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IPS and DPS – An overview

• Taxability of income arising from exercise of ‘personal services’ under DTAA is governed by:
  
  – Article on Independent Personal Services – Personal services in independent capacity i.e. more like a professional services

  – Article on Dependent Personal Services – Personal services while in employment

• Both IPS and DPS deals with exercise of ‘personal services’
Article 14 – Independent Personal Services
Independent Personal Services – An overview

• Income from professional services/other activities of independent character
  – Thrust on taxability of services of independent nature
• Exclude professional services performed in employment
• Excludes industrial and commercial activities – covered under Article 5 and 7
• Professional services include –
  – Independent scientific, literary, artistic, educational or teaching activities
  – Independent activities of physicians, lawyers, engineers, architects, dentists, auditors and accountants
  – Other services of independent character
Independent Personal Services – Article 14 (UN Model)

Independent Personal Services

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State:
   
a) If he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State; or
   
b) If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

2. The term “professional services” includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.
Independent Personal Services – At a glance

• Article covers independent activities involving skills – Exportation of Skills – Most common known is Professional skills

• Normally covers services rendered by Individuals - In case of DTAAs like Australia, UK, USA, etc. firms also covered

• Suggests ‘Principal to Principal’ relationship

• Combines the effect of Article 5 and 7

• Excludes industrial and commercial activities – covered in Article on Business Profits

• Also excludes professional services while in employment – covered in article on Dependent Personal Services

• Income of Artistes, Athletes and Sportsman etc not covered.
IPS Taxability – Basic Rule

• Domestic Tax Law – Section 5 and Section 9

• Tax Treaty
  - Income from professional services or other services of independent character – **taxable in the country of residence**
  - In other words, the country of residence has primary right to tax income falling within this article
Taxability – By Source Country

Source country also has right to tax – mechanics

FB

- The fixed base is regularly available in the source country to the recipient of income
- For the purpose of performing his activity
- So much of the Income that is attributable to fixed base

No. of days stay

- If recipient of Income is present in the source country for more than 183 days in the period of 12 months
- Period of 12 month is rolling period (earlier Fiscal Year) – most Indian DTAAs do not have rolling period concept
- Different criteria for no. of days stay in different DTAAs

Additional criterion

- Remuneration exceeding certain specified amount
- Exist in very few Indian treaty
Definition of ‘Professional Services’

- **Inclusive definition** – includes specifically
  - Independent scientific, literary, artistic, educational or teaching activities
  - Independent activities of physicians, surgeons, lawyers, engineers, dentists and accountants
- **Services of personal nature**
- **Independent character**
- **Employment income is excluded**
- **Professional knowledge** of some department of science or learning is used
- There can be activities of independent character – though not qualified profession
- Immaterial whether recipient of services enjoys the same for business purposes or for personal availment
Definition of ‘Professional Services’….Cont’d

• MSEB v. DCIT – [2004] 90 ITD 793 (Mum)
  − A profession will imply any vocation carried on by an individual, or group of individual, requiring predominantly intellectual skills, dependent on individual characteristics of the person (s) pursing that vocation, requiring specialized and advanced education or expertise

• What can be covered under “Other services of independent character”
  − Distinguishable from business profits
  − Should be service
  − Be similar to professional services
  − Capital is secondary importance

• Indian DTAA – by and large uses the term “other services of similar character”
Fixed Base

- Not specifically defined - principles relating to PE can be applied
- Place from where work is performed e.g. consulting room or office etc
- Fixed or permanent character rather than temporary use
- Should be regularly available - not necessarily continuous
- Need not be owned or leased premises
- Even gratis user could be fixed base
- No time limit prescribed
- Income attributable to FB only taxable
- Commentary on Article 7 can be used as a guidance
  - For allocation of profits between HO and FB;
  - To determine allowability of expenses, characterisation of income; etc
Distinction vis-à-vis PE

- FB - Fixed place must be regularly available. PE - Fixed place through which business is wholly or partly carried on

- Services in relation to building or construction project can be PE but cannot be FB

- Agent cannot become FB unlike agency PE

- Force of attraction rule – applicability to FB??

Can preparatory & auxiliary activities be exempted from being considered as a FB?
### Illustrations

<table>
<thead>
<tr>
<th>Fixed Base</th>
<th>No Fixed Base</th>
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<tbody>
<tr>
<td>Office of an Architect/Lawyer.</td>
<td>Auditor provided room at client’s place to perform Audit.</td>
</tr>
<tr>
<td>Physician provided consulting room twice a week by polyclinic.</td>
<td>Desk made available to the manager situated in another enterprise without presence of necessary infrastructure.</td>
</tr>
<tr>
<td>Definite space in office of an associate.</td>
<td>Temporary camping by a researcher at base camp in Himalayas.</td>
</tr>
<tr>
<td>A Lawyer exercising profession from second home in another state.</td>
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</tbody>
</table>

*Note: Income attributable to the fixed base can alone be taxed.*
Stay of the person – Eligibility

• Present for more than 183 days – in aggregate
• Income derived from activities performed in that state only taxable
• Distinction vis-à-vis PE
  - Services for a period aggregating to more than 90 days within any twelve month period can be Service PE
  - Different criteria for no. of days for Services PE in different DTAAs
  - Clause 6 of Article 7 (UN Model) – for applicability of Article 14

OECD Model 2000 – Dropped Article 14
Reason – Article 5 read with Article 7 covers it.
Issues for consideration

• Can non-individuals render professional services?
  − Yes, DTAA with Australia, UK, USA covers firms
  − MSEB v. DCIT – [2004] 90 ITD 793 (Mum) – Article 14 can apply to non-individuals

• Partnership firms
  − How to count no. of days stay?
    ▪ No. of days stay of all the members
    ▪ Clifford Chance v. DCIT – [2002] 82 ITD 106 (Mum)

• Company/Other forms of corporate bodies
  − Cannot render services which can be regarded as “Personal”. Fees received by corporate are industrial and commercial profit – Christiani & Nielsen v. ITO [1991] 39 ITD 355 (Bom)
  − DTAA where term used is “Resident of contracting state” v. “Income derived by individual....who is a resident of contracting state”
  − DIT v. Paper Products Limited [2002] 257 ITR 1 (Del) – {old India Italy treaty}
Issues for consideration

• Furnishing of services is also covered by Article 5(3)(b)
  - Article 5(3)(b) applies to services other than IPS
  - Furnishing of services by an enterprise through employees or other personal engaged by the enterprise
  - It is possible that characterisation of income would encompass IPS as well as FTS
  - Specific would override the general
    ▪ MSEB – [2004] 90 ITD 793 (Mum) – elaborate explanation of professional services
    ▪ DCIT v. Chandbourne & Parke LLP [2005] 2 SOT 434 (Mum)
• What if a person abstains from undertaking the activity and is paid for it?
Key Pointers

• Income from immovable property used for IPS is taxable under Article 6 of the tax treaty

• Capital gains on sale of property used for IPS taxable under Article 13 of the tax treaty

• Income from services derived by exploration of rights and similar properties taxable under the head Royalty/FTS

• Artists, Athletes, Sportsman’s income will be taxable under separate article
IPS – Treaty comparison
### IPS- Article 14(1) (a) & (b) – Comparison

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<tr>
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<th>Germany</th>
<th>UK</th>
<th>US</th>
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<tr>
<td>1. Income derived by an <strong>individual or a firm of individuals (other than a company)</strong> who is a resident of one of the Contracting States in respect of professional services or other independent activities of a similar character shall be taxable only in that State unless: (a) the individual or firm has a fixed base regularly available to the individual or firm in the other Contracting State for the purpose of performing the individual's or the firm's activities, in which case the income may be taxable:</td>
<td>1. Income derived by an <strong>individual</strong> who is a resident of a Contracting State from the performance of professional services or other independent activities of a similar character shall be taxable only in that State except in the following circumstances when such income may also be taxed in the other Contracting State: (a) if he has a fixed base regularly available to him in the other Contracting State:</td>
<td>1. Income derived by an <strong>individual</strong>, whether in his own capacity or as a member of a partnership, who is a resident of a Contracting State in respect of professional services or other independent activities of a similar character may be taxed in that State. Such income may also be taxed in the other Contracting State if such services are performed in that other State and if:</td>
<td>1. Income derived by a <strong>person who is an individual or firm of individuals (other than a company)</strong> who is a resident of a Contracting State from the performance in the other Contracting State of professional services or other independent activities of a similar character shall be taxable only in the first-mentioned State except in the following circumstances when such income may also be taxed in the other Contracting State: (a) if such person has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or</td>
<td>1. Income derived by an <strong>individual</strong> who is a resident of a Contracting State from the performance of professional services or other independent activities of a similar character shall be taxable only in that State except in the following circumstances when such income may also be taxed in the other Contracting State: (a) if he has a fixed base regularly available to him in the other Contracting State:</td>
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### IPS- Article 14(1) (a) & (b)- Comparison

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<td></td>
<td>taxed in that other State but only so much of it as is attributable to activities exercised from that fixed base; or (b) the stay by the individual or, in the case of a firm, by one or more members of the firm (alone or together) in the other Contracting State is for a period or periods amounting to or exceeding 183 days in a year of income, in which case only so much of the income as is derived from the activities of the individual, that member or those members, as the case may be. in that</td>
<td>State for the purpose of performing his activities, in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or (b) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 120 days in the relevant fiscal year ; or (b) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 180 days in the relevant fiscal year.</td>
<td>(a) he is present in that other State for a period or periods aggregating to 90 days in the relevant fiscal year ; or (b) he, or the partnership, has a fixed base regularly available to him, or it, in that other State for the purpose of performing his activities ; but in each case only so much of the income as is attributable to those services.</td>
<td>available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or (b) if the person's stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any period of 12 months; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.</td>
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IPS - Case studies
• A doctor, being MD settled in UK, visits India to perform an operation on an Industrialist in India. The operation is performed at a hospital situated at Mumbai and the doctor stays in India for 15 days. Fees are paid to the doctor in Indian rupees.

What would be the tax liability on the doctor in respect of income earned in India that too in Indian Rupees?

_______________________________________________________

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Case studies….Cont’d

• A UK resident company M/s XYZ Ltd., a well known business strategist company, enters into an agreement with an Indian Company for advising on setting up of a new business in India for which the UK company prepares a strategy note and supplies the same for a sum of US$ 50,000.

1) Which Article shall apply for determining the taxability of the sum?
2) Will the answer differ if the UK resident is a firm of individuals?
3) What if it was a Singapore based partnership firm?

________________________________________________________________________

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Case studies….Cont’d

• A lawyer’s firm in India is consulted by UK based company for legal formalities for raising funds in India. Advice will be given from Indian base and while in India. Fees would be remitted to India in GBP.

1) Whether fees earned by Indian firm would be taxable in UK?

2) What would be the situation if instead of company based in UK the services are rendered to company based in Brazil?
Case studies….Cont’d

- Mr. A lawyer, resident of USA was regularly practicing in India through a fixed base. He discontinued his practice in India since past 2 years. However, he has been able to recover US$ 15,000 from his erstwhile client in the current year for services rendered when he was practicing in India.

1) What will be the nature of such fees & its taxability?

_________________________________________________________

_________________________________________________________

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Case studies….Cont’d

• A UK resident renders professional services to an Indian company. For the purposes of his services he is required to stay with the company in India for the period of 100 days. The payment of fees would be made in UK in pounds.

1) Whether Indian company is required to deduct tax at source from this payment.

2) What would be situation, if instead of UK resident the services were hired from professional who is resident of Mauritius?
Case studies...

• A resident of UK is contracted to act in an Ad. Film for TV programme on channel primarily viewed in India. He shall for purpose of shooting visit to India and stay in India during the shooting days that is expected to be 10 days. The payment shall be made to him directly in UK in pounds.

1) What would be the taxability of A?
Case studies…

• A UK resident painter renders professional services to an Indian company. He also owns a restaurant in India. He for the purpose of painting visited India and stayed for 15 days.

1) Whether Indian company is required to deduct tax at source from this payment.

2) What would be situation, if restaurant in India is used as contact place by UK resident?
IPS – Key decisions
Facts of the case

- An international firm of solicitors, resident in UK, with no office or fixed base in India
- Was appointed as legal advisors for four oil / power projects in India
- Details of the Projects and Clients are as follows:

<table>
<thead>
<tr>
<th>Project</th>
<th>Appellant’s client</th>
<th>Client’s residence in India</th>
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<tr>
<td>Bhadravati Power Project</td>
<td>Electric De France</td>
<td>Non-resident</td>
</tr>
<tr>
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<td>GEC Alsthom Group</td>
<td>Non-resident</td>
</tr>
<tr>
<td></td>
<td>Ispat Industries Ltd.</td>
<td>Resident</td>
</tr>
<tr>
<td>Vizag Power Project</td>
<td>Machen Development Corporation</td>
<td>Non-resident</td>
</tr>
<tr>
<td></td>
<td>National Power plc</td>
<td>Non-resident</td>
</tr>
<tr>
<td>Ravva Oil and Gas Fields Project</td>
<td>Chase Manhattan Bank (Australia) Ltd.</td>
<td>Non-resident</td>
</tr>
<tr>
<td>Vemagiri Power Project</td>
<td>Avondale Ltd.</td>
<td>Non-resident</td>
</tr>
</tbody>
</table>
Facts of the case

• The taxpayer was remunerated on the basis of time spent by its partners / employees on various projects

• Payments to the assessee were made outside India

• In previous year, presence of one of taxpayer’s partner in India exceeded 90 days

• A return of income was filed, declaring income as was attributable to operations conducted in India for four projects

• During scrutiny assessment, AO held that entire fees received by assessee in respect of four projects in India is taxable in India

• CIT(A) confirmed AO’s order
  − Determining factor was place where services were utilised by clients and not the place where appellant’s services were performed for, or rendered to, the clients.

• The Tribunal accepted contentions of taxpayers but upheld AO’s order holding that taxpayer had not provided full details of projects and nature of work done so as to limit to billed hours in India
High Court’s ruling

• As per Article 15 of treaty “Income derived by an individual, whether in his own capacity or as member of a partnership….., such income may also be taxed in that state if such services are performed in that other state and if he is present for more that 90 days”.

• In case of partnership presence of members is aggregated to ascertain their presence for 90 days

• If the test of 90 days is satisfied income would be taxable as per domestic tax law – Section 9(1)(i)

• HC, relying on principles laid down by SC in case of IHHI, accepted that territorial nexus doctrine plays an important part in assessment of taxable income

• In a situation where income arises out of operations in more than one jurisdiction it is not correct to contend that entire income accrues or arises in every jurisdiction
  
  – Apportionment of income to each jurisdiction
High Court’s ruling

• Professional services would be taxable in India to the extent referable to services rendered in India to the exclusion of service rendered from abroad.

• HC concluded that only income (as disclosed in return of income of taxpayer) which was charged on hourly basis in India and utilised in India shall be chargeable to tax under domestic tax law.
ADIT v. Clifford Chance [2013] 24 ITR(T) 1 (Mum) (SB)

Facts of the case

• The taxpayer is a firm of Solicitors operating as a partnership with its principal office in UK. It was engaged in providing international legal services in certain areas. The taxpayer did not have an office or fixed base in India.

• The taxpayer rendered legal consultancy services in connection with different projects in India. It did not have any office in India, but some part of the work was performed by its employees and partners during their visits to India.

• The taxpayer relied upon Article 15 of the India-UK tax treaty and claimed that aggregate period or periods of stay of its partners and employees during the years did not exceed 90 days in India. Accordingly, it was submitted that the income was not taxable in India.

Issue before the Tribunal

• Whether taxpayer is eligible to claim benefit of Article 15 of the India-UK tax treaty in respect to services rendered in India
Tribunal’s ruling

- In taxpayer’s earlier case, the Bombay High Court affirmed the decision of the Tribunal where it was held that Article 15 of the India-UK tax treaty provides for the residence rule in relation to taxation of income of an individual including members of partnership, the exception being where a member is present in the other state for a period aggregating 90 days or more during the previous year.

- It was held that in that case if test of 90 days are satisfied, the effect is virtually take the taxpayer out of the treaty, the taxability being determined u/s 9(1)(i) of the Act.

- The Tribunal relied on taxpayer’s earlier decision of the Bombay High Court, involving similar issue and held that a non-resident is taxable on income for services only if the services are rendered within India and are part of a business or profession carried on by such person in India. Both the above conditions have to be satisfied simultaneously.
Facts of the case

• The taxpayer is an exporter of leather footwear and footwear uppers.

• The taxpayer made payment towards design and development expenses to the resident of various countries without any deduction of tax at source.

• The Assessing Officer held that the payments to these persons were in the nature of FTS and therefore, liable for withholding of tax under section 195 of the Act.

Tribunal’s ruling

Payment to Spanish individual resident

• The payment to an individual will not be taxable in India under Article 15 of India-Spain tax treaty if the individual does not have a fixed base and he did not spend more than 183 days, in the relevant previous year, in India.

Payment to Italian individual resident

• The services are in the nature of professional services and therefore, provisions of Article 15 will come into play
However, Italian resident did not have a fixed base in India, nor did he stay in India for more than 183 days in the relevant previous year. Therefore, payment is not taxable as 'independent personal services' under article 15 of the Indo Italy tax treaty.

Paymen made to Belgium resident entity

- The provisions of Article 14 extend only to the individuals and not all residents of the treaty partner country.
- The taxpayer’s reliance on MSEB decision is misplaced because that was in the context of India-UK tax treaty.
- What is decided in the context of one treaty does not necessarily apply in other treaties as well, particularly when the treaties are differently worded.
- In the present case, the payment has been made to a business entity which is other than an individual and therefore, the provisions of Article 14 do not come to the rescue of the taxpayer.
- Taxable as FTS.
Article 15 – Dependent Personal Services
Dependent Personal Services – An overview

- Income derived from exercise of employment across the border covered
- Employer - Employee relationship is the crux
- All payment in respect of employment would be covered
  - Connection between work performed and compensation
- Perquisites, ESOPs, etc., would be covered by this clause
- Exemptions/deductions in computation of salary income would be available
1. Subject to the provisions of articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only if:

   a) The recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; and

   b) The remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

   c) The remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

3. Notwithstanding the preceding provisions of this article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.
Dependent Personal Services – At glance

- Taxable where employment is exercised
- Exercise of employment – where employee is physically present
  - Place of exploitation of result not material
- Term used - Salary, wages and other similar remuneration derived... in respect of employment
- Very wide – covers remuneration / benefits received from sources in third country as well
- Time of payment and place of payment is immaterial
- Severance pay would be covered (excluding severance pay in lieu of pension)
- ESOPs are covered
Dependent Personal Services – Remuneration not covered

- Directors Fees & Remuneration of Top-level managerial officials - Article 16
- Income of Artists & Sportspersons – Article 17
- Pensions & social security payments – Article 18
- Remuneration in respect of Government services – Article 19
- Payments received by students – Article 20
Dependent Personal Services – under the Act

Salary earned in India [Section 9(1)(ii)]

• Reference is to “salary earned” in India by a non-resident
• Salary is taxable to the extent services are rendered in India
• Rest period preceding and succeeding period of services rendered in India covered specifically
• Exemption under Section 10(6)(vi) of the Act is applicable where non-citizen employee of foreign enterprise renders services in India provided:
  − Foreign Enterprise is not engaged in any trade/business in India
  − Stay in India does not exceed 90 days
  − Remuneration is not deductible from income of employer
Dependent Personal Services – under the Tax Treaty

- Primary right of taxation is given to the country of residence;
- However, if the employment is **exercised in another country** than that of residence country, the source state may also tax such income. However, in following conditions source country will not have right to tax
  - Employee is present in source country for a period not exceeding 183 days in any 12 month period commencing or ending in the relevant fiscal year, and
  - Remuneration is paid by, or on behalf of, NR Employer, and
  - Remuneration is not borne by PE or FB situated in source country
  - Three conditions laid down above **are cumulative**
- If any of the condition is not fulfilled then source country will have right of taxation (In other words, exclusionary conditions do not operate)
Taxability under the Treaty – Some pointers

- Presence of **183 days**
  - Use of ‘days of *physical presence*’ method
  - Following days are included
      - Day of arrival
      - Day of departure
      - Holidays etc

- Concept of **rolling period** for counting twelve months
  - Indian treaty uses different phrases such as ‘relevant taxable year’, ‘fiscal year’, etc.
  - Concept of rolling period adopted in India-Malaysia tax treaty
Taxability under the Treaty – Some pointers

• Employer not required to be resident of source country
• Term ‘Employer’ not defined – In international hiring-out its crucial
  – Right on the work produced
  – Direction, supervision, installation and superintendence
  – Bearing responsibilities and risk
  – User of services of employees
  – Substance over form
• Extract from Klaus Vogel on Double Taxation Conventions at page 899:
  “An employer is someone to whom an employee is committed to supply his capacity to work and under whose directions the latter engages in his activities and whose instructions he is bound to obey”
• Does not include: Professionals, freelancers
  : Working partner
  : Director in his capacity as Board member
Taxability under the Treaty – Some pointers

• Remuneration must not be borne by PE or FB
  - Term ‘borne’ should be interpreted broadly
  - Whether remuneration deducted in calculation of profit or not is immaterial
  - What is important is that remuneration is deductible

• Impact of presumptive taxation

• Variants – “deductible”, ‘reasonable connected’, etc.
Taxability – Ship/Aircraft & Frontier Workers

For Ship/Aircraft -

- Ships or Aircraft operating in international traffic or boat engaged in inland waterways traffic
- Salary, remuneration etc. taxed in country of effective management of ships etc
- Only employment “on board” is covered
- In alignment with Article 8

Frontier Workers

- Employees staying near the border, & going to work in the country across the border – where is salary taxable?
  - OECD / UN models do not prescribe anything. It is left to the countries concerned
Issues for consideration

1. If Journalists visit to other country for collecting news, does he exercise employment in that country

2. What would be the position of technical personnel deputed for quality control by foreign based technical collaborator of an Indian Company
DPS – ESOPs

• OECD model commentary has incorporated the provisions of ESOP report
• In UN model - There is no specific reference
• Gains:
  - Upto exercise of option – Salary income under Article 15
  - After exercise of option – Capital gains under Article 13
• ESOP given by foreign holding companies to employees of Indian subsidiary are taxable
• Indian employee receives ESOPs – migrates abroad – exercises/encashes after he becomes NR
• Reverse case – Foreign employees who come to India and then sale the shares
  - Article 15 permits taxation in the country of source – to the extent of appreciation till exercise of ESOPs
DPS – Treaty comparison
## DPS – Article 15(2)(a) – 183 days rule – Comparison

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<tr>
<td>'Notwithstanding the provisions of paragraph (1), remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if: (a) the recipient is present in that other State for a period or periods not exceeding in the aggregate 183 days in a year of income of that other State</td>
<td>'Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if: (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned</td>
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<td>(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and</td>
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<td>(c) <strong>the remuneration is not deductible in determining taxable profits of a permanent establishment or a fixed base which the employer has in that other State.</strong></td>
<td>(c) <strong>the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.</strong></td>
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DPS – Key decisions
Facts of the case

- During the tax year under consideration, the employees of the Indian company were deputed on overseas assignment to UK;
- The employees qualified as “Non resident” under the Act and a “Resident” in the UK under its domestic tax law;
- Salary and other allowances continued to be paid in India by the Indian company to the employees deputed to overseas entity in the UK;
- Certain allowances were paid by the UK entity in the UK;
- Salary received in India are offered to tax in the UK as per its domestic tax law;
- During the tax year under consideration, the employees did not render any services for the Indian company though they remain on the payroll of the Indian company;
Facts of the case

- Salary and other allowances paid to the employees in India are charged back to the foreign entity (i.e. where the employees are deputed); and

- The employees submitted a declaration in Form 12B to the Indian company specifying the particulars of the income offered to tax and taxes paid in the UK.

Issues:

- Whether the salary received by the employees in India are taxable in India?

- Whether the Indian Company is required to withhold taxes on salary paid to the employees in India?
The salary received in India is not taxable in India provided the same has been offered to tax in the UK in pursuance of the DTAA;

The Indian Company is not liable to deduct tax from salary provided it is satisfied on the basis of the Form 12B submitted by the employees that the taxes have been paid on such income in the UK;

Principles laid down in Paragraph 1 and 2 of the DPS Article has been upheld
S Mohan – [2007] 294 ITR 177 (AAR)…. Distinguished…

Facts:

• S Mohan, an employee of Infosys Technology Ltd. was deputed on official duty to Norway;
• During AY 2006-07, he was a non-resident as per the Act;
• Salary received in India for services rendered in Norway
• No exemption was claimed in the Indian tax return; and
• He did not produce any proof of taxes paid in Norway.

Issue:

• Whether salary paid in India is taxable in India, though the assessee was non-resident during AY 2006-07?
### DPS – Article 15(2) (b) & (C) – Comparison

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<th>Australia</th>
<th>Germany</th>
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<td>not a resident of the other State and whose activity does not consist of hiring out of labour; and</td>
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<td>other State.</td>
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DPS – ESOPs

- OECD model commentary has incorporated the provisions of ESOP report
- In UN model - There is no specific reference
- Gains:
  - Upto exercise of option – Salary income under Article 15
  - After exercise of option – Capital gains under Article 13
- ESOP given by foreign holding companies to employees of Indian subsidiary are taxable
- Indian employee receives ESOPs – migrates abroad – exercises/encashes after he becomes NR
- Reverse case – Foreign employees who come to India and then sale the shares
  - Article 15 permits taxation in the country of source – to the extent of appreciation till exercise of ESOPs
Facts of the case

- Taxpayer was an employee of the UK entity and was working in their London office. He had worked in India for 20 days with Indian Subsidiary of the UK entity.
- A portion of the salary was payable in India and the said arrangement was made for the purpose of pensionary benefits. The Indian subsidiary paying the salary in India had deducted taxes and accordingly had issued a salary certificate in Form No. 16 for the same as well.
- It appears that the salary paid by the Indian subsidiary was not claimed as a deduction in their books of accounts but recovered from the UK parent company.
- The taxpayer while filing his return of income for the assessment year 2001-02 claimed exemption on salary income under Article 16(2) of the India-UK Treaty.
- The AO disallowed the exemption claimed by the taxpayer.

Issue before the High Court

Whether the taxpayer is eligible to claim exemption?
High Court’s ruling

- There is no dispute on whether the amount claimed by the taxpayer as exemption under Article 16 (2) of the India-UK Treaty is not taxed either in UK or in India.

- The condition stipulated in Article 16(2)(b) of the India-UK Treaty is not fulfilled in so far as the Indian subsidiary treated the taxpayer as its employee and issued a salary certificate in respect of the salary paid and tax deducted.
DPS – Key amendments
Key amendments – Disclosure of overseas assets

- Disclosure of overseas assets (including financial interest in any entity) or signing authority in any account located outside India, for ROR of India from Financial Year 2011-12
  - Foreign Bank Accounts - including peak balance
  - Financial interest in any Entity
  - Amount invested in Immovable Property
  - Amount invested in any other Asset
  - Details of Account(s) in which signing authority exists and not included above.

- Mandatory irrespective of whether individual has taxable income or not

- Tax return forms contain schedule for disclosing details such as peak balance in bank account during FY, peak investment during FY, required to be declared in INR

- Revenue can reopen cases for past 16 years if they have reason to believe that income relating to such assets has escaped assessment

- Impacts family members of expatriates who become or resident by virtue of stay pattern but otherwise may not have taxable income

- Several practical issues on definition of asset etc. still remain unresolved e.g. balance in 401K plan?
Key amendments – Non tax aspects

• Change in Social Security Regime
  - Concept of International Worker (IW)
  - IW’s to contribute to Indian Provident Fund if Indian entity a covered establishment
  - Exemption for individual’s coming from countries with which India has entered into a Social Security Agreement (SSA) or a Bilateral - Comprehensive Economic Partnership / Co-operation Agreement (CEPA-CECA)
  - Currently 18 SSA’s have been signed of which 9 is notified and 5 more SSA’s are under negotiation
  - Only Singapore CEPA eligible

• Stringent Visa Regulations
  - Tax compliance certificate requested at the time of Foreign Regional Registrations Office (FRRO) or visa extension

• Interplay of Tax, PF and Visa regulations
Key amendments – Tax Residency Certificate

• Amendments to Section 90 and 90A – Non-residents to furnish TRC to claim treaty benefits
  – W.e.f. 1 April 2013 and apply in relation to the Assessment Year 2013-14 onwards
• The Finance Act, 2013 eliminated the requirement of obtaining the particulars in prescribed format
  – Notification No. 57/2013 [F.No.142/16/2013-TPL] revised the Rule 21AB
  – Prescribed additional information to be furnished along with TRC.
• The additional details required to be furnished in Form 10F –
  – Status (Individual, Company, Firm, etc.) of the taxpayer
  – Permanent Account Number (PAN) of the taxpayer, if allotted
  – Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others)
  – Taxpayer's tax identification number or a unique number, as the case may be
  – Period for which the residential status, as mentioned in the TRC, is applicable and
  – Address of the taxpayer during the period for which the certificate is applicable
## TRC format of different countries

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<tr>
<th>Sr. No</th>
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<th>Status</th>
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<th>Period of residency</th>
<th>Address in the resident country</th>
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IPS v. DPS

Dieter Eberhard Gustav Von Der Mark – [1999] 235 ITR 698 (AAR)

Facts of the case

• Individual – receiving fees in India in capacity of director of Co. – additionally received consulting fees for services to be rendered in Germany

Issue

• Whether DPS or IPS

Ruling

• Fees are IPS and not taxable in India as ‘A’ was not present in India for 120 days and not having a FB
IPS v. DPS

Device Driven (India) Pvt. Ltd (ITA No. 282/Coch/2013)

Facts of the case

• Individual – a non-resident director, acting as a commission agent, receiving commission from an Indian company. The non-resident director is a qualified architect and has got vast experience in the technical field, especially in mobile communication in India.

• The commission agent to provide support to taxpayer in evaluation from a business perspective, in the light of his relationships with the proposed clients and local expertise. Also to provide support to the taxpayer for presentations and other collateral proposals and contracts.

Issue – whether DPS or IPS

Ruling

The Tribunal observed that as a non-resident director, the commission agent has every right to look into and was required to take care of the affairs of the taxpayer and hence, the office of the taxpayer in India can be treated as fixed base for the commission agent. Accordingly, the payments made to him are also taxable as Independent Personal Services of the India-Switzerland tax treaty.
Questions & Answers
Thank you

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