Taxing Capital (Losses)

- In a recent ruling[1], the hon'ble Income Tax Appellate Tribunal, Mumbai (ITAT/ Tribunal) invoked the principle of interpretation of *generalia specialibus non-derogant* to hold that the provision for computation of income-tax on long-term capital gains arising to a non-resident from transfer of unlisted securities or shares of a company in which public are not substantially interested under section 112(1)(c)(iii) [2] of the Income tax Act, 1961 (the Act) prevails over the general provision under section 48 of the Act;
- The Tribunal ruling could potentially lead to non-resident entities being subjected to capital gains tax in India despite incurring 'real' losses (i.e., in terms of their home currencies), as were the facts in the instant case;
- As per the Tribunal's decision, capital gains of non-resident entities accruing from sale of unlisted securities/shares cannot take into account movement of Indian Rupee against the currency utilized to make the original investment. In other words, the Tribunal upheld the contention of Revenue that gains or losses attributable to currency movement are to be completely ignored under special provisions of Section 112(1)(c)(iii) of the Act, notwithstanding primary computation mechanism under Section 48 which prescribes for exchange-rate fluctuation adjustment.

Nangia Andersen LLP's Take

The computation of taxable income should be ideally based on the real income theory. This issue seems to require the intervention of the higher authorities and it is likely that the Tribunal order will be appealed in the High Court.

[1]Legatum Ventures Limited vs. ACIT [ITA No. 1627/Mum/2022]
[1]10 percent of the capital gain computed without giving effect to the first (i.e., forex neutrality) and second (i.e., indexation) proviso to section 48 of the Act.