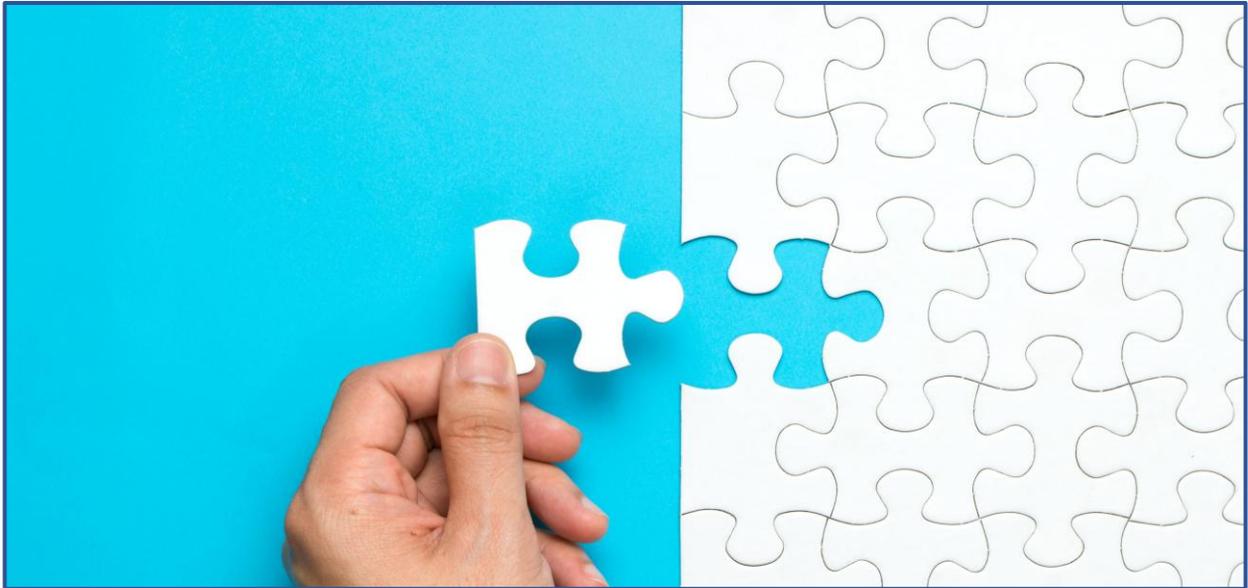


TAX MATTERS

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DID YOU KNOW?



After analysis of the New Income Tax Bill, 2025 by the Select Committee and considering the suggestions received from various stakeholders, the New Bill was reintroduced in the Lok Sabha and has been passed on the same day. The New Bill is to be effective from 1 April 2026.

The team at JMP Advisors is pleased to bring to you a gist of some of the significant developments in the direct tax space during July 2025:

Income tax rulings

➤ **Supreme Court emphasizes 'substance over form', observes that pervasive and enforceable control over Indian operations is sufficient to constitute a Permanent Establishment**

- Hyatt International Southwest Asia Ltd vs Additional Director of Income Tax ¹

The taxpayer is a tax resident of UAE and engaged in providing strategic planning, operational oversight, branding and performance management services to Indian hotel owners vide a Strategic Oversight Service Agreement ('SOSA'). The taxpayer filed a 'Nil' return of income for Financial Year ('FY') 2008-09 contending that the India UAE DTAA did not contain a specific Article to tax Fees for Technical Services ('FTS') and the taxpayer did not constitute a Permanent Establishment ('PE') in India.

Pursuant to scrutiny proceedings, the tax officer, relying on the judgment of the Hon'ble Supreme Court ('SC') in the case of Formula One World Championship Limited² held that the taxpayer had a fixed place of business in India, thereby constituting a PE as per the India UAE DTAA. The Delhi Tribunal as well as the Delhi High Court ('Delhi HC') upheld the position of the tax officer.

On appeal by the taxpayer, the Hon'ble SC had the following key observations in holding that a PE was constituted in India:

- i. The SOSA allowed the taxpayer to exercise pervasive and enforceable control over the hotel's strategic, operational and financial dimensions. The agreement vested the taxpayer with the powers to appoint and supervise key personnel,

implement human resources, control pricing, branding and marketing strategies, manage bank accounts and assign personnel to the hotel. The terms of the SOSA indicated active participation vested the taxpayer with the powers to appoint and supervise key personnel, implement human resources, control pricing, branding and marketing strategies, manage bank accounts and assign personnel to the hotel. The terms of the SOSA indicated active participation by the taxpayer in the core operational activities and essential functions of the hotel. The taxpayer was not merely involved in advisory activities but in administrative functions, establishing control over day-to-day operations. Hence, the functions performed by the taxpayer cannot be said to be preparatory or auxiliary in nature.

- ii. The Hon'ble SC relied on the observations in the case of Formula One wherein it was expressly held that exclusive possession is not essential for constituting a PE in India. If the premises in substance are at the disposal of the taxpayer and are used for conducting its core business operations, the taxpayer would constitute a PE in India.
- iii. The OECD commentary discusses that a fixed place PE through which business is carried on must satisfy the term 'disposal test' for it to constitute a PE. Though OECD commentary does not define the term 'disposal test', it

¹ Civil Appeal No 9767 to 9773 of 2025

² [2017] 80 taxmann.com 347 (SC)

clarifies that the duration of access is not determinative. It further emphasises three key features of a PE i.e., stability, productivity and dependence. The duration of the SOSA of 20 years coupled with the taxpayers' continuous and functional presence satisfies the core tests discussed in the OECD commentary.

- iv. Article 5 of the DTAA deals with continuity of business presence and not the length of stay of each individual employee. Hence, though no individual employee exceeded the threshold of stay of nine months in India, there was continuous and co-ordinated engagement resulting in the constitution of a PE.

In addition to the above, a reference was made earlier to a larger bench of the Delhi HC to determine whether any profits can be apportioned to the PE in India if the group has incurred a loss on a global level. The Hon'ble SC held that the taxation of a PE is to be determined independently, based on its own activities and not on the basis of the group's 'global income'. The 'source rule' dictates that the source State (where the PE is located) has the right to tax the PE's income and this right is not dependent on the global financial position of the entity. The court has held that PE is to be treated as a distinct and separate taxable entity and its tax liability must be determined solely based on its own operations and functions carried out within the source country.

Accordingly, the Hon'ble SC held that the taxpayer would constitute a PE in India and the income received under the SOSA is attributable to the Indian PE independent of the global profits or loss.

JMP Insights - The judgment offers crucial insights into the evolving landscape of PE taxation in India. It solidifies the 'disposal test' stating that a foreign entity can constitute a PE if local premises are 'at its disposal' even without formal ownership or rent, provided there is significant control. The Court emphasized 'substance over form' holding that the taxpayer's 'pervasive and enforceable control' over the Indian hotel's operations including staffing, pricing and financial management went beyond mere advisory services, establishing a PE.

Moreover, the determination of a PE for service providers hinges on the overall 'continuity of business presence in aggregate' through its personnel, rather than on the limited stay of individual employees. Significantly, the ruling affirms that profits can be attributed to a PE in India and taxed, irrespective of the foreign enterprise's global profit or loss, treating the PE as an independent taxable entity.

➤ **E-invoicing platform services not considered as FTS in the absence of fulfilment of the 'make available' condition under the India-UK DTAA**

- Tungsten Automation England Limited vs Deputy Commissioner of Income Tax³

The taxpayer is a tax resident of UK and is engaged in providing electronic invoicing platform services to an Indian entity, which in turn renders services to its non-resident clients. The taxpayer's electronic invoicing platform enables automatic generation of e-invoices compliant with local laws. The services were provided under a non-exclusive license, providing the Indian entity with limited use of the e-portal without any

transfer of proprietary software source code or technology enabling to independently offer such services.

The tax officer had initiated reassessment proceedings for FY 2016-17 and 2017-18, contending that the amounts received by the taxpayer from the Indian entity amounted to FTS under Article 13 of the India-UK DTAA and hence the said amounts were taxable in India. The tax officer observed that the license and training provided to GIPL made available technical knowledge, experience, skill or know-how to the Indian company, giving it enduring benefits.

The Tribunal upheld the tax officer's view, characterizing the receipts as taxable FTS.

On appeal, the Delhi HC examined the meaning of 'make available' of technical knowledge under the DTAA, relying on the judgements of the Karnataka High Court in case of De Beers India Minerals⁴ (P) Ltd and Delhi HC judgments in case of Guy Carpenter & Co Ltd⁵ and Bio-Rad Laboratories (Singapore) Pte Ltd⁶. The HC highlighted that for receipts to qualify as FTS, the technical or consultancy services must result in the service recipient acquiring the ability to deploy the technology or skill independently in the future without any reliance on the service provider.

The Delhi HC observed that the taxpayer's license was non-exclusive and did not convey rights to the source code of the software or the underlying technology. Further, the training did not enable the Indian entity to generate e-invoices independently after termination of the license. The services were a usage license of the proprietary e-portal with incidental operational training,

insufficient to satisfy the 'make available' condition required to constitute FTS under the India-UK DTAA.

Consequently, the Delhi HC held that the receipts did not constitute fees for technical services under the DTAA and are not taxable in India.

JMP Insights - This ruling reinforces the strict interpretation of the 'make available' condition under the India-UK DTAA for classifying payments as FTS. The Delhi HC clarified that merely granting access to proprietary software and providing operational training does not satisfy the make available criterion unless there is a genuine transfer of technical knowledge, skill or know-how enabling the recipient to independently exploit the technology post-contract. The decision highlights the critical importance of contractual clarity in distinguishing between a license to use software and an actual transfer of technology or know-how, which is pivotal in determining tax liability under cross-border agreements.

➤ **Buyback of shares at face value not taxable under Section 56(2)(viiia)**

- Lupin Investments Pvt. Ltd vs Income Tax Officer⁷

The taxpayer had undertaken a buyback of equity shares at face value and extinguished the shares. Pursuant to scrutiny proceedings, the tax officer made an adjustment to the taxpayer's income, *inter alia*, in respect of the buyback transaction, under Section 56(2)(viiia) of the Income-tax Act, 1961 ('the Act'). The said provision was introduced in the law to tax the difference between actual

⁴[2012] 346 ITR 467

⁵[2012] 20 taxmann.com 807 (Delhi)

⁶(2023) 459 ITR 5

⁷[TS-924-ITAT-2025(Mum)]

consideration for receipt of shares by a firm or a closely held company and the Fair Market Value ('FMV') of such shares. The adjustment under Section 56(2)(viia) of the Act was confirmed by the first appellate authority.

On appeal by the taxpayer, the Mumbai Tribunal ('the Hon'ble Tribunal') observed that Section 56(2)(viia) of the Act was not applicable in the context of buyback of own shares. The Tribunal relied on a co-ordinate bench decision⁸, wherein it was held that section 56(2)(viia) applies only when a taxpayer receives shares as 'property' and specifically when the shares received are of any other company. Further, in the said case, based on the Explanatory Memorandum to the Finance Bill, 2010 in connection with the introduction of Section 56(2)(viia), it is understood that this provision targets the practice of transfer of unlisted shares for prices much lower than their FMV and is aimed at preventing tax avoidance through undervalued transfers.

In the present case, since the shares in question were the taxpayer's own shares being bought back and extinguished, neither of these tests was met. The Hon'ble Tribunal therefore held that for a transaction to fall under the purview of Section 56(2)(viia), there must be a receipt of shares which becomes 'property' in the hands of the recipient, and such shares must be of a company other than the one undertaking the buyback. Hence, the addition in this regard was deleted by the Tribunal.

JMP Insights - This ruling reinforces the principle that the deeming provisions under Section 56(2)(viia) cannot be extended to cover buyback by a company of its own shares, as such shares do not qualify as 'property received' nor are they shares of 'any other company'.

CBDT Circular No. 9/2025 dated 21 July 2025

➤ Relief to Tax Deductors and Collectors in India where PAN was inoperative

The Indian tax authorities have recently issued a Circular to provide much-needed relief to businesses and individuals responsible for deducting or collecting taxes ('TDS/TCS') in India, especially in cases where the Permanent Account Number ('PAN') of the recipient was inoperative due to non-linkage with Aadhaar.

As per the tax law, if the PAN of a payee was not linked with Aadhaar, it was deemed 'inoperative' and the tax deductor or collector was required to withhold tax at a higher rate. This caused several practical difficulties, particularly in cases where the PAN was later regularised, and demands for short deduction or collection were still being raised by tax office.

To address these issues, the new Circular provides that no additional liability will arise for not applying higher TDS/TCS rates, if the PAN becomes operative within timelines specified as under:

- For payments or credits made between 1 April 2024 and 31 July 2025, there will be no penalty for not applying higher rates if the PAN becomes operative on account of linking with Aadhar by 30 September 2025.
- For payments or credits made on or after 1 August 2025, the higher rates will not

apply if the PAN becomes operative within two months from the end of the month in which the transaction occurred.

JMP Insights – It is important to note that this relief is limited to the requirement of applying higher tax rates due to inoperative PANs. The regular provisions for tax deduction or collection continue to apply as per the tax law.

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Should you wish to discuss any of the above issues in detail or understand the applicability to your specific situation, please feel free to reach out to us on coe@jmpadvisors.in.

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JMP Advisors offers advice in international taxation, domestic taxation, transfer pricing, mergers and acquisitions, Goods and Services Tax (GST), business laws and exchange control regulations and foreign investment consulting. We specialize in fiscal strategy, policy foresight and advocacy matters and are trusted advisors to high net worth families. Our team at JMP Advisors takes pride in being the best at what matters most to clients - technical expertise, innovative solutions, consistent, high quality service, reliability and ease of doing business.

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