Answer-to-Question- 1

Part 1(a)

Residential status in India of Techeve HK('THK') from April 1, 2015 to March 31, 2016

Section 6 of the Income-tax Act, 1961 ('Act') provides the rules for the purposes of determining the residential status of tax payers. In this connection, it would be pertinent to note that with effect from Financial Year ('FY') 2016-17, the provisions of the Act were amended to bring into effect the concept of Place of Effective Management ('POEM') for the purpose of determining the residential status of the company.

During FY 2015-16, the India domestic law provided that a Company shall be considered resident in India if it is:

1. Incorporated in India; or
2. The control and management of the company were wholly situated in India.

During FY 2015-16, the control and management of the THK was not situated in India. This may be substantiated by the following reasons:

- Both the founders ('F1' and 'F2') although situated in India attended Board meeting of THK remotely which were held to be in Hong Kong.
- Mr Andrews, the director appointed on the Board of of THK was a US citizen and therefore not based in India.
- Therefore, effectively the control of THK was situated outside India.
- Given that the THK was managed by Mrs Jang, who is based out of Hong Kong, it is safe to conclude that the affair of THK were also managed outside India.

Further, THK was incorporated in Hong Kong and therefore, for the period of FY 2015-16, THK would not be considered a resident of India under the provisions of section 6 of the Act.

It would also be pertinent to note that India does not have a Double Taxation Avoidance Agreement ('DTAA'), in the absence of which determination of the residential status would entire depend on the India domestic law.

Part 1(b)

Determination of residential status after April 1, 2016

As mentioned above, the provisions of section 6 of the Act, which deal with the determination of the residential status of a company were amended vide Finance Act, 2016 to take effect from FY 2016-17.

The amended Act provides that a company would be considered to be a resident in India if:

- It is an Indian company; or
- The POEM of the company is situated in India during the relevant FY.

In light of the above, the Central Board of Direct Taxes)('CBDT') has issued a set of guidelines for the purpose of determining whether a non-resident has its POEM in India.

In this connection, the facts of the present case in light of the guidelines have been examined below:

1. Active business outside India ('ABOI')

- The guidelines provide that where a foreign company has ABOI and majority of the board meetings are conducted outside India - the POEM of such company shall be outside India.

- In the instant case, THK was incorporated outside India.
- THK has no passive income sourced from India. In fact the majority of business income earned by THK is sourced from HongKong (from HBK Finance).
- More than 50% of the employees of THK are based outside India. In this case Mrs Jang is the only employee and is based outside India.
- More than 50% of employee cost is spent on employees situated outside India. Again Mrs Jang being the only employee - 100% of employee cost is spent outside India / on residents outside India.

- Given the above factors, it may be concluded that THK has ABOI.

2. Board meetings conducted by THK - Secondary factors

- It is provided that the Board meetings of THK after April 1, 2016 are conducted in India.

- In this connection, the POEM guidelines provide that the location of the Board meetings would be important for the purpose of determining the POEM of the company. However, it also provides that it is crucial to note the location / jurisdiction where the outcome of the meetings are implemented. The outcome of the Board meetings are implemented in HongKong.

- The POEM guidelines speak about the relevance of technology and the impact the same has on the determination of POEM. The guidelines provide that while the participants to a Board meeting may be located in various jurisdictions, it is important to note where the impact of the decisions taken lie. In this scenario, the impact of the decisions taken by F1, F2 and Mr Andrews could be considered to be in Hong Kong.

- The POEM guidelines also talk about the 'residential status' of the directors. So far as the residential status of the directors goes, 2 out of 3 directors are tax residents of India. Further, it appears that F1, holding 30% stake in THK, has the casting vote.

- Further, neither of the Indian directors had a role to play in the operational decision making in THK. Further, it may be presumed that MR Andrews, appointed by the investors, made the relevant strategic and policy decisions.

- Having said the above, the guidelines do not provide a precedence of application of the guiding factors or a set combination of factors to determine the residential status of a Company.

- Given the ambiguity of the POEM guidelines and the limited fact pattern, in my view the THK would be considered to be a resident in India although it has ABOI. The other factors provided under the guidelines are not sufficiently met by THK.

Part 2

Upon being considered resident in India, a company may have to face several consequences in India.   Some of the consequences have been outlines below:

- All compliances under the Act as applicable to a resident would being to apply to the foreign company.

- The resident would be taxed on its world wide income at a rate of 30% and may be liable to discharge Dividend Distribution Tax.

- Where, for other reasons, the foreign company is said to have a PE in India, income from such PE may be taxes at a rate of 40%.

- Given the fact that Hong Kong does not have a tax treaty with India, the income of THK would be doubly taxed in Hong Kong and then in India on the basis of residence. Further, it may be very difficult to obtain tax credit for excess taxes discharged as foreign tax credit is normally allowed on the basis of residence.

Measures that may be taken to avoid being considered a resident in India:

- Basis the fact pattern it would be crucial to ensure that all the board meeting i.e., strategic and policy decisions are taken outside India and accordingly, implemented outside India.

Part 3(a)

Since, THK is not a resident for the time period of FY 2015-16, the income eared from HKB Finance would not be taxable in India. Only income that is sourced in India would be taxable in its case.

Part 3(b)

Given the fact that THK would be considered to be resident in India by virtue of section 6 of the Act, its worldwide income would be taxed in India. Accordingly, income from HBK Finance would be taxed in India at the rate of 30%.

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Answer-to-Question-2

Part 1

India Bulls ('IB')is a company that is incorporated in Mauritius. Therefore, it may be presumed that IB is a resident of Mauritius.

All the income that is generated by IB shall be governed by the provisions of the India-Mauritius Double Taxation Avoidance Agreement ('DTAA').

- Where the investments have been made by IB in Indian equity shares before April 1, 2017, the gains on sale of shares shall not be taxable in India under the provisions of the India-Mauritius DTAA and shall be taxed in Mauritius only.
- With respect to gains derived from investment in shares after April 1, 2017 which are sold off before March 31, 2019,the gains shall be taxed in India as capital gains. However, the rate of taxation shall be limited to 50% of the existing tax rates provided the Limitation of Benefits ('LOB') under the India-Mauritius DTAA is complied with.
- With respect to sale of equity shares after March 31, 2019, the capital gains shall be taxed in India on full rates of taxation.

Debt instruments continue to enjoy the benefits of being taxes on residential basis and gains arising therefrom would be taxed in Mauritius and not be taxed in India.

Part 2

There has been a long drawn debate in India with respect to the applicability of the provisions of section 115 JB of the Income-tax Act, 1961 ('Act') with respect to Minimum Alternate Tax ('MAT') in India.

Currently, there is no possibility of the provisions of MAT being made applicable to the income of IB under the provisions of section 115JB of the Act since, IB does not have a PE in India as per the provisions of the India-Mauritius DTAA. This requirement has been provided and clarified by Explanation 4 to section 115JB of the Act.

Part 3

With respect to the dividends received by NI and SE which are essentially sourced from India there was a ambiguity whether the same would be considered as gains from the provisions of indirect transfers as provided under section 9(1) of the Act.

In this connection, the CBDT had issued a clarification stating the that intent of introducing the provisions of indirect transfer under section 9(1) of the Act was to being to tax gains arising from transfer of shares of foreign companies that derive its value substantially from asset located in India. The intention was not to bring to tax dividends received by investors from foreign shares that are received from India.

Given the above, there would be no implication with respect to the dividends received by NI and SE.

Part 4

Section 9(1) of the Act provides that income shall be deemed to accrue or arise in India where directly or indirectly from any property or asset situated in India.

Further, it is clarified that shares of a foreign company that derives it value substantially from assets located in India shall be deemed to be situated in India.

Accordingly, sale / redemption of shares of IB would trigger the provisions of section 9(1) of the Act as IB (resident of Mauritius) derives its value substantially from asset (shares of portfolio companies) situated in India. Both NI and SE would be required to discharge tax on capital gains generated in India from the indirect transfer of Indian shares.

It would be pertinent to note that for the purpose of the above,it is presumed that BI is not a Category I or Category II Foreign Portfolio Investor under the SEBI norms.

It would also be pertinent to note that NI and SB would not be able to take any shelter under the India-Mauritius DTAA although the investments have been made before April 1, 2017.

Part 5

The Indian companies are not required to undertake any reporting under the Income-tax Act, 1961 with respect to their shares being transferred by IB from Mauritius. However, the Indian companies may be required to undertake certain reporting under the Foreign Exchange regulations.

However, in a scenario the shares of IB are transferred by NI and SE, the Indian companies shall have to undertake certain reporting and file Form 49D with the respective Income-tax authority as required under section 285A of the Act.

Part 6

CCDs are debt instruments that are issued by Indian companies to comply with the Exchange Control regulations. These are debt instruments that would convert to equity shares at a pre-determined time. Further, interest paid on CCDS is a tax deductible expenditure is also eligible for a reduced rate of withholding tax under the Act.

Ordinarily, the gains arising from the sale of CCDs would not be taxed under the India-Mauritius DTAA given that the seller (BI) is a resident of Mauritius. However, the Courts in India with respect to the sale of CCD to a shareholder has stated that such transfer constitutes a colourable device and is liable to tax. The courts have held that any income stream from a CCD constitutes interest income which is not liable to any treaty benefit under the India-Mauritius DTAA.

Given the same, gains from sale of CCD to a shareholder would be considered taxable in India.

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Answer-to-Question-5

Part 1

As per the provisions of section 6 of the Income-tax Act, 1961 ('Act', a foreign partnership firm (including LLP) shall be considered to be a non-resident in India only if the control and management of affairs is wholly situated outside India.

Therefore, an LLP would be considered a non-resident for taxation purposes in India only if its the control and management of affairs is wholly situated outside India.

In the instant case, Alpha and Beta are solely responsible for the control and management of Singapore LLP and all decisions are taken in Ploomeria. Accordingly, it may be concluded that Singapore LLP would be considered a non-resident in India.

Part 2

Singapore LLP, for the purpose of Singapore laws, is considered to a tax transparent entity.

With regard to determining whether Singapore LLP would be eligible to take benefit of the India-Singapore tax treaty, it would be crucial to examine whether Singapore LLP would be considered as a 'person'. As per Article 3 of the India Singapore tax treaty, any entity which is considered a taxable unit as per the domestic laws of the contracting states shall be a person.

While, Singapore LLP may not be a person for the purpose of Singapore domestic laws, it would be considered as a taxable unit for the purpose of the Indian tax laws {stated in the question that LLP laws are similar to that of India}.

Further, in this context, with respect to an LLP incorporated in the UK, the Indian Courts have held that the UK LLP would be considered as a person for the purpose of claiming any treaty benefits under the India-UK tax treaty. Further, the Courts have taken a further step in stating that the tax transparency status of the LLP in the UK would be insignificant in determining whether it would be eligible to claim treaty benefits in India.

Accordingly, Singapore LLP should be eligible to claim benefits under the India-Singapore DTAA.

Part 3

Dividend - The dividend earned by Singapore LLP shall be exempt under the provisions of section 10(34) of the Act. It would be pertinent to note that the provisions of section 115 BBDA of the Act would be applicable only to resident firms.

Long term capital gains - It is noted that Singapore LLP has duly discharged Securities Transaction Tax ('STT') on sale of shares on the stock exchange. Accordingly, capital gains arising therefrom would be exempt under the provisions of section 10(38) of the Act.

Short term capital gains - Where STT has been discharged by Singapore LLP, it shall be liable to be taxed at a rate of 15% on the short term capital gains under the provisions of section 111A of the Act.

Please note that impact of the India-Singapore tax treaty has not been examined for the purpose of the above.

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Answer-to-Question-8

Part 1

There has been a trend of companies globally being funded by a higher proportion of debt as compared to equity. Being funded by debt has its own advantages such as obtaining a tax break on the interest paid, taking advantage of mismatch of definition of quasi-debt instruments in different jurisdictions etc.

This issue was also noted by the OECD in its Action Plan 4 which specifically dealt with the issue of excessive interest payments. As the law stands today, the following consequences could arise in India from being substantially funded though debt as compared to equity:

1. Thin Capitalisation Rules

The Finance Act, 2017 introduced section 94B, which provides for a limitation on the interest deduction claimed by Indian companies. The section limits the interest deduction that may be claimed by an Indian company to 30% of the Earnings before Interest, Taxes, Depreciation and Amortisation ('EBITDA'). This requirement has been specifically provided with respect to debt taken from non-resident Associated Enterprises ('AE').

In the instant case, Platinum France ('P France') would be an AE of Platinum India ('P India') under the provisions of section 92A of the Act. Accordingly, P India could expose itself to a disallowance of excessive interest paid if it is heavily leveraged.

2. Applicability of General Anti Avoidance Rule ('GAAR')

At the very outset it would be pertinent to note that the Indian Government has clarified that provisions of GAAR would operate alongside the provisions of any Specific Anti Avoidance Rules ('SSAR'). In this back drop, it would be possible for the Indian Revenue Authorities to invoke the provisions of GAAR to examine whether the debt invested by P France in P India is an Impermissible Avoidance Arrangement ('IAA') in spite of the Thin Capitalisation Rules.

As per the provisions of section 98 of the Act, where an arrangement has been declared to be an IAA the consequences of such declaration could include denial of a tax benefit under the Act or the provisions of any applicable tax treaty. Further, sub-section (2) to section 98 specifically states that any debt may be treated as equity as a consequence of being an IAA.

Where any the debt is treated as equity under GAAR, P India stands to lose the deduction of interest that may have been taken for the purpose of computing business profits. Further, any interest repatriated to P France may be considered to be dividend, in which case it may be liable to discharge dividend distribution tax.

Part 2

Facts of the case

- P India is engaged in the business of providing high end, customised software research for several clients worldwide.
- P France and P India have entered in to a Management Service Agreement (‘MSA’) under which P France will provide overall supervision and motoring of P India’s deliverables.
- P France shall not train any employees of P India and does not entail any employee of P France spending time in India.

Analysis

- At the very outset, it would be pertinent to take note of the provisions of section 90(2), which provide that a tax payer shall have the option to adopt the provisions of the Act or a tax treaty, which ever is more beneficial to it.

- Section 9(1)(vii) of the Act provides a very vide definition of the term Fees for Technical Services (‘FTS’) to include within its ambit consideration of any kind for rendering managerial, technical or consultancy services.

- In the instant case, the definition of the term FTS under the India-France tax treaty is also as vide and includes payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature.

- For the purpose of our analysis, we shall examine the provisions of the India-France DTAA only.

- From a simple reading of the definition, it appears that the services being provided by P France would fall within the ambit of the definition of the term FTS and payments thereof would qualify as FTS.

- Supervisions services provided would qualify as managerial services and monitoring (akin to quality control)would qualify as technical services.

- However, the India-France DTAA contains the Most Favoured Nation ('MFN') clause. The MFN clause conceptually provides that any treaty entered into subsequent to the negotiation of the treaty in question, which contains a restricted scope or provides a lower rate of tax with respect to any income stream, shall be considered for the purpose of applying the treaty in questions. However, the treaty entered into subsequently must also have an MFN clause.

- Generally, most OECD countries have an MFN clause in their tax treaties.

- In the instant case, it may be relevant to note that provisions of the India-Netherlands tax treaty which was amended vide a notification in the year 1999 after the treaty with France was entered into.

- As per the amended treaty consideration for technical or consultancy services shall be treated as FTS only if such services make available technical knowledge, skill, experience, know-how or a process.

- In the instant case, the services rendered by P France, does not make available any technical skill knowledge etc.

Conclusion

Therefore, applying the MFN clause and the India-Netherlands tax treaty, it may be concluded that the services rendered by P France is not technical services under India-France tax treaty and therefore not taxable in India.

It would be pertinent to note that the Indian Courts have in the context of the Belgian and USA treaties upheld the position of applying the MFN clause with respect to technical and consultancy services that do not fit in to the Make Available clause.

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Answer-to-Question-3

Part 1

The amounts paid as export commissions to KS UK by MH India would not qualify as either FTS or Royalty under the provisions of the India-UK tax treaty.

Given the same, there would be no India tax consequences and MH India would not be required to withhold any taxes.

Part 2

Payments made to Logik HK also do not qualify as either FTS or Royalty under the provisions of the Act. Further, Hong Kong does not have a tax treaty with India.

Therefore, MH India has no obligation to withhold taxes thereon.

Part 3(a)

Where MH India lisences its patented technology to TPMs, it should recieve a consideration in the form royalty from the TPMs which would be subject to withholding taxes under the India-UK tax treaty.

Further, where the technology is patended by MH India, the provisions of section 115 BBF of the Act would apply whereby it shall be required to discharge taxes at the rate to 10%.

Part 3(b)

With respect to the income from sale of bats by TPMs, there would be no consequence in India from a taxation prespective as it would constitute business income in its hands and the TPMs do not have a PE in India as per the provisions of the India-UK tax treaty.

Part 4

Dividends from MH UK would be taxes under the provisions of section 115BBD at the rate of 15%.

MH India would be able to claim credit for underlying taxes paid by MH UK as clarified by the HMRC in the UK domestic law.

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