

TAXATION TIMES

October 2022



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Introduction

Any foreign company which earns income in India has concerns about its taxability, compliances & procedures to be followed. We have attempted to simplify these concerns of a foreign company & elaborate the tax rates, compliances & procedures required for a foreign company to file its tax returns in India.

In this month's Taxation Times, we cover :

1. An article encompassing the brief provisions of a foreign company in India;
2. Case Laws from various courts & jurisdictions;
3. Tax Compliance Calendar - November 2022;
4. Circulars & Notifications - October 2022;
5. Tax News from around the world

We hope that you find this month's edition of the Taxation Times useful. In case you have any feedback or need us to include any information to make this issue more informative, please feel free to write to us at

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Happy Reading!
Best Regards,
UJA Tax Team



Neha Raheja
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Foreign Companies, their tax rates & filing of Income Tax Return in India

Foreign companies are very enthusiastic about setting their footprint in India & establishing their commercial presence here. Foreign companies can set up a Wholly Owned Subsidiary in India, a Limited Liability Partnership, a Project Office, a Liaison Office, a Branch Office, etc.

A Wholly Owned Subsidiary & a Limited Liability Partnership are companies resident in India and accordingly, the tax rates applicable to domestic companies apply to them. A Project Office, a Branch Office, and a Liaison Office are treated as foreign companies.

In India, companies are taxed on their income depending upon their residential status. A company resident in India is taxed on its global income. A non-resident company or a foreign company is taxed only on income earned in India and accrued in India.

A Company is treated as a resident of India in any previous year if:

- It is an Indian Company;
- Its Place of Effective Management (POEM) in that year is in India. POEM means a place where key management & commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

Residential Status of a Company

Section	Company	Residential Status	Taxability
6(3)(I)	Indian Company	Resident in India	Global Income is taxed in India
6(3)(ii)	A Foreign Company (turnover/gross receipts exceeds INR 50 crore)	Will be a resident in India if POEM is in India	Global income attributable to the foreign company is taxable in India
6(3)(ii)	A Foreign Company (turnover/gross receipts are less than INR 50 crore)	Non - Resident in India	Tax only on income received, accrued, or arising in India

A foreign company that does not have a POEM in India shall be considered a non-resident company and shall be taxable only on income that accrues or arises in India.

However, under s. 90 of the Income Tax Act 1961 ('ITA'), a non-resident company is provided with the option to choose between the Income Tax Act 1961 ('ITA') and Double Taxation Avoidance Agreement ('DTAA') whichever is more beneficial to the taxpayer company. Hence, at this point, the concept of Permanent Establishment ('PE') is important.

What is a Permanent Establishment?

The term Permanent Establishment ('PE') in International Taxation means a fixed place of business in another country or state that results in income tax liability in that state/jurisdiction.

The business income of a non-resident company that arises directly or indirectly from its PE is taxed in India.

A Permanent Establishment is defined in every DTAA. Article 5 of a DTAA generally contains criteria for the establishment of a PE in India. A PE could be a Fixed Place PE, Service PE or Agency PE.

Once, it is established that a foreign company has a PE in India, then business income (i.e royalty, fees for technical services, etc.) derived from a PE will be taxable in India as business income.

What happens if a foreign company does not have a PE in India?

If a foreign company does not have a PE in India, any income derived by way of fees for technical services, royalty etc. is deemed to accrue or arise in India & the company making payments to such foreign companies is required to deduct TDS as per the provisions of the ITA or DTAA which is more beneficial to the foreign company.

Here, it is important to note that since the foreign company does not have a PE in India, the provisions of MAT do not apply

Tax Rates

The corporate income tax rates applicable to a foreign company in India for FY 2022 - 2023 are as under :

Particulars	Income upto INR 10 million	Income between INR 10 million upto INR 100 million	Income in excess of INR 10 million
Foreign Companies	41.60% (40% basic + 4% HEC)	42.432% (40% basic + 2% + surcharge + 4% HEC)	43.68% (40% basic + 5% + surcharge + 4% HEC)

Rates of MAT as applicable to a foreign company are as under:

Particulars	Income upto INR 10 million	Income between INR 10 million upto INR 100 million	Income in excess of INR 10 million
Foreign Companies	15.60% (15% basic + 4% HEC)	15.912% (15% basic + 2% + surcharge + 4% HEC)	16.38% (15% basic + 5% + surcharge + 4% HEC)

Application of a Permanent Account Number ('PAN')

A Branch Office, Liaison Office & a Project Office are considered to be foreign companies in India. As these companies are required to file their income tax returns in India, it becomes essential for them to obtain a PAN in India.

A foreign company having a PE in India is required to obtain a PAN since it is required to file its income tax return in India. However, a foreign company not having a PE in India which earns income in India by way of royalties or fees for technical services is not mandatorily required to obtain a PAN in India.

Case Laws

1 Deputy Commissioner of Income Tax V/s DCIT V/s Channel V Music Networks Ltd. [2022] 143 taxmann.com 41 (Mumbai - Trib.) [01-09-2022]

Section: 72 of the Income Tax Act, 1961

Facts: The assessee is a foreign company and tax resident of Hong Kong. It operates satellite television channels featuring various genres of programming. During the relevant previous year the assessee had received franchise fees from an Indian entity. While filing the return of income the assessee claimed set off of this income against brought forward business losses. During the assessment proceedings the Ld. AO disallowed the amount of loss claimed by the assessee citing two reasons. One being the loss claimed is subject to finalisation of assessment under section 143(3) and second being the franchise fees being in the nature of royalty and not being business profit, cannot be set off against the business loss.

Aggrieved by the assessment order passed by the Ld. AO, the assessee company filed an appeal before Ld. CIT(A) which in turn uphold the assessment order.

The assessee company had preferred an appeal before the Hon. ITAT against the order passed by the Ld. CIT(A). Hon. ITAT passed an order favoring the assessee company.

Issue: Whether business loss can be set off against income which is chargeable at different rate?

Held: Business Loss c/f is entitled to be set-off u/s 72(1) against following year's business profit, even if different tax rates apply to both.

Where tax rate applicable to income from business (PGBP) in respect of which loss is brought forward to the following year is 42.23% (including surcharge and cess), there is no bar under section 72(1) to set-off the same against franchise fees earned in course of business in the following year even though franchise fees is taxable as royalty at a lower rate of tax of 27.04% (including surcharge and cess) under section 115A(1)(b) of the Act.

In Favour of: The Assessee

2 Assistant Commissioner of Income Tax V/s Cathay Pacific Airways Limited [2022] 142 taxmann.com 196 (Kolkata - Trib.) [06-09-2022]

Section: 44BBA of the Income Tax Act, 1961

Facts: The assessee is a non resident company engaged in the business of airline service for passengers and cargo. The assessee filed its return of income for relevant assessment year declaring income under section 44BBA of the Act.

The Assessing Officer took the view that the turnover should include the amount of service tax and accordingly added the same in the turnover of the assessee thereby increased the income declared by the assessee.

Aggrieved by the assessment order passed by the Ld. AO, the assessee company filed an appeal before Ld. CIT(A) which in turn uphold the assessment order.

The assessee company had preferred an appeal before the Hon. ITAT against the order passed by the Ld. CIT(A).

Held: For computing presumptive income of non-resident airliner u/s 44BBA, service tax collected from customers is not includible in 'gross receipts'. The expression "amount paid or payable" in section 44BBA(2)(a) and the expression "amount received or deemed to be received" in section 44BBA(2)(b) is qualified by the words "on account of the carriage of passengers, livestock material or goods from any place in India/outside India". Therefore, only such amounts which are paid or payable for the service provided by the assessee can form part of the gross receipts for the purpose of computation of gross total income u/s. 44BBA(1) of the Act.

Service tax collected by the assessee does not have any element of income. It is collected by the assessee from its customers for and on behalf of the Central Government on account of a statutory

levy and, therefore, it does not form part of the receipts of the assessee on which income accrues or arises to it. Assessee merely acts as a collection agent for and on behalf of the Central Government and after collection, deposits the service tax so collected into the treasury of the Central Government.

In Favour of: The Assessee

3 Nabco Products Private Limited V/s Union of India [2022] 142 taxmann.com 326 (Allahabad)[03-08-2022]

Section: 148A of the Income Tax Act, 1961

Facts: Assessee had been served a notice under section 148 of the Act, requiring the assessee to respond on the same and the same has been submitted by the assessee on the income tax portal. However, the assessing officer passed an order under section 148A of the Act, without considering the reply submitted by the assessee.

Issue: Whether order passed under section 148A(d) by the revenue without considering the reply filed by the assessee under section 148A(b) is valid?

Held: Section 148A, read with section 148, of the Income-tax Act, 1961 - Income escaping assessment - Conducting inquiry, providing opportunity before issue of notice (Opportunity of hearing) - Assessee was issued notice under section 148A(b) - Pursuant to which assessee submitted a reply on income tax portal along with rectification application - However, Assessing Officer passed order under section 148A(d) without considering reply of assessee and issued reopening notice - Rectification application was also rejected on similar ground - Revenue contended that reply of assessee was not reflected in notings maintained in portal - Whether impugned orders passed by Assessing Officer were in gross violation of principles of

natural justice and were to be quashed - Held, yes - Whether, however, revenue was granted liberty to pass order under section 148A(d) after affording reasonable

4 Shri Devendra Chedda V/s Income Tax Officer [ITA 6012 / MUM / 2014]

Section: Section 50C of the Income Tax Act, 1961

Facts: The assessee is an individual and partner in various partnership firms declared his total income for the year under consideration including long term capital loss and filed return of income. The assessee had sold his right to acquire / own land and claimed long term capital loss.

The Assessing Officer took the view that the assessee actually sold the land not rights and applied provisions of section 50C retrospectively on unregistered agreement to sell rights. The Ld. AO assessed the such transfer as long term capital gain. Aggrieved by the order passed by the Ld. AO the assessee filed an appeal before CIT(A) and CIT(A) uphold the order.

The assessee company had preferred an appeal before the Hon. ITAT against the order passed by the Ld. CIT(A) and Hon. ITAT passed an order favoring the assessee. The department had preferred an appeal before Hon. High Court. Hon. High Court quashed the order passed by the Hon. ITAT and remanded the appeal back to the tribunal.

Held: Hon. ITAT held that, what is transferred by the assessee is only rights in the land and not the land per se. This fact is very much evident from the fact that possession of the land was never handed over to the assessee. The assessee had only rights in acquiring the land and never had the land in his possession and never owned the land. No doubt the right to acquire the land is a capital asset. When such capital asset is transferred, the assessee is bound to offer capital gains. In the instant case, the assessee had offered capital gains in the return of income.

ITAT also observed and commented that, "Substance of the transaction need to be seen than its form".

Moreover, the amendment brought in Section 50C of the Act from 01/10/2009 cannot be made applicable for transactions carried out prior to 01/10/2009. Hence, it could be safely concluded that the amendment in Section 50C of the Act by including the expression "assessable" could be made applicable only in respect of transfer of capital assets made on or after 01/10/2009. In the instant case, the transfer according to the Revenue had been completed prior to 01/10/2009. Hence, the amended provisions of Section 50C of the Act could not be applied at all by the Revenue, as admittedly the transfer of rights in land had happened pursuant to an unregistered agreement. Prior to 01/10/2009, we hold that provisions of section 50C of the Act cannot be applied for unregistered documents.

ITAT directed the Ld. AO to delete the full value of consideration substituted by him by adopting stamp duty value in terms of Section 50C of the Act and accept the sale consideration reported by the assessee herein. And thereby delete the additions made by him.

In Favour Of: The Assessee.

Circulars & Notifications October 2022

A. Circulars:

Additional Guidelines for removal of difficulties under sub-section (2) of section 194R of the Income-tax Act, 1961.

<https://incometaxindia.gov.in/communications/circular/circular-no-18-2022.pdf>

CBDT issues revised guidelines for Compounding of Offences under Income-tax Act

<https://incometaxindia.gov.in/Lists/Press%20Releases/Attachments/1102/Press-Release-CBDT-issues-Revised-Guidelines-for-compounding-of-offences-dated-17.09.2022.pdf>

Extension of due date for furnishing return of income for Assessment Year 2022-2023

<https://incometaxindia.gov.in/communications/circular/circular-20-2022.pdf>

CBDT extends due date of filing of TDS return in Form 26Q for 2nd quarter of FY 2022-23 to November 30, 2022

<https://incometaxindia.gov.in/communications/circular/circular-21-2022.pdf>

B. Notifications:

Statement to be furnished under section 285B of the Income-tax Act, 1961 by a person carrying on production of a cinematograph film or engaged in specified activity or both

[https://incometaxindia.gov.in/communications/notification/notification no 109 2022 .pdf](https://incometaxindia.gov.in/communications/notification/notification%20no%20109%202022.pdf)

CBDT notifies Form ITR-A for filing of modified return by successor entity

<https://incometaxindia.gov.in/communications/notification/notification-no-110-2022.pdf>

C. Press Release:

Direct Tax Collections for F.Y. 2022-23 up to 08.10.2022

<https://www.pib.gov.in/PressReleasePage.aspx?PRID=1866193>

Tax Compliances for November 2022

7 November 2022

Due date for deposit of Tax deducted/collected for the month of October, 2022.

14 November 2022

Due date for issue of TDS Certificate for tax deducted under section 194-IB, section 194IA and section 194M in the month of September, 2022

15 November 2022

Quarterly TDS certificate (in respect of tax deducted for payments other than salary) for the quarter ending September 30, 2022

Due date for furnishing of Form 24G by an office of the Government where TDS/TCS for the month of October, 2022 has been paid without the production of a challan

30 November 2022

Return of income for the assessment year 2022-23 in the case of an assessee if he/it is required to submit a report under section 92E pertaining to international or specified domestic transaction(s)

Report in Form No. 3CEAA by a constituent entity of an international group for the accounting year 2021-22

Due date for claiming foreign tax credit, upload statement of foreign income offered for tax for the previous year 2021-22 and of foreign tax deducted or paid on such income in Form no. 67. (if due date of submission of return of income is November 30, 2022).

Tax News from around the World



UK corporation tax to rise to 25% as PM Truss U-turns

<https://www.reuters.com/world/uk/uk-corporation-tax-rise-25-19-this-april-daily-telegraph-2022-10-14/>

Credit Suisse faces U.S. tax probe, senate inquiry

<https://www.reuters.com/business/finance/credit-suisse-faces-us-tax-probe-senate-inquiry-bloomberg-news-2022-10-11/>

OECD presents new transparency framework for crypto-assets to G20

<https://www.oecd.org/newsroom/oecd-presents-new-transparency-framework-for-crypto-assets-to-g20.htm>

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