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KALYAN-DOMBIVLI BRANCH OF WIRC OF ICAI

JUNE 2019

First & foremost

Respected Members of the Branch,

Newsletter provides an opportunity to the Branch to communicate with the Members of the Branch regarding the various programs which are planned by the Branch, various initiatives taken for members and students and overall progress of the Branch. Members and Students being at helm of affairs for the Branch, it's a great opportunity to communicate with them. This newsletter also consist of recent updates in Taxes, company law and audit and I am sure that this will be very useful to the members in their practice.

This time due to general elections the exams were postponed and have started from 27th May. Branch committee as successfully completed the responsibility casted upon by ICAI in respect of the Exams. Further branch committee is in close contact with the exam committee and exam centers to resolve any issue which arise during the course of the exams.

General Elections have elected stable government is the center and I am sure this will help a great deal to the economic development of the nation. As chartered accountants we are partner in nation building and we will play the same role of catalyst in economic growth of the nation and would extend all possible support as a Branch in this regards.

Branch is hosting DISA batch starting from 8th June 2019 @ springtime club, Kalyan. DISA being very useful in the day to day practice as well as for various assignments in Banks, Financial Institutions etc it provides a great boost to the practice and particularly is very useful for the young members. MCM CA Kaushik Gada and Coordinator CA Prakash Thakkar have taken great efforts in scheduling this Batch.

June is the month of transformation, Monsoon transforms the mother earth and there would be atmosphere of vibrance, energy and liveliness around. In our professional walk also the June 2019 will be marked as a month of transformation as we all would be doing GST Audit for the first time. Considering the challenges in the area of GST Audit all the Study circles under the Branch have scheduled timely CPE programs on the topic of GST Annual Return and Audit. Eminent speakers have guided the members and members have updated themselves to perform the task in best possible manner. I would take this opportunity to thank all the Conveners of the Study circles and their teams for their efforts in this direction.

CONTINUED...

1st July being CA foundation day, Branch has started planning for the same and we will soon come up with various programs on the occasion of CA Foundation day as well as CPE programs for the benefit of members. I would request all the members to kindly reserve their calendar for CA foundation day. Internal audit, Auditing Standards and Direct Tax are some of the topics we want to focus on.

From the month of June 2019, Branch will begin its Orientation batches at CHM college Ulhasnagar. This will be of great help and convenience to the Students and we are sure that the same would be conducted successfully.

I am glad to Share with you all that the BOS has allotted the Branch Students Conference in the month of December 2019. This will be first such conference for the Branch and the entire team of branch and WICASA will strive to make it a grand success as well as extremely beneficial for the Students of the Branch. We are thankful to the HO for bestowing confidence in the Branch and providing us such opportunity.

I am thankful to ICAI as well as WIRC for their continuous support to the Branch. I also take this opportunity to thank the members who are regularly contributing to the Newsletter and the News letter committee well lead by MCM CA Parag Prabhudesai. I also make an appeal to interested members to kindly join and share their expertise through newsletter to the members.

I remain here until next month and wish all the members a successful time with GST Audits apart from other assignments.

CA Saurabh S. Marathe

Chairman

Kalyan Dombivli Branch of WIRC of ICAI

Companies Significant Beneficial Owners Rules, 2019

Background:

After a play of hide and seek for nearly 6 months the Significant Beneficial Owners (SBO) Rules makes a comeback. The MCA by its notification dated 13/06/2018, had notified the **Companies (SBO) Rules, 2018** to eradicate money laundering and to unmask the hidden owners of the company.

After number of suggestions made by various Stakeholders regarding the confusion in the 2018 rules the MCA has now notified amendments to the previously notified Rules.

The intention is to **unmask the real owners of Companies.** As of now we see there are huge numbers of Companies with layers of investments made in each other and **it's tough to find out who is the real individual owner of these Companies.**

This article attempts to clarify the SBO rules in a simplified manner. For this purpose we shall dissect the section and the rules for the sake of clarity and understanding.

Pertains to: Companies (Significant Beneficial Owners) Rules, 2018 **&** 2019.

NEW TERMS INTRODUCED:

MAJORITY STAKE:

A PERSON / BODY CORPORATE HOLDING:

- More than one-half of the equity share capital in body corporate.
- Holding more than one-half of the voting rights in the body corporate;
- Having the right to receive or participate in more than one-half of the distributable dividend or any other distribution by the body corporate.

REPORTING COMPANY:

It means a company as defined in clause (20) of section 2 of the Act, required to comply with the requirements of section 90 of the Act

FYI: *Section 2(20) states: "company" means a company incorporated under this Act or under any previous company law.*

FYI: *Section 90 of Companies Act, 2013 states that every Company requires to maintain a "REGISTER OF SIGNIFICANT BENEFICIAL OWNERS IN THE COMPANY."*

The Amended SBO Rules provide that a Significant Beneficial Owner is an individual (as specified above), who:

- Holds indirectly, or along with any direct holdings, at least 10% per cent of the shares of the company.
- Holds indirectly, or along with any direct holdings, at least 10% of the voting rights in the shares of the company.
- Has been vested with the right to receive or participate in at least 10% of the total distributable dividend, or any other distribution in a financial year solely through indirect holdings, or along with any direct holdings.
- Has been vested with the right of exercising significant influence or control through direct-holdings and other means

The Amended Rules has laid out the criterion on the rights or entitlements of direct holding in the Reporting Company based on the legal structure of the member. Here's an overview of it

No.	Nature of Member of Reporting Company	Relationship of Individual to such Member
a.	Where the member of the reporting company is a body corporate (Indian or foreign), other than a limited liability partnership ('**LLP**').	An individual who: (a) holds majority stake (i.e. more than 50%) in that member; or (b) holds majority stake in the ultimate holding company (Indian or foreign) of that member.
b.	Where the member of the reporting company is a Hindu Undivided Family ('**HUF**') (through karta).	An individual who is the karta of the HUF.
c.	Where the member of the reporting company is a partnership entity (through itself or a partner).	An individual who: (a) is a partner; (b) holds majority stake* in the body corporate which is a partner of the partnership entity; or (c) holds majority stake in the ultimate holding company of the body corporate which is a partner of the partnership entity.
d.	Where the member of the reporting company is a trust (through trustee).	An individual who: (a) is a trustee in case of a discretionary trust or a charitable trust; (b) is a beneficiary in case of a specific trust; is the author or settlor in case of a revocable trust.
e.	Where the member of the reporting company is: (a) a pooled investment vehicle; or (b) an entity controlled by the pooled investment vehicle; in each case, based in member country of the Financial Action Task Force ('**FATF**') on Money Laundering and the regulator of the securities market in such member country is a member of the International Organization of Securities Commissions.	An individual in relation to the pooled investment vehicle who: (a) is a general partner; (b) is an investment manager; or is a chief executive officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity.
f.	Where such member of the reporting company is: (a) a pooled investment vehicle; or (b) an entity controlled by the pooled investment vehicle; but does not satisfy the requirements set out in row (e) above.	An individual determined under rows (a); (b); (c); or (d) above.

*Rule 2(d) of the amended SBO Rules defines 'majority stake' to mean: (i) holding more than **one-half** of the equity share capital in the body corporate; or (ii) holding more than **one-half** of the voting share capital in the body corporate; or (iii) having the right to receive or participate in more than **one-half** of the distributable dividend or any other distribution by the body corporate.

ANY INDIVIDUAL WHO DOES NOT HOLD ANY SUCH RIGHT SHALL NOT BE TREATED AS A SBO.

1. Responsibilities of the Reporting Company

Reporting Companies, as per the amended rules, are required to identify the existence of a Significant Beneficial Owner associated with it and necessitate him/her to file a declaration in Form Ben-1. The Reporting Company may issue a notice to a member seeking information in Form BEN-4 if the latter holds at least 10% of the former's shares, voting rights or right to receive or partake in the dividend or any other distribution payable in a financial year.

Apart from these, a Reporting Company is obligated to:

⇒ File a return in Form BEN-2 with the Registrar with respect to any declaration made by a Significant Beneficial Owner and any changes in the Significant Beneficial Ownership.

⇒ Maintain a register of Significant Beneficial Owners in Form BEN-3. The register must include their respective names, addresses, date of birth and details of ownership.

⇒ Issue notice to all its non-individual members who are holding more than 10% of the shares requiring them to disclose information of the SBO of such member (in Form BEN-4).

⇒ File an application to the National Company Law Tribunal (NCLT) to impose restrictions on the shares if a person doesn't provide the required information.

2. Filing of Obligations

The amended Rules require every SBO to file a declaration in Form BEN-1 to the respective company within a time frame of 30 days of acquiring the status of SBO. On the same note, these SBOs are also required to file the same within 90 days of introducing the amended rules. The amendment was enforced on the 8th of February this year.

Penalties

SBO's not filing Form BEN-1 would be imposed a fine ranging between INR 1,00,000 to INR 10,00,000 lakhs; and for a continuing offence, an additional fine of INR 1000 would be imposed for every day of default. Companies which are not compliant with the respective norms would be penalized with a sum of INR 10,00,000 to INR 50,00,000 (also applies to the people in-charge); and for continued offences, an additional fine of Rs. 1000 would be imposed for every day of default.

3. Non-applicability of the Amendment

The following persons need not make disclosures under the new SBO Rules:

- The Investor Education and Protection Fund
- The holding reporting company of the reporting company.
- The Central Government, state governments and local authorities.
- Entities administered by the Central Government, by any of the state governments or partly by the Central Government and any of the state governments.
- All investment vehicles registered with the Securities and Exchange Board of India (SEBI).
- Investment vehicles governed by the Reserve Bank of India (RBI)/Insurance Regulatory and Development Authority of India (IRDA)/ Pension Fund Regulatory and Development Authority.

Changes in Penal Provisions

Section No.	Default	Penal provisions as per the erstwhile Section	Penal provisions as per the Ordinance 2019
Section 10A: Commencement of Business, etc.	Failure to furnish declaration under the section	No such provision	**Company:** Rs.50,000/- **Officer-in- default**: Rs.1,000/- for each day to maximum Rs.1,00,000/-
Section 53 : Prohibition of issue of shares at Discount	Issue of shares at a discount	**Company:** Minimum Fine of Rs. 1,00,000/- Max Fine of Rs. 5,00,000/- **Officer in Default:** Minimum Fine of Rs. 1,00,000/- Max Fine of Rs. 5,00,000/-	**Company & Officer in Default**: Amount raised or Rs.5,00,000/- The Company shall also be required to refund the money raised through such issue at a rate of interest of 12% p.a. from the date of issue of shares.
Section 64 : Notice for alteration of share capital	Non-filing of notice with Registrar for alteration of share capital of the Company	**Company & Officer in default**: Minimum Fine of Rs.1,000/- per day Maximum Fine of Rs. 5,00,000/-	**Company & Officer in default:** Minimum Fine Penalty of Rs.1,000/- per day Maximum Fine Penalty of Rs.5,00,000/-
Section 90: Significant Beneficial Ownership	Person fails to make declaration	No such provision	Imprisonment of 1 year or with the fine applicable and may even be levied fine and imprisonment both.
Section 92 : Annual Return	Non-filing of Annual Return (MGT-7)	**Company** : Minimum Fine of Rs.50,000/- Maximum Fine of Rs.5,00,000/- **Officer in default**: Imprisonment of 6 months or Minimum Fine of Rs.50,000/- Maximum Fine of Rs.5,00,000/-	**Company & Officer in default**: Minimum Fine Penalty of Rs.50,000/- Further Penalty of Rs.100/- per day Maximum Fine Penalty of Rs.5,00,000/-
Section 102 : Statement to be annexed to the Notice	Mis.- statement in Explanatory statement	Every promoter, director, manager or other KMP who is in default shall be punishable with fine which may extend to Rs.50,000/- or 5 times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is more.	Every promoter, director, manager or other KMP who is in default shall be punishable with fine/ Penalty which may extend to Rs.50,000/- or 5 times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is more.
Section 105: Proxies	Notice of General Meeting to contain clause for proxies	**Company and Officer in Default**: Fine of Rs.5,000/-	**Company and Officer in Default**: Fine Penalty of Rs.5,000/-

Changes in Penal Provisions

Section No.	Default	Penal provisions as per the erstwhile Section	Penal provisions as per the Ordinance 2019
Section 117: Resolutions and agreements to be filed	Non-filing of MGT-14	**Company** : Minimum Fine of Rs.1,00,000/- Maximum Fine of Rs.25,00,000/- **Officer in default:** Minimum Fine of Rs.50,000/- Maximum Fine of Rs.5,00,000/-	**Company**: Minimum Fine Penalty of Rs.1,00,000/- Further, Penalty of Rs.5.00/- everyday Maximum Fine Penalty of Rs.25,00,000/- **Officer in default**: Minimum Fine Penalty of Rs.50,000/- Further Penalty of Rs.5.00/- per day Maximum Fine Penalty of Rs.5,00,000/-
Section 121: Report on Annual General Meeting	Non-filing of MGT-15	**Company**: Minimum Fine of Rs.1,00,000/- Maximum Fine of Rs.5,00,000/- **Officer in default**: Minimum Fine of Rs.25,000/- Maximum Fine of Rs.1,00,000/-	**Company** : Minimum Fine Penalty of Rs.1,00,000/- Further Penalty of Rs.500/- per day Maximum Fine Penalty of Rs.5,00,000/- **Officer in Default**: Minimum Fine Penalty of Rs.25,000/- Further Penalty of Rs.500/- per day Maximum Fine Penalty of Rs.1,00,000/-
Section 137: Filing of Financial Statements	Failure in filing financial statements with the Registrar	**Company**: Fine of Rs.1,000/- everyday Maximum Fine of Rs.10,00,000/- **Officer in default**: Imprisonment of term of 6 months Minimum Fine Rs.1,00,000/- Maximum Fine Rs.5,00,000/-	**Company**: Fine Penalty of Rs.1,000/- everyday Maximum Penalty of Rs.10,00,000/- **Officer in Default**: Minimum Fine Penalty Rs.1,00,000/- Further Penalty Rs.100/- per day Maximum Fine Penalty Rs.5,00,000/-
Section 140: Resignation of Auditor	Non-filing of e-Form ADT-3	Auditor: Minimum Fine of Rs.50,000/- or amount equal to remuneration of auditor, whichever is less Maximum Fine of Rs.5,00,000/-	**Auditor :** Minimum Fine Penalty of Rs.50,000/- or amount equal to remuneration Further penalty of Rs.500/- every day Maximum Fine Penalty of Rs.5,00,000/-

Changes in Penal Provisions

Section No.	Default	Penal provisions as per the erstwhile Section	Penal provisions as per the Ordinance 2019
Section 157(2): Intimation of DIN	Failure to intimate DIN of directors to the Registrar	**Company**: Minimum Fine of Rs.25,000/- Maximum Fine of Rs.1,00,000/- **Officer in default**: Company: Minimum Fine of Rs.25,000/- Maximum Fine of Rs.1,00,000/-	**Company**: Minimum Fine Penalty of Rs.25,000/- Maximum Fine Penalty of Rs.1,00,000/- Further Penalty of Rs.100/- per day **Officer in default:** Minimum Fine Penalty of Rs.25,000/- Maximum Fine Penalty of Rs.1,00,000/-
Section 159: Punishment for contravention of sections 152, 155, and 156	Punishment for contravention of sections 152, 155, and 156	**Individual or Director**: Imprisonment of 6 months Or Minimum Fine of Rs.50,000/- Further Fine of Rs.500/- per day	**Individual or Director**: Imprisonment of 6 months Or Minimum Fine Penalty of Rs.50,000/- Further Fine Penalty of Rs.500/-
Section 165: No of Directorships	Non-compliance of permissible number of directorship by director	**Director** : Minimum Fine of Rs.5,000/- Maximum Fine of Rs.25,000/-	**Director** : Penalty of Rs.5,000/- per day Minimum Fine of Rs. 5000 Maximum Fine of Rs. 25,000
Section 191: Payment to Director for loss of office	Contravention of the section	**Director** : Minimum Fine of Rs.25,000/-	**Director** : Minimum Fine of Rs. 25,000 Maximum Fine Penalty of Rs.1,00,000/-
Section 197: Overall maximum managerial remuneration in case of inadequacy of profits	Non-compliance of the provisions of the section	Minimum Fine of Rs.1,00,000/- Maximum Fine of Rs.5,00,000/-	Minimum Fine Penalty of Rs.1,00,000/- Maximum Fine Penalty of Rs.5,00,000/-
Section 203 : Appointment of Key Management Personnel	Default in appointment of Key Managerial Personnel	**Company**: Minimum Fine of Rs.1,00,000/- Maximum Fine of Rs.5,00,000/- **Director/KMP/Officer in default**: Minimum Fine of Rs.50,000/- Further Fine of Rs.1,000/- everyday	**Company**: Minimum Fine of Rs. 1 Lakh Maximum Fine Penalty of Rs.5,00,000/- **Director/ KMP/Officer in default:** Minimum Fine Penalty of Rs.50,000/- Further Fine Penalty of Rs.1,000/- everyday Maximum Penalty of Rs.5,00,000/-

Changes in Penal Provisions

Section No.	Default	Penal provisions as per the erstwhile Section	Penal provisions as per the Ordinance 2019
Section 238: Registration of offer of schemes involving transfer of shares	Contravention of the section	Minimum Fine of Rs.25,000/- Maximum Fine of Rs.5,00,000/-	Minimum Fine of Rs. 25,000 Maximum Fine of Rs. 5 Lakh Penalty of Rs.1,00,000/-
Section 446B Application of Fines	Default in filing annual return by OPC and small company	½ of fine or imprison-ment or both as may be specified in section 92(5) of the Act	½ of fine penalty or imprisonment or both as may be specified in section 92(5) of the Act
Section 447: Punishment for fraud	Penal provisions for fraud involving Rs.10,00,000/- or 1% of turnover and does not involve public inter-est	**Any person guilty**: Imprisonment of 5 years Or Fine of Rs.25,00,000/-	**Any person guilty**: Imprisonment of 5 years Or Fine of Rs.25 50,00,000/-

Dual Residency Conundrum

The resident country gets right to tax the global income of its residents. As discussed in my earlier article, under the Income-tax Act, 1961, the residence of an individual is determined by the number of days of the stay in the country. In case of some countries, the residency of an individual is determined by citizenship or nationality or immigration status.

In case of expatriates coming to India for short term assignments, the problem of dual residency arises i.e. they become resident of 2 countries based on the stay of days exceeding threshold as well as by citizenship in some other country.

Taxation of dual residency is resolved by tie-breaker rule under Article 4(2) of DTAA. A sequence of test is provided to resolve the dual residency conundrum and to determine which country would get the ultimate right to tax the global income of an individual.

Article 4(2) – Tie breaker rule for Individual

Article 4(2) of OECD and UN Model Convention provides:

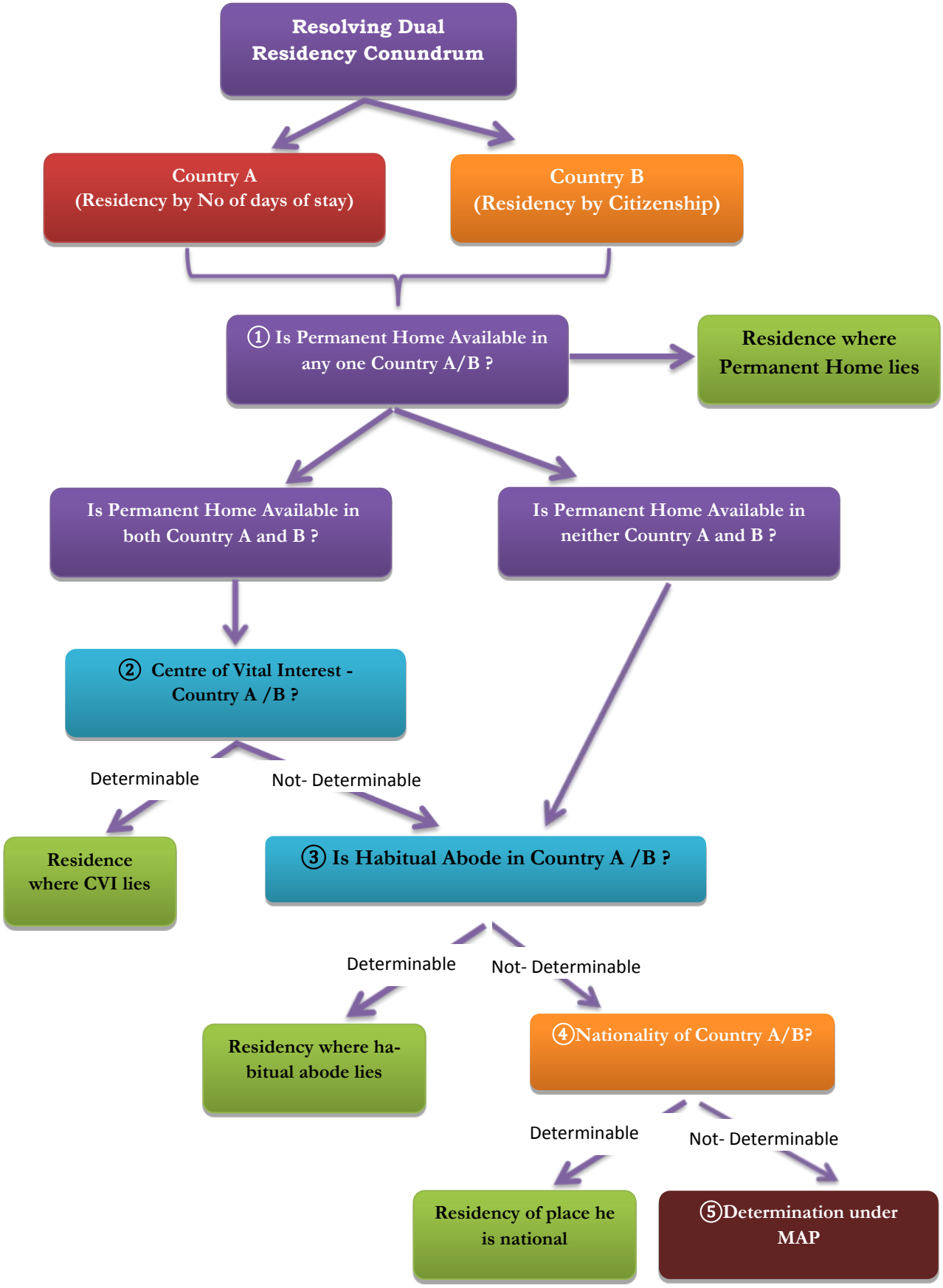
Where by reason of the provisions of paragraph 1 **an individual is a resident of both Contracting States**, then his status shall be determined as follows:

(a) He shall be deemed to be a resident only of the State in which he has **a permanent home** available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his **personal and economic relations are closer (centre of vital interests)**;

(b) If the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an **habitual abode**;

(c) If he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a **national**;

(d) If he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by **mutual agreement**.


Resolving Dual Residency Conundrum
Country A (Residency by No of days of stay)
Country B (Residency by Citizenship)
① Is Permanent Home Available in any one Country A/B ?
Residence where Permanent Home lies
Is Permanent Home Available in both Country A and B ?
Is Permanent Home Available in neither Country A and B ?
② Centre of Vital Interest - Country A /B ?
Determinable
Not- Determinable
Residence where CVI lies
③ Is Habitual Abode in Country A /B ?
Determinable
Not- Determinable
Residency where habitual abode lies
④Nationality of Country A/B?
Determinable
Not- Determinable
Residency of place he is national
⑤Determination under MAP

a) Place of Permanent Home:

Permanent home means dwelling place available to any individual all the time continuously and not occasionally. This also includes place taken on rent for a prolonged period of time. Any place taken for a short duration of stay or for temporary purpose, may be for reasons such as short business travel, educational purpose or short holiday is not regarded as permanent home.

b) Centre of vital Interest-economic & personal interest:

Centre of Vital interest shall mean place where the individual has family ties and social relations, occupation, place of business, place of administration of his properties.

c) Place of Habitual Abode:

Habitual abode refers to the frequency, duration, regularity of stays that are part of settled routine of an individual life and are therefore, more than transient.

Case Study:

Mr. John an Indian citizen and born in India, lives in UK since he was 15 years old. He went to Australia for 2 years for employment and went with his family. However, he maintained his house in UK and returned to UK many times during the 2 years. He stayed in his UK house on those visits. Mr. John is resident of both the countries under their domestic tax laws. Where is Mr. John resident for tax purposes during his 2 year period:

a) if he returns to UK, b) if he moves to South Africa

Applying the tie breaker test as per Article 4(2) of the UK-Australia DTAA, Mr. John is a resident of UK since a permanent home is available for him in UK. If he moves to South Africa, even then he is a resident of UK since the condition is availability of permanent home and not the actual utilization of permanent home.

Recently, Bangalore ITAT in Shri Kumar Sanjeev Rajan (2019) 104 taxmann.com 183 (Bang-trib.) has ruled that in case of dual residency of an individual, the residency has to be determined as per the provisions of Article 4 of India-USA DTAA. ITAT granted exemption by applying the tie-breaker rules as per Article 4(2) and held that taxpayer's vital interest was closer to USA.

Facts of that case:

The assessee and his family members were citizens of the USA. The assessee had been living and working in the USA for nearly 20 years until he was deployed on a temporary cross-border assignment in India for six years. He completed his assignment in India from June 2006 to August 2012 and moved back to the USA upon completion of the assignment. For PY 2012-13, the taxpayer was resident and ordinary resident (ROR) in India and resident of USA as well as per its domestic tax law. For the period April 1, 2012 to August 10, 2012, since the house property of the taxpayer in the USA was let out, for the purpose of tie-breaker, the house would be considered as 'unavailable to use' to the assessee during this period. Hence, he satisfied the first test of "availability of permanent home" in India and tie-broke his residency in India for this period. For the period August 11, 2012 to March 31, 2013, since there was tie in the first test of tie-breaker rules under the tax treaty as he had permanent home available in both countries, the taxpayer contended that his vital interest were in USA. He contended that he and his family went back to USA after assignment in India got ended, he has house and personal belongings in USA, he has all social security plans and investments in USA and that he intends to plan rest of lifetime in USA. The AO contended that the personal and economic relations refer to long and continuous relation that an individual nurtures with a place and cannot be broken forthwith upon relocation to another country.

Therefore, the assessee cannot claim that after the end of assignment (i.e. from August 2012) his personal and economic relations were closer to USA than in India. The AO held that the assessee was an Indian resident for the entirety for AY 2011-2012, and such residence does not fluctuate with the assessee moving to the USA for less than eight months in the AY 2012-2013. Further, the AO also contended that there is no concept of split residency under the Act or DTAA i.e., the tax year is not split such that income during the first four months of AY 2012-2013 is taxed in India and the rest in the USA.

The CIT(A) noted that the assessee had permanent home available in India as well as USA for the period August 11, 2012 to March 31, 2013. Therefore, there was tie in the first test of the tie-breaker rules under Article 4(2)(a) of DTAA. The CIT(A) noted that assessee's Center of Vital Interest was closer to the USA than to India on a consideration of the following factual points:

* The Assessee and his family went back to USA after assignment in India got ended,
* The Assessee has 2 houses, car and personal belongings in USA
* Exercise of voting rights in the USA.
* Holding of driving licence in the USA.
* Enjoying better social ties in the USA owing to many years of residence there.
* Holding a significant portion of investments, retirement savings plan and insurance policies in the USA.
* Contribution towards social security in the USA since 1988 and pension plan since 1998.
* Intention to stay in the USA with family for the rest of the assessee's lifespan.

Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States.

ITAT ruled that the CIT(A) had rightly applied the Centre of Vital Interest test and arrived at the conclusion that the assessee's Center of Vital Interest was closer to the USA than to India.

This decision throws considerable light on the fact that residence in the prior years would not be a bar for determining the residence of the current year. Further, within the same financial year, the residence can be changed based on center of vital interest with the country where personal ties are closer.

Article 4(3) – Tie breaker rule for other than Individual

For person other than individuals, the residency is determined by the place of incorporation, place of effective management or place where BoD meetings take place. As per Sec.6 of Income -tax Act, a company is said to be resident in India by its incorporation in India or by virtue of POEM being in India. Article 4(3) resolves dual residency for person other than individual through MAP. Article 4(3) of OECD and UN Model Convention provides:

Until 2017, the sole tie-breaker test for resolving double taxation disputes was through POEM. However, in 2017, the Committee on Fiscal Affairs recommended a change to case by case approach considering the number of tax avoidance cases involving dual resident companies. Now, the determination would be made under MAP. The competent authorities shall take into consideration various factors such as place where BoD meetings are conducted, where the CEO and other senior executives carry on their activities, place where head quarters are located etc.

If the competent authorities are unable to determine, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States. This will not prevent the taxpayer from being considered as resident of each contracting state for purposes other than granting treaty relief or exemption.

Proof of Residency :

In many cases the treaty benefit has been denied to the taxpayer in absence of valid 'Tax Residency Certificate' (TRC) issued by the Resident country. Therefore, in order to claim the relief under DTAA, taxpayer is required to furnish TRC.

In respect of Article 4 of the India-Mauritius DTAA, the CBDT had issued Circular No 789 stating that "In respect of taxation of dividends and capital gains, Certificate of Residence issued by the Mauritian Authorities will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership". SC in Azadi Bachao Andolan Case upheld the validity of Circular No 789.

Further, Sec.90(4) and 90(5) has been inserted vide Finance Act, 2012 and 2013 w.e.f AY 2013 -14 to provide that a non-resident can claim treaty relief in India only if:

a) He obtains TRC from State R and

b) He provides information Form 10F

Therefore, in order to claim the treaty benefit, a person should provide the valid TRC and Form 10F.

Bombay High Court

CIT VS Union Bank of India : Appeal No 1196 of 2013

Date of Publication 30th April 2019

Section 115 JB : AY 2005-06

Conclusion: -

Section 115JB as it stood prior to its amendment by virtue of Finance Act, 2012 is not applicable to a banking company (also insurance & electricity cos). The mechanism provided for computing book profit in terms of Section 115JB(2) is wholly unworkable for a banking company. When the machinery provision fails, the charging section also fails. The anomaly was removed by the Finance Act, 2012. However, the amendments are neither declaratory nor clarificatory but make substantive and significant legislative changes which are applicable prospectively (Kerala State Electricity Board 329 ITR 91 (Ker) followed)

Ahmadabad Tribunal

DCIT VS Lovy Ranka : ITA No 2107/Ahd /17 Date of Publication 30th April 2019

Section 50 C Assessment Year 2013-14

Conclusion: -

Though Section 50C is a deeming provision and the AO is obliged to compute the capital gains by taking the valuation arrived at by the DVO in place of the actual consideration received by the assessee, the assessee is entitled to challenge the correctness of the DVO's valuation before the CIT(A) and the Tribunal. The DVO has to be given an opportunity of hearing.

Delhi Tribunal

Nice Bombay Transport Pvt Ltd Vs ACIT : ITA No 1331 /Del /2012

Date of Publication 4th May 2019

Section 14 A Rule 8 D Assessment Year 2008-09

Conclusion: -

Though Maxopp Investment 402 ITR 640 (SC) rejects the theory of dominant purpose in making investment, it makes a clear distinction between dividend earned on shares acquired for controlling interest & shares purchased as stock-in-trade. **In the case of the latter, it is only by a quirk of fate that the shares were held by the assessee when the dividend was declared. Accordingly, s. 14A & Rule 8D do not apply to shares held as stock-in-trade.**

Hon'ble Apex Court, therefore, while rejecting the theory of dominant purpose in making investment in shares-whether it was to acquire and retain controlling interest in the other company or to make profits out of the trading activity in such shares – clearly made a clear distinction between the dividend earned in respect of the shares which were acquired by the assessee in their exercise to acquire and retain the controlling interest in the investee company, and the shares that were purchased for the purpose of liquidating those shares whenever the share price goes up, in order to earn profits. It is, therefore, clear that though not the dominant purpose of acquiring the shares is a relevant for the purpose of invoking the provisions under section 14 A of the Act, the shares held as stock in trade stand on a different pedestal in relation to the shares that were acquired with an intention to acquire and retain the controlling interest in the investee company.

Kolkata Tribunal

Rashmi Metaliks Ltd Vs DCIT : ITA No 24 To 30 /Kol /2016

Date of Publication 11th May 2019

Section 153A Assessment Year 2008-09 To 2013-14

Conclusion: -

Natural Justice: The assessee cannot be kept in the dark. Adverse statements or materials cannot be kept away from his eyes. If the AO intends to use it to draw adverse inference/finding, the assessee should be provided the adverse material/statements in order to rebut/cross examine the provider/maker of the adverse material. Failure to do so is a serious flaw which renders the assessment a nullity

Mumbai Tribunal

ITO Vs Smart Sensors & Transducers Ltd : 176 ITD 104 Section 50

Assessment Year 2011-12

Conclusion: -

S. 50 : Capital gains-Depreciable assets-Block of assets-Brought forward business loss and long term capital loss can be set off against short term capital gain computed under section 50 on sale of factory building being depreciable asset. [S. 72, 74].

Dismissing the appeal of the revenue the Tribunal held that, brought forward business loss and brought forward long term capital loss can be set off against short term capital gain arising as per section 50 on sale of factory building being a depreciable asset. Followed CIT v. Manali Investments [2013] /219 Taxman 113 (Mag.)(Bom.) (HC). (AY. 2011-12)

Income Tax Appellate Tribunal , Mumbai

DCIT Vs Just Dial Ltd : Appeal No 6900/ Mum / 2017

Section 271(1) (C) AY 2007-08

Conclusion: -

Penalty for concealment can be levied only when there is some element of deliberate default and not mere mistake; penalty would not levied for claim of capital loss against the profit of business by negligence or mistake. The AO while passing the assessment order noted that the assessee had debited a sum of Rs. 36,08,634 to the profit and loss account, on account of loss on PMS sale of shares. The assessee has not added the same while computing the total income. Therefore, the AO added amount Rs. 36,08,634/- to the income of the assessee and initiated penalty u/s. 271(1)(c).

The assessee filed its reply dated 21/03/2012. In the reply the assessee contended that due to oversight and mistake the profit and loss on account of loss on PMS sale of shares was not added back the short term capital loss in the statement of counts. The explanation of assessee was not accepted by AO. The assessee during the assessment realized its mistake and offered the same for taxation. There was no malafide intention on the part of the assessee. The assessee filed no further appeal against the addition as the bona fide mistake was accepted and the income was offered for taxation. There was no malafide intention on the part of the assessee. The assessee filed no further appeal against the addition as the bona fide mistake was accepted and the income was offered for taxation.

The Hon'ble Bombay High Court in Bennett Colemann & Co. Ltd (supra) held that when there was an inadvertent mistake in the part of the assessee in including the interest received of 6% on the Government of India capital index bond as interest received on tax free bond no penalty is leviable. Further in CIT vs Somany Evergreen Knits Ltd (supra) the Hon'ble Bombay High Court held that the bona fide and inadvertent mistake of CA while filing of return of income will not amount furnishing of inaccurate particulars of income.

The Hon'ble Punjab and Haryana High Court in CIT Vs Sidhartha Enterpises (supra) held that penalty for concealment can be levied only when there is some element of deliberate default and not mere mistake; penalty would not levied for claim of capital loss against the profit of business by negligence or mistake.

Income Tax Appellate Tribunal , Jodhpur

Oxcia Enterprises Pvt Ltd Vs DCIT Udaipur : ITA No 291 / Jodh / 2018

Section 201(1) / 201(1A) : AY 2016-17

Conclusion :

The assessee-Company purchased a residential property for Rs. 60.12 lakhs from two people Shri Anant Ram Kumawat and Smt. Seema Kumawat who jointly owned the same. The Tribunal held that the co-owners are jointly owning the immovable property. So, the sale consideration has to be divided equally into two by virtue of sec. 46 of the Transfer of Property Act which prescribed that where the immovable property is transferred for consideration by persons having a distinct interest therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally. So, in this case, since there is no contract to the contrary could be pointed out by the Ld. DR for Revenue, in this case, consideration for each transferor comes to Rs.30,06,000/- each, which is below the prescribed limit of Rs.50 lacs given by the statute as aforesaid and, therefore, in the light of the same, we are of the opinion in the facts as discussed, supra, that the provisions of sec. 194- IA of the Act are not applicable in the instant case

CBDT CIRCULAR

Exemption u/s 11 available for ITR filed belatedly by Trusts registered u/s 12AA – CBDT Clarification F.No173/193/2019-ITA-IGovernment of India-Ministry of Finance-Department of Revenue -

Conclusion:

The Said circular is for the A.Y. 2018- 19 which clarifies that Charitable Trusts can avail the exemption u/s 11 although the returns are filed belatedly u/ s 139(4) of the Income Tax Act, 1961

Thank You

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