [(2020) 8 SCC 531***], the Court emphasised that viability and value assessment are matters exclusively within CoC's domain. Reliance was also placed on ***Kalparaj Dharamshi vs. Kotak Investment Advisors Ltd. [(2021) 10 SCC 401***]

and ***Kalyani Transco vs. Bhushan Power & Steel Ltd. [2025 SCC OnLine SC 2093***] to hold that concurrent findings of NCLT and NCLAT ought not to be interfered with unless ex facie arbitrary, illegal or contrary to mandatory statutory provisions.

Further, once the Resolution Plan stood implemented, and creditors paid, unsettling the same would defeat the object of finality and value maximisation under the IBC. The Court reaffirmed that unsuccessful resolution applicants have no vested right to insist that their plan be accepted.

Accordingly, no question of law arose under Section 62 and no ground under Section 61(3) was made out. The appeals were dismissed.

4 SHIVKRUPA SAHAKARI PATPEDHI LTD. VS. STATE OF MAHARASHTRA & ORS. – JUDGEMENT DATED FEBRUARY 24, 2026, PASSED IN WRIT PETITION NO.676 OF 2026 [2026:BHC-AS:9333]

Maharashtra Cooperative Societies Act, 1960 ("MCS Act") — Ss. 81, 81(5-B), 88 and 154 — Audit — Special Report — Inquiry — Revisional jurisdiction — Scope — Special Report under S. 81(5-B) and order directing inquiry under S. 88 — Whether revisable under S. 154 — Held, No — Audit report and Special Report are preliminary, fact-finding and non-adjudicatory — They do not determine rights or liabilities — Order directing inquiry under S. 88 merely sets statutory mechanism in motion — "Order" or "decision" under S. 154 contemplates adjudicatory determination affecting rights — Revisional authority cannot interdict audit findings or initiation of inquiry — Impugned revisional order quashing Special Report and S. 88 inquiry set aside

Facts

The Petitioner, a credit co-operative society, alleged that Respondent Nos. 6 to 18 (former directors) committed financial irregularities causing loss to the society. A General Body resolution dated 13-09-2023 directed inquiry. An internal inquiry report dated 25-07-2024 and valuation reports indicated misappropriation. During statutory audit for FY 2022-23 and 2023-24, the Statutory Auditor submitted a Special Report dated 14-08-2024 under Section 81(5-B) of the MCS Act, 1960. On 12-09-2024, the Additional Registrar ordered inquiry under Section 88 and appointed an Inquiry Officer. Respondent Nos. 6 to 18 filed Revision Application No. 629 of 2024 under Section 154 before the Minister for Cooperation, who by order dated 17-12-2025 set aside both the Special Report and the order directing inquiry. The society challenged the revisional order in writ jurisdiction.

Issues

1. Whether a Special Report submitted by the Statutory Auditor under Section 81(5-B) constitutes an "order" or "decision" amenable to revision under Section 154 of the Act?

2. Whether an order directing inquiry under Section 88 is revisable under Section 154?

3. Whether the revisional authority acted within jurisdiction in quashing the Special Report and halting the Section 88 inquiry?

Held

The Court allowed the Writ Petition and set aside the revisional order dated 17-12-2025.

The Court undertook a structural and harmonious reading of Sections 81, 81(5-B), 88 and 154 of the *MCS Act, 1960*. It held that audit under Section 81 is confined to financial scrutiny and reporting; it is preventive and corrective, not adjudicatory. A Special Report under Section 81(5-B) merely communicates apparent irregularities and functions as a statutory trigger. It does not impose liability, determine guilt, or alter legal rights. The Registrar's independent satisfaction is required before further action such as FIR.

Section 88 operates at a distinct stage — it contemplates inquiry for "fixing responsibility" and adjudication of loss after hearing affected persons. An order directing inquiry under Section 88 is administrative and preliminary; it merely sets in motion the statutory mechanism and does not determine civil consequences.

Section 154 confers supervisory revisional jurisdiction over an "order" or "decision" affecting rights or liabilities. The expressions "order" and "decision" imply adjudicatory determination with legal consequences. Preparatory steps, audit observations, notices, and initiation of inquiry are not revisable. Treating audit findings as adjudicatory would collapse the statutory stages and render Section 88 redundant.

The Court distinguished adjudicatory determinations from audit findings and held that revisional jurisdiction cannot be invoked against internal reports or initiation of inquiry. The revisional authority exceeded jurisdiction in quashing the Special Report and the Section 88 order. Consequently, the impugned revisional order was set aside and the order dated 12-09-2024 directing inquiry under Section 88 stood restored.

■

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the capacities of the spirit of inquiry, creativity,
entrepreneurial and moral leadership among students
and become their role model. "

Dr. A.P.J. Abdul Kalam

THE CHAMBER NEWS



CA Mehul Sheth
Hon. Jt. Secretary



CA Ankit Sanghavi
Hon. Jt. Secretary

Important events and happenings that took place online / physical between **February 1, 2026 to February 28, 2026** are being reported as under:

I. ADMISSION OF NEW MEMBERS

The details of new members who were admitted in the Managing Council Meeting held on February 23, 2026 are as under:

Type of Membership

Life Member	Ordinary Member	Half yearly - Ordinary	Digital Membership
10	4	1	2

Student Member	Associate Member	Total Members
1	0	18

II. PAST PROGRAMMES

STUDENT

6.2.2026 & 8.2.2026
Topic: 9th Dastur National Debate Competition- 2026
In association with the Growth, Development and Change Cell of H.R. College of Commerce & Economics

DIRECT TAXES

9.2.2026
Topic: Clause-by-Clause Analysis of Direct Provisions of the Finance Bill 2026
Speaker: ***CA Yogesh Thar & CA Gautam Nayak***

18.2.2026
Topic: ISG - Recent Important Decisions Under Direct Tax
Speaker: ***CA Ashok Mehta***

INDIRECT TAXES

12.2.2026
Topic: Study Circle - Issues in the E-Commerce (ECOM) Industry under GST
Group Leader : CA Khyati Luthia
Mentor : CA Rajat Talati

24.2.2026
Topic: Mastering GSTAT: Procedure, Strategy and Practical Filing of Appeals
Speaker: ***Adv. Vinay Jain***

INTERNATIONAL TAXATION

13.2.2026
Topic: Study Circle - ITAT on Individual Tax Residency: Analysis of the Binny Bansal Case
Speaker: ***Adv. Divesh Chawla***

PUNE STUDY GROUP

14.2.2026
Topic: Deep Dive into Intricacies of Budget 2026
Speaker: ***CA. Abhitan Mehta***

Topic: Indirect Tax Amendments in Budget
Speaker: ***CA Shankar Rochlani***

COMMERCIAL & ALLIED LAWS

19.2.2026
Topic: The 3P program : Role of Professionals in Processes related to Public offerings
Speaker : ***CS B Renganathan***

27.2.2026
Topic: Seminar on Attachments and Seizures Provisions under Prevention of Money Laundering Act, 2002 Jointly with Bombay Chartered Accountants Society

a Keynote Address on the Framework of Search & Seizure under Section 17 of PMLA
Speaker: ***Hon'ble Justice Ms. Aarti Sathe, Judge, Hon'ble Bombay High Court; Adv. Sunny Punamiya; CA Shardul Shah***

b Keynote Address on the Framework of Attachment under Sections 5 & 8 of PMLA
Speaker: ***Hon'ble Justice Shri Advaith Sethna, Judge, Hon'ble Bombay High Court, Adv. Sunny Punamiya Adv. Bernardo Reis***

BENGALURU STUDY GROUP

21.1.2026

Topic: **Recent Bangalore ITAT ruling in Buckeye Trust - key findings and some observations**

Speaker: ***Mr. Bharath Lakshminarayana, Advocate***

STUDENT

Topic: **CA Student Orientation Course**

a **23.2.2026**
Inauguration
Speaker: ***CA Jayant Gokhale***

GST Landscape: Best Practices for Returns and Compliance
Speaker: ***CA Yash Parmar***

b **24.2.2026**
Valuation Overview and Methodologies
Speaker: ***CA Vitang Shah***

c **25.2.2026**
FEMA Basics & Compliance : What every CA Article Student Must Know
Speaker: ***CA Hinesh Doshi &***
CA Aarti Karwande

d **26.2.2026**
Communication and Stress Management
Office Ettiquettes
Speaker: ***CA Atul Bheda***
CA Srinivas Vakati

e **27.2.2026**
AI-powered audit tools and technologies
Speaker: ***CA Ankit Sanghavi***

f **28.2.2026**
Mastering Income tax filings
Speaker: ***CA Piyush Bafna***

STUDY CIRCLE & STUDY GROUP

25.2.2026

Topic: **Study Circle - Navigating through Private Trusts and Succession Planning - Taxation and Other Issues**

Group Leader : CA Ketki Mittal
Chairman : CA Vishal Gada

SELF AWARENESS SERIES

26.2.2026

Topic: **Design Your Annual Operating Plan (For Owner Managed BusinessBiz Owners seeking to scale in line with their Personal Vision of success)**

Speaker: ***Mr. Ramaswamy Krishnan***


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Overall Score

Taxmann.AI	Gemini	ChatGPT (GPT-5)
83.02	64.90	64.48

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Application & Justification are where most AI models fail.

Taxmann.AI leads across every stage of professional legal reasoning.

From identifying the issue to justifying the conclusion.

Why This Matters

Most general GPTs are built to generate text. Taxmann.AI is built to reason through tax and legal problems, delivering structured legal analysis.

- Strong on **application of law**, where generic AI drops
- Clear, defensible **conclusions and reasoning**
- Built for **real professional use**

**IRAC+ is a legal reasoning framework used to evaluate how AI analyses tax and legal issues—not just how it generates answers.

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