

**M V DAMANIA & CO.
CHARTERED ACCOUNTANTS**

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INCOME TAX

Foreign Company Having PE In India Cannot Be Taxed At Rate Applicable To Domestic Company.

Issue: Foreign Companies are taxed at the rate higher than Domestic Company rates. Is it covered by Article 24 on "Non-discrimination"?

CASE: JCIT v. **State Bank of Mauritius Ltd.** (2009-TIOL-712-ITAT-MUM)

AUTHORITY: Income-tax Appellate Tribunal.

HELD: Foreign company having PE in India cannot be taxed at rate applicable to domestic company but pay at rate prescribed in Finance Act (i.e. at higher rate) even if taxpayer covered by provisions of India-Mauritius tax treaty.

➤ **Facts of case:**

- Taxpayer was company incorporated in Mauritius and had PE in India.
- As per Article 24 of tax treaty i.e. 'non-discriminatory' clause, taxpayer claimed its status as equivalent to 'domestic company' as defined under section 2(22A) of The Income Tax Act and contended that higher rate of tax prescribed for non-resident companies and also surcharge thereon should not be applicable in its case.
- The AO contended that non-resident company has to pay taxes at the rates provided in Finance Act. Accordingly, AO held that taxpayer was liable to pay tax at the higher rate.
- Commissioner of Income-tax (Appeals) observed that there was no limitation to non-discriminatory provision of tax treaty and once it prevailed in conflict situation, lower rate will apply and not the higher rate.

➤ **Taxpayer's contentions:**

- After referring Article 24 on 'Non Discrimination' of tax treaty, taxpayer claimed that its status was equivalent to that of a 'domestic company' as defined in section 2(22A) of IT Act and therefore, it was liable to pay tax at lower rate and not at higher rate
- Further, surcharge applicable to other 'non-resident' companies will not apply in its case.

➤ **Tax department's contentions:**

- Tax department relied on decision of Authority for Advance Rulings in the case of Societe Generate wherein it was held that non-domestic company has to pay taxes at given rate in The Finance Act.
- Accordingly, taxpayer was liable to pay tax at higher rate.

➤ **Tribunal's ruling:**

- Tribunal observed that earlier there were certain decisions in favour of the taxpayers wherein it was held that since provisions regarding levy of higher taxation of Act was less favourable to foreign companies which is against provision of tax treaty, provisions of the tax treaty would override the normal provisions of The Act and accordingly foreign companies would be chargeable to tax at the rates prescribed for domestic companies.
- However, Finance Act 2001 inserted an explanation 1 to section 90 of The IT Act with retrospective effect from 1 April 1962² to end this controversy. The Explanation states that charge of tax in respect of foreign company at rate higher than rate at which domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.
- Tribunal further observed that similar view was taken by Mumbai Tribunal in case of Chohung Bank v. DDIT [2006] 102 ITD 45 (Mum) where Mumbai Tribunal held that higher rate of tax charged was not affected by non-discrimination clause incorporated in tax treaty since domestic and foreign banking companies did not function under similar circumstances.
- Tribunal held that tax rates prescribed in Finance Act has to be applied even if taxpayer foreign company is covered by provisions of tax treaty. Accordingly, taxpayer was liable to pay tax at higher rate of tax.
- Further, Tribunal on issue of disallowance of expenditure under section 37(2) of Act observed that as per article 7 of tax treaty expenditure is to be allowed on the basis whether same is incurred for purposes of business of PE. No restriction provided in Act can be imposed on such foreign Company.
- Accordingly, Tribunal held that since expenditure incurred by taxpayer was in relation to PE in India and therefore, as per article 7 of tax treaty disallowance cannot be made as per restrictions provided under domestic IT Act.

➤ **Our Comments:**

- It is to be noted that Mumbai Tribunal has followed decision of Chohung Bank where it was held that if after treaty comes into force, enactment of Parliament is passed which contains provisions contrary to non-discrimination article 24, scope and effect of legislation cannot be curtailed by reference to tax treaty.
- Mumbai Tribunal in case of Sakura Bank Ltd.⁵ and Kolkata Tribunal in case of ABN AMRO Bank NV⁶ also held that explanation to section 90 expressly permits differential rates for domestic and overseas companies.
- However, even without explanation, the Mumbai Tribunal in case of Mashreq Bank denied relief to foreign bank of lower tax rate applicable for domestic companies.
- It is also pertinent to note that certain tax treaties (e.g. UK) expressly provide that Article 24 cannot be construed to mean that tax rate in respect of PE and domestic company must be same.

Compiled by : Yogendra Jain

AUDIT

**a. Accounting Policies, Changes in Accounting Estimate and Errors
Major items of GAAP differences (IFRSs vis a vis Indian GAAP):**

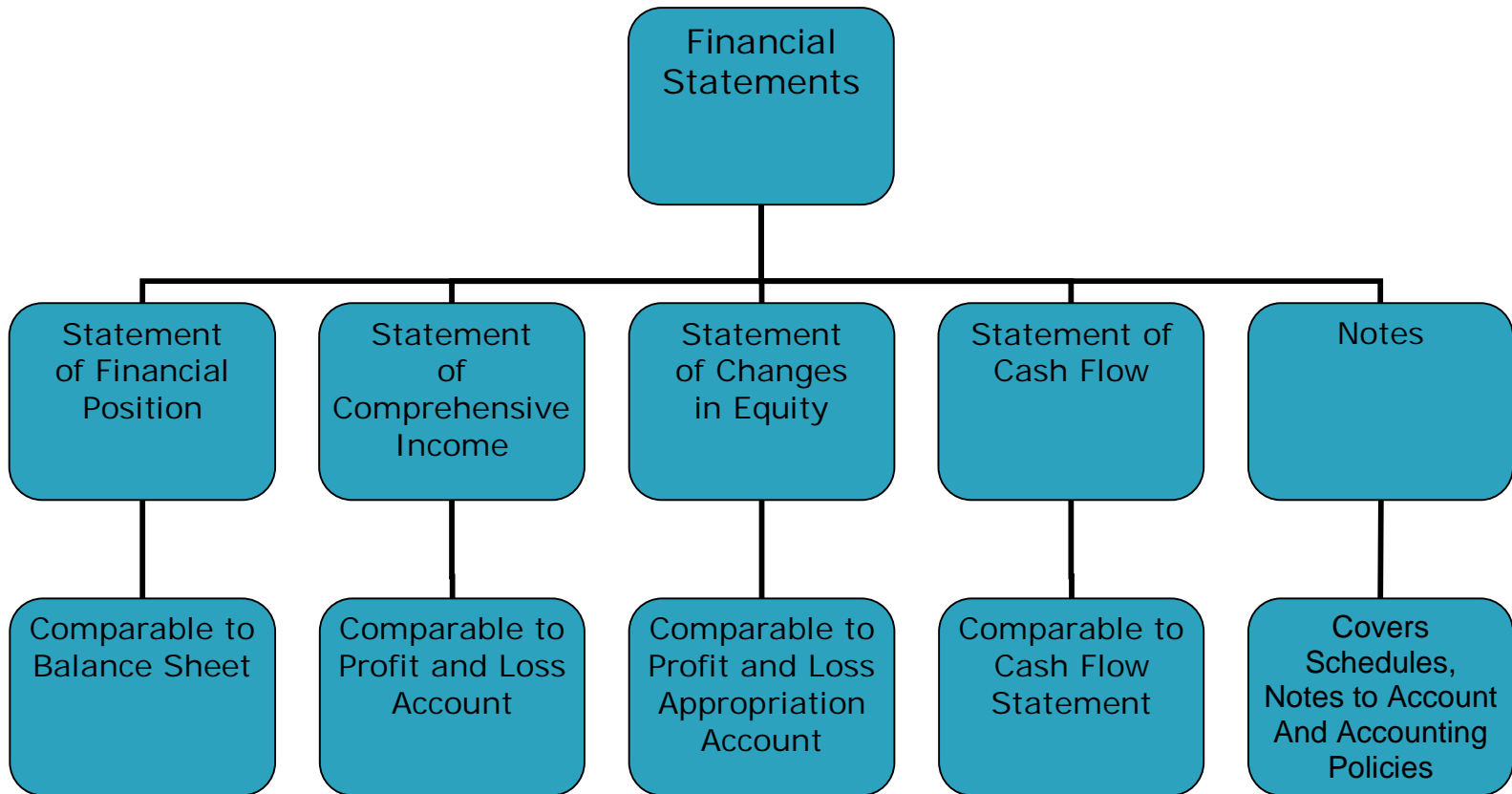
Sr No	Particulars	As per IFRSs	As per Indian GAAP
	Relevant Text	IAS 8	AS 5
		Accounting Policies, Changes in Accounting Estimate and Errors	Net Profit or Loss for the Period, Prior Period Items and Changes in Accounting Policies
1	Change in Accounting Policy	Requires Retrospective application of changes in accounting policy by adjusting opening balances of equity statement of the earliest period presented and other Comparative figure presented accordingly.	Retrospective effect is given in current year income statement with appropriate disclosures.
2	Change in Accounting Estimate	Prospective effect, by reporting in income statement of current year and future, if applicable	Similar to IFRS
3	Correction of Errors	Comparatives figures are restated and, if the error occurred before the earliest prior period presented, the opening balances of assets, liabilities and equity will be restated.	Restatement is not required. The effect of correction is included in current year income statement with separate disclosure as Prior Period items.
4	New Accounting Pronouncement	New accounting pronouncement that have been issued but are not yet effective at the end of the reporting period needs to be disclosed. Possible impact of said new pronouncement if reasonably estimated needs to be disclosed.	Not Required.

b. Important Dates - IFRS Convergence Process

PARTICULARS	Balance sheet	Income Statements	Cash flow statements	Remark
2009-10	As per Indian GAAP	As per Indian GAAP	As per Indian GAAP	
2009-10	Restated as per IFRS	No change	No change	Base balance sheet for preparation of Accounts of 2009-10 as per IFRSs
2010-11	As per Indian GAAP	As per Indian GAAP	As per Indian GAAP	
2010-11	As per IFRS	As per IFRS	As per IFRS	For disclosure of comparative year figures
2011-12	As per IFRS	As per IFRS	As per IFRS	As per decision of core group

Please note that financial statements for the year ended March 2012 and December 2012 needs to be prepared as per IFRSs / IASs and its clarifications (IFRIC/ SIC) as applicable on closing date. This also applies to comparative figures i.e. financial statements for the year ended 31st March 2011.

**c. COMPONENTS OF FINANCIAL STATEMENTS (IAS 1) - As per International
Financial Reporting standards (IFRSs)**



Compiled By: Bharat Jain

HUMAN WANTS VERSUES NEEDS:

Courtesy: The Economic times

The very nature of the mind is to be dissatisfied, not be contented, and not be in the present moment. The mind can only exist either in the past or the future because you cannot have thoughts in the present moment. So, by its very nature, the mind will chase desires. We have to bring awareness to ourselves and understand whether our desires are actually ours or borrowed from others.

When you go for a drive in your car and notice an expensive Mercedes alongside, you start thinking, 'It is time to buy a new car... may be a Mercedes.' Until then you were happy, but now, seeing somebody else's car, a desire has entered you to possess that same vehicle. You have borrowed the desire of that car owner — this borrowed desire is an example of a want, not a need, which is born out of comparison. Drop all your prestige problems and do an honest self-analysis of your desires. If you cannot drop your prestige when alone, how will you drop it when you are with people!

Before sending you to planet Earth, Existence furnishes you with the energy to fulfill all that you will require to live a contented and fulfilling life. But when you start spending this energy to realise borrowed desires, you start feeling that you are not equipped with enough energy for fulfilling all your desires. You experience discontentment because your own desires have not been fulfilled. The moment one want is fulfilled, numerous wants arise within you because you borrow more desires from others.

The enlightened master Ramana Maharishi says, 'The mind is such that it shows a tiny mustard seed to be a huge mountain until it is attained. As soon as it has been attained, even a mountain appears as insignificant as a mustard seed!' We all function around these three axes of doing, having and being. Doing for having, without enjoying being, is the cause of all our misery. Doing never catches up with having! Every time you work hard and fulfill one desire, suddenly that desire loses its pull over you.

As soon as one desire is fulfilled, you attract another desire — you don't even have time to enjoy your fulfilled desire and feel satisfied. You start thinking, 'Just let me acquire one more thing. Then I can relax and enjoy what I have.' Be very clear, your mind will never allow it happen. You have enough energy for fulfilling all of your needs but not your wants. The only way to really live and enjoy life is to enjoy the very doing itself. Then automatically the doing, having and being, will be integrated and will happen. Be Blissful!