Taxation of Income from Immovable Property

Presented:

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Article 6 - Income from Immovable Property

- Taxability as per The Income tax Act, 1961: Taxable in India if property is situated in India - Section 9(1)(i).
- Article 6 of the OECD, U.N., and U.S. model conventions deal with income from Immovable Property.
- DTAA between India-Greece is an exception, income from immovable property falls under Article 10.
- The paragraphs of Article in all three conventions are similar with a minor difference.
Article 6 – Income from Immovable Property

UN Model
- *May be taxed in source state*
- Exhaustive meaning to Immovable Property
- Ships, Boats & Aircrafts *not* regarded as Immovable Property
- *Form of exploitation is not relevant*

OECD Model
- May be taxed in source state
- Exhaustive meaning to Immovable Property
- Ships, Boats & Aircrafts not regarded as Immovable Property
- Form of exploitation is not relevant

US Model
- May be taxed in source state
- Meaning as given in source country laws
- No such specific exclusion
- Form of exploitation is not relevant
- Option to compute income on gross or net basis

Both OECD and UN Model are identical
Most Indian DTAAs are based on UN Model
## Article 6 - Income from Immovable Property

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Article 6 - Income from Immovable Property

Mr. X in India

Property in USA

Mumbai

Property in UK

No DTAA

Indo-US DTAA

Indo-UK DTAA
Article 6 - Paragraph 1

- Grants primary right of taxation to the country wherein property is situated
  - Close economic connection between source of income and State of Source

- Income from *agriculture and forestry* included
  - May be taxed under Article 7 if agreed between two States

- No mechanism for computing taxable income
  - Domestic regulations should apply; para 2 of UN Model Commentary – taxable on net basis

- Income from property situated in third State not covered

*Income also taxable in the “State of Residence”*
Example- Mr. A, resident of India who owns property in France has let it out to a resident of Netherlands, Mr. B. Rent received taxable under ‘Other Income’. Treaty between India and The Netherlands can not apply as the property is situated in France.

If Mr. B sublets the property to Mr. C of France, income of Mr. B will be covered by Article 6 of France Netherlands treaty.
Article 6 - Paragraph 1

Mr. B of Netherland pays rent to Mr. A, resident of India. Mr. A owns immovable property in France, from which he sub-lets and receives rent.
Controversy in interpretation of the terminology ‘may be taxed in’-

- The SC held in CIT v. P.V.A.L. Kuldandagan Chettiar 267 ITR 654 that income from rubber estate in Malaysia was not taxable in India although Article 6 uses the words ‘may be taxed in’. Madras and MP High Courts and Chennai ITAT have taken the same view.

- Notification No. 91/2008 dt. 28-8-2008 clarifies that where the treaty provides ‘may be taxed in’, such income shall be included in the income of resident in India.
Article 6 - Income from Immovable Property

- **Paragraph 6(2)**
  - Meaning of immoveable property
  - Reference to domestic law (reference to article 3(2))
  - Specific Inclusions
    - Property accessory to Immoveable property
    - *Livestock* and equipments used in agriculture
    - Rights
  - Specific Exclusions
    - Ships
    - Boats
    - Aircrafts
Article 6 - Income from Immovable Property

- **Meaning of ‘Immovable Property’ under the Income Tax Act (‘the Act’)**

- **Section 269 A (e)**

  any land or any building or part of a building, and includes, where any land or any building or part of a building is transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also. *(including any rights pertaining to the above)*
Article 6 - Income from Immovable Property

Company

- Considered as income from IP
- Income from tea plantations

Shareholders in UK

- Considered as dividend in the hands of the shareholders
- Country ‘A’
- UK

Classification conflicts

TDS credit may not be granted by UK for taxes withheld in country A
Article 6 - Income from Immovable Property

- Paragraph 6(3)
  - Forms of exploitation
    - Direct use
    - Letting out
    - Indirect use / use in any other form
  - Exclusions

Situs based taxation of income from IP
Irrespective of form of exploitation of property
Article 6 - Paragraph 4

- **Priority of the rule of situs**
  - Priority over Article 7
  - Income taxable under this article even if such property form part of PE of the enterprise or service provider

- **Consequences on computation of income**
  - Principles laid down in Article 7 do not apply
  - Restrictions do not apply
  - Principles of domestic tax law would prevail
Article 6 - Paragraph 4

USCO

PE in India

USA

India

Business Income
Article 7

Rental Income
Article 6 Income from IP
Article 6 - Indian Approach (Select India’s DTAAAs)

- Australia
  - Expression “real property” used though the heading is “Immovable Property”
  - It does not exclude “ships, boats and aircrafts”
  - Separate definition for Australia and India
  - Additional para 3 – lease of land or any other interest in or over land

- Germany
  - Does not include “income from agriculture or forestry”
  - “Immovable Property” not defined in Article 6
    - Defined in Article 3 (definitions) – same definition
Article 6 - Indian Approach (Select India’s DTAAs)

- **USA**
  - Expression “real property” used
  - Inclusive and Exclusive part of the definition not included

- **UK**
  - Same as per UN Model

- **Includes income from agriculture**
  - Armenia/Austria/France

- **Does not include income from agriculture**
  - China/Denmark/Japan
Case Laws

- SRM Firm & Others (1994) 208 ITR 400 (Mad)
- Kulandagan Chettiar (2004) 137 Taxman 460