Government of India decides that Minimum Alternate Tax shall not be applicable to foreign companies having no permanent establishment/place of business in India

Background

The issue of applicability of Minimum Alternate Tax (MAT) under the provisions of Section 115JB of the Income-tax Act, 1961 (the Act) on foreign companies has been a matter of debate before the Courts.

While dealing with this issue, in some of the decisions, the Authority for Advance Rulings¹ (AAR) held that MAT provisions do not make a distinction between Indian and foreign companies and therefore, such provisions apply to the foreign companies as well. On the other hand, in a few decisions² the AAR held that in the absence of any physical presence in India, the provisions of MAT will not apply to foreign companies.

The issue gained prominence earlier this year when the Government vide the Finance Act, 2015 amended MAT provisions pursuant to which deduction of following items are allowed to be reduced in case of foreign companies while computing book profits under the provisions of MAT with effect from 1 April 2015:

- Capital gains; and
- Interest, Royalty or Fees for Technical Services.

As the amendment is prospective, issue arises whether MAT provisions were applicable to foreign companies for years prior to 1 April 2015. Pursuant to this amendment, the tax authorities started issuing notices to Foreign Portfolio Investors (FPIs) for assessing their income under MAT provisions for years prior to 1 April 2015.

Taking cognisance of this, the government formed a three member committee headed by Justice A.P. Shah to look into this matter. The terms of reference to the A.P. Shah Committee were confined to applicability of MAT provisions to FPIs for years prior to 1 April 2015. The A.P. Shah Committee vide its report dated 25 August 2015 recommended to the government that MAT should not be levied on FPIs for years prior to 1 April 2015.

As the A.P. Shah Committee was required to confine its recommendations only in the context of FPIs, the report of the A.P. Shah Committee and its subsequent acceptance by the government did not address the issue of applicability of MAT to foreign companies not having any physical presence in India.

The government now, vide the Press Release³, has notified that with effect from 1 April 2001 the provisions of MAT shall not apply to foreign companies if:

- The foreign company is a resident of a country having a tax treaty with India and such foreign company does not have a permanent establishment within the definition of the term in the relevant tax treaty, or
- The foreign company is a resident of a country which does not have a tax treaty with India and such foreign company is not required to seek registration under Section 592 of the Companies Act 1956 or Section 380 of the Companies Act 2013.

The press release also mentions that an appropriate amendment to this effect will be carried out under the Act.

3 Press Information Bureau Release, dated 24 September 2015

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Our comments

The government of India has issued a welcome press release where it is provided that MAT shall not be applicable to foreign companies having no permanent establishment/place of business in India. This will provide a much needed clarity on applicability of MAT provisions to foreign companies. This would also help in avoiding unnecessary litigation.
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