# MAT: Retrospective Tax Is Back?

There exists proverb in English “Once bitten, twice shy”. This proverb doesn’t hold well in case of Indian tax system. After facing the Backlash from the international investors in case of Vodafone retrospective case which resulted in vitiating economic environment. Since that judgment, there has been constant assurance made by Mr. P. Chidambaram, former Finance Minister, and present NDA government to foreign investors for ensuring stable Tax regime with no retrospective tax in future.

One can never know when income tax officials *(Herein after referred as “Revenue”)* comes back to haunt assessee.

**Issue**

Castleton Investment Limited (CIL), a Mauritius entity, owned shares of Glaxo Smithkline India, since 1993. It wanted to transfer these shares to a Singaporean group entity Glaxo Smithkline Pharmaceuticals Limited (“GSPL”) as part of restructuring exercise. Entity had been in possession of shares for more than 20 years and proposes to transfer the share for cash consideration at “Fair Market Value”.

CIL filed an application seeking view on whether Section 112 is applicable in case of MAT provisions.

AAR came up with judgment in favor of revenue and held that MAT provisions scope was wide to cover all companies including foreign companies. It does not make any difference whether or not PE exists or not.

Department after 3 years from above ruling came up with the demand of whopping Rs 602 crores to be charged from FII’s and FPI’s. There has been no action taken for last 3 Years on above ruling. Suddenly the demand notice is being given to concerned assessees. Revenue extends Castleton judgment to top foreign portfolio investors as well.

**IS MAT REALLY CHARGEABLE OR NOT?**

Let’s first define what is MAT?

*MAT has been defined as per Section 115JB, 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 is less than 18.5% of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be at the rate of 18.5%.*

The term “company” includes Foreign Company under its ambit. Moreover while calculating Book Profits the amount of income referred to in section 10(38) shall not be reduced. Income by way of long Term capital Gains referred to in Section 10(38) shall be exempt while computing the income under the normal provisions of Income Tax Act. However such income credited to P&L A/c shall not be reduced while computing the book profits and shall therefore be liable to MAT. Thereby extending its applicability to foreign company and FIIs.

There has been several judicial precedence against the revenue. Certain cases are mentioned herein:-

1. [**M/s. Praxair Pacific Limited (A.A.R. No. 855/2009 dated 23 July 2010)**](http://taxguru.in/income-tax-case-laws/transfer-of-shares-by-a-foreign-company-to-its-wholly-owned-indian-subsidiary-not-taxable-in-india.html)

Praxair, Mauritius based company had Wholly Owned Subsidiary in India

**RULING:** MAT is not applicable to foreign companies which do not have any presence in India. But Treaty benefits shall be applicable.

**2.**[The Timken Company (A.A.R. No.836 of 2009 **dated 23 July 2010**)](http://taxguru.in/income-tax-case-laws/section-115jb-is-not-designed-to-be-applicable-to-a-foreign-company-who-has-no-presence-or-pe-in-india.html)

Timken a US based company having No Permanent Establishment in India

**RULING:** Since Applicant does not have any business in India, there is no requirement for preparing its financial statements in accordance with the Companies Act, which is a fundamental requirement for levy of MAT. ‘

**3.**[Bank of Tokyo Mitsubishi UFJ Ltd. v. ADIT [2014] 49 taxmann.com 441 (Delhi – Trib.)](http://taxguru.in/income-tax/mat-provisions-115jb-apply-foreign-companies.html)

**RULING:** MAT applicable only to domestic companies

[**4. Krung Thai Bank PCL v. Jt Director of Income-tax – International Taxation (ITAT Mumbai), ITA No. 3390/Mum/2009**](http://taxguru.in/income-tax-case-laws/provisions-of-minimum-alternate-tax-mat-do-not-apply-to-banking-companies.html)

**RULING:** Where a tax payer is not required to prepare its financials in accordance with Schedule VI of the Companies Act, MAT provisions should not apply.

**Implication**

Think of a situation when big VC bought into a startup from its Mauritius entity. It got an “exit” by having that company go through an IPO. It sold the shares later on an exchange, and returned the profits to its investors.

Suddenly they get a tax demand saying give us 20% of that old money back. Why? Because MAT is applicable. How are they going to get that money back? It does not seem to be feasible option for FIIs. India as investing destination shall prove to be nightmare for such investors.

If the intention of the revenue was to tax on capital Gain then concerned stakeholders should be informed well in advance. Such level of uncertainty tarnishes the level of faith in the system.

**Government Intervention**

Finance Minister Arun Jaitley on 30 April 2015 said that “capital gains made by foreign investors will be exempt from Minimum Alternate Tax (MAT), but did not provide relief for past liabilities.

The minister said all capital gains from sale of securities as well as royalties, interest, technical services fee earned by foreign companies will be exempt from MAT, if the normal tax rate on such income is lower than 18.5 per cent.”

But this news did not augur well for foreign investors sentiments thereby resulting in freefall in Indian stock exchange. FIIs have been pulling out of Indian market.

In wake of such development, high-level panel under Law Commission Chairman A P Shah, has been constituted. Moreover government has put the onus on the Courts to address the issue of applicability of MAT on capital gains.

**CONCLUSION**

I hope government of the day shall try to bring stability in the system rather than instilling fear and creating a situation of tax terrorism.

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