K C Mehta & Co LLP

Chartered Accountants

kcm Insight

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Dear Reader,

We are happy to present **kcmInsight**, comprising of important legislative changes in direct & indirect tax laws, corporate & other regulatory laws, as well as recent important decisions on direct & indirect taxes.

We hope that we are able to provide you an insight on various updates and that you will find the same informative and useful.

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Detailed Analysis

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Air India's Flight Ahead

What is Air India up to?

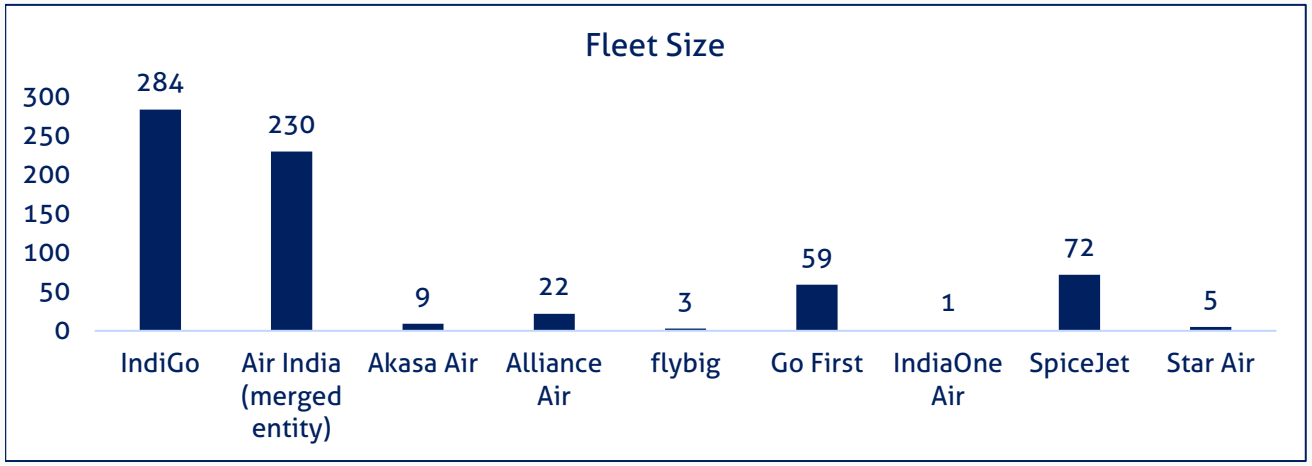
Air India is India's one of the flagship carriers with an impeccable history and a rusty recent past. Tata Group acquired the debt-ridden carrier in Jan-22 for Rs 18,000 Cr and is now eyeing a complete turnaround of Air India through organic and inorganic strategies. Tata Group has also acquired remaining stake of 16.33% in AirAsia India from AirAsia Berhad for Rs 155.6 Cr with a no profit - no loss proposition. Subsequently, Air India announced to merge AirAsia India's operations into its low-cost carrier vertical - Air India Express.

According to a recent stock exchange filing, Tata Group will merge Air India and Vistara, with partner Singapore Airlines holding a significant minority stake of 25.1% of the merged entity, creating an airline that could potentially challenge market leader IndiGo. Singapore Airlines, which owns 49% of full-service carrier Vistara, will get a 25.1% stake in the merged carrier for a payment of Rs 2,058.5 Cr in cash while Tata Group will own the remaining 74.9%.

Merger to synergize

When Tata Group acquired Air India, it controlled as many as 4,400 domestic and 1,800 international landing and parking slots at various airports around the world. The merger will only add to the already existing slots of the carrier. Air India along with Air India Express has a fleet size of 153 aircrafts. But with its merger with AirAsia and proposed merger with Vistara, Air India will become India's second largest aircraft carrier only behind Indigo.

Tata Group and Singapore Airlines look to invest Rs 25,000 Cr over the next 2 years in the merged entity for fleet modernization, aircraft induction and other operational purposes, whereby providing Air India a platform to grow its network and fleet, revamp its customer proposition and enhance safety, reliability, and on-time performance by offering both full-service and low-cost service across domestic and international routes.



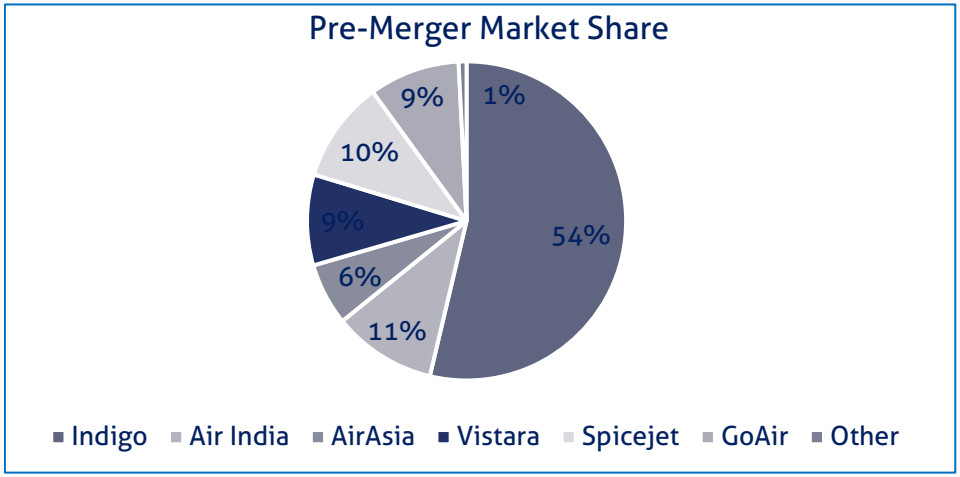
Source: knowindia.net

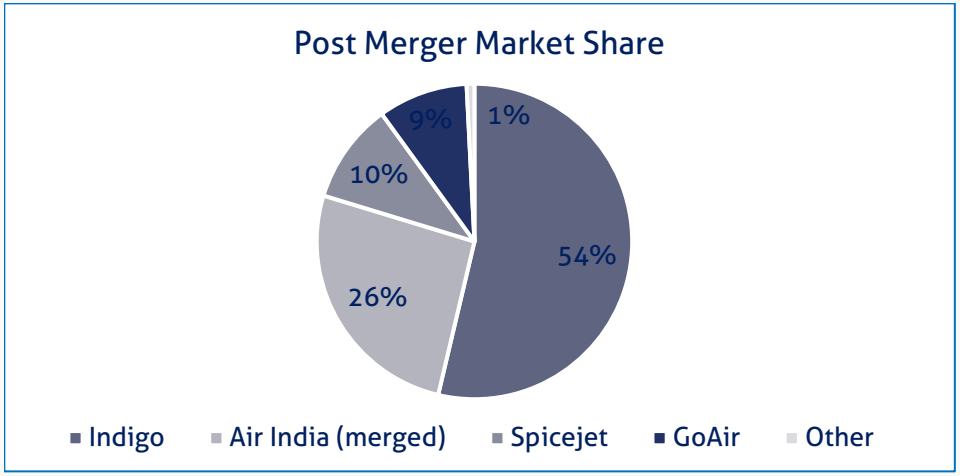
Air India's Flight Ahead

The combination of both the airlines will reap synergies in terms of customer enhancement, optimization of cost, widening of revenue and improvement in operational efficiency. More importantly, there will be proper set of standards, protocols, aviation best practices, systems and routes Air India is in advanced talks with Airbus and Boeing to place one of the biggest orders for new aircrafts in the history which will significantly increase its fleet size.

Market Share

Indian skies are currently dominated by Interglobe Aviation Limited which does business under the brand Indigo. Indigo currently has market share of c. 54%. Air India currently has about c. 10.50% of market share, but with its merger with AirAsia and Vistara, Air India can become the second largest player in the Indian aviation industry with c. 26% market share.





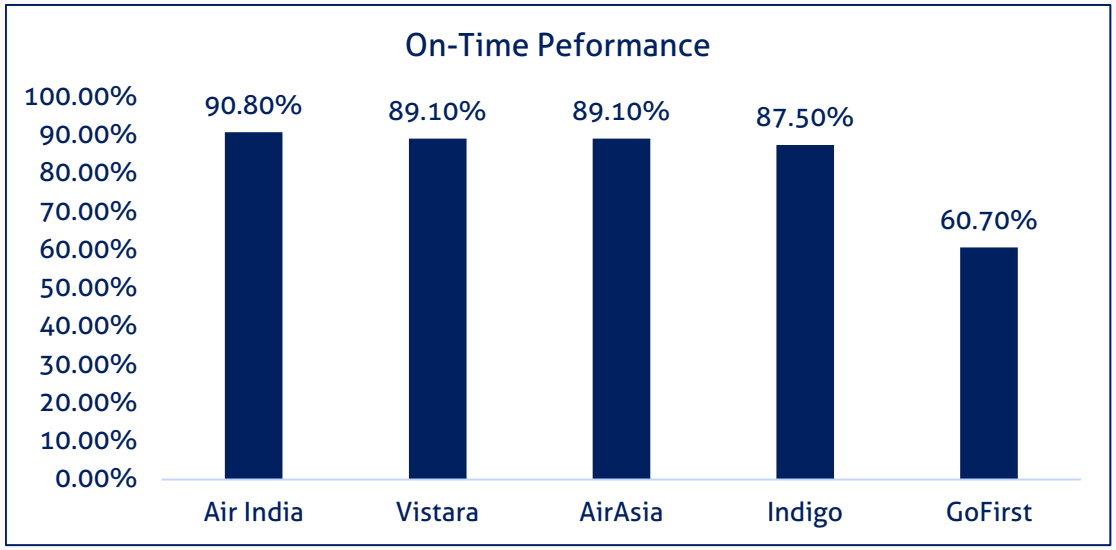
Source – DGCA

Road to Profitability

Air India has been consistently making losses since its merger with the then state-owned domestic carrier Indian Airlines. Even with an increase in revenue by c. 64%, Air India's losses have increased from Rs 7,017 Cr in FY21 to Rs 9,556 Cr in FY22. In a business with thin margins due to lower penetration and an ever-increasing competition, Air India path to profitability seems difficult in the near term. However, Air India has made several changes to its operations to make it more efficient. One of the key operating indicators is an airline's on-time performance. According to a report by McKinsey & Co., on-time performance adds to customer satisfaction and to the reputation of the airline which in the long run helps in making the airline profitable. According to the latest monthly report by

Air India's Flight Ahead

DGCA, Air India topped the list of airlines with an on-time performance of 90.8% for the month of Oct-22.



Source: DGCA

Another sign of improvement has been an increase in the Passenger Load Factor (PLF) which measures percentage of available seats being filled by passengers. It was amongst one of the two airlines that have shown an improvement in PLF by about 2.5% to 73.6% in Aug-22 when compared to Jul-22. Whereas Tata Group's other airlines - Vistara and AirAsia have shown PLF of around 84.3% and 75% respectively.

Way Forward

According to CAPA India, competitive dynamics in India are moving towards a two-pillar structure around Air India group and IndiGo. The two carriers combined are expected to achieve a domestic market share of 75-80%. In the international market, they are expected to grow to over 50%. This will redraw the market in the global arena back to Indian carriers, which has historically been dominated by foreign airlines.

Air India has drafted for itself a five-year plan called Vihaan.ai which aims at growing its network, developing a completely revamped customer proposition, improving reliability and on-time performance. The first steps are already visible with improved seats, in-flight entertainment, well-groomed staff and well-functioning website among other things. The airline aims to achieve 30% market share in domestic markets while significantly growing in the international markets. The road ahead seems a long and tiring one for Air India, but Tata Group seems to be making relentless efforts to revive the old glory of the Maharaja.

Sources of information: Moneycontrol, Livemint, DGCA, CAPA India, Forbes, VCCEdge

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For detailed understanding or more information, send your queries to ***kcminsight@kcmehta.com***

Important Rulings

Revaluation of capital assets credited to partners' capital account is taxable u/s 45(4)

CIT vs. M/s Mansukh Dyeing and Printing Mills, Civil Appeal No.8258 & 8259 OF 2022, Supreme Court of India

The Taxpayer, a partnership firm, was reconstituted whereby several partners were added to and some partners retired from the firm. Subsequently, the assets of the partnership firm were revalued and surplus on such revaluation was credited to the capital account of the partners in their profit-sharing ratio.

The AO contended that revaluation of the assets and subsequent credit to partner's capital accounts constitutes "transfer" of capital asset of the firm and accordingly treated revaluation surplus as capital gain of the firm u/s 45(4) of the ITA. The CIT(A) observed that partners have also withdrawn amounts from capital account and hence confirmed the addition made by AO by holding that there is clear distribution of assets. The CIT(A) further noted that, to the extent that, value has been assigned to each partner by credit to capital accounts, the partnership has effectively relinquished its interest in the assets and such relinquishment can be termed as transfer by relinquishment. ITAT set aside the decision made by the AO and the HC dismissed the appeal filed by revenue.

The matter came up before the Hon'ble SC wherein Revenue contended that introduction of section 45(4) was accompanied by omission of section 47(ii) of the ITA, wherein distribution of capital assets on the dissolution of firm was not treated as transfer. Plug this loophole, section 45(4) was inserted. Subsequent to insertion of section 45(4), distribution of capital assets to partners' capital account is deemed transfer of capital assets and therefore assessable as capital gains in the hands of the firm.

The Taxpayer contended that for applicability of section 45(4), twin conditions must be satisfied: (i) transfer by way of distribution of capital assets and (ii) such transfer shall be either on account of dissolution of firm or otherwise. In the instant case, there was neither distribution of assets of firm, nor dissolution/otherwise of firm had taken place. The surplus on revaluation of assets, which is credited to partners' capital account of all partners, was notional book entry, which is not represented by any tangible asset or income. Since there is no profit/gains accrued to firm on revaluation resulting in real income, there can be no distribution of such profit/gains and therefore, same cannot be added to income of firm as capital gains.

The Taxpayer distinguished the decision of Bombay HC in case of A N Naik Associates and Ors. Tax Appeal Nos. 50 and 55 of 2002, which was relied by the Revenue, by pointing out that, in such case, capital assets of partnership firm were actually transferred to retiring partner by way of deed of retirement, unlike mere revaluation of assets in the case of the Taxpayer.

However, the Apex Court accepted the argument of Revenue by holding that the object and purpose of introduction of Section 45(4) was to plug the loophole by omission of section 47(ii) of the ITA. In view of specific words 'or otherwise' added in section 45(4), SC opined that submission of Taxpayer has no substance. SC relied on decision of Bombay HC in the case of A N Naik Associates and Ors. wherein it was observed that the word 'otherwise' takes into its sweep not only cases of dissolution but also

cases of subsisting partners of partnership, transferring assets in favor of retiring partner. SC applied the analogy of the said decision to the facts of this case by observing that credit of revaluation surplus to capital account of partners is, in effect, distribution of assets to partners and the same fall in the category of 'otherwise' and therefore, provision of section 45(4) shall be applicable.

While giving its decision, SC did not distinguish the facts of case from that of A N Naik Associates. In such case, assets of partnership firm were actually transferred to retiring partner, whereas in the instant case, revaluation surplus was credited to the partner's capital accounts and therefore, there was no distribution/transfer of capital assets to partner. However, it appears that the Apex Court went into the substance of the case and therefore decided the case against the Taxpayer.

It is worthwhile to note that Finance Act 2021 has amended the provisions of section 45(4) to provide that cash/asset received by the partners from the firm in connection with reconstitution of the firm in excess of their capital balance (ignoring revaluation) is taxable as Capital Gains in the hands of the firm. Accordingly post introduction of such provision, the firm is liable to tax u/s 45(4) in case of distribution of cash/assets in excess of partner's capital account balance, excluding the amount of revaluation of assets.

Ownership of an asset for claim of depreciation cannot be disputed merely because third party has right to repurchase

CIT v. SBI Home Financer Ltd., Civil Appeal No. 3548 OF 2007, Supreme Court of India

The Taxpayer, during the course of its business of leasing and finance, entered into a lease agreement with M/s Western Paques India Limited ("WPIL") for lease of an effluent treatment and bio-gas generation plant, set-up at the premises of M/s Sayaji Industries Ltd. ("SIL"). The Taxpayer acquired the plant and leased the same to WPIL. However as per the agreement, SIL had the right to re-purchase the plant at the end of a stipulated period. The Taxpayer offered to tax lease income from such asset as business income and claimed depreciation on such plant u/s 32 of the ITA.

Revenue has denied the claim of the depreciation to the Taxpayer on the ground that it is not the owner of the asset since SIL has a right to repurchase such asset. The Tribunal upheld the action of AO in disallowing claim of depreciation made by Taxpayer. The Taxpayer filed an appeal before the HC against the order of the Tribunal.

Bombay High Court has held that the transaction of lease between the Taxpayer and WPIL is on operating lease basis and not on finance lease. Further WPIL has not claimed depreciation on such asset and claimed lease rent as allowable expenditure. In view of the same, HC concluded that Taxpayer was owner of plant for purpose of section 32 and by leasing it out to WPIL, Taxpayer had used the plant for the purpose of its business of leasing and as such income earned thereon by way of rental was business income. Accordingly, since conditions of section 32 of the ITA were fulfilled, Taxpayer was entitled to depreciation u/s 32 of the ITA.

Further regarding the issue of ownership between the Taxpayer and SIL, HC drew inference from provisions of section 53A of

Important Rulings

Transfer of Property Act, 1882. As per section 53A of such Act, title of transferee becomes complete and perfect with mere delivery of possession, even without transfer of title of ownership. HC observed that in the facts of the case, Taxpayer has acquired interest in property with notice of right of SIL and until and unless such right is enforced, Taxpayer continues to be owner of property against the whole world.

On further appeal by the Revenue, SC observed that on construing relevant clauses of agreement, the Taxpayer became owner of plant and machinery and further lease rentals have been taxed as revenue receipt in hands of Taxpayer. In view of such factual background, SC upheld the decision of HC and dismissed the appeal of Revenue.

It is interesting to note that the Apex Court has upheld the verdict of HC wherein HC held that ownership of an asset in the hands of buyer of asset shall not be disputed merely because the seller has a right to acquire the same after specified time and especially in a situation wherein depreciation on such asset has not been claimed by the lessee.

Interest expenses cannot be set off against interest income on fixed deposit prior to commencement of business

Sion Panvel Tollways Pvt. Ltd, ITA Nos.489 AND 249/PUN/2018, Pune ITAT

The Taxpayer is a company engaged in the business of development of state highway. It had invested idle funds before the commencement of business in fixed deposits (FDRs) and offered interest income from said FDRs under the head 'Income from Other Sources' in its return of income. The Taxpayer claimed deduction of interest expenditure on project loan availed u/s 57(iii) of the ITA. Such claim of the Taxpayer was denied by the AO since such project loan was taken for the construction of highway and therefore no deduction of such expenditure shall be allowable u/s 57(iii) of the ITA. However, the CIT(A) allowed the claim of the Taxpayer.

Aggrieved by such order of CIT(A), Revenue filed an appeal before ITAT. Before the Pune ITAT, the Taxpayer has contended that since the FDRs have been made out of funds borrowed for the highway project, deduction u/s.57(iii) should be allowed. Further, the Taxpayer alternatively claimed that such interest income on FDRs should be treated as capital receipt since business was not commenced.

ITAT noted that, only such expenditure can be allowed as deduction u/s 57(iii) which is incurred wholly and exclusively for the purpose of earning such income. ITAT further remarked that the decisive criterion for allowing the deduction is that the activity of earning income should be directly connected with or be incidental to the primary activity for which borrowing was made. In the facts of case, funds were borrowed for purpose of development of highway and were invested in FDRs since the same was not immediately required. Therefore, the interest paid on borrowings for highway development activity cannot be considered as expenditure incurred for the purpose of earning interest income and cannot be allowed as deduction u/s 57(iii) against interest income earned on FDRs.

Further, ITAT observed that interest was earned from deposit of idle funds and making of FDRs had no relation with purpose for which loan was

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taken. Therefore, while relying upon the decision of SC in case of Tuticorin Alkali Chemicals & Fertilizers Ltd. [(1997) 227 ITR 172 (SC)] & Autocast Ltd. [(2001) 248 ITR 110 (SC)], ITAT held that interest earned on deposit cannot be treated as capital receipt and shall be chargeable to tax under head 'Income from other sources.

Interest payable on demand from fresh assessment cannot be relate back to the date of set-aside order

AT & T Communication Services (India) Pvt. Ltd., ITA No. 428/2022

The Taxpayer filed its return of income for AY 2004-05, subsequent to which certain additions were made by the AO during the course of assessment proceedings. The Taxpayer had preferred an appeal against such order of the AO before CIT(A) & ITAT. The ITAT set aside the order of the AO and restored the additions back to the AO for re-consideration. The AO reframed the assessment and reconfirmed the additions made in the original assessment order. The AO while computing demand payable, levied interest u/s. 220(2) from the date of original assessment order which was set aside. Aggrieved by such order, Taxpayer filed an appeal before CIT(A) & ITAT, wherein both the judicial authorities deleted the interest levied by the AO by holding that interest u/s. 220(2) can be charged only after expiry of 30 days from the date of service of demand notice pursuant to fresh assessment order.

Aggrieved by such order, revenue filed an appeal before the Delhi HC. Delhi HC while relying upon CBDT Circular no. 334 dated April 3, 1982 and decision of Rajasthan HC in case of Rajesh Kumar and Bombay HC in case of Chika overseas upheld the order of ITAT and held that interest u/s. 220(2) can be levied after expiry of 30 days from the issuance of demand notice pursuant to fresh assessment order and not from the date of original assessment order since the entire original assessment has been set aside and ceased to exist.

Important Notifications

CBDT extended filing of second quarter Form 26Q till November 30, 2022

Circular no. 21/2022 dated October 27, 2022

On account of revision in format and consequent updation required, CBDT has extended due date of filing Form 26Q for second quarter of FY 2022-23 from October 31, 2022, to November 30, 2022

CBDT condones delay in filing Form 10A

Circular no. 22/2022 dated November 1, 2022

On consideration of difficulties reported by taxpayers in electronic filing of Form 10A and various representations received in this regard, CBDT condones the delay in filing Form 10A up to November 25, 2022, which was earlier required to be filed by March 31, 2022. Form No. 10A is application form required to be filed by charitable/religious trusts for seeking registration u/s 12A, 10(23C) and 80G(5) of the ITA.

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Important Rulings

India Rulings

Gain on sale of shares of Indian Company is exempt under India-Mauritius DTAA subject to availability of TRC

MIH India (Mauritius) Ltd.- ITA No.1023/Del/2022- Delhi ITAT

The Taxpayer is a non-resident corporate entity incorporated under the laws of Mauritius and has been issued a valid Tax Residency Certificate (TRC) by Mauritian Revenue Authorities. Further, it had no PE in India. The Taxpayer acquired shares of an Indian company in September 2016 and subsequently sold such shares of the Indian company to its Indian subsidiary company in March 2017. The resultant short term capital gain was claimed as exempt under Article 13(4) of India – Mauritius DTAA.

The revenue authorities analyzed such transactions and made following observations:

- The taxpayer had had no financial strength to invest in Indian Company and has obtained loan from its Holding Company, based out of Netherlands.
- Taxpayer does not carry out any commercial/business activity and incurs meagre expenses for running the business venture.
- Control and management of the Taxpayer company lies with its holding company in Netherland.
- Thus, the Taxpayer is a conduit company and only for the purpose of claiming the benefit under India-Mauritius DTAA, the entire share purchase arrangement has been structured.

Accordingly, the revenue authorities concluded that the beneficial owner of the Indian company's shares is the holding company at the Netherlands and thus India-Netherlands treaty should be invoked. The Hon'ble ITAT have perused the arguments advanced by revenue authorities and observed as under:

- The amended provisions of Article 13 of India – Mauritius Tax Treaty won't apply to the present case as the shares were acquired before 01 April 2017 (grandfathering provisions).
- The Taxpayer not only made substantial investments in India and other countries, but it also proposes to make further significant investments in the year under consideration and thus not merely a conduit company.
- The Taxpayer has substantial interest in subsidiary company to whom shares were sold (i.e., buyer of shares) and such shares sold were till date held by its subsidiary company.
- The Tribunal further negated the argument of the Revenue that on application of MLI provisions, the ratio laid down by the Hon'ble Supreme Court in case of ***Union of India & Another Vs. Azadi Bachao Andolan*** shall not hold good. The SC relying on CBDT Circular no. 789 dated 13.04.2000 held that the Taxpayer shall be entitled to claim treaty benefit provided the Mauritius tax authority has provided TRC to the Taxpayer as it constitutes sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAA. The Tribunal held that the decision cannot be made by anticipating a futuristic event of ratification of MLI resulting into amendment to the India-Mauritius tax treaty.

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Further, for the sake of completeness, it also examined the position assuming the Netherlands entity to be the beneficial owner of shares and held that onus is entirely on the AO to prove that the value of shares is derived principally from immovable property situated in the source country in order to tax such income in India as per Article 13(4) of India-Netherlands treaty. As in the present case, no such allegation has been made by AO short-term capital gain arising on sale of shares is not taxable in India. At this juncture, it would be important to note that revenue authorities themselves are attempting to invoke principle of 'implicit beneficial ownership' and Tribunal has also entertained and negated the said argument. In this regard, one would appreciate that revenue authorities are generally not obliged to verify the existence of DTAA between Source State and State of beneficial owner and the only requirement is to verify whether benefit under DTAA can be granted or not to immediate recipient. Further, recently, the concept of implicit beneficial ownership was also upheld by French Supreme Court in case of ***Planet***.

This decision has cemented the decision of *Azadi Bachao Andolan (supra)* holding benefits under the India-Mauritius tax treaty to be allowed consistently if the taxpayer could obtain a valid TRC from Mauritian tax authorities. However, in the recent past, the authority for advance rulings ("AAR") has been denying treaty benefits to investors who had opted the Mauritius route to make investments in India (*viz. AAR New-Delhi in case of Tiger Global International Holdings [2020] 116 taxmann.com 878*). Hence, the commercial substance of an entity incorporated in Mauritius has been critical factor for arriving at conclusions by the courts. It is also important to note that OECD commentary also provides for non-granting of DTAA benefits, in case of conduit companies which are incorporated in any jurisdiction solely for obtaining a particular benefit under such DTAA. Further, in the Indian context also, there is a plethora of judicial precedents wherein it was held that if the requirement of beneficial ownership was not satisfied and if a Company was interposed with a sole object of obtaining DTAA benefit, such benefit should not be granted. On the contrary, in the recent decision of Mumbai ITAT in case of ***Blackstone FP Capital Partners Mauritius V Ltd [2022] 138 taxmann.com 328 (Mumbai - Trib.)***, it was held that in absence of express condition of beneficial ownership in case of Capital Gain Article, the same cannot be imported automatically.

Fee for marketing services rendered by marketing partner is Fee for Technical Services chargeable to tax

M/s. Sunsmart Technologies Private Limited - ITA No.2791/Chny/2019 – Chennai ITAT

The taxpayer was engaged in the business of providing software solutions and services to diversified industries. The taxpayer had entered into an agreement with the foreign company named SSG Technologies LLC, Dubai for marketing of its products in the middle east Asian countries. Terms of the said agreement inter-alia includes authorizing the foreign company as marketing partner for promoting and distribution of products to the customers and provide sales support services.

Revenue authorities have alleged that payment made by the taxpayer to the foreign company for providing marketing services is in the nature of FTS and due to non-deduction of tax by the taxpayer while making the payment,

disallowance was made under section 40(a)(i) of the ITA.

ITAT held that having regard to the peculiar nature of services and terms and conditions of agreement entered into between the parties, it is undisputed fact that taxpayer was required to train the resources of the foreign company in order to enable them in providing pre-sale and post-sale services to various customers. Hence, the said services provided by the foreign company require a technical expertise and knowledge, especially having regard to the product of the taxpayer. Hence, ITAT dismissed the appeal filed by the taxpayer and uphold the disallowance made by revenue authorities on the ground that payment made to the foreign company was FTS and non-deduction of tax attracts disallowance.

At this juncture, one would appreciate that in the present facts of the case, employees of the foreign company are not capable enough to provide marketing services, unless taxpayer provides them a requisite training. Hence, per se there was no receipt of any additional technical or consultancy services by the taxpayer from a foreign company, rather the taxpayer is passing a requisite training to employees of the foreign company to enable them to provide marketing support to the customer. Also, there is plethora of judicial rulings wherein the Courts and Tribunals have held that providing marketing support services is not FTS under the ITA or DTAA. Also, ITAT had not discussed much on exclusion provided under section 9(1)(vii) of the ITA which provides that if payment is made for earning income from a source outside India, then payment made should not be considered as FTS under the ITA.

In addition to above, it is also worthwhile to note that in the entire decision, there is no discussion on taking recourse of India UAE DTAA, for whatsoever reason. It is important to note that India UAE DTAA does not have a clause of FTS. In such case, as per various judicial precedents, it was held that if DTAA does not have a clause of FTS, then the same must be dealt with in accordance with Article 7 (Business Profits) or Article 22 (Other Income). Even in case of other income, exclusive taxation right is provided to UAE only and not India. Hence, to this limited extent, decision provided by ITAT requires a reconsideration.

Foreign ruling

Spanish Supreme Court upholds re-characterization of consideration for transfer of customers and operational data as royalties emphasizing 'substance over form' principle

Judgment of 24 June 2022, appeal of cassation number 5441/2020 (Supreme Court of Spain)

A Spanish Company had entered into an agreement with its related party, a German Company. As per the agreement, German Company 'transferred' its Portuguese customer data and operational data (financial information and relevant data to provide distribution services in Portugal) to the Spanish Company and considered the same as 'transfer' giving rise to 'capital gains', exempt from tax in Spain.

Spanish Tax audit and other Spanish Courts observed that the transferred data consisted of certain Portuguese 'customer data' such as names, addresses, information relating to retail stores and billings and 'operational data' based on business experience of former distributor of products by German Company in Portugal and that the data were exclusive and were not

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publicly available and considered the same as Royalties, subject to withholding tax in Spain.

Spanish Supreme Court upheld the characterisation of consideration for transfer or assignment of customers and operational data as 'royalties' in light of the 'Substance over form' principles. In this regard, the Supreme Court held that irrespective of the nomenclature used in the agreement, it was not proved that the transfer of ownership in the present case was definitive or that the transferor no longer had the right to dispose or use the transferred information to consider the transaction as transfer of capital assets.

The Spanish Supreme Court laid an important principle on 'Dynamic interpretation of tax treaties through use of OECD Commentaries' and upheld use of Commentaries to Article 12 of the 2008 OECD Model Tax Convention for interpretation of the term 'Royalty' under Article 12 of the 1966 German – Spain tax treaty for transactions entered into by the German Company in 2009 i.e. post 2008 OECD Model Tax Convention. The Spanish Supreme Court thus observed that the German Company had provided exclusive data or information derived from its commercial experience and that the same was a notion included in the definition of royalties under Article 12 of the German – Spain tax treaty read with the 2008 OECD Commentaries.

On dynamic interpretation of tax treaties, Spanish Supreme Court had also pronounced decisions in 2020, wherein, it was held that the dynamic interpretation of DTAAs should be restricted to clarificatory provisions and where there is substantial or material changes to the terms used in tax treaty, the OECD Model Tax Convention and its Commentaries cannot be read retrospectively. In continuation with the same view, where the language or terms used in the treaty is same, the Spanish Supreme Court in the present case opines that it should be possible to have dynamic interpretation in light of the OECD Commentaries and holds that the consideration payable to German Company was liable to tax withholding in Spain.

As international forums like UN and OECD work towards tax transparency, tax efficiencies and taxation in the new dynamics of the digitalization, this case is a classic example of various judiciaries internationally looking beyond the documents and acknowledging the significant impetus of the principle of 'Substance over form' and 'Dynamism in Tax world'.

Important Updates

Foreign update

Introducing residency norms by UAE vide issue of Cabinet Decision

In January 2022, UAE MoF had announced introduction of corporate tax on the business profits which will be effective from financial years starting on 01 June 2023. While the final statute is not yet released, the consultation document issued for public comments includes various aspects such as meaning of taxable person, residency of taxable person, basis of taxation, calculation of taxable income etc.

Pending notification of corporate tax law, UAE MoF has released a Cabinet Decision No. 85 of 2022 specifying conditions for determining a tax residency of legal and natural person in the UAE. The extract of the conditions is as follows:

Tax residency of a juridical person

A juridical person would qualify as tax resident in the UAE, subject to fulfilment of any of the following conditions:

- It was incorporated, formed, or recognized in accordance with the legislation in force in the State and that does include the branch that is registered by foreign juridical person in that State; or
- It is considered as tax resident as per the tax law of the State.

Tax residency of a natural person

A natural person would qualify as tax resident in UAE, subject to fulfilment of any of the following conditions:

- If his usual or primary place of residence and the centre of his financial and personal interests are in the State, or he meets the conditions and criteria determined by a decision from the Minister; or
- If he has been physically present in the State for a period of (183) one hundred and eighty-three days or more, within the relevant (12) twelve consecutive months; or
- If he has been physically present in the State for a period of (90) ninety days or more, within the relevant (12) twelve consecutive months, and he is a UAE national, holds a valid Residence Permit in the State or holds the nationality of any member state of the Gulf Cooperation Council, and meets any of the following:
  - Has a permanent place of residence in UAE; or
  - Has a job or a business in the UAE

It is important to note that definition of resident Individual provided in Article 4 of India UAE DTAA is not in line with the criteria prescribed in the Cabinet decision. Hence, it may be possible that UAE will amend its treaties with other countries to align the definition of resident person in line with the Cabinet decision.

In addition to above, Cabinet decision also provides that if any person is treated as resident of UAE as mentioned above, then such person may make an application to tax authorities for issue of Tax Residency Certificate.

Issuing this decision by the Cabinet is a welcome move to provide adequate clarity to legal entities and individuals about their tax residency in the UAE, especially before enforcement of corporate tax law.

The decision is applicable with effect from 01 March 2023.

Important Updates

Hong Kong and Mauritius signed comprehensive DTAA

Signing of Double Taxation Avoidance Agreement ('DTAA') between Hong Kong and Mauritius was pending since long. In the Cabinet Meeting held on 01 April 2022, Mauritius Cabinet has finally agreed for signing DTAA with Hong Kong. As per communique released by financial service commission of Mauritius, Hong Kong has signed DTAA on 14 November 2022 and Mauritius has signed DTAA on 07 November 2022. The DTAA shall come into force from the tax year following the calendar year in which relevant ratification procedures are completed by the government of both the contracting states.

DTAA contains a specific provision for elimination of double taxation with respect to the taxes on income without creating opportunities for double non-taxation or reduced taxation through tax evasion or tax avoidance (including through treaty shopping arrangements). Few of the salient features of Hong Kong Mauritius DTAA is as follows:

- Specific provision for availing Unilateral Tax Credit by resident of Mauritius [Article 22]
- No clause of Fees for Technical Services [Article 12]
- Absence of clause in other income article which also provides taxation right to source country [Article 21]

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Important Rulings

Reduction in denomination for investment in debt securities and non-convertible redeemable preference shares

SEBI / HO / DDHS / P / CIR / 2022 / 00144 dated October 28, 2022

SEBI has decided to make investment in debt markets more pocket friendly by reducing the size of denomination (i.e., face value) from INR 10 lakhs to INR 1 lakh. The primary objective of this initiative is to enhance the broaden the participation of investors and enhance liquidity in the corporate bond market. With the reduction in denomination, the pool of investors seeking such investment in such debt securities/redeemable preference shares can only increase exponentially.

This Circular comes into effect from January 1, 2023.

Standardization of Rating Scales used by Credit Rating Agencies (CRAs)

SEBI/HO/DDHS/DDHS-RACPOD2/P/CIR/2022/ 146 dated October 31, 2022

Credit Rating Agencies [CRAs] have their own ratings scale as well as the nomenclature for denoting the credit worthiness of the Borrower. However, this leads to considerable confusion and there is no parity between the scales of each CRA. SEBI being well aware of this discrepancy and has devised and standardized symbols and definitions of rating scales for use by CRAs.

Standard descriptors to be used when an issuer/security is placed on Rating Watch which indicates an expected direction of rating movement in medium terms while Rating Outlook indicates an expected direction of rating movement in short term as per Table provided below:

Sr. No.	Rating Symbol	Definitions of Issuer Rating
1	AAA	Highest degree of safety regarding timely servicing of debt obligations. Debt exposures to such issuers carry lowest credit risk.
2	AA	High degree of safety regarding timely servicing of debt obligations. Debt exposures to such issuers carry very low credit risk.
3	A	Adequate degree of safety regarding timely servicing of debt obligations. Debt exposures to such issuers carry low credit risk.
4	BBB	Moderate degree of safety regarding timely servicing of debt obligations. Debt exposures to such issuers carry moderate credit risk
5	BB	Moderate risk of default regarding timely servicing of debt obligations
6	B	High risk of default regarding timely servicing of debt obligations.
7	C	Very high risk of default regarding timely servicing of debt obligations.
8	D	In default or are expected to be in default soon.

This Circular shall be effective from January 1, 2023.

Important Rulings

Streamlining of Process of handling Clients' Securities by Trading Members (TM) / Clearing Members (CM)

SEBI/HO/MIRSD/MIRSD-PoD-1/P/CIR/2022/153 dated November 11, 2022

To prevent misuse of unpaid securities (i.e.) securities that have not been paid in full by the clients and to streamline the process of handling of such unpaid securities by Trading Members (TM)/Clearing Members (CM), SEBI has issued several guidelines in this regard, which includes:

- Unpaid securities will be transferred to the demat account of respective client with the creation of an auto pledge.
- On creation of pledge, a communication (via email/SMS) shall be sent by TM/CM informing the client about their obligation to pay as well as the right of TM/CM to sell such securities in the event of failure by client to fulfil the obligation.
- On fulfilment of fund obligation, the pledge shall be released and securities will be available to client. In case non-fulfilment of obligation, the TM/CM have the right to dispose off such securities in the market. The resultant profit/loss on sale transaction shall be transferred to/adjusted from the respective client account.
- All existing "client unpaid securities accounts" shall be closed down on or before April 15, 2023, and securities lying in such accounts shall either be disposed off in market or be transferred to the client's demat account.

This Circular shall be effective from March 31, 2023.

Registration and regulatory framework for Online Bond Platform Providers (OBPPs)

SEBI/HO/DDHS/DDHS-RACPOD1 / P / CIR / 2022 / 154 dated November 14, 2022

There has been a significant increase in the offering of debt securities to non-institutional investors through "Online Bond Platforms" (OBPs), which provides an additional avenue to investors to access bond market.

In order to streamline the operations of "Online Bond Platforms Providers" [OBPPs] SEBI have developed a framework for OBPPs under Regulation 51A of SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 ('NCS Regulations'), which in addition to complying with 51A of NCS Regulations, includes the following:

- Compliances with regard to appointment of a Company Secretary and qualified KMPs.
- Adequate and updated technology infrastructure.
- Easy access and participation of investors.
- Minimum disclosure requirements, conflict of interest and advertisements.
- Comprehensive risk management framework.
- Investor grievance redressal mechanism.

This Circular shall come into force with immediate effect (i.e.) date of notification of the Circular.

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Abbreviations

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Abbreviation	Meaning
AAR	Authority of Advance Ruling
AAAR	Appellate Authority of Advance Ruling
AAC	Annual Activity Certificate
AD Bank	Authorized Dealer Bank
AE	Associated Enterprise
AGM	Annual General Meeting
AIR	Annual Information Return
ALP	Arm's length price
AMT	Alternate Minimum Tax
AO	Assessing Officer
AOP	Association of Person
APA	Advance Pricing Arrangements
AS	Accounting Standards
ASBA	Applications Supported by Blocked Amount
AY	Assessment Year
BOI	Body of Individuals
BRC/FIRC	Bank Realisation Certificate / Foreign Inward Remittance Certificate
CBDT	Central Board of Direct Tax
CBIC	Central Board of Indirect Taxes and Customs
CCA	Cost Contribution Arrangements
CCR	Cenvat Credit Rules, 2004

Abbreviation	Meaning
CESTAT	Central Excise and Service Tax Appellate Tribunal
CGST Act	The Central Goods and Services Tax
CIT(A)	Commissioner of Income Tax (Appeal)
COO	Certificate of Origin
Companies Act	The Companies Act, 2013
CPSE	Central Public Sector Enterprise
CSR	Corporate Social Responsibility
CTA	Covered Tax Agreement
CUP	Comparable Uncontrolled Price Method
Customs Act	The Customs Act, 1962
DFIA	Duty Free Import Authorization
DFTP	Duty Free Tariff Preference
DGFT	Directorate General of Foreign Trade
DPIIT	Department of Promotion of Investment and Internal Trade
DRI	Directorate of Revenue Intelligence
DTAA	Double Tax Avoidance Agreement
ECB	External Commercial Borrowing
ECL	Electronic Credit Ledger
EGM	Extra-ordinary General Meeting

Abbreviation	Meaning
FEMA	Foreign Exchange Management Act, 1999
FII	Foreign Institutional Investor
FIFP	Foreign Investment Facilitation Portal
FIRMS	Foreign Investment Reporting and Management System
FLAIR	Foreign Liabilities and Assets Information Reporting
FPI	Foreign Portfolio Investor
FOCC	Foreign Owned and Controlled Company
FTC	Foreign Tax Credit
FTP	Foreign Trade Policy 2015-20
FTS	Fees for Technical Service
FY	Financial Year
GAAR	General Anti-Avoidance Rules
GDR	Global Depository Receipts
GOI	Government of India
GST	Goods and Service Tax
GSTN	Goods and Services Tax Network
GVAT Act	Gujarat VAT Act, 2006
HC	High Court
HSN	Harmonized System of Nomenclature
ICAI	Institute of Chartered Accountant of India

Abbreviations

Abbreviation	Meaning
ICDS	Income Computation and Disclosure Standards
ICDR	Issue of Capital and Disclosure Requirements
IEC	Import Export Code
IGST	Integrated Goods and Services Tax
IRDA	Insurance Regulatory and Development Authority
ISD	Input Service Distributor
ITA	Income Tax Act, 1961
ITC	Input Tax Credit
ITR	Income Tax Return
IT Rules	Income Tax Rules, 1962
ITAT	Income Tax Appellate Tribunal
ITR	Income Tax Return
ITSC	Income Tax Settlement Commission
JV	Joint Venture
LEO	Let Export Order
LIBOR	London Inter Bank Offered Rate
LLP	Limited Liability Partnership
LO	Liaison Office
LODR	Listing Obligations and Disclosure Requirements
LTA	Leave Travel Allowance
LTC	Lower TDS Certificate
LTCG	Long term capital gain
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
MEIS	Merchandise Exports from India Scheme
MSF	Marginal Standing Facility
MSME	Micro, Small and Medium Enterprises
ODI	Overseas Direct Investment
OECD	The Organization for Economic Co-operation and Development
OM	Other Methods prescribed by CBDT
PAN	Permanent Account Number
PE	Permanent establishment
PPT	Principle Purpose Test
PSM	Profit Split Method
PY	Previous Year
RBI	Reserve Bank of India
RCM	Reverse Charge Mechanism
RMS	Risk Management System
ROR	Resident Ordinary Resident
ROSCTL	Rebate of State & Central Taxes and Levies
RoDTEP	Remission of Duties and Taxes on Exported Products
RPM	Resale Price Method
SC	Supreme Court of India
SCN	Show Cause Notice
SDS	Step Down Subsidiary
SE	Secondary adjustments
SEBI	Securities Exchange Board of India
SEP	Significant economic presence
SEZ	Special Economic Zone
SFT	Specified Financial statement
SION	Standard Input Output Norms
SST	Security Transaction Tax
ST	Securitization Trust
STCG	Short term capital gain
SVLDRS	Sabka Vishwas (Legacy Dispute Resolution Scheme) 2019
TCS	Tax collected at source
TDS	Tax Deducted at Source
TNMM	Transaction Net Margin Method
TP	Transfer pricing
TPO	Transfer Pricing Officer
TPR	Transfer Pricing Report
TRO	Tax Recovery Officer
WHT	Withholding Tax
WOS	Wholly Owned Subsidiary