

NEW “WORK FROM HOME” RULES IN SPECIAL ECONOMIC ZONES MAY LEAD TO TAX HOLIDAY DISALLOWANCE

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Recognizing the prevalence of flexible hybrid working models and taking into account industry demands, the Ministry of Commerce and Industry, Government of India, has introduced a new [Rule 43A](#) – “Work from Home” in the Special Economic Zones Rules, 2006 (“**Rule 43A**”), which will apply to all employees working in information technology (“**IT**”) and information technology enabled service (“**ITES**”) units operating in India’s special economic zones (“**SEZs**”).

In March 2022, the office of the Development Commissioner (“**DC**”), Santa Cruz Electronic Export Processing Zone (“**SEEPZ**”) SEZ issued directions to its SEZ units to commence ‘work from office’ in a phased manner. Following this, several companies in the SEEPZ SEZ were obligated to bring back employees to office. See our update on implications of return to office direction to SEZ units in Maharashtra [here](#).

The new Rule 43A provides a uniform work from home policy that will be applicable to all SEZs in India.

The key features of Rule 43A are:

1. It covers employees: (i) working in IT and the ITES SEZ units; (ii) who have been temporarily incapacitated; and (iii) who are either travelling or working at an offsite location.
2. In order to obtain approval to allow employees to work from home, the SEZ unit will be required to submit a proposal to the DC at least fifteen (15) days in advance (except in cases where employees are temporarily incapacitated or travelling) through e-mail or by way of a physical application. The application should contain the employment terms and conditions for working from home, the date from which the permission is required and the details of employees for whom the permission is sought.
3. SEZ units, where employees are already working from home or from outside the SEZ unit, will be required to submit the application to the jurisdictional DC within ninety (90) days from July 14, 2022 (i.e., date of commencement of Rule 43A).
4. Subject to the DC’s discretion, the permission to work from home will be granted for a maximum of 50% of the employee strength, including contractual employees; however, the DC has the power to approve a higher number of employees on a case-to-case basis.

5. The DC's permission will be valid for a period of one (1) year only, which can be extended by the DC for periods not exceeding one (1) year at a time.
6. SEZ units will be required to provide equipment and secured connectivity to enable employees to perform authorized operations from home and will be granted permission to take out equipment from the SEZ location without payment of customs duty or integrated goods and services tax (IGST).
7. Certain other conditions (mentioned below) will have to be adhered to by SEZ units that are granted permission:
 - ✓ They will have to maintain accurate attendance records for the duration permitted and submit details to the DC from time to time.
 - ✓ Employees while working from home should only perform services that have been authorized by the DC for that SEZ unit.
 - ✓ SEZ units should ensure that the foreign exchange export revenue of that service is attributable to the employee tagged.
 - ✓ If an employee ceases to be part of the project of the SEZ unit, the employee will be un-tagged and the identity card surrendered as per the SEZ Rules, 2006.

Our Comments

The introduction of Rule 43A is a welcome step. It will assist companies based in SEZs in retaining employees who prefer remote or hybrid working models. Having said that, Rule 43A has created new hurdles. For instance, previously, the jurisdictional SEZ authorities could permit SEZ units to allow all employees to work from home, but now the 50% cap will be applicable, and any increase will be allowed only on a case-to-case basis. As we see it, most employees prefer a hybrid working model, and most companies are opting for hybrid models in the post-Covid world. SEZ units may face challenges in retaining the balance 50% of the employees who may not be permitted to work from home.

Separately, notwithstanding Rule 43A, an aggressive interpretation of Indian tax law may lead to instances where tax officials may consider the work done remotely from home as ineligible for tax holiday benefits because of the specific condition that the SEZ unit is statutorily required to provide services from the SEZ location. In our view, a clarification on the treatment of services rendered from home in case of SEZ units will be helpful to avoid protracted tax litigation.