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SUBMISSIONS TO THE HIGH LEVEL COMMITTEE HEADED BY JUSTICE AP SHAH, TO EXAMINE THE MATTER RELATING TO LEVY OF MAT ON FIIS FOR THE PERIOD PRIOR TO 01.04.2015

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EXECUTIVE SUMMARY

The present submissions seek to analyse the legal basis to levy the Minimum Alternate Tax (MAT) upon Foreign Institutional Investors (FIIs) for transactions prior to 01.04.2015 keeping in mind the legislative history of the MAT under the Income Tax Act, 1961 ("the Act"), the Double Taxation Avoidance Agreements (DTAAs) which India has entered into and the judgments and orders of the appropriate courts.

The legislative history of the MAT, from the time it was first introduced by the Finance Act, 1983, to the present version contained in Section 115JB of the Act suggests that it was never intended to apply to any and all foreign companies that may have some income arising or accruing in India. It was always intended to apply only to Indian companies which, despite making profits, did not pay any income tax as a result of availing exemptions under the Act. The only foreign companies which were held to be bound to pay MAT were those foreign companies which were governed by the Companies Act, 1956 as a result of having a permanent establishment in India.

With respect to the DTAAs that India has entered into with countries where most FIIs are based, capital gains from share transfers are taxable only in those countries where the FII is a resident of, in accordance with Article 13 of such Agreements. Consequently, the basis for charging MAT in India on such FIIs does not arise at all. Furthermore, Section 90(2) of the Act also mandates that where the provision of the DTAA is more beneficial to an assessee from the point of view of tax liability, assessees are entitled to be given such benefit irrespective of the provisions of the Act.

The order of the Authority for Advance Ruling (AAR) in the case of *In re: Castleton* ([2012] 348 ITR 537 (AAR)) cannot be relied upon to levy MAT on the FIIs which are not resident in India. Orders of the AAR are only binding between parties to the dispute as per Section 245S and such orders may have persuasive value at best. Even so, the order in *Castleton* directly contradicts the earlier order of the AAR in *The Timken Company v Director of Income Tax, International Taxation* [2010] 326 ITR 193 (AAR)*)* where on near-identical facts, the AAR had come to the conclusion that Section 115JB would not apply to capital gains from share transfers made by non-residents.

The reasoning adopted by the AAR in *Castleton* itself is also flawed. Its reliance upon the ruling in *In Re P No. 147 of 1997* ([1998] 224 ITR 335) ignores the factual differences between the circumstances, the key difference being that *In Re P* concerned a case where the business profits of a non-resident company with a permanent establishment in India were held liable to MAT. The AAR in *Castleton* has also not taken note of the specific provisions of the Companies Act, 1956 applicable to foreign companies on the facts of *In re P,* which are entirely inapplicable on the facts of the *Castleton* case itself.

The levy of MAT under Section 115JB on the capital gains income of FIIs, which are non-resident companies, is therefore unsustainable in law and contrary to the provisions of the Act, the DTAAs entered into by India and the well settled jurisprudence of the adjudicating authorities concerned with income tax.

INTRODUCTION

The present submissions have been prepared by the Vidhi Centre for Legal Policy in response to the call for submissions by the High Level Committee headed by Justice AP Shah on Direct Tax Matters. The Terms of Reference of the Committee are to "Examine the Matter Relating to Levy of MAT on FIIS for the Period Prior to 01.04.2015 among others" and to submit recommendations to the Government on this issue.

Vidhi Centre for Legal Policy is an independent legal policy advisory group whose mission is to achieve good governance in India through impacting legislative and regulatory design. Apart from independent research work related to, *inter* alia, Tribunals, Nuclear Liability, Environmental Impact Assessment and Land Acquisition Laws. We have assisted the Fourteenth Finance Commission in the preparation of their Report to the Central Government, have contributed to the 244th, 248th, 249th, 250th, 251st, 253rd, 255th and 256th Reports of the Law Commission of India, and are currently part of the Bankruptcy Law Reform Committee, which is preparing a Draft Bankruptcy Code for India.

The present High Level Committee having been set up to resolve issues relating to the imposition of Minimum Alternate Tax (MAT) on Foreign Institutional Investors (FIIs), these submissions have been prepared with a view to clarify and bring to the Committee's attention the legislative history of the Minimum Alternate Tax in India, the judicial interpretation of the concept of Minimum Alternate Tax and the international tax implications of imposing the MAT on FIIs.

The submissions are broadly divided into three chapters. The first chapter will focus on the legislative history of the "Minimum Alternate Tax" and the reasons for which it was introduced and withdrawn over various points of time in the last three decades. The second chapter will examine the international law implications of the imposition of the MAT on FIIs, with specific reference to the Double Taxation Avoidance Agreements entered into by India. The third chapter will examine the legal basis for imposing MAT on FIIs prior to 01.04.2015, specifically the orders of the Authority for Advance Rulings. The last chapter will lay out conclusions and suggestions for future course of action.

At the outset, we may state that our submissions do not focus on the desirability of the MAT as a concept in the Income Tax Act, 1961 ("the Act") or the desirability of extending it to FIIs for the purposes of raising revenue. We are not commenting on the larger beneficial or deleterious impact of extending the MAT to FIIs as it is beyond our expertise to do so. These submissions therefore only focus on the legal question, viz. whether the Central Government would be justified in law while seeking to impose MAT on FIIs for transactions which took place prior to 01.04.2015.

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I. LEGISLATIVE HISTORY OF MINIMUM ALTERNATE TAX IN INDIA

In this chapter, we will briefly outline the history of the introduction of the MAT in India, the reasons why it was repealed in the past and re-introduced again. We have only tried to highlight major changes to the concept of MAT in India as relevant to the submissions at hand, and have not gone into all amendments made to the relevant provisions concerned with any aspect of the MAT in the Act.

1. Introduction of Section 80VVA to address "Zero-Tax Companies"

The first legislative step towards addressing the problem of zero profit companies came in the form of Section 32 of the Finance Act, 1983 that incorporated Chapter VIB, into to the Act which levied a minimum tax on companies for the first time. It was introduced into the Act for the first time in 1983 to address the problem of so-called "zero-tax companies". In the Budget Speech of then Finance Minister, Pranab Mukherjee, the nature of the problem posed by such "zero-tax companies" was stated as follows,

> "Hon'ble Members must be aware of the phenomenon of companies which are flourishing, but are paying no tax at all, or only a nominal tax. This is largely due to these companies availing of the tax incentives and concessions available under the provisions of the Income-tax Act. It has been a matter of concern to us that under our tax system several highly profitable companies are able to reduce their tax liability to zero even though they continue to pay high dividends. It seems reasonable that profitable and prosperous companies should contribute at least a small portion of their profits to the national exchequer at a time when other and less better off sections of society are bearing a burden. I therefore propose to provide that fiscal incentives and concessions shall not absorb more than 70 per cent of the profits. This would secure that companies pay a minimum tax, on at least 30 per cent of their profits." [1]

Section 80VVA of Chapter VIB as introduced, read as follows:

> **80VVA**. Restriction on certain deductions in the case of companies.-
>
> (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee being a company, the amount or, as the case may be, the aggregate amount which, but for the provisions of this section, would have been admissible as deduction for any assessment year under any one, or more of the provisions of this Act specified in sub-section (2) exceeds seventy per cent. of the amount of total income as computed had no deduction been allowed under any of the said provisions (such total income being hereinafter referred to as the pre-incentive total income), the amount or, as the case may be, the aggregate amount to be allowed as deduction for that year in

[1] Pranab Mukherjee, Speech of Shri Pranab Mukherjee Minister of Finance Introducing the Budget for the Year 1983-84, para 90 available at <http://indiabudget.nic.in/bspeech/bs198384.pdf> last accessed 29th June, 2015.

respect of any one or more of the said provisions shall be restricted, in the manner specified in sub-section (3), to seventy per cent. of the pre-incentive total income.

(2) The provisions referred to in sub-section (1) shall be the following, namely:—

(i) clause (iii) of sub-section (1) of section 35;

(ii) clause (ia) of sub-section (2) of section 35;

(iii) sub-section (2A) of section 35, to the extent to which the deduction under the said sub-section exceeds the sum paid by the assessee;

(iv) sub-section (2B) of section 35, to the extent to which the deduction under the said sub-section exceeds the expenditure incurred by the assessee;

(v) section 35C;

(vi) section 35CC;

(vii) section 35CCA;

(viii) section 35CCB;

(ix) clause (ii) of sub-section (2) of section 33;

(x) clause (ii) of sub-section (2) of section 33A;

(xi) sub-section (1), or, as the case may fee, sub-section (1), read with clause (i) of sub-section (2) of section 33A;

(xii) clause (ii) of sub-section (3) of section 32A;

(xiii) sub-section (1), or, as the case may be, sub-section (1), read With clause (i) of sub-section (3) of section 32A;

(xiv) section 80G;

(xv) clause (b) of sub-section (2) of section 80GGA;

(xvi) clause (c) of sub-section (2) of section 80GGA;

(xvii) section 80HH;

(xviii) section 80HHA;

(xix) section 80HHB;

(xx) section 80HHC;

(xxi) section 80-I;

(xxii) section 80J;

(xxiii) section 80JJ,

(xxiv) section 80K;

(xxv) section- 80M;

(xxvi) section 80N;

(xxvii) section 80-O; and

(xxviii) section 80QQ.

(3) The deduction under the provisions' specified in sub-section (2) shall, for the purposes of restricting under sub-section (2), the amount or, as the case may be, the aggregate amount of deduction, under those provisions, be allowed in the order in which the said provisions have been specified in sub-section (2), and accordingly—

(a) deduction shall first be allowed "under the provision specified in clause (i) of sub-section (2); and

(b) if no deduction is allowable under the provision specified in the said clause (i) or the deduction allowable under that provision is less than seventy per cent. of the pre-

incentive total income, deduction shall next be allowed under the provision specified in clause (ii) of sub-section (2); and

(c) if no deduction is allowable under the provision specified in the said clause (ii), or the deduction under that provision together with the deduction allowed under the provision referred to in the said clause (i), is less than seventy per cent. of the pre-incentive total income, deduction shall next be allowed under the provision specified in clause (iii) 'of sub-section (2) and so on until the aggregate deduction so allowed is equal to seventy per cent. of the pre-incentive total income.

(4) To the extent to which full deduction cannot be allowed in the assessment year in respect of any provision specified in subsection (2), by virtue only of the restriction under sub-section (2) (and not by virtue of anything contained in any other section), the amount remaining unallowed shall be added to the amount, if any, to be allowed to the assessee under the said provision for the next following assessment year and be deemed to be part of the deduction admissible to the assessee under the, said provision for that year or, if no such deduction is admissible to the assessee for that year, be deemed to be the deduction admissible to the assessee for that year, and so on for succeeding assessment years.."

As noted above, Section 80VVA listed out the specific deductions which could be availed only in a limited manner by companies for the purposes of calculating the income tax payable. In effect, there was a ceiling on the total amount of incentives or allowances that a company was allowed to avail of in a given year. It, however, allowed companies to carry forward these unabsorbed allowances and set it off against the taxable income in the future.

This legislative intent behind Section 80VVA was also discussed by the Madras High Court in the case of *Commissioner of Income-Tax vs M/S. S.S.C. Shoes Ltd.*[2], where the Hon'ble High Court held,

> "5. Section 80 VVA of the Act was introduced by the Finance Act, 198 3 with effect from 1.4.1984 to curb the expenditure in case of companies which had paid no tax or paid nominal tax due to absorption of various fiscal incentives and concessions granted to the companies though the companies were highly profitable companies. The section came to be introduced when it was found that several highly profitable companies were able to reduce their tax liability to zero though they continued to pay dividend and hence, the restriction was imposed to the effect that the fiscal incentives and deductions granted under Chapter VI-B of the Act should not exceed 70% of the profits. Section 80 VVA(1) has imposed certain restrictions on the allowability of certain deductions specified in sub-section (2) of that section and the deductions were restricted in the sense that the deduction was granted to the extent of 70% of the amount of profits as computed under sub-section (2) of section 80 VVA of the Act."[3]

It may be pointed out here that India is not the only country to have introduced a concept akin to the "minimum alternate tax" in the context of the Income Tax. The United States of America had introduced the "alternative minimum tax" in 1969 on all entities, individuals, companies and other legal entities. In essence, an American tax payer is required to pay whichever is higher, the AMT or

[2] Commissioner of Income Tax v. M/S. S.S.C. Shoes Ltd, (2005) 197 CTR Mad 487.

[3] SSC Shoes (n 2).

the tax as assessed under the usual provisions of the Internal Revenue Code.[4] However, since no explicit link was drawn to the United States example, the intent in the Indian context was to only make so-called “zero-tax companies” liable to pay tax.

2. Minimum Alternate Tax – Section 115J

With effect from the Assessment Year 1988 – 1989, the Finance Act, 1987 replaced the erstwhile Section 80 VVA with Section 115J introducing the concept of tax on book-profits. In the budget speech for the years 1987 – 1988, Prime Minister Rajiv Gandhi, who was doubling as the Finance Minister, repeated the sentiment expressed by Pranab Mukherjee to the extent so as to shed limelight to the zero-tax companies:

> “It is only fair and proper that the prosperous should pay at least some tax. The phenomenon of so-called “zero-tax” highly profitable companies deserves attention. In 1983, a new Section 80VVA was inserted in the Act so that all profitable companies pay some tax. This does not seem to have helped and is being withdrawn. I now propose to introduce a provision whereby every company will have to pay a “minimum corporate tax” on the profits declared by it in its own accounts. Under this new provision, a company will pay tax on at least 30% of its book profit. In other words, a domestic widely held company will pay tax of at least 15% of its book profit. This measure will yield a revenue gain of approximately Rs.75 crores.”[5]

While interpreting Section 115J in *Commissioner of Income Tax v Prana Carriers (P) Ltd.*[6] the Karnataka High Court also pointed to a study on such zero-tax companies in explaining why the MAT was introduced. The Court pointed out that:

> “Section 115J was introduced in the assessment year 1988-1989. Prior to the insertion of this provision, Section 80VVA provided for payment of tax on atleast thirty percent by the Companies of the income. Studies carried out by the Central Board of Direct Taxes revealed that while the provision of Section 80VVA had the effect of subjecting companies to minimum tax which they would have otherwise not paid, there were still companies which had no income-tax liability despite substantial profits, on account of the fact that companies were availing of depreciation in full under the Income-tax Act. Therefore despite Section 80VVA, the phenomenon of prosperous zero tax companies continued. A study carried out by a economic journal in regard to the performance of 650 top companies during the assessment year 1984-1985 showed that out of the top 23 profit-making companies, the profit and loss accounts of 12 companies showed no income tax liability though they had profits and had declared dividends. About 28 percent of the companies accounting for a net profit of Rs. 274 crores showed no tax liability. Therefore, Section

[4] On how the Alternative Minimum Tax is calculated in the US for individuals, see Congressional Budget Office, “The Individual Alternative Minimum Tax” January 15, 2010 available at http://www.cbo.gov/sites/default/files/01-15-amt_brief.pdf last accessed 29 June 2015.

[5] Rajiv Gandhi, “Speech of Shri Rajiv Gandhi, Prime Minister and Minister of Finance Introducing the Budget for the Year 1987-88”, para 80, available at <http://indiabudget.nic.in/bspeech/bs198788.pdf>, last accessed 29 June 2015.

[6] ILR 1999 Kar 2297.

> 80VVA had become otiose. So, the necessity to introduce the impugned provision, viz., Section 115J, arose in order to tackle the problem of zero tax prosperous companies to ensure minimum corporate tax by suitably modifying Section 80VVA. With the avowed object of bringing the zero tax prosperous companies within the taxable net, Section 115J has been enacted."[7]

With this, the concept of Minimum Alternate Tax (*hereinafter,* 'MAT') was introduced in India with the primary objective of bringing zero-tax companies under the tax net. Section 115J first introduced the concept of tax on book profits by the Finance Act, 1987 with effect from A.Y. 1988-89. While the main intention behind the introduction of Section 115J remained to curb the presence of zero tax companies, from Prime Minister Rajiv Gandhi's speech, it can also be gleaned that the intentions was to make sure that the "*prosperous pay at least some tax*".

Section 115J read as follows:

> *115J Special provisions relating to certain companies:*
>
> *Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee being a company (other than a company engaged in the business of generation or distribution of electricity), the total income, as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1988 but before the 1st day of April, 1991 (hereafter in this section referred to as the relevant previous year); is less than thirty per cent of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent of such book profit.*
>
> *(1A) Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956).*
>
> *Explanation – For the purpose of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (1A), as increased by –*
>
> *(a) the amount of income-tax paid or payable, and the provision therefor; or*
>
> *(b) the amounts carried to any reserves (other than the reserves specified in section 80HHD or sub-section (1) 33AC), by whatever name called; or*
>
> *(c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or*
>
> *(d) the amount by way of provision for losses of subsidiary companies; or*
>
> *(e) the amount or amounts of dividends paid or proposed; or*
>
> *(f) the amount or amounts of expenditure relatable to any income to which any of the provisions of Chapter III applies; or*
>
> *(g) the amount withdrawn from the reserve account under section 80HHD, where it has been utilised for any purpose other than those referred to in sub-section (4) of that section; or*
>
> *(h) the amount credited to the reserve account under section 80HHD, to the extent that amount has not been utilised within the period specified in sub-section (4) of that section; or*
>
> *(ha) the amount deemed to be the profits under sub-section (3) of section 33AC; if any amount referred to in clause (a) to (f) is debited or, as the case may be, the amount*

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[7] *Prana Carriers* (n 6), para 6.

referred to in clauses (g) and (h) is not credited to the profit and loss account, and as reduced by,-

(i) the amount withdrawn from reserves (other than the reserves specified in section 80HHD) or provisions, if any such amount is credited to the profit and loss account: Provided that, where this section is applicable to an assessee in any previous year (including the relevant previous year), the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1988, shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation ; or

(ii) the amount of income to which any of the provisions of Chapter III applies, if any such amount is credited to the profit and loss account; or

(iii) the amounts[as arrived at after increasing the net profit by the amounts referred to in clauses (a) to (f) and reducing the net profit by the amounts referred to in clauses (i) and (ii) attributable to the business, the profits from which are eligible for deduction under section 80HHC or section 80HHD; so, however, that such amounts are computed in the manner specified in sub-section (3) or sub-section (3A) of section 80HHC or sub-section (3) of section 80HHD, as the case may be ; or

(iv) the amount of the loss or the amount of depreciation which would be required to be set off against the profit of the relevant previous year as if the provisions of clause (b) of the first proviso to sub-section (1) of section 205 of the Companies Act, 1956 (1 of 1956), are applicable.

(2) Northing contained in sub-section (1) shall affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of sub-section (2) of section 32 or sub-section (3) of section 32A or clause (ii) of sub-section (1) of section 72 or section 73 or section 74 or sub-section (3) of section 74A or sub-section (3) of section 80J.

Circular Number 495 dated 22nd September, 1987 issued by the Central Board for Direct Taxes, further explains the scope of the application of MAT. It categorically states that the introduction of Section 115J was undertaken as a measure of equity.[8] Clarifying the provision, the circular elaborates that there are two processes involved – first, an assessing authority has to determine the income of the company under the provisions of the Act. Second, the book profit is to be worked out in accordance with the Explanation to section 115J(1) and it is to be seen whether the income determined under the first process is less than 30 per cent of the book profit. Section 115J would be invoked if the income determined under the first process is less than 30 percent of the book profit. The Explanation to sub- section (1) of section 115J gives the definition of the "book profit" by incorporating the requirement of section 205 of the Companies Act, 1956 in the computation of the book profit. Brought forward losses or unabsorbed depreciation, whichever is less, are to be reduced in arriving at the book profits. Sub- section (2), however, provides that the application of this provision will not affect the carry forward of unabsorbed depreciation, unabsorbed investment allowance, business losses to the extent not set off, and deduction under section 80J, to the extent not set off as computed under the Income-tax Act.

[8] See, Circular Number 495 dated 22nd September, 1987.

3. Repeal of Section 115J

In 1990, Finance Minister Madhu Dandavate slashed the basic corporate income tax rate from fifty percent to forty percent, abolished small scale industry exemption, investment allowance and depository for direct taxes, withdrew some of the incentives including investment allowance, and abolished Minimum Alternate Tax by the Finance Act, 1990.[9] The legislative justification and primary intention behind the abolition remained that since major exemptions were abolished by the Finance Act, 1990, it was only natural and consequential to abolish MAT which primarily sought to remedy the mischief of non-payment of taxes due to the cumulative effect of exemptions.

By Section 32 of the Finance Act, 1990, under the heading 'Relief for Income Tax', Section 115J of the Income Tax Act was repealed. It read as follows:

> ***32***. Relief for income-tax- *In section 115-J of the Income-tax Act, in sub-section (l), after the words, figures and letters "on or after the 1st day of April, 198BJ', the words, figures and letters "but before the 1st day of April, 1991" shall be inserted.*

The scope of repeal was clarified in the by Section 21 of the Budget Memorandum. It read as follows:

> *Section 21:*
>
> *Under the existing provisions of section 115J of the Income-tax Act, in the case of a company whose total income as computed under the Income-tax Act, is less than 30 per cent of the book profit, as computed under that section, the total income chargeable to tax will be 30 per cent of the book profit. The provision was enacted to restrict the erosion of the base of taxable income on account of a large number of tax concessions.*
>
> *In view of the package of measures for rationalising the tax structure including discontinuance of certain investment incentives, having the effect of increasing the taxable income base, there is no necessity of retaining the provisions of section 115J on the statute book. Accordingly, Section 115J has been amended so as to provide that its provisions shall not apply to assessment year 1991-92 and subsequent years.*

4. Re-introduction of Minimum Alternate Tax

In the 1996 budget speech for the financial year 1997 – 1998, Finance Minister P. Chidambaram reintroduced MAT in a revamped Section 115JA in the Finance Act, 1996. The reintroduction of the MAT sought to remedy the resurgence of the zero-tax companies that had increased with the abolition of the MAT. Additionally, concerns regarding the corporate surcharge also had to be remedied given that it was promised to be a temporary set-up. In his budget speech, the then Finance Minister said:

> "Corporate tax rates have been reduced and simplified over the past few years and the results have been very encouraging with a significant increase in corporate taxes as a percentage of GDP. However, there are two issues which need to be addressed. The first is

[9] See Madhu Dandavate "Speech of Professor Madhu Dandavate Minister of Finance Introducing the Budget for the Year 1990-91", para 88 available at <http://indiabudget.nic.in/bspeech/bs199091.pdf> last accessed 29 June 2015.

> the promise made in the past that the corporate surcharge will be temporary. The other is the phenomenon of zero tax companies which, according to many observers, reflects an excessive degree of laxity in the tax regime. I propose to respond to the two issues as follows: (i) I am reducing the rate of surcharge on corporation tax from 15% to 7.5% and hope to take a similar step in my next budget. The reduced tax burden will benefit all companies big and small. (ii) I propose to introduce a "Minimum Alternate Tax" (MAT) on companies. In a case where the total income of the company, as computed under the Income Tax Act after availing of all eligible deductions, is less than 30 per cent of the book profit, the total income of such a company shall be deemed to be 30 per cent of the book profit and shall be charged to tax accordingly. The effective rate works out to 12 per cent of book profit calculated under the Companies Act. Companies engaged in the power and infrastructure sectors will, however, be exempted from the levy of MAT."[10]

As under Section 115JA, industries involved in infrastructure and power sectors were excluded from paying MAT under the Act. The justification for this exclusion can be seen from Ministry of Finance's Report Budget 1996-1997. As far as these sectors are considered, the budget for 1996 emphasised upon strengthening the power and infrastructure sector.[11] Highlighting the importance of availability of adequate infrastructure for accelerating the economic development of the country, enterprises engaged in developing, maintaining and operating infrastructure facilities such as roads, highways, bridges, airports, ports and rail systems, irrigation, water supply, sanitation and sewerage systems were granted tax incentives, including exemption from MAT to promote investment.[12]

Section 115JA as inserted read as follows:

> "115JA. Deemed income relating to certain companies.—(1) Notwithstanding anything contained in any other provisions of this Act, where in the case of an assessee, being a company, the total income, as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 (hereafter in this section referred to as the relevant previous year) is less than thirty per cent. of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent. of such book profit.
>
> *(2)* Every assessee, being a company, shall, for the purposes of this section prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956):
>
> Provided that while preparing profit and loss account, the depreciation shall be calculated on the same method and rates which have been adopted for calculating the depreciation for the purpose of preparing the profit and loss account laid before the

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[10] See, P. Chidambaram, "Speech of P. Chidambaram Minister of Finance Introducing the Budget for the Year 1996-97", para 90, available at <http://indiabudget.nic.in/bspeech/bs199697.pdf> last accessed 29 June 2015.

[11] Also see Bakul H Dholakia, "Macroeconomic Analysis of Union Budget 1996-97", Indian Institute of Management Ahmedabad, available at <http://vslir.iimahd.ernet.in:8080/xmlui/bitstream/handle/123456789/1941/WP%201996_1324.pdf?sequence=1&isAllowed=y> last accessed 29 June 2015.

[12] Ministry of Finance, Budget Report 1996-1997 - Chapter Two: Tax Measures, Government of India, available at <http://indiabudget.nic.in/es96-97/CHAP2.HTM#TAX> last accessed 29 June 2015.

company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956):

Provided further that where a company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956) which is different from the previous year under the Act, the method and rates for calculation of depreciation shall correspond to the method and rates which have been adopted for calculating the depreciation for such financial year or part of such financial year falling within the relevant previous year.

Explanation.—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section *(2)*, as increased by—

(*a*) the amount of income-tax paid or payable, and the provision therefor; or

(*b*) the amounts carried to any reserves by whatever name called; or

(*c*) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or

(*d*) the amount by way of provision for losses of subsidiary companies; or

(*e*) the amount or amounts of dividends paid or proposed; or

(*f*) the amount or amounts of expenditure relatable to any income to which any of the provisions of Chapter III applies;

if any amount referred to in clauses *(a)* to *(f)* is debited to the profit and loss account, and as reduced by,—

(*i*) the amount withdrawn from any reserves or provisions if any such amount is credited to the profit and loss account:

Provided that, where this section is applicable to an assessee in any previous year (including the relevant previous year), the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this *Explanation;* or

(*ii*) the amount of income to which any of the provisions of Chapter III applies, if any such amount is credited to the profit and loss account; or

(*iii*) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

Explanation.—For the purposes of this clause, the loss shall not include depreciation; or

(*iv*) the amount of profits derived by an industrial undertaking from the business of generation or generation and distribution of power; or

(*v*) the amount of profits derived by an industrial undertaking located in an industrially backward State or district as referred to in sub-clause *(b)* or sub-clause (*c*) of clause (*iv*) of sub-section (2) of section 80-IA, for the assessment years such industrial undertaking is eligible to claim a deduction of hundred per cent. of the profits and gains under sub-section (5) of section 80-IA; or

(*vi*) the amount of profits derived by an industrial undertaking from the business of developing, maintaining and operating any infrastructure facility as defined under sub-section *(12)* of section 80-IA, and subject to fulfilling the conditions laid down in sub-section *(4A)* of section 80-IA; or

(*vii*) the amount of profits of a sick industrial company for the assessment year commencing from the assessment year relevant to the previous year in which the said company has become a sick industrial company under subsection (*1*) of section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.— For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (*go)* of sub-section *(1)* of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986).

> *(3)* Nothing contained in sub-section*(1)* shall affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of sub-section *(2)* of section 32 or subsection *(3)* of section 32A or clause *(ii)* of sub-section *(1)* of section 72 or section 73 or section 74 or sub-section *(3)* of section 74A.
>
> *(4)* Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section."

In the following year, in his budget speech for the financial year 1997 – 1998, Finance Minister P. Chidambaram, categorically denied any requests to repeal or review the provisions relating to the MAT under Section 115JA since the factors that necessitated its existence (namely, presence of zero-tax companies) had not been remedied.[13] However, the Finance Act, 1996 introduced a mechanism for MAT credit through which the tax credit earned when a company paid MAT, could be allowed to be carried forward for a period of five assessment years. Further, in the assessment year when regular tax became payable, the difference between the regular tax and tax computed under MAT for that year would be set off against the MAT credit available. Thus, at the proposed new rate of corporate tax, every company including the zero tax companies, would have had to pay income-tax of not less than 10.5 per cent on its book profits.

5. Minimum Alternate Tax under Section 115JB

The Finance Act, 2000, inserted section 115JB of the Income Tax Act, 1961, with effect from 01.04.2001 which provided for the levy of MAT on companies in a manner that was conceptually different from the erstwhile Section 115JA. According to Circular No. 13, issued on 09.11.2001 by the Central Board of Direct Taxes, Section 115JA, which provided for MAT on companies, did not deem any part or the whole of book profit as total income. However, the new provision of section 115JB provided that if the tax payable on total income is less than 7.5% of book profit, the tax payable under this provision would be 7.5% of book profit.

Section 115JB as it stood then, read as follows:

> "115JB. Special provision for payment of tax by certain companies.—(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one-half per cent of its book profit, the tax payable for the relevant previous year shall be deemed to be seven and one-half per cent of such book profit.
>
> (2) Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956):
>
> **Provided** that while preparing the annual accounts including profit and loss account,—

[13] See P. Chidambaram, "Speech of P. Chidambaram Minister of Finance Introducing the Budget for the Year 1997-98", para 99, available at <http://indiabudget.nic.in/bspeech/bs199798.pdf> last accessed 29 June 2015.

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

(iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956) :

Provided further that where the company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under this Act,—

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

(iii) the method and rates adopted for calculating the depreciation,

shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year falling within the relevant previous year.

Explanation.—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by—

(a) the amount of income-tax paid or payable, and the provision therefor; or

(b) the amounts carried to any reserves, by whatever name called; or

(c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or

(d) the amount by way of provision for losses of subsidiary companies; or

(e) the amount or amounts of dividends paid or proposed ; or

(f) the amount or amounts of expenditure relatable to any income to which section 10 or section 10A or section 10B or section 11 or section 12 apply,

if any amount referred to in clauses (a) to (f) is debited to the profit and loss account, and as reduced by

(i) the amount withdrawn from any reserves or provisions if any such amount is credited to the profit and loss account:

Provided that, where this section is applicable to an assessee in any previous year (including the relevant previous year), the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 2001 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation; or

(ii) the amount of income to which any of the provisions of section 10 or section 10A or section 10B or section 11 or section 12 apply, if any such amount is credited to the profit and loss account; or

(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

Explanation .—For the purposes of this clause, the loss shall not include depreciation; or

(iv) the amount of profits eligible for deduction under section 80HHC, computed under clause (a) or clause (b) or clause (c) of sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section; or

(v) the amount of profits eligible for deduction under section 80HHE computed under sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section; or

(vi) the amount of profits eligible for deduction under section 80HHF computed under sub-section (3) of that section, and subject to the conditions specified in that section; or

(vii) the amount of profits of sick industrial company for the assessment year commencing on and from the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.—For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986).

(3) Nothing contained in sub-section (1) shall affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of sub-section (2) of section 32 or sub-section (3) of section 32A or clause (ii) of sub-section (1) of section 72 or section 73 or section 74 or sub-section (3) of section 74A.

(4) Every company to which this section applies, shall furnish a report in the prescribed form from an accountant as defined in the Explanation below sub-section (2) of section 288, certifying that the book profit has been computed in accordance with the provisions of this section along with the return of income filed under sub-section (1) of section 139 or along with the return of income furnished in response to a notice under clause (i) of sub-section (1) of section 142.

(5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.'."

Another striking feature of the replaced Section 115JB was that it did not provide for MAT credit like its predecessor. Section 115JB also provided for fewer exemptions from MAT itself than Section 115JA.[14]

6. Conclusions drawn from legislative history

The purpose of the above discussion has been to highlight the history behind the existence of the Minimum Alternate Tax as it stands today. The initial concept, to tax the so-called "zero-tax companies" which had otherwise made profits and distributed dividends to shareholders, remains the same. At every stage when the MAT has been introduced, whether in its initial form under Section 80VVA, or introduced later under Section 115J, or its present avatar as Section 115JB, the underlying purpose has remained the same. The table below indicates the provision relating to computation under the provisions which have dealt with MAT over the years.

[14] See *PN Shah, Minimum Alternate Tax on Companies*, available at https://www.bcasonline.org/articles/artin.asp?153 last accessed 29 June 2015.

Table 1: Comparison of computation provisions in versions of the MAT.

INCOME TAX ACT PROVISION	PROVISION LINKING THE COMPUTATION TO CALCULATION OF THE PROFITS TO THE COMPANIES ACT
Section 80VVA	N/A
Section 115J	*(1A) Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of* ***Parts II and III of Schedule VI to the Companies Act, 1956****.*
Section 115JA	*(2) Every assessee, being a company, shall, for the purposes of this section prepare its profit and loss account for the relevant previous year in accordance with the provisions of* ***Parts II and III of Schedule VI to the Companies Act, 1956*** *(1 of 1956) :* *Provided that while preparing profit and loss account, the depreciation shall be calculated on the same method and rates which have been adopted for calculating the depreciation for the purpose of preparing the profit and loss account laid before the company at its annual general meeting in accordance with the provisions of* ***Section 210 of the Companies Act, 1956*** *(1 of 1956):*
Section 115JB	*(2) Every assessee,—* *(a) being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of* ***Part II of Schedule III to the Companies Act, 2013****; or* *(b) being a company, to which the proviso to sub-section (2) of* ***Section 129 of the Companies Act, 2013*** *is applicable, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of the Act governing such company:*

The budget speeches of various Finance Ministers have been referred to and highlighted here for the purposes of clarifying the above point. The intention of the legislature is also clear from the plain meaning of the sections that provide for MAT.

As far as the scope of MAT is concerned, right from when the concept was first introduced into the Act through Finance Act, 1983 it has always been intended to be applied *only* to those companies governed by the Companies Act, 1956 (and now Companies Act, 2013) which had availed of the deductions and paid no income tax on their book profits. At no stage was the MAT ever intended to apply to one off transactions of non-resident entities who were not governed by the Companies Act, 1956 in India. It is important to draw this distinction about the scope of the MAT especially since there are instances, such as the "Alternative Minimum Tax" in the USA, which apply the concept to the taxing of individuals as well.

In interpreting the scope of Section 115JB, a crucial principle of interpretation of tax law must be kept in mind. The charging section and the computation section constitute a single code, and if a transaction is such that the computation sections cannot be applied at all, it in fact suggests that

the transaction was never intended to be taxed at all. The Supreme Court outlined this principle in the case of *CIT v BC Srinivasa Setty*[15] as follows:

> "This inference flows from the general arrangement of the provisions in the Income Tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head."[16]

Even assuming that sub-section (1) of Section 115JB does not restrict itself to Indian companies alone, the fact that the machinery and computation provisions require adherence to the Indian Companies Act, 1956 and the maintenance of books of account in accordance with the provisions of the same, suggests that it cannot be held to apply, willy-nilly to all foreign companies.

If however, the scope of the MAT is sought to be applied to foreign companies, such as FIIs which are otherwise not within the purview of the Companies Act, 1956 or Companies Act, 2013, there are certain other issues which arise that have been elaborated in the next chapter.

[15] (1981) 2 SCC 460.

[16] *Srinivasa Setty* (n 15) para 10, 465.

II. INTERNATIONAL TAX IMPLICATIONS OF THE MINIMUM ALTERNATE TAX ON FOREIGN INSTITUTIONAL INVESTORS

This chapter examines the implications of extending MAT to FIIs in the context of the Double Tax Avoidance Agreements entered into by India and the provisions of the Act which deal with how such transactions should be taxed in the first instance. This chapter will first examine the liability of FIIs to pay tax on capital gains in India under the Act and then examine the provisions of the DTAA which relate to capital gains, where applicable. This chapter will also examine whether the imposition of MAT on FIIs will be in accordance with India's obligations under the DTAA.

1. Taxation of Capital Gains arising from transfer of shares by Foreign Institutional Investors

In so far as taxation of capital gains is concerned, Section 10(38) of the Act exempts income arising from transfer of long term capital asset (being shares in a company). The provision reads as under:

> **"Section 10(38)-** any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust where—
>
> (*a*) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force; and
>
> (*b*) such transaction is chargeable to securities transaction tax under that Chapter :
>
> **Provided** that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under Section 115JB."

It may be noted here that the income from long term capital gains is taken into account while computing the book profit and while determining the MAT payable by the company under Section 115JB. However, Section 10(38) exemption is not applicable in cases of FIIs. Though by virtue of Section 10(38), income from transfer of long term capital asset such as shares is exempt, the same is to be added back for calculation of book profits for determining MAT liability.

A specific section, namely section 115AD provides for tax on income of FIIs from securities or capital gains arising from their transfer. The relevant text of the provision is as follows-

> **115AD.** (1) Where the total income of a Foreign Institutional Investor includes—
>
> (*a*) income other than income by way of dividends referred to in section 115-O received in respect of securities (other than units referred to in section 115AB); or
>
> (*b*) income by way of short-term or long-term capital gains arising from the transfer of such securities,
>
> the income-tax payable shall be the aggregate of—
>
> (*i*) the amount of income-tax calculated on the income in respect of securities referred to in clause (*a*), if any, included in the total income, at the rate of twenty per cent :
>
> **Provided** that the amount of income-tax calculated on the income by way of interest referred to in section 194LD shall be at the rate of five per cent;

(*ii*) the amount of income-tax calculated on the income by way of short-term capital gains referred to in clause (*b*), if any, included in the total income, at the rate of thirty per cent:

Provided that the amount of income-tax calculated on the income by way of short-term capital gains referred to in section 111A shall be at the rate of[fifteen] per cent;

(*iii*) the amount of income-tax calculated on the income by way of long-term capital gains referred to in clause (*b*), if any, included in the total income, at the rate of ten per cent; and

(*iv*) the amount of income-tax with which the Foreign Institutional Investor would have been chargeable had its total income been reduced by the amount of income referred to in clause (*a*) and clause (*b*).

(2) Where the gross total income of the Foreign Institutional Investor—

(*a*) consists only of income in respect of securities referred to in clause (*a*) of sub-section (1), no deduction shall be allowed to it under sections 28 to 44C or clause (*i*) or clause (*iii*) of section 57 or under Chapter VI-A;

(*b*) includes any income referred to in clause (*a*) or clause (*b*) of sub-section (1), the gross total income shall be reduced by the amount of such income and the deduction under Chapter VI-A shall be allowed as if the gross total income as so reduced, were the gross total income of the Foreign Institutional Investor.

(3) Nothing contained in the first and second provisos to section 48 shall apply for the computation of capital gains arising out of the transfer of securities referred to in clause (*b*) of sub-section (1).

Explanation.—For the purposes of this section,—

(*a*) the expression "Foreign Institutional Investor" means such investor as the Central Government may, by notification in the Official Gazette, specify in this behalf;

(*b*) the expression "securities" shall have the meaning assigned to it in clause (*h*) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956).]

This section applies only to FIIs, as specifically defined for the purposes of this Section under clause (a) of the Explanation. The list of FIIs who will benefit from the above Section have been listed out in Notification No. SO 282 (E) issued on 31.03.1995. In addition, the Central Board of Direct Taxes (CBDT) has also notified that all "foreign portfolio investors" (FPIs) registered under the Securities Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014 shall be deemed to be "foreign institutional investors" for the purposes of Explanation clause (a) to Section 115AD. For the purposes of this Submission, we will be referring to all the entities notified under Explanation clause (a) to Section 115AD as "FIIs".[17]

In case an FII is liable to pay tax under the Act and not under the relevant Double Taxation Avoidance Agreement (DTAA), then Section 115AD is applicable. In so far as MAT is concerned, Section 115JB provides that for computing the net profit for MAT liability, the following expenditure, though debited for calculating book-profits as per the Companies Act, 1956, is to be added back.

17 Notification SO No. 199 (E) issued on 22.01.2014 available at http://www.incometaxindia.gov.in/communications/notification/920110000000000014.pdf.

Explanation to Section 115JB states:

> "*Explanation* —For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by—
>
> (*f*) the amount or amounts of expenditure relatable to any income to which section 10(other than the provisions contained in clause (*38*) thereof) or section 11 or section 12 apply;"

Hence, the provisions as they existed prior to the Finance Act, 2015 stated that even though income arising from transfer of shares is not taxable, it is to be included under book profits for the purpose of determining MAT liability under the Act and furthermore the expenditure relatable to such income (income as mentioned under Section 10(38)) shall be allowed and not added back for computing the net profit.

2. The relevant amendment introduced in Section 115JB via Finance Act, 2015

The Finance Act, 2015 inserted two provisions to Section 115JB in this regard. Clause (iid) in Explanation 1 provides that the amount of income from the transactions in securities accrued or arising to an assessee being a foreign company, if any such amount is credited to the profit and loss account, shall be reduced from the book profits. A corresponding provision (Clause (fb) in Explanation 1) increases the book profit by the amount of expenditure relatable to the income from such transaction.

The relevant text of the Finance Act, 2015 is as follows-

> *In section 115JB of the Income-tax Act, in the Explanation 1 below sub-section (2), with effect from the 1st day of April, 2016,—*
>
> *after clause (iib), the following clauses shall be inserted, namely:—*
>
> *(iid) the amount of income accruing or arising to an assessee, being a foreign company, from,— (A) the capital gains arising on transactions in securities; or*
>
> *(B) the interest, royalty or fees for technical services chargeable to tax at the rate or rates specified in Chapter XII, if such income is credited to the profit and loss account and the income-tax payable thereon in accordance with the provisions of this Act, other than the provisions of this Chapter, is at a rate less than the rate specified in sub-section (1);*
>
> *after clause (f), the following clauses shall be inserted, namely:—*
>
> *(fb) the amount or amounts of expenditure relatable to income accruing or arising to an assessee, being a foreign company, from,—*
>
> *(A) the capital gains arising on transactions in securities; or*
>
> *(B) the interest, royalty or fees for technical services chargeable to tax at the rate or rates specified in Chapter XII,*
>
> *if the income-tax payable thereon in accordance with the provisions of this Act, other than the provisions of this Chapter, is at a rate less than the rate specified in sub-section (1);*

after Explanation 3, the following Explanation shall be inserted, namely:—

'Explanation 4.—For the purposes of sub-section (2), the expression "securities" shall have the same meaning as assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956.'.

However, this amendment is prospective in nature (as was the case under the Finance Act, 2015 as originally introduced) and will not impact or benefit FIIs/foreign companies on whom demand notices have been served to pay MAT on transactions that took place prior to 01.04.2015.

Hence, what is clear is the fact that expenditure relatable to such income, is to be included for calculating the book profits for determining the MAT liability.

Although, as stated by the Finance Minister, the purpose of the above provisions, is "[t]*o rationalise the MAT provisions for FIIs, profits corresponding to their income from capital gains on transactions in securities that are liable to tax at a lower rate shall not be subject to MAT*,"[18] This once again highlights the fact that the Finance Act, 2015 merely exempts capital gains income from transfer of shares, from the purview of MAT, although the intent is also to levy MAT liability on foreign companies. However, it still remains to be seen whether the extension of MAT to FIIs would be justifiable in law.

3. Applicable provisions of the Income Tax Act, 1961 and the Double Taxation Avoidance Agreements

a. Taxation of income of non-residents under the Income Tax Act, 1961

It is a settled principle that tax can be levied based on either the source of the income or the residence of the assessee.[19] In cases of a foreign company, only the "source rule" can be applied as the said company is not a domestic company. As far as the source rule is concerned, the Double Taxation Avoidance Agreement (DTAA) or the domestic law applies, if certain territorial nexus with the source country is established. A foreign company can therefore be taxed under the Act only to the extent of Section 5 and Section 9 of the Act and there is no provision that allows extending the source rule to Section 115JB of the Act.

Section 5 of the Act provides for the scope of income taxable in India for non-residents. Section 5(2) of the Act provides that income which is received; accrues or arises; or is deemed to accrue or arise to a non-resident in India is taxable under the Act. Section 9 of the Act further extends this

[18] "Foreign Investors' MAT woes not over just yet", Business Standard, March 2, 2015 available at http://www.business-standard.com/budget/article/mat-sword-hanging-over-fpis-till-march-end-115030100063_1.html last accessed 29 June 2015.

[19]See *Vodafone International Holdings BIFV v Union of India* (2012) 6 SCC 613.

scope by deeming certain incomes to arise in India. Capital gains that would be deemed to arise in India under Section 9 would be all income arising, whether directly or indirectly, through the transfer of a capital asset situated in India. It envisages taxability in a case where income may arise outside India due to transfer happening outside India, but is still deemed to arise in India if the capital asset transferred is situated in India.

Section 45 of the Act provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to tax under the head "Capital gains" and shall be deemed to be income of the previous year in which the transfer took place.

Long term capital gains from transfer of shares is exempt by virtue of Section 10(34) of the Act, while short term capital gains is chargeable to tax by virtue of Section 45 read with Section 48 (computation provision) of the Act.

b. Taxation of Capital Gains in accordance with the Double Taxation Avoidance Agreements.

A DTAA is not the source of the taxing power itself. Rather, it allocates taxing powers to the parties to the treaty in a manner such that tax payers do not ending up paying tax on the same income in both parties to the Agreement. The taxation of capital gains are governed by Article 13of the OECD Model Convention with respect to Taxes on Income and on Capital, 2014 which states:

> "1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.
>
> 2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State.
>
> 3. Gains from the alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to the operation of such ships, aircraft or boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.
>
> 4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.
>
> 5. Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting State of which the alienator is a resident."

As per clause (4) of Article 13 as indicated above, capital gains arising out of a share transfer simpliciter, that does not involve transfer of fifty per cent of the shareholding of a company in one country, will be taxed in the country in which the person selling the shares is a resident. This means that an FII, located outside India, which transfers shares amounting to less than fifty percent of the shareholding in an Indian company, will be taxable only in the country in which it is resident. However, if more than 50% of the shareholding stands transferred, then the capital gains will be payable by such FII in India.

On the other hand, Article 13 of the India-Mauritius Double Taxation Avoidance Agreement, 1982 states:

"ARTICLE 13

CAPITAL GAINS

1. Gains from the alienation of immovable property, as defined in paragraph (2) of article 6, may be taxed in the Contracting State in which such property is situated.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other State.

3. Notwithstanding the provisions of paragraph (2) of this article, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this article shall be taxable only in that State.

5. For the purposes of this article, the term "alienation" means the sale, exchange, transfer, or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition thereof under any law in force in the respective Contracting States."

It may be noted that the above provision is slightly different from Article 13 of the OECD Model Tax Convention. Irrespective of whether more than 50% of the shareholding is transferred, where a Mauritian based FII transfers shares in an Indian company, such FII will pay tax only in Mauritius. Hence, the capital gains from transfer of shares are only taxable in such State where the FII is resident, and not in India.

An interpretation of Section 115JB to levy MAT on capital gains of FIIs, unless FIIs have transferred more than 50% of the shareholding in a company, would therefore be contrary to the provisions of Article 13 of the OECD Model Convention DTAA where such DTAA has been entered into by India with another country. Where Article 13 clearly prescribes that capital gains on transfer of shares has to be taxed in the country where the assessee is resident, provisions of the Act cannot be used to override it unilaterally.

c. Interplay of Section 90(2) and Section 115JB of the Act

Even under the Act itself, where countries in which FIIs are resident do not impose a tax or impose a lesser tax than the Act in India, according to Section 90(2), FIIs who are tax residents of such countries cannot be taxed in India if the source of such income is in India. For instance, since capital gains is not taxable in Mauritius, by virtue of Section 90(2) of the Act, where Article 13(4) of the DTAA is more beneficial to FIIs, MAT provisions will not be applicable to such FIIs either. Sub-section (2) of Section 90 reads:

"(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double

> taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."

Though no provision of the DTAA per se conflicts with Section 115JB, by virtue of Section 90(2) of the Act, clause (4) of Article 13 has to apply to such capital gains and capital gains tax on transfer of shares by FIIs based outside India, and such capital gains will not be taxable in India

The scope of Section 90(2) of the Act has been interpreted by the Supreme Court in ***Union of India vs. Azadi Bachao Andolan***;[20] a judgement which still holds the field. Here, the Supreme Court held that-

> "The provisions of sections 4 and 5 of the Act are expressly made 'subject to the provisions of this Act', which would include section 90 of the Act. As to what would happen in the event of a conflict between the provision of the Income-tax Act and a notification issued under section 90, is no longer res integra…[21]
>
> A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income-tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the Legislature to make a departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections 'subject to the provisions' of the Act. The very object of grafting the said two sections with the said clause is to enable the Central Government to towards implementation of the terms of DTAs which would automatically override the provisions of the Income-tax Act in the matter of ascertainment of chargeability to income-tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAC."[22]

How Section 90(2) applies to a given transaction has also been explained by the Delhi High Court in the case of *Director of Income Tax* v. *Rio Tinto Technical Services*[23] where it was held:

> "Section 90(2) mandates that where the Central Government has entered into a Double Taxation Avoidance Agreement under subsection (1) for granting relief of tax or, as the case may be, avoidance of double taxation, then in relation to the assessee to whom the agreement applies, the provisions of the Act apply to the extent they are more beneficial to the assessee. In other words, where an article in a Double Taxation Avoidance Agreement and a provision of the Act apply to the assessee, then the article of the Double Taxation Avoidance Agreement or the provision the Act will apply depending upon which one of the two is more beneficial/advantageous to the assessee. The first requirement, therefore, is to see whether the provisions of the Act apply to a particular transaction undertaken/ income earned by an assessee, which is taxable in India under the Act. In case the transaction/income is not taxable under the Act, the income earned would not be taxed. In case the said transaction or income of an assessee is taxable under the Act, then the provisions of the Double Taxation Avoidance Agreement, if applicable, may be resorted to if they are more beneficial and advantageous to the assessee, i.e., if they negate or reduce the tax liability."

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[20] (2004) 10 SCC 1.

[21] *Azadi Bachao* (n 20), para 21, 25.

[22] *Azadi Bachao* (n 20) para 28, 27.

[23] (2012) 340 ITR 507 (DEL).

Hence, the above case clearly establishes the law as regards the inter-play between the domestic law and the DTAA and the interpretation of Section 90(2) of the Act. The Supreme Court of India in the case of *Azadi Bachao* has laid down that in case of conflict the provisions of the Double Taxation Avoidance Agreement would prevail over the statutory provisions of the Act in case the same are more beneficial to the Assessee.[24]

Most recently, in the specific context of the provisions of MAT, the Delhi Bench of the Income Tax Appellate Tribunal in its order in *Bank of Tokyo Mitsubishi UF Ltd v ADIT*[25] has taken the view that Section 90(2) will prevail over Section 115JB in so far as treaty benefits are concerned. Here, the appellate was a non-resident bank whose Indian operations were sought to be taxed under Section 115JB and not in accordance with Article 7(3) of the India-Japan DTAA. When challenged before the ITAT, the Tribunal pointed to Section 90 of the Act which stated that Article 7(3) of the DTAA had to apply to the assessee by virtue of the provision.

Hence, once it is found that the tax is payable in the "other country" under a DTAA and Section 4 and 5 of the Act are not applicable, there is no question of MAT being applicable to a given transaction in India. MAT is an alternative tax regime, which comes into existence when the regular tax is not payable by virtue of the computation provisions being such that liability is NIL, and not because of lack of applicability of charging provisions. However, in case of foreign companies, the very charging provision is ousted because of the interpretation of Section 90(2) of the Act. Thus, there is no question of the MAT applying when the chargeability to tax in India of a transaction is itself ousted.

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[24] Also see *CIT v. Visakhapatnam Port Trust* [(1983) 144 ITR 146 (AP).

[25] Available at MANU/ID/763/2014.

III. JUDICIAL PROUNOUNCEMENTS ON THE APPLICABILITY OF MAT ON FIIS

From a survey of the legislative history of the MAT and the analysis of the provisions of the Act, and the OECD Model DTAAs, the application of the MAT on FIIs does not seem to be justified in law. To re-iterate, the MAT was envisioned as a law applicable to the profits of Indian companies, specifically those which had availed of exemptions available to them under the Act to the extent that they were paying no taxes on their income by way of profits. It was not meant to cover any and all persons who may not be paying taxes as a result of the operation of any provision of law whatsoever.

Even where it has been held to apply to foreign companies, it has been done so in the very limited context, as was done in the judgment of the AAR in *In Re P* No. 14 of 1997,[26] and which shall be discussed in depth later. It may be noted here that there is a fundamental difference between how business profits of a non-resident, and the capital gains of a non-resident are taxed respectively under the DTAA; the business profits are taxed only to the extent to which such income is *attributable* to India whereas in the case of capital gains, no part of the income of a non-resident is taxed in India.

However, the order of the AAR in *In re: Castleton Investment Ltd*[27] seems to suggest that the imposition of MAT on FIIs would be justified in law. In *Castleton,* the AAR has held that the provisions of Section 115JB apply to income from capital gains arising from transactions of shares made by foreign companies in Indian entities. The applicant in *Castleton* was a non-resident company which had transferred its shareholding in an Indian company to another non-resident company, and did not have any Permanent Establishment or even office in India. Nevertheless, the AAR has held that Section 115JB will be applicable to this transaction in its order dated 14.08.2012.

In arriving at this conclusion, the AAR's order reproduces the reasoning set out by it in the cases of *Moody's Analytics Inc.*[28] and *ZD*[29]. Here, the Authority has held that Section 115JB is the overriding provision. It overrides all the other provisions in the Act and it is the overriding charging provision. The AAR takes that view that Section 115JB provides for payment of income-tax by an assessee, which is a company and refers to the definition of a company in the Act, and not the term as defined under the Companies Act, 1956. The AAR dismisses the contention that since sub-section

[26] [1998] 234 ITR 335 (AAR).

[27] [2012] 348 ITR 537 (AAR).

[28] Unreported order, AAR No. 1186 to 1189 of 2011.

[29] Unreported order, AAR No. 1098 of 2011.

(2) of section115JB refers to the Companies Act, it does not mean that the definition from therein has to be borrowed. The AAR also discounts the possibility of "practical difficulties" for foreign companies to prepare an account in terms of Schedule VI of the Companies Act, 1956 (which does not apply to them) and finds that to be no reason to whittle down the scope of section 115JB of the Act.

At present, the order of the AAR is presently under challenge by the applicant before the Supreme Court of India on various grounds.

Without going into the specifics of the *Castleton* case, it may be mentioned here that the reasons adopted by the AAR in *Castleton* are suspect and reliance upon the same to impose MAT on FIIs is not justified in law for the following two reasons:

a. **Orders of the AAR are not binding generally**

The orders of the AAR are binding only between the parties who approached the AAR and do not lay down the law on the matter. Section 245S of the Income Tax Act makes this quite clear and is extracted below for reference:

> "**245S.** (1) The advance ruling pronounced by the Authority under section 245R shall be binding only—
>
> (*a*) on the applicant who had sought it;
>
> (*b*) in respect of the transaction in relation to which the ruling had been sought; and
>
> (*c*) on the Principal Commissioner or Commissioner, and the income-tax authorities subordinate to him, in respect of the applicant and the said transaction.
>
> (2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced."

In *Columbia Sportswear v Director of Income Tax, Bangalore*,[30] the Supreme Court clarified the exact binding nature of the orders of the AAR as follows:

> "The Authority, thus, held that the advance ruling of the Authority is binding in the case of one transaction only and the parties involved in respect of that transaction and for other parties, the ruling will be of persuasive nature. The Authority, however, has clarified that this is not to say that a principle of law laid down in a case will not be followed in future. This decision of the Authority in *Cyril Eugene Pereira, In re*. (supra) has been taken note of by this Court in *Union of India* v. *Azadi Bachao Andolan* 2003 263 ITR 706 at 742 to hold that the advance ruling of the Authority is binding on the applicant, in respect of the transaction in relation to which the ruling had been sought and on the Commissioner and the income-tax authorities subordinate to him and has persuasive value in respect of other parties. However, it has also been rightly held by the Authority itself that this does not mean that a principle of law laid down in a case will not be followed in future."[31]

At most, therefore, the order of the *AAR* is persuasive in nature where the facts are near identical. This must also be seen light of the fact that the AAR itself has delivered contrary orders on

[30] [2012] 346 ITR 161 (SC).

[31] *Columbia Sportswear* (n 30), para 9.

identical facts. In the case of *The Timken Company v Director of Income Tax (International Taxation),*[32] where the question concerned taxability of capital gains in India in the hands of a non-resident company, the AAR held that Section 115JB would have no applicability in such a case especially since such non-resident had no permanent place of business in India that is to say, no "permanent establishment" in India that would make the transaction taxable.

The AAR has discussed the ruling in *Timken* above, but "disagreed" with the approach adopted in *Timken* relying upon the earlier AAR order in *In re P*. The AAR having no powers to overrule earlier judgments, the finding in *Timken* would, as per Section 245S be binding on the parties concerned and also have equal persuasive value as *Castleton*.

It is well established law that when two views are possible on the interpretation of a taxing provision, the Court should give the benefit of the doubt to the tax payer and adopt the one which favours the tax payer. To that extent therefore, reliance upon the order of the AAR in *Castleton,* to extend the applicability of MAT to FIIs would not be justified in law.

b. **The interpretation afforded by the AAR conflicts with plain words of the Act.**

The reasons adopted by the AAR, with respect, are contrary to the plain terms of the law, and the distinction drawn between the facts of the case and *Timken* are not at all evident.

In choosing to follow the finding in *In re P* over the finding in *Timken*, the AAR in *Castleton* has, with due respect, not taken note of the facts of the case before it. *Castleton,* like *Timken*, the applicant in question was a non-resident with no PE and the transaction was a one off sale of shareholding. Where the fact situation is broadly identical, it was incumbent upon the AAR in *Castleton* to have applied the same reasoning as contained in *Timken*.

In re P on the other hand concerned a foreign resident company. The applicant in that case had a project office in India which was a "permanent establishment" in India which was concerned with the carrying on of the business of the foreign company in India. In this context, the AAR held that the provisions of Section 115JB of the Act would apply to such a company and it would have to prepare its accounts and pay tax accordingly.

The reasoning of *In re P* is sounds in as much as the Companies Act, 1956 does in fact apply to a foreign company which has a permanent establishment in India. Specifically Sections 592 to 602 were intended to apply to such companies as can be seen from Section 591 of the Companies Act, which states:

> "**591. Application of sections 592 to 602 to foreign companies**.
>
> (1) Sections 592 to 602, both inclusive, shall apply to all foreign companies, that is to say, companies falling under the following two classes, namely:-
>
> (a) companies incorporated outside India which, after the commencement of this Act, establish a place of business within India; and

[32] [2010] 326 ITR 193 (AAR).

(b) companies incorporated outside India which have, before the commencement of this Act, established a place of business within India and continue to have an established place of business within India at the commencement of this Act."

Under Section 594 of the Companies Act, 1956 as it stood, foreign companies covered by Section 591 of the Companies Act, 1956 are also required to file their accounts in the following manner:

"**594. Accounts of foreign company.**

(1) Every foreign company shall, in every calendar year,-

(a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having annexed or attached thereto such documents (including, in particular documents relating to every subsidiary of the foreign company) *as under the provisions of this Act it would, if it had been a company within the meaning of this Act, have been required to make out and lay before the company in general meeting*; and

(b) deliver three copies of those documents to the Registrar: Provided that the Central Government may, by notification in the Official Gazette, direct that, in the case of any foreign company or class of foreign company the requirements of clause (a) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in the notification.

(2) If any such document as is mentioned in sub- section (1) is not in the English language, there shall be annexed to it a certified translation thereof.

(3) Every foreign company shall send to the Registrar with the documents required to be delivered to him under sub- section (1), three copies of a list in the prescribed form of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in sub- section (1) is made out." (emphasis supplied)

Under the Companies Act, 2013 the foreign companies which have to file their returns have however, been narrowed down. The equivalent to Section 591 of the Companies Act, 1956 in the Companies Act, 2013 is Section 379 which states:

"**379**. Where not less than fifty per cent. of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India,or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India"

The provision congruent to Section 594 is Section 381 of the Companies Act, 2013 which states:

"**381**. (1) Every foreign company shall, in every calendar year,—

(a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having annexed or attached thereto such documents as may be prescribed; and

(b) deliver a copy of those documents to the Registrar:

Provided that the Central Government may, by notification, direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in that notification.

(2) If any such document as is mentioned in sub-section (1) is not in the English language, there shall be annexed to it a certified translation thereof in the English language.

> (3) Every foreign company shall send to the Registrar along with the documents required to be delivered to him under sub-section (1), a copy of a list in the prescribed form of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in sub-section (1) is made out."

Under the Companies Act, 2013 therefore only those foreign companies where an Indian citizens or Indian entities hold more than fifty per cent of share capital are even required to file their accounts in the manner prescribed by the Central Government, which need not necessarily be akin to those filed by Indian companies.

The changes between the Companies Act, 1956 and the Companies Act, 2013 would suggest that while *In re P* was right at the time when it was delivered, in light of subsequent changes, it is no longer good law. However, it is without doubt that under both the Companies Act, 1956 and the Companies Act, 2013, a foreign company which only holds shares in an Indian company cannot be expected to be governed by the Indian company law. Consequently, Section 115JB, one of whose key obligations is to prepare accounts in accordance with the appropriate provision of the Companies Act, 1956 cannot be held to extend to entities which never had the obligation in the first place.

It cannot therefore be said that a foreign company, which merely holds the shares of an Indian company can be said to have "established a place of business within India" for purposes of Section 592. The AAR in *Castleton* has not examined this aspect of the reasoning underlying *In re P* at all. This crucial aspect of the reasons underlying the order of the AAR in *In Re P* not having been engaged with at all, it was therefore entirely incongruous for the AAR to have applied this line of reasoning to the facts of the case that were before the Authority in *Castleton*. Consequently, there was no basis for the AAR to have relied upon the reasoning in *In re P* and rejecting the line of reasoning that informed *Timken*.

It is our view therefore that given the legal infirmities in the reasoning, the *Castleton* order of the AAR cannot be relied upon as an authority to require FIIs to pay MAT on capital gains earned by selling shares of Indian companies. An FII, being a non-resident without a Permanent Establishment in India, would not be liable to pay MAT under the provisions of Section 115JB on the plain interpretation of the provisions of the Act and the Companies Act, 1956.

IV. CONCLUSIONS

What emerges from an exhaustive analysis of the legislative history of the MAT in the context of the Act, the provisions of the DTAA and an analysis of the orders of the AAR are as follows:

1. The MAT has been introduced as a measure to ensure that no Indian company which makes profits escapes liability for income tax as a result of the exemptions available to it under the Act.
2. The applicability of the MAT was always intended to be limited by the requirements of the Companies Act, 1956 (now Companies Act, 2013) and only to those companies which are bound by the provisions of the Companies Act, 1956 in the manner in which they maintain their books of account and profits.
3. The provisions of the OECD model DTAA, which requires that the non-resident pay tax in the "other country" implies therefore that a tax on capital gains for FIIs cannot be levied in India without being a violation of the DTAA.
4. Section 90(2) of the Act, which requires that where the provisions of a DTAA is more beneficial to a non-resident then such DTAA should be applied are therefore relevant.
5. Even where no DTAA is applicable, Section 115JB will have no application to an FII, which is a foreign company without a permanent establishment in India on its own terms as *In re P* will not be applicable to such an FII.
6. The reliance upon the order of the AAR in *Castleton*, to contend that MAT can be imposed on FIIs, is entirely erroneous as the order does not take existing provisions of law into account and conflicts with prior orders of the AAR which have been decided correctly.

From a survey of the legislative history of the MAT, the provisions of the Act relating to international tax and the DTAAs, apart from the judicial interpretation of the above provisions all make it clear that Section 115JB were never intended to apply to FIIs. The structure of Section 115JB, in so far as it is considered for transactions prior to 01.04.2015, does not permit an application of the same to the capital gains of FIIs.

It is our view that the notices which have been issued to the FIIs to pay MAT on the capital gains accrued to them prior to 01.04.2015 are not sustainable in a court of law.

At the moment, the *Castleton* case is pending adjudication before the Supreme Court of India having been challenged by the applicant, with the Income Tax Department arrayed as the defendant. No hearing has taken place since 07.05.2013. An authoritative judgment of the Supreme Court of India on this aspect should close the matter and end any uncertainty about the It may be

advisable for the Government to seek an early hearing from the Supreme Court of India as a means to bring certainty and closure in the matter.

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