Global Legal Group

The International Comparative Legal Guide to:

Corporate Tax 2012

A practical cross-border insight to corporate tax work

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The International Comparative Legal Guide to: Corporate Tax 2012

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Chapter 21

India

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1 General: Treaties

1.1 How many income tax treaties are currently in force in India?

India has entered into over 81 comprehensive Double Taxation Avoidance Agreements (DTAAs) and about 15 limited agreements, with respect to merchant shipping and income of airlines. Whilst India does have a DTAA with some tax havens like Mauritius and Cyprus, it does not have DTAAs with many other tax havens like the British Virgin Islands, Cayman Islands, Isle of Man, etc.

Apart from the DTAAs, India has currently entered into Tax Information Exchange Agreements (TIEAs) with various countries such as Bermuda in October 2010, and the Bahamas and the Isle of Man in February 2011.

1.2 Do they generally follow the OECD or another model?

No, they generally follow the UN Model.

1.3 Do treaties have to be incorporated into domestic law before they take effect?

No, as per the authority granted under Section 90 of the Income Tax Act, 1961 (the Act), the Central Government can enter into DTAAs with governments of other countries. In India, it is not necessary to obtain parliamentary approval to enter into DTAAs with other countries. The relevant DTAA comes into force, on a mutually agreed date, by the two participating countries and on the issuance of notification by the Central Government.

1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation of benefits" articles)?

Yes, some DTAAs like the India-UAE and India-USA contain limitation of benefits articles. Further, as stated above, the government is taking several measures to obtain information for controlling tax evasion and taxing unaccounted income by entering into TIEAs with many countries.

Also, recently *vide* Finance Act, 2011, certain anti-avoidance measures have been introduced under the domestic tax laws, by insertion of a new Section 94A under the Act. The objective of introducing this section is to discourage transactions by a resident assessee with persons located in any country or jurisdiction which does not 'effectively' exchange information with India. The Central Government can now notify such country or jurisdiction as a Notified Jurisdictional Area (NJA). If an assessee enters into a transaction where one of the parties to the transaction is a person located in a NJA, there are several consequences which may then follow which *inter-alia* include: (i) all the parties to the transaction shall be deemed to be the associated enterprises and accordingly all the transfer pricing provisions shall apply to such transaction; and (ii) any payment made to a person located in the NJA shall be liable to withholding tax at the rate in force under the Act / DTAA or at 30%; whichever is higher, etc.

1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

Not at present. However, if the provisions of domestic law are more favourable to the assessee, compared to the treaty provision, then as per Section 90(2) of the Act, the provision of the Act will apply to the extent they are more beneficial to the assessee.

The Direct Tax Code Bill, 2010 (DTC), which is proposed to be introduced from 1 April 2012, contains specific treaty override provisions in cases where general anti-avoidance rules (GAAR), controlled foreign company (CFC) and branch profit tax provisions are invoked/levied.

2 Transaction Taxes

2.1 Are there any documentary taxes in India?

Yes. Stamp duty is payable on all instruments listed in the schedule of the relevant Stamp Act. This schedule is broad enough to cover most types of instruments. In India, most of the states have their respective Stamp Acts listing the instruments liable to stamp duty, in the absence of which the provisions of the Indian Stamp Act, 1899, which is a central legislation, will apply.

2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

Yes. Domestic sale of goods are taxed under separate legislations, i.e. the state Value Added Tax Acts (VAT Act/s) and the Central Sales Tax Act, 1956 (CST Act), depending on whether the goods are sold within a state or between two states.

Goods which are sold within a state are taxed in accordance with, and at the rate specified in, the relevant state VAT Act. Rates under VAT Acts vary depending on the nature of goods. For e.g., under the Maharashtra VAT Act, the general rate of VAT is 12.5%.

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However, certain specified goods are taxed at a lower rate of 1% (e.g. precious metals and stones) or 5% (e.g. IT products, industrial inputs) or at a higher rate of 20% - 30% (e.g. liquor, tobacco).

Goods which are sold between two states are taxed in accordance with and at the rate specified in the CST Act; 3%. This rate is, however, applicable to a sale of goods between two registered dealers only. If goods are sold by a registered dealer in one state to a person in another state who is not a registered dealer, then generally the rate of tax is that which is specified in the local VAT Act.

Presently 32 states and union territories have implemented VAT laws. The remaining three union territories of Andaman and Nicobar Islands, Chandigarh and Lakshadweep are governed by the Central Sales Tax Act, 1956.

2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

VAT is levied only on the sale of movable goods. Immovable properties are excluded from the purview of VAT. Further, VAT laws of various states provide exemption to various classes of goods.

Service tax is levied on the provision of certain notified services under the Finance Act, 1994, as amended from time to time by subsequent Finance Acts.

2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

Yes, it is generally recoverable by all businesses by means of input credit. For availing the input credit, a dealer has to be a registered dealer for the purpose of VAT laws. However, an input tax credit is not allowed in certain cases such as taxes paid in other states, taxes paid in respect of exempt goods, goods transferred as gifts, etc.

2.5 Are there any other transaction taxes?

Yes, securities transaction tax is levied on sale and purchase of listed securities and units of some mutual funds, dividend distribution tax on the distribution of profits by the company, research and development cess on import of technology, etc.

2.6 Are there any other indirect taxes of which we should be aware?

Yes, there are several other indirect taxes payable in India as provided hereunder:

- custom duty payable on importation of goods;
- anti-dumping and safe guard duties;
- excise duty on manufacture of goods;
- property tax on immovable properties;
- *octroi* and entry tax on transport of goods between certain city/area limits;
- entertainment tax on exhibition, horse races etc.; and
- luxury tax on hospitality services such as hotels, lodging houses, clubs, etc.

3 Cross-border Payments

3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Section 115-O of the Act states that in addition to the income tax chargeable in respect of the total income of a domestic company for any assessment year, any amount declared, distributed or paid by such company by way of dividends shall be charged at an additional income tax at the rate of 15% plus applicable surcharge and education cess thereon.

Further, under the provision of Section 10(34) of the Act, dividend income is exempt in the hands of a recipient, including a non-resident. Hence, no withholding tax is imposed on any company for payment of dividend to its shareholders. However, if a non-resident shareholder receives dividend on which dividend distribution tax has not been paid for any reason, income tax is payable at the rate of 20% plus an applicable surcharge and education cess thereon under the provision of Section 115A(1)(a)(i). This would need to be withheld when remitting the dividends.

3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Yes. Under the Act, the withholding tax rate on royalties paid to non-residents is 10% plus applicable surcharge and education cess thereon if such payment is made pursuant to an agreement entered into after 1 June 2005. However, in case there is a DTAA which provides for a more favourable withholding tax rate than provided under the Act, the non-resident payee may opt to be governed by the provisions of the relevant DTAA. For e.g. India-UAE DTAA provides for a tax rate of 10%, thus reducing the tax marginally since surcharge and cess are not included.

3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Yes. Under the Act, the withholding tax rate on interest paid to non-residents is 20% plus applicable surcharge and education cess thereon, subject as above to a lower withholding provided in any applicable DTAA. For example, the India-Singapore DTAA provides for the withholding tax rate of 10% in case the interest arises from a loan granted by a bank carrying out the *bona fide* banking business or by a similar financial institution and a withholding tax rate of 15% in all other cases.

3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

No, presently India does not have any thin capitalisation rules. However, the DTC proposes to introduce the concept of thin capitalisation rules in the Indian tax regime in a limited manner. These rules are being introduced under the GAAR provisions in order to restrict the tax evasion by companies who infuse more debt than equity by allowing for re-characterisation of debt into equity and *vice-versa*.

3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

No, India does not have a safe harbour regime at present. However, Section 92CB of the Act gives power to the Central Board of Direct

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Taxes (CBDT) to make safe harbour rules for the purposes of determination of arm's length price under transfer pricing regulations but no such rules have been notified till date.

3.6 Would any such "thin capitalisation" rules extend to debt advanced by a third party but guaranteed by a parent company?

Not applicable at present. Once the DTC is notified, the new rules will have to be studied to determine the effect.

3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

Interest payable to an offshore associated enterprise must comply with the arms length principles under current transfer pricing regulations.

3.8 Does India have transfer pricing rules?

Yes, Section 92 to 92F of the Act deals with the provisions relating to transfer pricing. These rules currently apply only to international transactions among associated enterprises.

4 Tax on Business Operations: General

4.1 What is the headline rate of tax on corporate profits?

The rate of tax for corporate profits of a domestic company is 30% plus an applicable surcharge and education cess thereon. For the financial year 2011-2012, the surcharge is 5% on the base rate if the total income is in excess of INR 10,000,000 (10 million) and education cess is 3% on the base rate and surcharge.

The rate of tax on corporate profits of foreign companies is 40% plus an applicable surcharge and education cess thereon. For the financial year 2011-2012, the surcharge is 2% on the base rate if the total income is in excess of INR 10,000,000 (10 million) and education cess is 3% on the base rate and surcharge.

Further, Section 115JB provides for levy of Minimum Alternate Tax (MAT) where the tax liability of a company (Indian or foreign) under the normal provisions of the Act is lower than 18.5% of the book profit, and thus the book profit of the company shall be deemed as total income of the company and 18.5% of book profit shall be deemed as tax liability.

4.2 When is that tax generally payable?

Advance tax is payable under Section 211 of the Act, based on the estimate of corporate profits on or before the following dates each year:

- on or before 15 June – not less than 15% of such advance tax;
- on or before 15 September – not less than 45% of such advance tax, reduced by the amount, if any, paid by the earlier instalment;
- on or before 15 December – not less than 75% of such advance tax, reduced by the amount, if any, paid in the earlier instalment or instalments; and
- on or before 15 March – the whole amount of advance tax as reduced by the instalments, if any, paid in the earlier instalment or instalments.

Any shortfall in advance tax is required to be paid by 31 March, failing which at the time of filing tax returns, interest is to be paid along with the return at the prescribed rates. Tax returns are required to be filed by companies within six months of the end of the financial year, i.e. by 30 September of each year and by 30 November, where the company is required to furnish a report from an accountant under Section 92E of the Act pertaining to international transaction(s).

4.3 What is the tax base for that tax (profits pursuant to commercial accounts subject to adjustments; other tax base)?

The tax payable is on net profits pursuant to the commercial accounts. Some items of expenditure may be disallowed or reduced if the rates of deduction prescribed in the Act are different than the rates used in the commercial accounts. For example, in case of depreciation, it may be calculated on a straight line method for accounting purposes, whereas, the Act provides that for computing profits for income tax purposes, the depreciation shall be calculated on a written down value method and also the rates for depreciation provided under the Act are different than the rates used in the commercial accounts.

4.4 If it otherwise differs from the profit shown in commercial accounts, what are the main other differences?

Please refer to our response to question 4.3. Also the provisions on MAT as described in response to question 4.1 may become applicable.

4.5 Are there any tax grouping rules? Do these allow for relief in India for losses of overseas subsidiaries?

No, each company is treated as an independent entity for tax purposes.

4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

No. However, an additional tax, i.e. dividend distribution tax (DDT) is required to be paid by a domestic company on distribution of its profits to the shareholders at the rate of 15%. Once the DDT is paid by the company on the distributed profits, the shareholder is no more liable to pay tax on the distributed income. Refer to our response to question 3.1 above for details.

4.7 Are companies subject to any other national taxes (excluding those dealt with in "Transaction Taxes") - e.g. tax on the occupation of property?

No material other national taxes.

4.8 Are there any local taxes not dealt with in answers to other questions?

There are certain property and municipal taxes which vary from state to state.

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5 Capital Gains

5.1 Is there a special set of rules for taxing capital gains and losses?

Yes, part 'E' of Chapter IV of the Act specifically deals with capital gains. The rate of taxes is different based on various circumstances like period of holding the asset, the nature of asset, etc.

The rate of tax on capital gains is determined on the basis of whether the capital gain would qualify as a short-term capital gain or a long-term capital gain under the Act. Capital gains arising as a result of transfer of a capital asset within 36 months are considered short-term capital gains and capital gains arising from transfer of assets after 36 months (in case of shares the period is reduced to 12 months from 36 months) are considered long-term capital assets. A long-term capital gain is taxed at the rate of 20% and a short-term capital gain is taxed at the normal income tax rates.

5.2 If so, is the rate of tax imposed upon capital gains different from the rate imposed upon business profits?

Yes, the rate of tax imposed upon capital gains is different from the rate imposed upon business profits except in the case of short-term capital gains (other than short-term capital gains from listed securities), where the rate of tax imposed is the same.

5.3 Is there a participation exemption?

Yes. Capital gains from the sale of shares listed on a stock exchange are exempt, provided that securities transaction tax has been paid. Exemption from capital gains may be available to an investor under the provisions of the relevant DTAA. For example, under the India-Mauritius DTAA, capital gains arising in the hands of a Mauritius resident company from the sale of shares held by it in an Indian company would be subject to tax only in Mauritius and not in India. Similar exemptions apply under the India-Cyprus DTAA and India-Singapore DTAA, subject to certain conditions.

5.4 Is there any special relief for reinvestment?

Yes. Exemptions are available if the capital gains are from the sale of long-term assets and are invested in specified assets and in some cases also in residential properties. For example, long-term capital gains arising from the sale of a residential house property are exempted from tax if such gains are reinvested to acquire another residential house property, subject to certain conditions.

6 Local Branch or Subsidiary?

6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

Stamp duty and registration fees are chargeable on the charter documents of the company, i.e. the Memorandum of Association and Articles of Association at the time of its formation.

6.2 Are there any other significant taxes or fees that would be incurred by a locally formed subsidiary but not by a branch of a non-resident company?

A subsidiary of a foreign company incorporated in India is treated on par with an Indian entity for corporate income tax and the tax rates and exemptions as applicable to a domestic company would equally apply to a subsidiary of a foreign company. A subsidiary also has to pay DDT on profits repatriated to its shareholders. A branch though taxable in the first instance at a higher rate does not need to pay any DDT on repatriation of profits.

6.3 How would the taxable profits of a local branch be determined?

The taxable profits would be calculated in the same manner as the profits of a domestic company but taxable at the rate prescribed for foreign companies, which is currently 42.024% (inclusive of surcharge and education cess). A branch can however repatriate its net profit after tax to its parent company without payment of DDT, unlike a company which has to pay DDT.

6.4 Would such a branch be subject to a branch profits tax (or other tax limited to branches of non-resident companies)?

Not at present. However, the DTC proposes to introduce the concept of branch profit tax at the rate of 15% on the branch profits of a financial year.

6.5 Would a branch benefit from tax treaty provisions, or some of them?

No, the branch not being an entity in itself is at the very first instance not liable to be taxed as a resident of the country in which it is situated. It is the parent company of the branch which will be taxed to the extent of its profits attributable to the branch in India. Further, under the DTC, it is proposed that the provisions dealing with branch profit tax will override the DTAA provisions.

6.6 Would any withholding tax or other tax be imposed as the result of a remittance of profits by the branch?

Not under the present Act.

7 Overseas Profits

7.1 Does India's tax profits earned in overseas branches?

Yes, under the provisions of the Indian tax laws a resident is taxed on its global income. Under Section 5 of the Act, a resident is taxed on the income which is received or deemed to be received by him in India, accrues or arises or is deemed to accrue or arise to him in India and the income which accrues or arises to him outside India. Hence, India does tax a resident company on profits earned in its overseas branches.

7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

Yes, the receipt of dividends by a local company from a non-resident company is taxable in the hands of the local company at the applicable corporate rate of tax, which is currently 32.445% (inclusive of surcharge and education cess).

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7.3 Does India have "controlled foreign company" rules and if so when do these apply?

No, not presently existing under the domestic tax laws. However, the DTC proposes to introduce CFC rules. Under the DTC, income (computed in accordance with the specified formula) attributable to a controlled foreign company will be included in the total income of the resident assessee and taxed in India as a residuary source of income at the applicable corporate rate of tax. These provisions will override the provisions of the DTAA and will apply in case of foreign companies, which satisfies the following conditions:

- for the purposes of tax, it is a resident of a territory with lower rate of taxation;
- the shares of such company are not listed on any stock exchange recognised by law of such territory;
- persons, resident in India, exercise control over the company;
- it is not engaged in active trade or business; and
- the specified income of the company determined in accordance with a specified formula exceeds INR 25,00,000 (2.5 million).

8 Anti-avoidance

8.1 Does India have a general anti-avoidance rule?

No, not presently existing under the domestic tax laws. However, the DTC proposes to incorporate GAAR for the first time in India. GAAR provisions will provide almost sweeping powers to the tax authorities and will empower them to declare any arrangement (a step in or a part of or the whole of) as an "impermissible avoidance arrangement", provided the same has been entered into with the objective of obtaining tax benefit and satisfy any one of the following conditions:

- it is not at arm's length;
- it represents misuse or abuse of the provisions of the DTC;
- it lacks commercial substance; or
- it is carried out in a manner not normally employed for *bona fide* business purposes.

If introduced as per the present proposal, GAAR will override the provisions of the DTAA.

8.2 Is there a requirement to make special disclosure of avoidance schemes?

No, there is not.

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