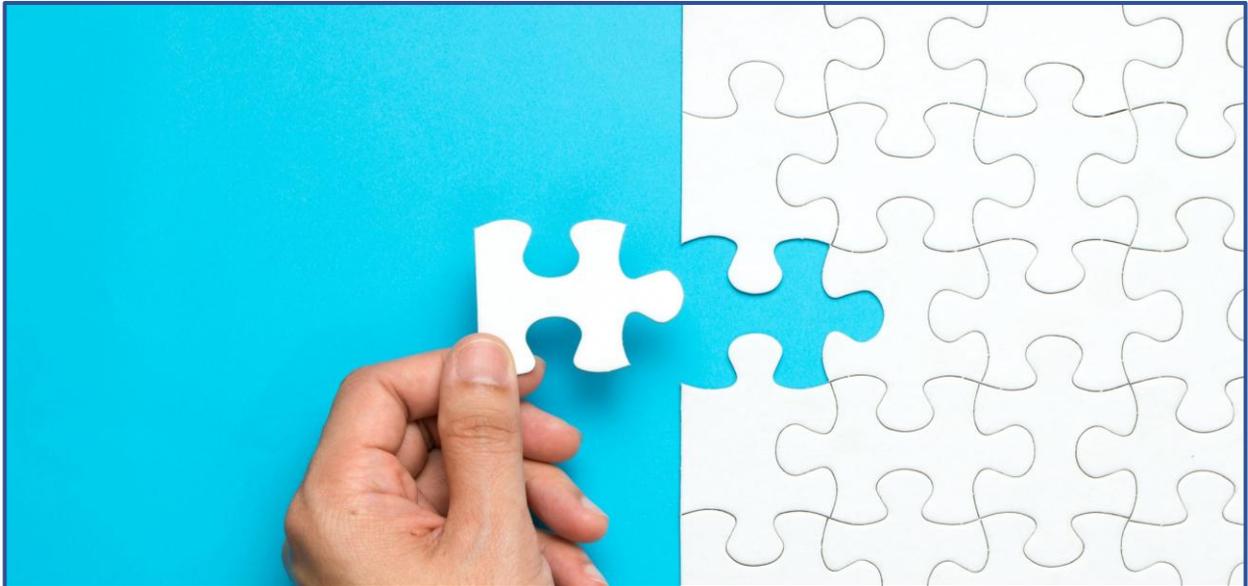


TAX MATTERS

Issue number: 01/2026

09 January 2026



Contents

- **Restriction on deduction of Head Office expenses of non-residents under Section 44C of the Income-tax Act**
- **Bombay High Court rules that Dividend Distribution Tax is subject to DTAA rate**
- **Delhi HC confirms Remote/virtual services alone do not create Permanent Establishment in India**
- **Non-resident long-term capital gains taxed under normal provisions overriding detailed computation methods**
- **MCA relaxes Director KYC norms with three years cycle**

DID YOU KNOW?



The Ministry of Corporate Affairs ('MCA') has amended the definition of a 'Small Company' effective 1 December 2025, increasing the paid-up capital limit from INR 40 Million to INR 100 Million and the turnover limit from INR 100 Million to INR 1000 Million. However, public companies, holding and subsidiary companies, Section 8 companies and entities governed by special Acts will continue to remain outside the scope of the definition, regardless of their capital or turnover. The revised definition reduces compliance requirements by expanding the definition of a 'small company'.

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 December 2025:

Income tax rulings

➤ **Restriction on deduction of Head Office expenses of non-residents under Section 44C**

- DCIT vs American Express Bank Limited¹

The taxpayer is a non-resident banking company domiciled in the USA, carrying on business in India through its branches.

During Financial Year ('FY') 1996-97, the Head Office ('HO') in USA incurred expenses of approximately INR 63.91 Million on the solicitation of business (i.e. deposits from non-resident Indians) for its Indian branch and of approximately INR 135.09 Million exclusively for its Indian branches. The taxpayer filed its income tax return by claiming deduction under Section 37(1) of the Income-tax Act, 1961 ('the Act') for the aforesaid expenses, considering that to be expenses incurred wholly and exclusively for the purpose of Indian operations.

During assessment, the tax officer restricted the deduction to 5% of the Gross Total Income under Section 44C of the Act, which imposes a statutory ceiling on HO expenses for non-resident.

- The tax officer held that Section 44C of the Act, being a non-obstante provision, overrides other provisions of the Act and prevents excessive claims of HO expenditure, irrespective of actual expenses incurred.
- The purpose of inserting Section 44C of the Act was to address the difficulties encountered in scrutinising the books of account maintained outside India.
- The definition of Head Office expenses includes all kinds of expenses of any office outside India.

The taxpayer contended that the expenses in contention could not be treated as HO expenditure under Section 44C of the Act, as the expenses were incurred wholly and exclusively for Indian operations and did not relate to business outside India.

The Tribunal, and subsequently the Bombay High Court ('HC'), following the decision in *Emirates Commercial Bank Ltd.*², accepted the taxpayer's contention, holding that where actual HO expenses attributable to Indian operations are ascertainable, the restriction under Section 44C does not apply.

The issue before the Supreme Court ('SC') related to interpretation of Section 44C - whether it merely covered 'common expenditure' incurred by the HO attributable to the taxpayer's business in India or would it also include 'exclusive expenditure' incurred by the HO for the Indian branches.

The SC examined the scope and purpose of Section 44C of the Act and held that it imposes a statutory limitation. Being a non-obstante provision, Section 44C of the Act overrides Sections 28 to 43A of the Act for computing HO expenditure of non-resident taxpayers. The SC clarified that 'head office expenditure' is not limited to common expenses across branches and requires two conditions, the expenditure must be incurred outside India and must relate to executive or general administrative expenses.

The SC observed that the language of Section 44C of the Act is clear and unambiguous and does not permit any deduction beyond the ceiling prescribed. Clause (c) of Section 44C of Act provides for computation of head office expenditure on an actual basis, covering all expenditure attributable to the business in India. The deduction is restricted to the lower of (i) 5% of the adjusted total income or (ii) the amount

¹ TS-1655-SC-2025

² 262 I.T.R 55

of head office expenditure attributable to the India business.

The SC further observed that the distinction between common and exclusive expenditure under Section 44C of the Act in *Emirates Commercial Bank's* case does not establish that the expenditure covered by section is of a common nature. It further noted that the taxpayer's contention of a conceptual difference between 'attributable' and 'exclusive' expenditure is unsustainable, as exclusive expenditure is inherently a form of attributability and must be treated as part of attributable expenditure under clause (c) of Section 44C of the Act.

The SC also clarifies the taxpayer's reliance on the 1976 Finance Bill Memorandum's reference to 'a proportion of the general administrative expenses' related to allocation of collective expenses and not to expenses exclusively for the Indian branch. It noted that under Article 7(3) of the India-USA DTAA, deductions for a permanent establishment in India are permissible but governed by the limits of Section 44C of the Act. The provision was introduced to limit deductions, avoid disputes over attribution of HO expenses and safeguard the Indian tax base from inflated or unverifiable claims.

Based on the above reasoning, the SC allowed the appeal filed by the tax department, set aside the judgments of the Tribunal and the HC, and held that the deduction of HO expenses claimed by the taxpayer must be restricted in accordance with Section 44C of the Act.

JMP Insights – *This judgment establishes that Section 44C imposes a limit on the deduction of head office expenses for non-residents operating in India. It clarifies that even when actual expenses can be specifically identified and attributed to Indian operations, the statutory limit cannot be breached. At the same time, Article for attribution of profits and non-discrimination in*

the relevant tax treaty provisions must be independently examined. The SC has reinforced the legislative intent to ensure certainty, uniformity and protection of the Indian tax base, significantly impacting foreign banks and multinational enterprises operating through branches in India.

➤ **Bombay High Court rules that Dividend Distribution Tax is subject to DTAA rate**

- Colorcon Asia Private. Ltd. vs. Pr. CIT³

The taxpayer, an Indian company wholly owned by a United Kingdom ('UK') resident company, distributed dividends to its UK parent during FY 2015-16, 2016-17 and 2017-18 and discharged Dividend Distribution Tax ('DDT') under section 115-O of the Act at the domestic rates in force.

The taxpayer approached the Board for Advance Rulings ('BFAR') contending that since the dividend income was governed by Article 11 of the India-UK DTAA, the DDT levy should be restricted to the treaty-prescribed rate. The BFAR rejected the application, holding that the DTAA could not limit DDT, relying particularly on the Special Bench decision in the case of *Total Oil India Pvt. Ltd.*⁴, which treated DDT as outside the scope of 'taxes covered' by the India-UK DTAA. Aggrieved by the ruling, the taxpayer filed a writ before the Hon'ble Bombay HC.

The issue before the Bombay HC was whether DDT under section 115-O of the Act is subject to India-UK DTAA provisions or is it exclusively governed by domestic provisions under the Act.

The Bombay HC held that DDT is a tax on dividend income of the shareholder, the incidence of which has merely been shifted to the distributing company for administrative

³ TS-1623-HC-2025(BOM)

⁴ TS-197-ITAT 2023 (Mum)

convenience. The Bombay HC observed that the levy of additional income-tax under section 115-O of the Act derives its authority from the charging provision contained in section 4 of the Act, which covers income-tax including additional income-tax on total income. Accordingly, DDT is treated as 'tax' for the purposes of the Act. It further observed that 'Income' as defined in section 2(24) of the Act specifically includes dividend and therefore tax on dividend income clearly falls within this charging framework. Once it is regarded and is covered by section 4, it necessarily becomes subject to section 90 of the Act and therefore, to the provisions of the applicable tax treaty.

The Bombay HC emphasised that Article 11 of the India-UK DTAA focuses on the nature of income (dividend) and not on the person from whom the tax is collected. It rejected the tax officer's contention that treaty protection is unavailable merely because tax is collected at the level of the company and not the shareholder. The Bombay HC reiterated the settled principles of treaty interpretation laid down in *Azadi Bachao Andolan*⁵, namely that treaties must be interpreted in good faith, in light of their object and purpose and unilateral domestic amendments cannot dilute treaty obligations.

The Bombay HC observed that conditions of Article 11 of India UK DTAA - Dividends related to payment and beneficial ownership for treaty applicability were satisfied and dividends were paid by an Indian resident company to a UK resident company which was the beneficial owner of the dividends. Accordingly, the tax on such dividend income could not exceed the 10% ceiling provided under Article 11(2) of the India-UK DTAA

Consequently, the Bombay HC set aside the

BFAR ruling and held that the taxpayer was entitled to the DTAA rate limitation on DDT. DDT collected in excess of the treaty-prescribed rate was declared unlawful, with the HC observing that retention of such excess tax would violate Article 265 of the Constitution of India. The Bombay HC thus conclusively held that DDT is covered by the India-UK DTAA and is subject to the treaty rate restriction and cannot exceed the rate stipulated in the applicable treaty.

JMP Insights – *The recent landmark ruling is expected to significantly influence the interpretation of India's DTAA's concerning dividends and the credit for DDT. The judgment has undoubtedly tilted the scales in favour of taxpayers by affirming that provisions of DTAA restricting the tax rate on dividends to 10% would override the domestic rate prescribed under Section 115-O for payment of DDT. Consequently, companies that have paid DDT in excess of the treaty rate should be entitled to claim a refund of the differential amount, in accordance with the procedures and mechanisms prescribed or permissible under law.*

<<This space is left blank intentionally>>

➤ Delhi HC confirms Remote/virtual services alone do not create Permanent Establishment in India

- CIT vs. Clifford Chance Pte Ltd⁶

The taxpayer, a Singapore resident law firm, engaged in rendering legal advisory services. The taxpayer claimed relief under the India-Singapore DTAA and contended that it did not have a Service Permanent Establishment ('PE') in India since the physical presence of employees rendering services in India did not exceed the 90-day threshold under Article 5(6) of the India-Singapore DTAA. The taxpayer submitted timesheets, leave records and declarations to show that although the employees were present in India for 120 days, only 44 of those days involved furnishing services in India, after excluding vacation, business development and overlapping common days.

The tax officer contended that the taxpayer constituted a Service PE in India that Article 5(6) of the India-Singapore DTAA does not require physical presence and asserted that services rendered virtually beyond 90 days create a taxable presence in India. Tax Officer referred to the decision in Hyatt International Southwest Asia⁷ Ltd to contend continuity of service of employees for the establishment of a PE. The tax officer further contended that leave taken for vacation could not be excluded.

The Tribunal ruled in favour of the taxpayer, holding that DTAA requires services to be furnished in India through employees physically present in India. Only days of actual service activity could be counted toward the 90-day threshold.

The Delhi HC held that Article 5(6) of India Singapore DTAA mandates physical performance of services in India and that services rendered remotely from outside India do not constitute a PE. The Delhi HC

rejected the virtual PE theory, stating that tax treaties must be strictly interpreted and courts cannot read concepts not expressly provided in treaties. Accordingly, the HC held that the taxpayer did not have either a Service PE or a Virtual Service PE in India.

JMP Insights – This judgment strengthens certainty for cross-border service providers by confirming that PE exposure arises only where the treaty conditions are expressly satisfied and not based virtual presence.

➤ Non-resident long-term capital gains taxed under normal provisions overriding detailed computation methods

- Income Tax Officer vs Godrej Agrovvet Limited⁸

The taxpayer, an Indian resident is engaged in the business of manufacturing and marketing animal feed, agricultural inputs and allied products. During FY 2015 -16, the taxpayer acquired equity shares of Creamline Dairy Products Ltd., an unlisted Indian company, and Astec Lifesciences Limited, a listed company from non-resident individual shareholders.

The taxpayer remitted the consideration to the non-residents towards the transfer of shares and deducted tax at source ('TDS') at the rate of at 10% (plus applicable surcharge and cess under Section 112(1)(c)(iii) of the Act in respect of unlisted shares and in accordance with the first proviso to Section 112 of the Act in respect of listed shares.

During assessment proceedings, the tax officer held that TDS ought to have been deducted at a higher rate by applying the computation mechanism contained in the first

⁶ TS-1603-HC-2025(DEL)

⁷ [2025] 176 taxmann.com 783 (SC)

⁸ TS-1682-ITAT-2025(Mum)

and second provisos to Section 48 of the Act and accordingly, treated the taxpayer as an 'assessee in default' under Section 201(1) of the Act.

Aggrieved by the order passed under Section 201 of the Act, the taxpayer filed an appeal before the Commissioner of Income Tax ('CIT'), who allowed the appeal. On further appeal by the tax officer, the Tribunal held that Section 112(1)(c)(iii) of the Act is a substantive charging provision that specifically prescribes the rate of tax applicable to Long-Term Capital Gains ('LTCG') arising to non-residents.

The Tribunal clarified that the first and second provisos to Section 48 of the Act merely lay down the mode of computation of capital gains and cannot be invoked to override or modify the concessional rate of tax expressly prescribed under Section 112 of the Act. The Tribunal rejected the tax officer's contention that indexation or foreign currency computation under Section 48 of the Act could result in a higher effective rate of tax for withholding purposes.

The Tribunal observed that Section 112(1)(c)(iii) of the Act applies to LTCG from transfer of unlisted shares and the first proviso to Section 112 of the Act in respect of listed shares are taxable at 10% (plus applicable surcharge and cess) for transfers made prior to 23 July 2024. As the taxpayer had withheld tax in accordance with the provision of the Act, it had fully complied with its withholding obligations.

Accordingly, the Tribunal held that the directions of the CIT were in accordance with the statutory framework and that the taxpayer could not be treated as an 'assessee in default' under Section

201(1) of the Act.

JMP Insights – *The Tribunal clarified that the tax rate specifically prescribed for non-resident capital gains takes precedence over computational provisions. While the first and second provisos to the Section 48 provide the method for calculating capital gains (including adjustments like indexation or currency conversion), they cannot be used to increase the tax rate. The ruling further clarifies that this position applies to transfers effected prior to 23 July 2024, given that the tax rates have since been aligned.*

➤ **MCA relaxes Director KYC norms with three years cycle**

The Ministry of Corporate Affairs, vide notification dated 31 December 2025, has relaxed the compliance requirements for Directors of company by amending the Companies (Appointment and Qualification of Directors) Rules, 2014. Key changes include:

- Director KYC filing reduced from an annual exercise to once in every three FYs
- A single web-based Form 'DIR-3-KYC-Web' introduced for KYC, updating details and DIN reactivation. Directors holding a DIN as on 31 March must file DIR-3-KYC-Web by 30 June of the immediately following third year
- If there is any change in mobile number, email ID or residential address, the director must update the details within 30 days by filing DIR-3-KYC-Web

The amended Director KYC provision shall come into force from 31 March 2026.

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.

JMP Advisors Private Limited

12, Jolly Maker Chambers II, Nariman Point, Mumbai 400 021, India

E: info@jmpadvisors.in, W: www.jmpadvisors.com

Follow us on 

Recognised consistently as a leading tax and transfer pricing firm in India, inter alia, by ITR in the 2026 Directory!

About JMP Advisors

JMP Advisors is a leading professional services firm that offers advisory, tax and regulatory services. The vision of JMP Advisors is to be 'The Most Admired Professional Services Firm in India'. It aims to be the best as measured by the quality of its people and service to clients. The firm has a merit based culture and operates to the highest standards of professionalism, ethics, and integrity. Jairaj (Jai) Purandare, the Founder Chairman has over four decades of experience in tax and business advisory matters and is an authority on tax and regulation in India. Jai was Regional Managing Partner, Chairman - Tax and Country Leader - Markets & Industries of PricewaterhouseCoopers India. Earlier, Jai was Chairman of Ernst & Young India and Country Head of the Tax & Business Advisory practice of Andersen India.

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.

JMP Advisors has been consistently recognized as a leading Tax firm in India, *inter alia*, in the International Tax Review (Euromoney) World Tax Directory for all successive years since incorporation, including the 2026 Directory.

Disclaimer

This material and the information contained herein is of a general nature and is not intended to address specific issues of any person. Any person acting on the basis of this material or information shall do so solely at his own risk. JMP Advisors Private Limited shall not be liable for any loss whatsoever sustained by any person who relies on this material or information.

© JMP Advisors Pvt Ltd 2025

