NEWSLETTER

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INTERNATIONAL TAX

Whether a foreign company is required to file its Tax Return in India?

A question arises is whether a foreign company which has earned income from a source in India is required to file its tax return in India.

Section 139(1) of The Income Tax Act deals with the subject of who is required to file tax return in India. According to section, every Company is required to furnish its Tax Return within the time frame allowed under that Section.

The defination of Company, as per Section 2(17) includes any body corporate incorporated outside India ie. a foreign Company. Therefore, every foreign company too is required to file its Tax Return in India. Although, the income that a foreign company is required to declare is only the income that accrues or arise in India or is deemed to accrue or arise in India. Therefore, one can say that every foreign company who derives taxable income in India must file its tax return in India declaring Indian income and payment of the tax thereon.

An exception is carved out under Section 115A (5) of the income Tax Act which states as follows:

A foreign company is not required to file its tax return in India if BOTH the following conditions are fulfilled:

1. If the income of the foreign company in India consisted only income by way of:

    - Dividend (other than dividend referred to in section 115-O);
    - Interest received from Government or Indian Company on borrowing from them in foreign currency;
    - Interest received from an infrastructure debt fund;
    - Interest from certain Government bonds and securities
    - Interest in respect of units of Investment funds;
    - Income in respect of units purchased in foreign currency.

2. The Payer of income (Indian Company) has deducted tax at source and paid to the Government of India in accordance with the provisions of the domestic Income Tax Act.

If both the above conditions are satisfied, the foreign company, though it has income from a source within India, is not required to file its tax return in India.

Now, let us assume a case where a foreign company does not have any Permanent Establishment in India. It has provided some technical services to an Indian company from a place outside India and the Indian company has deducted and paid the required amount of tax (Withholding tax) to the credit of Indian Government. Question arises that whether such foreign company is required to file its tax return in India or not.

The income in the nature of “fees for technical services” that a foreign company earns from an Indian Company is deemed to accrue or arise in India in view of Section 9(1)(vii). Assume that the same is also taxable in terms of Article 13 on “Royalties and Fees for Technical Services”. On such payment, Indian company has deducted and paid Withholding Tax in accordance with Section 115A(1)(d) of the domestic Act or Article 13 of The Double Tax Avoidance Agreement.

In this case the foreign company does have a source of Income within India. This source of income (Fees for technical services) is not the source of income which is covered by the exemption granted by section 115A(5). Therefore, this foreign company is required to file its tax return in India within the timelines as specified under Section 139(1) of The Act.

However, since the Indian company, the payer, has deducted and paid the required amount of tax on such income, there will not be any additional tax liability on the foreign company. It will simply have to furnish its tax return declaring the income derived from India and claim the tax which is deducted and paid by the Indian company.

Whether this foreign company is required to file ‘Transfer Pricing Report’ along with its tax return?

In the above case, if the foreign company has earned fees for technical services from its ‘related enterprise’ in India, it has entered into an “international transaction” and therefore it is required to obtain a report from an accountant that the transaction entered into is at Fair Market Value. It is required to furnish the said report before the tax authority within the timeline prescribed.

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DISINVESTMENT IN INDIA

DEFINITION

Disinvestment can be defined as the action of an organisation (or government) selling or liquidating an asset or subsidiary. It is also referred to as 'divestment' or 'divestiture.' In most contexts, disinvestment typically refers to sale from the government, partly or fully, of a government-owned enterprise.

A company or a government organisation will typically disinvest an asset either as a strategic move for the company, or for raising resources to meet general/specific needs.

OBJECTIVES OF DISINVESTMENT

- To reduce the financial burden on the Government.
- To improve public finances.
- To introduce competition and market discipline.
- To fund growth.
- To encourage wider share of ownership.
- To depoliticise non-essential services.

Importance of Disinvestment

- Financing the increasing fiscal deficit.
- Financing large-scale infrastructure development.
- For investing in the economy to encourage spending.
- For retiring Government debt: A lot of Govt's revenue go towards repaying public debt/interest.
- For social programs like health and education.

Different Approaches to Disinvestments

There are primarily three different approaches to disinvestments (from the sellers' i.e. Government's perspective)

Minority Disinvestment

A minority disinvestment is one such that, at the end of it, the government retains a majority stake in the company, typically greater than 51%, thus ensuring management control.

Historically, minority stakes have been either auctioned off to institutions (financial) or offloaded to the public by way of an Offer for Sale. The present government has made a policy statement that all disinvestments would only be minority disinvestments via Public Offers.

Examples of minority sales via auctioning to institutions go back into the early and mid-90s. Some of them were Andrew Yule & Co. Ltd., CMC Ltd. Power Grid Corp. of India Ltd. etc.

Majority Disinvestment

A majority disinvestment is one in which the government, post disinvestment, retains a minority stake in the company i.e. it sells off a majority stake.

Historically, majority disinvestments have been typically made to strategic partners. These partners could be other central public sector enterprise (CPSEs) themselves, a few examples being BRPL to IOC and KRL to BPCL. Alternatively, these can be private entities like the sale of Modern Foods to Hindustan Lever, BALCO to Sterlite, CMC to TCS etc.

Again, like in the case of minority disinvestment, the stake can also be offloaded by way of an Offer for Sale, separately or in conjunction with a sale to a strategic partner.

Complete Privatisation

Complete privatisation is a form of majority disinvestment wherein 100% control of the company is passed on to a buyer. Examples of this include 18 hotel properties of ITDC and 3 hotel properties of HCI.

Disinvestment and Privatisation are often loosely used interchangeably. There is, however, a vital difference between the two. Disinvestment may or may not result in Privatisation. When the Government retains 26% of the shares carrying voting powers while selling the remaining to a strategic buyer, it would have disinvested, but would not have 'privatised', because with 26%, it can still stall vital decisions for which generally a special resolution (three-fourths majority) is required.

HISTORY OF DISINVESTMENT IN INDIA

For the first four decades after Independence, the country was pursuing a path of development in which the public sector was expected to be the engine of growth. However, the public sector overgrew itself and its shortcomings started manifesting in low capacity utilisation and low efficiency due to over manning, low work ethics, over capitalisation due to substantial time and cost over runs, inability to innovate, take quick and timely decisions, large interference in decision making process etc. Hence, a decision was taken in 1991 to follow the path of Disinvestment.

Period 1991-92 to 2000-01

Against an aggregate target of Rs. 54,300 crore to be raised from PSU disinvestment from 1991-92 to 2000-01, the Government managed to raise just Rs. 20,078 crore. Interestingly, the government was able to meet its annual target in only 3 (out of 10) years.

The reasons for such low proceeds from disinvestment against the actual target set were:

1. Unfavourable market conditions.
2. Offers made by the government were not attractive for private sector investors.
3. Lot of opposition on the valuation process.
4. No clear-cut policy on disinvestment.
5. Strong opposition from employee and trade unions.
6. Lack of transparency in the process.
7. Lack of political will.

Period from 2001-02 - 2003-04

This was the period when maximum number of disinvestments took place. These took the shape of either strategic sales (involving an effective transfer of control and management to a private entity) or an offer for sale to the public, with the government still retaining control of the management.

The valuations realized by this route were found to be substantially higher than those from minority stake sales.

Period from 2004-05 - 2008-09

The issue of PSU disinvestment remained a contentious issue through this period. As a result, the disinvestment agenda stagnated during this period. In these 5 years from the total receipts from disinvestments were only Rs. 8,515 crores.

Period from 2009-10-2017-18

A stable government and improved stock market conditions initially led to a renewed thrust on disinvestments. The Government started the process by selling minority stakes in listed and unlisted (profit-making) PSUs. This period saw disinvestments in companies such as NHPC Ltd., Oil India Ltd., NTPC Ltd. etc. through public offers.

Financial Year 2018-19

The central government nudged past its target of ₹80,000 crore to raise ₹84,972.16 crore as

part of its disinvestment programme for FY18-19. Data from the department of investment and public asset management indicates that almost half the capital was raised through CPSE exchange traded fund (ETF).

The government offers a pool of shares of PSU companies, which are open for buyers to trade in. Across two tranches of Bharat 22 ETF and

CPSE ETFs the government has raised ₹45,079.92 crore. It raised ₹17,000 crore, its single largest tranche, through a CSPE ETF in November 2018.

The government also sold its stake in Rural Electrification Corp. to Power Finance Corp. for ₹14,500 crore which is 70 percent funded through equity and rest through debt.

Conclusion:

The interim budget 2019-20 had set a disinvestment target of ₹90,000 crore and subsequently the final budget set a disinvestment target of ₹ 1,05,000 crore. In my opinion, looking at the current government's performance and if similar policies with regards to disinvestment be adopted to serve the objective that such activities are carried out for, the government will be able of achieving or even go past of the target. This pace and manner of Disinvestment will also help the economy in reducing its fiscal deficit.

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