FPIs continue to be haunted by MAT ghost; have to show I-T they don’t have any 'permanent establishment' in India

Foreign portfolio investors (FPIs) are yet to exorcise the ghost of minimum alternate tax, or MAT . These offshore asset managers, based out of financial centres like Singapore, Hong Kong and New York, will now have to convince the Indian tax office that they do not have "place of business" and "per manent establishment" (pe) here to escape MAT.

In the past ten days, about half a dozen FPIs have received letters from income-tax assessing officers asking them to clarify on whether they have a PE in India.

A committee headed by Justice AP Shah, set up to clear the fog on MAT, recommended that FPIs would not pay MAT if they have no place of business, or PE, in India. Even though the government has accepted this, there are fears that the foreign portfolio investors' relationships with custodians, brokers and banks in India could be construed as having a PE by the tax department. More so, in the absence of a clear definition of PE in the law.

FPIs Need to Show Records of Past 7 Years

"FPIs will obviously have dealings with custodians and brokers in India but that doesn't constitute a PE," said Ketan Dalal, managing partner (West), PwC India, which has several FPI clients. However, a government official told ET that the tax department nurtures the view that dealing with these intermediaries could amount to having a PE.

The recent notices have been received by FPIs who were among those that had approached the Dispute Resolution Panel, an alternative resolution mechanism, on the MAT issue. The offshore portfolio investors who were under the impression that the Shah panel report would end the MAT controversy, are now trying to figure out whether these notices from the assessing officers could prolong the dispute.

"Since the CBDT press release said that FPIs would be exempt from MAT only if they don't have PE in India, the DRP would want to examine whether the FPIs have a PE in India. It would be interesting to see how tax authorities analyse the existence of PE in India since FPIs generally operate from abroad and have agreements with independent third parties in India such as brokers and custodians," said Rajesh H Gandhi, partner, tax, Deloitte Haskins & Sells.

While MAT has been scrapped for FPIs' earnings post April 2015, these investors would have to prove that they never had a PE in the preceding seven years. According to the provisions of MAT — a tax that was first brought into the Income-tax Act in 1987 — a company has to pay MAT if the normal tax payable by it is less than the MAT which is calculated on the basis of 'book profit' (in the profit and loss account).
It is a widely shared perception that such a levy was introduced to bring Indian companies, which were escaping tax due to multiple deductions, into the tax net and was not aimed at foreign companies. A MAT would mean 18.5% tax on the earnings of FPI, most of who pay no short-term capital gains tax in India.

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