



Newsletter

Sharp View

May 2024

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MAY 2024

May marks the zenith of summer in India, where temperatures soar between 30 to 45 degrees Celsius. Despite not being the most conducive period for tourism, it remains a popular time for vacations. Additionally, on the 11th of May, India commemorates its National Technology Day, acknowledging the significant contributions made by its scientists to the realms of science and technology. This date holds particular significance as it commemorates India's successful nuclear tests at the Pokhran test range, elevating it to the status of a nuclear-armed nation. Presently, technology has evolved into an omnipresent force, permeating various sectors of the economy worldwide, including education, healthcare, hospitality, business, trade, and commerce. Furthermore, India stands as the third most attractive destination for technology investments globally. It also boasts a prominent position in scientific research, ranking among the top five nations globally in space exploration endeavours.





CONSULTING

The role of independent directors in corporate governance

The term 'Independent Director' is a decade-old concept in the Indian corporate sector. The role of independent directors in companies assumes paramount significance considering the ever-expanding corporate horizon and Indian businesses becoming truly global. Schedule IV to the Companies Act, 2013 lists a code for the independent directors setting out their professional conduct, role and functions. Ms. Priya Tolani ('Vadodara office') throws light on the concept, the role of independent directors, the challenges, and the positives of having independent directors on board.

Consulting

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Corporate governance plays a pivotal role in shaping the trajectory of businesses, ensuring transparency, accountability, and responsible decision-making. In the Indian context, where the corporate landscape has witnessed dynamic growth and significant transformations, the role of independent directors has become increasingly crucial. Independent directors act as the custodians of good governance, representing the interests of stakeholders and contributing to the overall sustainability of corporations. This article delves into the evaluation of the role of independent directors in corporate governance in India, analysing their functions, challenges, and impact on business practices.

The evolution of corporate governance in India

The concept of corporate governance in India has evolved over the years, driven by a growing economy, globalization, and the need for robust regulatory frameworks. The Companies Act, 2013, marked a significant milestone in this evolution by emphasizing the importance of independent directors in ensuring corporate accountability and transparency. Independent directors are envisioned as individuals with expertise and experience who can bring an impartial perspective to board deliberations, mitigating conflicts of interest and safeguarding the interests of minority shareholders.

The concept of an independent director

The role of an independent director in India is multifaceted, encompassing various responsibilities aimed at ensuring corporate governance, transparency, and protection of stakeholders' interests. Here are certain key aspects that define the role of an independent director in India:

Independence and impartiality

Independent directors are expected to bring an unbiased and objective perspective to board discussions. They should be free from any relationships or interests that could compromise their ability to make impartial decisions in the best interests of the company.

Oversight and monitoring

One of the primary roles of an independent director is to oversee the company's management and monitor its performance. This involves critically evaluating strategic decisions, financial reporting, and risk management practices to ensure alignment with the company's objectives.

Active participation in Board Committees

Independent directors often serve on various board committees, such as audit, nomination, and remuneration committees. Their active participation in these committees is crucial for effective governance, financial oversight, and ensuring a fair and transparent executive remuneration process.

Consulting

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Risk management

Independent directors play a key role in identifying, assessing, and ensuring to their satisfaction that the financial information, financial controls and the risk management systems are robust and defensible. Their insights and experience contribute to the development of healthy risk management strategies that safeguard the interests of the company and its stakeholders.

Conflict resolution

Independent directors are entrusted with the role of balancing the conflicting interests of the stakeholders as well as acting as mediators in resolving conflicts within management and shareholders's interests. Their ability to navigate and resolve disputes impartially contributes to maintaining a harmonious and productive corporate environment.

Stakeholder advocacy

Independent directors represent the interests of all stakeholders, and especially the minority shareholders. They advocate for a balanced approach that considers the concerns of minority shareholders, employees, customers, and the wider community, fostering trust and goodwill.

Strategic guidance

Independent directors provide strategic guidance and bring their expertise to the table during important decision-making processes. Their experience and diverse perspectives contribute to the formulation and evaluation of the company's strategic plans.

Continuous learning and development

Independent directors should commit to continuous learning and development to stay abreast of industry trends, emerging risks, and evolving governance practices. This commitment ensures that they remain effective contributors to the board's decision-making processes.

Ethical leadership

Upholding ethical standards and promoting a culture of integrity within the company are fundamental responsibilities of independent directors. Their leadership in ethical behaviour sets the tone for the entire organization, influencing corporate culture and fostering a commitment to ethical business practices.

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The role of independent directors in corporate governance

Challenges faced by independent directors

Limited independence

Despite their designation as independent, some directors may face challenges in maintaining true independence due to personal or professional relationships with the company. Striking a balance between being knowledgeable about the company and remaining impartial can be a delicate task.

Liability concerns

Independent directors may be held personally liable for governance failures, leading some to adopt a cautious approach that could potentially impede their ability to contribute constructively. Striking a balance between accountability and the freedom to make courageous decisions is an ongoing challenge.

Skill and diversity gap

Ensuring that independent directors possess the necessary skills, industry knowledge, and diversity is crucial. The composition of boards needs to reflect a mix of expertise, gender, and background to foster a comprehensive and well-rounded decision-making process.

Impact on business practices

Enhanced corporate accountability

Independent directors contribute significantly to the accountability of corporations. Their vigilant oversight ensures that companies adhere to ethical standards, regulatory requirements, and best practices, ultimately fostering a culture of responsibility.

Better risk management

By actively participating in risk management processes, independent directors play a pivotal role in identifying and mitigating risks. Their objective viewpoint aids in making informed decisions that protect the company from potential pitfalls.

Stakeholder confidence

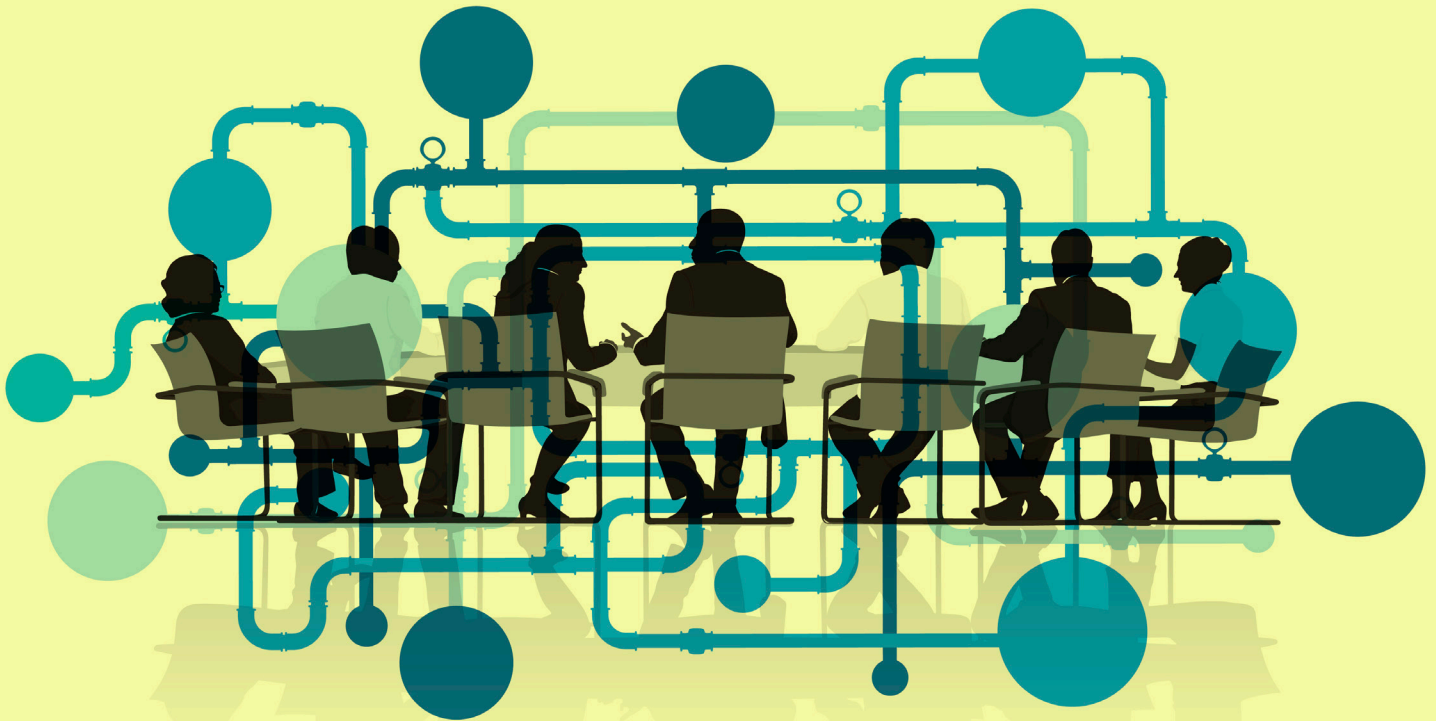
The presence of capable and independent directors enhances stakeholder confidence. Investors, employees, and the public at large are more likely to trust companies that demonstrate a commitment to robust corporate governance, facilitated by the involvement of independent directors.

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The role of independent directors in corporate governance

Conclusion

Independent directors are essential pillars of corporate governance in India. Their multifaceted roles, from oversight to conflict resolution, contribute to the overall health and sustainability of businesses. Despite facing challenges, independent directors play a crucial role in enhancing accountability, mitigating risks, and instilling confidence in stakeholders. On the background of a high growth rate of the Indian economy against the world economic backdrop, the role of independent directors continues to be pivotal. The tasks of ensuring ethical standards, integrity and the best corporate governance seem crucial on the ever-expanding business horizon of Indian companies worldwide.



INCOME TAX

30TH EDITION

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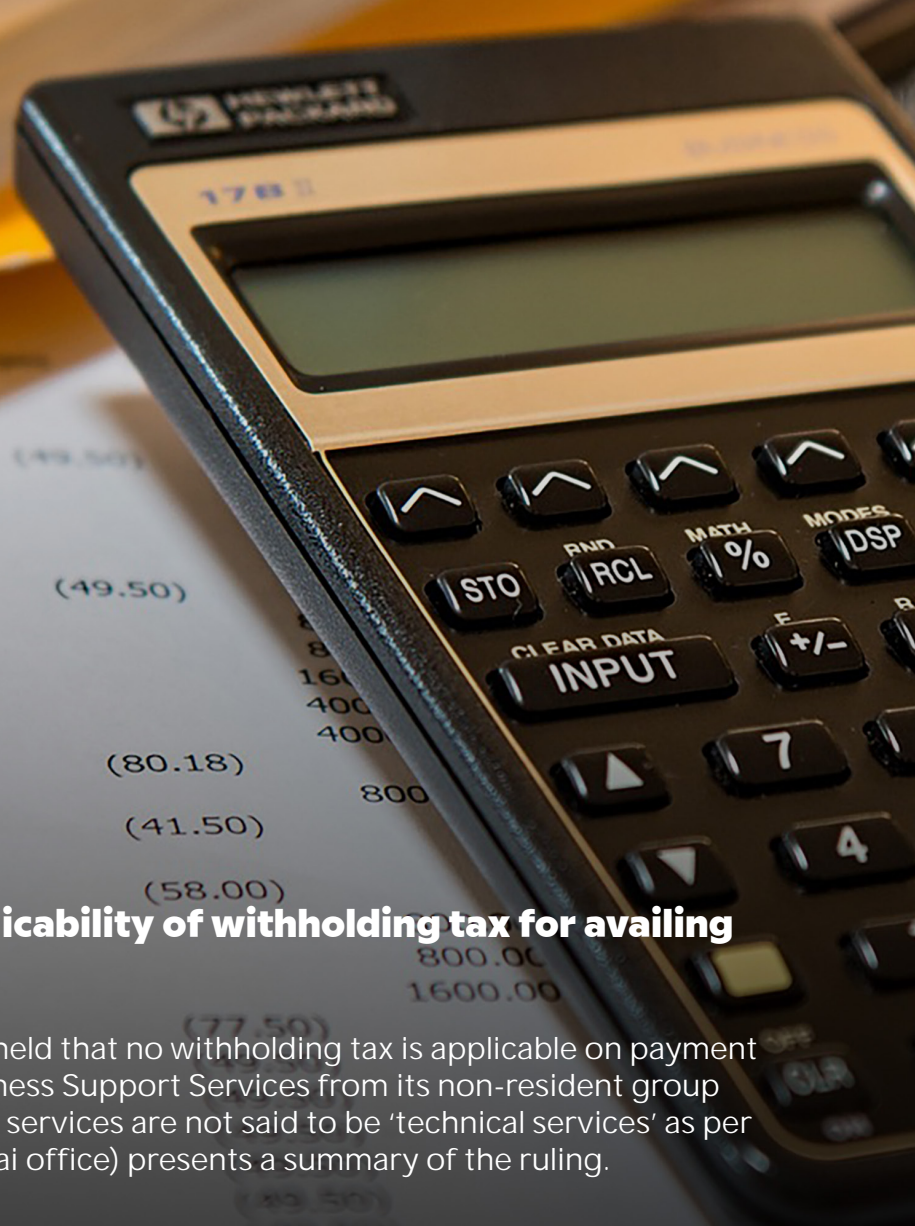
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TAXATION

Income-tax: India-UK treaty - Applicability of withholding tax for availing business support services

In a recent Bombay High Court ruling, it was held that no withholding tax is applicable on payment made by an Indian company for availing Business Support Services from its non-resident group company in the United Kingdom ('UK') as the services are not said to be 'technical services' as per India-UK Treaty. Ms. Vaibhavi Gandhi (Mumbai office) presents a summary of the ruling.

Taxation

Income-tax: India-UK treaty - Applicability of withholding tax for availing business support services

Case name: Shell India Market Pvt. Ltd vs Union of India

Date and reference- 1st March 2024 ([2024] 160 taxmann.com 175 (Bombay))

Synopsis

The Honourable Bombay High Court held that the services availed by assessee cannot be said to be technical services as per Article 13 of India-UK treaty since the services are not made available to the assessee.

Facts

Shell India Markets Private Limited ('the assessee') is an Indian company engaged in the business of network of retail fuel stations in India.

The assessee had entered into a Cost Contribution Arrangement ('CCA') with its non resident group company in UK, Shell International Petroleum Company Limited ('SIPCL') for availing business support services (BSS). The assessee avails of BSS provided by SIPCL to all operating companies in its group across the world. SIPCL manages for consideration of its group entities, either directly or through own employees or through its third party affiliates/vendors. The costs incurred are then allocated to Shell entities including SIPCL on a cost to cost basis.

The assessee construed that the services availed by it are managerial services only and specifically exclude technical services. It makes payment for the availed services on the basis of share determined using cost allocation keys specified in the CCA. With a view to attain clarity in respect of its obligation to deduct tax at source the assessee had made an application under Section 245R of the Income Tax Act, 1961 ('the Act') to the AAR. The AAR ruled that the payment made by the assessee to SIPCL for availing the General BSS under the CCA would constitute income in the hands of SIPCL and is in the nature of fees for technical services within the meaning of Article 13.4(c) of the DTAA between India and UK and the payment received by SIPCL is chargeable to tax in India. Therefore, assessee is under obligation to withhold tax under section 195 of the Act.

Analysis & judgement

According to the High Court, the crux of the matter lies in ascertaining whether the finding of the AAR that services availed by assessee from SIPCL are of/for 'technical/consultation' services and secondly, whether such services are 'made available' to the assessee.

On analysis of Article 13 of the DTAA India-UK, the Court held that SIPCL will be chargeable to tax in India only if the payment by the assessee is towards fees for 'technical services'. Under Article 13(4), the term 'fees for technical services' means payments of any kind in consideration for the rendering of any technical or consultancy services. Sub-para (c) to Article 13(4) further restricts the meaning of the term to only that which makes available technical knowledge, experience, skill, know-how or processes, or consists of the

Taxation

Income-tax: India-UK treaty - Applicability of withholding tax for availing business support services

development or transfer of a technical plan or technical design.

The High Court observed that the word 'Consultancy' appearing in the Article is to be interpreted in the context of consultancy which makes available technical knowledge, etc. and not of managerial nature. The reading of the Article clearly indicates that the consultancy service must be which makes available technical knowledge, etc. Sub-para (c) to Article 13(4) restricts such services to those which make available technical knowledge or consist of development and transfer of a technical plan or technical design. Thus, a harmonious reading of the provision of Article 13 in its entirety, clearly establishes the intent of the DTAA in making income chargeable to tax only if the services availed pertain to technical services or consultancy services.

Technical services in this context mean services requiring expertise in a technology. By Consultancy Services, in this context, would mean advisory services. The categories of technical and consultancy services are to some extent, overlapping.

Under paragraph 4, technical and consultancy services are considered included services only to the following extent:

- If they are ancillary and subsidiary to the application or enjoyment of a right, property or information for which a payment described in paragraph (3)(a) of Article 13 is received;
- Are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph (3)(b) of Article 13 is received; or
- As described in paragraph 4(c), if they make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

Thus, under paragraph 4(c), consultancy services which are not of a technical nature cannot be included services. Thus, the services availed by assessee cannot be said to be technical services and Article 13 is wholly inapplicable in the facts and circumstances of the present case.

To conclude

The Honourable High Court held that even if it is fees for technical or consultancy services, it can be only where fees are paid in consideration for making available technical knowledge, experience etc. Thus the view of the AAR that SIPCL works closely and advises the employees of assessee and hence makes available the services is not correct. This view in fact suffers from fallacy since the CCA continues to operate till date. If the view of AAR is to be held as correct then the contract must stand concluded as once the services and the know-how, skill etc is transferred to the assessee, the need of continuing to render said services must end. This is factually not so as the CCA is in effect till date.

Accordingly it was held that the AAR has interpreted the requirements to be satisfied for 'make available' based on its own general notion of the said term without appreciating the applicable law on the subject and also reached an erroneous conclusion that the services availed are technical services. Thus, the assessee is not required to withhold tax on the consideration paid to SIPCL as business support services.

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