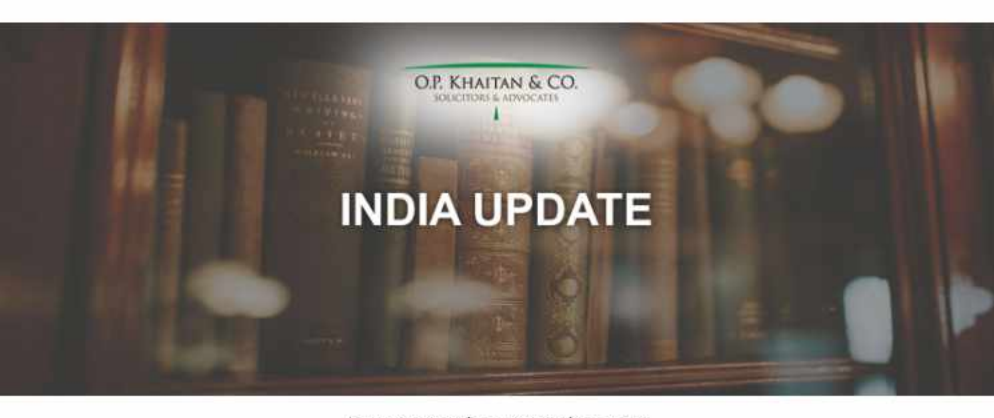


Issue September-December 2019

INDIA'S CORPORATE INCOME TAX RATES SLASHED

India's effective corporate tax rate will reduce by almost 10 percentage points for domestic companies. More specifically, for the 2019-20 Financial Year:

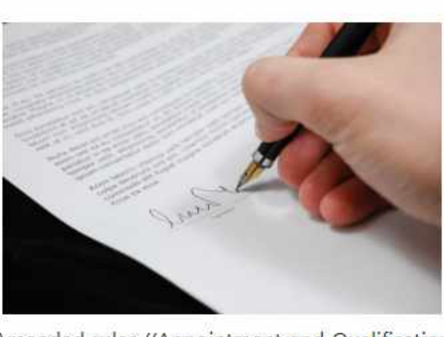
- For existing domestic companies, the corporate tax rate is reduced from around 35 percent to 25 percent (for domestic entities that do not avail of any exemptions or incentives, the effective tax rate could be as low as 22 percent);
- For manufacturing firms incorporated after October 1, 2019 and beginning operations before March 31, 2023, the corporate tax rate is slashed from 25 percent to 15 percent (this will amount to an effective tax rate near 17 percent, including surcharge and cess):
- For manufacturing firms incorporated after October 1, 2019 and beginning operations before March 31, 2023, the corporate tax rate is slashed from 25 percent to 15 percent (this will amount to an effective tax rate near 17 percent, including surcharge and cess):
- For companies that continue to avail of exemptions or incentives, the rate of minimum alternate tax (MAT) is reduced to 15 percent from the current 18.5 percent (the effective MAT will lower from 21 to 22 percent to 17 percent, including surcharge and cess).

QUALIFY FOR INDEPENDENT DIRECTORSHIP IN INDIA

Pursuant to the notification of the Ministry of Corporate Affairs ("MCA") dated October 22, 2019, an online data bank for the independent directors has been rolled out by the Indian Institute of Corporate Affairs ("IICA"). All individuals who are proposed to be appointed as an independent director or who are already appointed as an ID on board of companies in India have to register themselves in the Data Bank and then appear for an online proficiency test.

A qualification exam will be conducted by the IICA – an Institute which works under the leadership of MCA) in December 2019 for prospective professionals who are aspiring to work as an independent director.

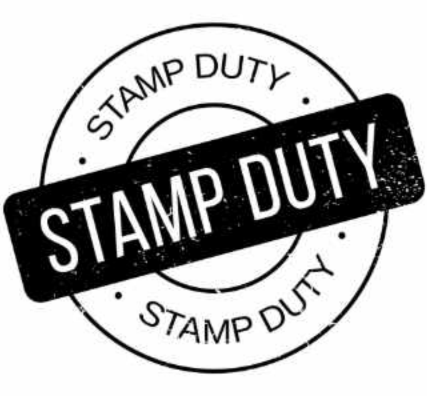
The score of 60% in the qualification test will be mandatory for the aspirants to assume the office of an independent director. The exam pattern will include an online proficiency self-assessment test to gauge the eligibility of the prospective candidates. Proficiency test will cover various subjects (i.e Companies law, securities law, basic accountancy and all other areas associated with the business/administration).



Amended rules ((Appointment and Qualification of Director) Fifth Amendment Rules, 2019,Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019 and Companies (Accounts) Amendment Rules, 2019) in relation to qualification test/eligibility of independent directors came into effect from December 01, 2019.

NEW STAMP DUTY RULES

The Finance Act, 2019 has introduced certain significant amendments to the Indian Stamp Act, 1899 with the objective of curbing stamp duty evasion and introducing a centralised collection mechanism for stamp duty collection through a single agency for securities transactions.



The amendments also consolidated the provisions pertaining to stamp duty on issuance, sale and transfer of securities market instruments under the newly inserted Sections 9A and 9B of the Central Act with an endeavour to avoid multiple instances of stamp duty and restricting the ability of the State Governments to determine rates or levy stamp duty in addition to the Central Act.

On 10 December 2019, the Ministry of Finance (a) notified the amendment to the Central Act, and(b) introduced the Indian Stamp (Collection of Stamp-Duty through Stock Exchanges, Clearing Corporations and Depositories) Rules, 2019 (Stamp Duty Rules), both of which shall come into force with effect from January 9, 2020.

SOLE ARBITRATOR CANNOT BE APPOINTED SOLELY BY ONE PARTY

In a recent judgment passed by the Hon'ble Supreme Court of India in the matter of Perkins Eastman Architects DPC & Anr. versus HSCC (India) Ltd. (decided on 26.11.2019), the Hon'ble Supreme Court held that the person who has interest in the outcome of the decision of the dispute must not have the power to appoint a Sole Arbitrator.

The issue before the Hon'ble Supreme Court was as to whether an arbitration clause authorising one of the parties to the contract to appoint the "Sole Arbitrator" for adjudication of disputes, would be valid in law or not. Another issue, inter alia, before the court was as to what would be the consequence of a situation where the party so authorised to appoint the Sole Arbitrator under the contract, has failed to do so within a period of 30 days (or within the time period, if so, provided in the agreement) from the date of receipt of notice.

This judgment will curb misuse of power by dominating parties in the contracts who usurp the right to appoint a sole arbitrator, leaving the opponent with no choice. All the arbitration clauses providing for appointment of sole arbitrator by one of the parties, would not be valid any more. Thus in such cases only option of the parties would be to appoint the sole arbitrator by mutual consent failing which, as per amended Act (post 2019 amendment), such appointment shall be made by Arbitral Institutions designated by Supreme Court or the High Court.

ARBITRATION (AMENDMENT) ACT, 2019

The Supreme Court in the case of Hindustan Construction Company Ltd v Union of India has struck down Section 87 of the Arbitration and Conciliation Act, 1996 as being manifestly arbitrary and ultra vires the Constitution of India. The Supreme Court further restored Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 and brought back the position of law as it stood after the case of BCCI v Kochi Cricket Pvt Ltd (2018) 6 SCC 287.

In August 2019, the Arbitration (Amendment) Act, 2019 (2019 Amendment Act) was brought in to fix certain loopholes created by the 2015 Amendment Act. In the 2019 Amendment Act, a new Section 87 was introduced clarifying the applicability of the 2015 amendments to only those court proceedings arising out of or in relation to arbitration proceedings which commenced after the cut-off date. In addition, the 2019 Amendment Act simultaneously repealed Section 26 of the 2015 Amendment Act. Consequently, the practice of 'automatic stay' on arbitration awards was reinstated for all those challenge proceedings which arose from arbitrations which commenced prior to the cut-off date. Not only was the law as laid down by the Supreme Court in BCCI nullified, but also the award debtors who had deposited amounts as a condition to stay an award now moved applications seeking refunds.

Pursuant to the 2019 amendments, various writ petitions were filed challenging the constitutional validity of the new Section 87 and the repeal of Section 26. The grievance was that despite having arbitral awards in their favour, these parties are unable to reap the benefits due to the resurrection of the 'automatic stay'. This had the effect of rendering awards nugatory, leaving the award creditors embroiled in long-drawn litigations and more obstacles to overcome before they could actually realise the proceeds from the awards.

As rightly appreciated by the Supreme Court, Section 87 of the Act had the effect of causing a significant amount of delay in the disposal of arbitration proceedings and an increase in the interference of courts in arbitration matters, ultimately defeating the very object of the Act, which was further strengthened by the 2015 Amendment Act.

AMENDMENTS TO THE INDIAN INSURANCE COMPANIES (FOREIGN INVESTMENT) RULES, 2015

The Department of Financial Services, Ministry of Finance, Government of India by way of a notification dated September 2, 2019 has amended the Indian Insurance Companies (Foreign Investment) Rules, 2015, pursuant to which the 49% foreign equity investment cap applicable to insurance intermediaries has been removed. Accordingly, 100% foreign equity investment is now permitted under the automatic route, subject to verification by the Insurance Regulatory & Development Authority of India ('IRDAI'). However, in case of entities whose primary business is outside the insurance area and is allowed by IRDAI to function as insurance intermediaries, the foreign equity investment caps applicable to the sector in which such entities operates will continue to apply, subject to the condition that the revenues of such entities from the primary (non-insurance related) business must remain above 50% of their total revenues in any financial year. The Government will now have to issue corresponding notifications under the applicable foreign exchange laws to operationalize these amendments. Amendments will also be required to the Guidelines dated November 20, 2015 by IRDAI on 'Indian Owned and Controlled', as applicable to insurance intermediaries.

Further, an insurance intermediary having majority shareholding by foreign investors are inter alia required to comply with the following:

1. For existing domestic companies, the corporate tax rate is reduced from around 35 percent to 25 percent (for domestic entities that do not avail of any exemptions or incentives, the effective tax rate could be as low as 22 percent);
2. For manufacturing firms incorporated after October 1, 2019 and beginning operations before March 31, 2023, the corporate tax rate is slashed from 25 percent to 15 percent (this will amount to an effective tax rate near 17 percent, including surcharge and cess):
3. For manufacturing firms incorporated after October 1, 2019 and beginning operations before March 31, 2023, the corporate tax rate is slashed from 25 percent to 15 percent (this will amount to an effective tax rate near 17 percent, including surcharge and cess):
4. For companies that continue to avail of exemptions or incentives, the rate of minimum alternate tax (MAT) is reduced to 15 percent from the current 18.5 percent (the effective MAT will lower from 21 to 22 percent to 17 percent, including surcharge and cess).

THE SEAT / VENUE IN ARBITRATION: SUPREME COURT REVERTS TO VIEW TAKEN IN BALCO AND DECLARES ANTRIX AND HARDY EXPLORATION BAD LAW

On 10 December 2019, a three-judge bench of the Supreme Court (SC) passed a judgment in BGS SGS SOMA JV v NHPC Ltd deciding key issues relating to interpretation of arbitration clauses and scope of appealable orders under the Arbitration and Conciliation Act 1996 (Arbitration Act).

In particular, the SC has held that:

(a) an appeal against an order transferring proceedings under Section 34 of the Arbitration Act is not maintainable under Section 37 of the Arbitration Act;

(b) the designation of a seat confers exclusive jurisdiction upon the courts of the said seat; and

(c) a place of arbitration, regardless of its designation as venue / seat / place is the juridical seat of arbitration, unless there are significant contrary indicators.

In doing so, the SC has specifically declared that its earlier judgments in Union of India v Hardy Exploration and Production (India) Inc (AIR 2018 SC 4871) (Hardy Exploration) and Antrix Corporation Ltd v Devas Multimedia Pvt Ltd (2018 (4) ArbLR 66 (Delhi)) (Antrix) are incorrect.

PRESS NOTE 4 OF 2019

The Department for Promotion of Industry and Internal Trade (DPIIT) on September 18, 2019, notified Press Note 4 of 2019 (PN 4 of 2019) to give effect to the government's directive to liberalise foreign direct investment (FDI) norms in the sectors of: (a) coal mining; (b) contract manufacturing; (c) single-brand retail trading (SBRT); and (d) digital media.

The key changes

The vital changes introduced by PN 4 of 2019 are as follows:

Coal Mining: Per the FDI policy, 100 percent FDI was only permitted in companies engaged in coaland lignite mining for captive consumption by power plants, iron and steel and cement units and not for any other incidental or associated activity. FDI up to 100 percent under automatic route has now also been permitted in a company engaged in the business of sale of coal and coal mining activities, including associated processing infrastructure (ie, activities in the nature of: (i) coal washery; (ii) crushing; (iii) coal handling; and (iv) magnetic and non-magnetic separation).

Contract Manufacturing: While FDI up to 100 percent was allowed under the automatic route in the manufacturing sector, it was not specifically clarified under the extant FDI policy that whether a company not undertaking manufacturing activity directly but through contract labour would be eligible to receive FDI. PN 4 of 2019 has now expressly clarified that a company engaged in manufacturing activity even through contract manufacturing, either on a: (i) principal to principal basis; or (ii) principal to agent basis, would be eligible to receive FDI under the automatic route.

Single Brand Retail Trade:

1. Automatic route: Earlier, a company engaged in Single Brand Retail Trade was permitted to receive FDI in excess of 49 percent only after obtaining prior approval from DPIIT. PN 4 of 2019 has now permitted a company engaged in Single Brand Retail Trading to receive FDI up to 100 percent under the automatic route.
2. Relaxed sourcing requirement: While the extant sourcing requirements (ie, requirement to locally source 30 percent of the value of goods) have been retained, PN 4 of 2019 has relaxed the stringent requirements by, specifying that all procurements made from India would now be counted towards local sourcing, irrespective of whether the goods procured are sold in India or exported; and offering single brand retailers with an option to set off their sourcing requirements against the value of goods sourced, either directly (including through their respective group companies) from India for their global operations (in INR terms) in a particular financial year, or indirectly through a third party.
3. Retail trading through e-commerce: Single brand retailers have now been allowed to engage in retail trading through e-commerce, without mandatorily setting up a brick and mortar store. However, such single brand retailers would be required to open a brick and mortar store within 2 years from date of commencing of their online operations.
4. Submission of license by the investee company: The requirement to submit copy of the licensing / franchise / sub- license agreement with the Reserve Bank of India (in case of FDI up to 49 percent) and with the DPIIT (in case of FDI in excess of 49%) has now been done away with.
5. **Digital Media:** FDI up to 26 percent under government route has now been specifically permitted for companies engaged in the activity of uploading / streaming of news and current affairs through 'digital media'.

FOREIGN EXCHANGE MANAGEMENT (NON-DEBT INSTRUMENTS) RULES, 2019 (NDI RULES)

The Central Government, vide notification dated 17 October 2019 had notified the Foreign Exchange Management ("Non-debt Instruments") Rules, 2019 ("NDI Rules") in supersession of the Foreign Exchange Management (Transfer and Issue of Security by a Person Resident outside India) Regulations, 2017 ("Old FEMA 20") and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018.

The Ministry of Finance, Department of Economic Affairs, vide its notification dated 5 December 2019 has further amended the NDI Rules ("NDI Amendment Rules"). The revisions brought in the NDI Amendment Rules are of clarificatory nature and have been implemented retrospectively from 17 October 2019 (i.e. the date of implementation of the NDI Rules). Certain amendments however have been implemented prospectively from 5 December 2019 (i.e. the date of notification of the NDI Amendment Rules).

A Summary of the amendments notified with 'retrospective effect' is set out below:

Amendments in definitions

The key changes to definitions are:

Definition of "Investment Vehicle":

Mutual funds that invest more than 50% in equity and are governed by the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 (Mutual Funds Regulations) have now been excluded from the definition of "Investment Vehicle".

Definition of "Sectoral Cap":

The term "sectoral cap' now means the maximum investment including both foreign investment on a repatriation basis by persons resident outside India in equity instruments of a company or the capital of a LLP, as the case may be and the term "debt" has again been omitted from the definition of "Sectoral Cap".

Amendments related to gift of shares

The scope of gift by person resident in India has now been widened. A person resident in India holding equity instruments or units of an Indian company (whether on non-repatriation basis or even on repatriation basis) is permitted to gift the shares to person resident outside India. The conditions prescribed under the NDI Rules for gift (including the requirement of prior approval of the Reserve Bank of India) shall continue to apply.

Clarification on conversion price / formula

Going back to the original position of Old FEMA 20, it has now been clarified that the price / conversion formula of convertible equity instruments need to be determined upfront at the time of issue of convertible equity instruments. Further, the price at the time of conversion should not be lower than the fair value worked out at the time of issuance of the convertible equity instruments.

A Summary of the amendments notified with 'prospective effect' is set out below:

Sectoral Changes

The NDI Rules had not taken into account the changes brought about in the FDI policy by press note no. 4 of 2019 released by Department for Promotion of Industry and Internal Trade on 18 September 2019 (Press Note 4) in relation to FDI in coal mining, single brand retail, contract manufacturing and digital media. Now, pursuant to the NDI Amendment Rules the changes brought about in the FDI policy by Press Note 4 have been incorporated in the NDI Rules.

PERSONAL DATA PROTECTION BILL, 2019

The Personal Data Protection Bill, 2019 ("PDP Bill") was introduced in the lower house of Parliament in India on December 11, 2019.

The PDP Bill is an omnibus, cross-sector privacy law, with similarities to the E.U. General Data Protection Regulation (GDPR) and the California Consumer Privacy Act. It is a substantially revised

version of the draft Personal Data Protection Bill, 2018, that was proposed in July 2018 by a Committee of Experts set up by the Government, chaired by retired Supreme Court judge, Justice Srikrishna . Along with the bill, the Committee had released their report with views and deliberations giving context to the bill.

On December 12, 2019, the PDP Bill was referred to a Joint Parliamentary Committee for further debate and examination ("Parliamentary Committee"). The Parliamentary Committee has been instructed to give its report to the Lok Sabha in February 2020).

Please reach out to us if you would like us to assist

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