

BOMBAY CHARTERED ACCOUNTANTS' SOCIETY

- TAX IMPLICATIONS ON
FOREIGN ENTITIES
AND TDS ON
PAYMENTS TO NR

*Presented by:
Yogesh Thar*

Synopsis

- Introduction
- Scope of Total Income
- Income deemed to accrue in India
- New (amended) definitions
- Branch Profit Tax
- Transfer Pricing
- Advance Pricing Agreements
- DTAA
- Rates of Tax and TDS
- Foreign Tax Credit

Introduction

- Para 1.7 of the Discussion Paper
 - DTC is not an attempt to amend I.T. Act
 - Not an attempt to improve upon I.T. Act
 - CBDT has started with a clean drafting stage
 - Some assumptions held ground for many years discarded

Introduction (Contd.)

- Best practices in the world incorporated
- Policies to promote growth with equity
- Read the DTC without preconceived notion
- Do not compare with the present Act.

Scope of Total Income

- Resident
 - World income taxable
 - Income accruing/received outside India shall be included in TI, regardless of :
 - Income having been charged to tax outside India; or
 - Method of granting relief for double taxation under DTAA

Scope of Total Income (Contd.)

- Non-Resident
 - Accrues in India
 - Deemed accrual in India
 - Received in India
 - Deemed received in India

Income deemed to accrue in India

- ITA 9(1)(i) V/s DTC 5(1)(d)
 - Income shall be deemed to accrue in India, if it accrues, directly or indirectly, through or from :

“the transfer, directly or indirectly, of a capital asset situated in India”.

Income deemed to accrue in India (Contd.)

- Besides salaries, dividend, interest, royalty and FTS - “transportation charges” also included.
 - TC accrued from Govt.
 - TC accrued from Resident - exception: Transport from a place o/s India to another place o/s India
 - TC accrued from Non-Resident, if - Transport to or from a place in India

Income deemed to accrue in India (Contd.)

- Deemed accrual will apply regardless of:
 - payment outside India
 - services rendered outside India
 - Income otherwise accrued outside India

New (Amended) Definitions [Changes only]

- Royalty
 - ITA 9(1)(vi) : secret formula or process
 - DTC 284(24D)(b) : secret formula, process
 - Use of ICS equipment – “including ship or aircraft”
 - Use or right to use of “transmission by satellite, cable, optic fibre or similar technology”
 - Transfer of all or any right (including grant of licences) in respect of “live coverage of any event”

New (Amended) Definitions [Changes only] (Contd.)

- FTS
 - consideration paid/payable “directly or indirectly” for
 - scope expanded to include development and transfer of design, drawings, plan or software or any other service of similar nature”

New (Amended) Definitions [Changes only] (Contd.)

- “development and transfer”
 - mere development covered in general definition
 - mere transfer – not FTS
 - pith and substance – “service” and not “supply”

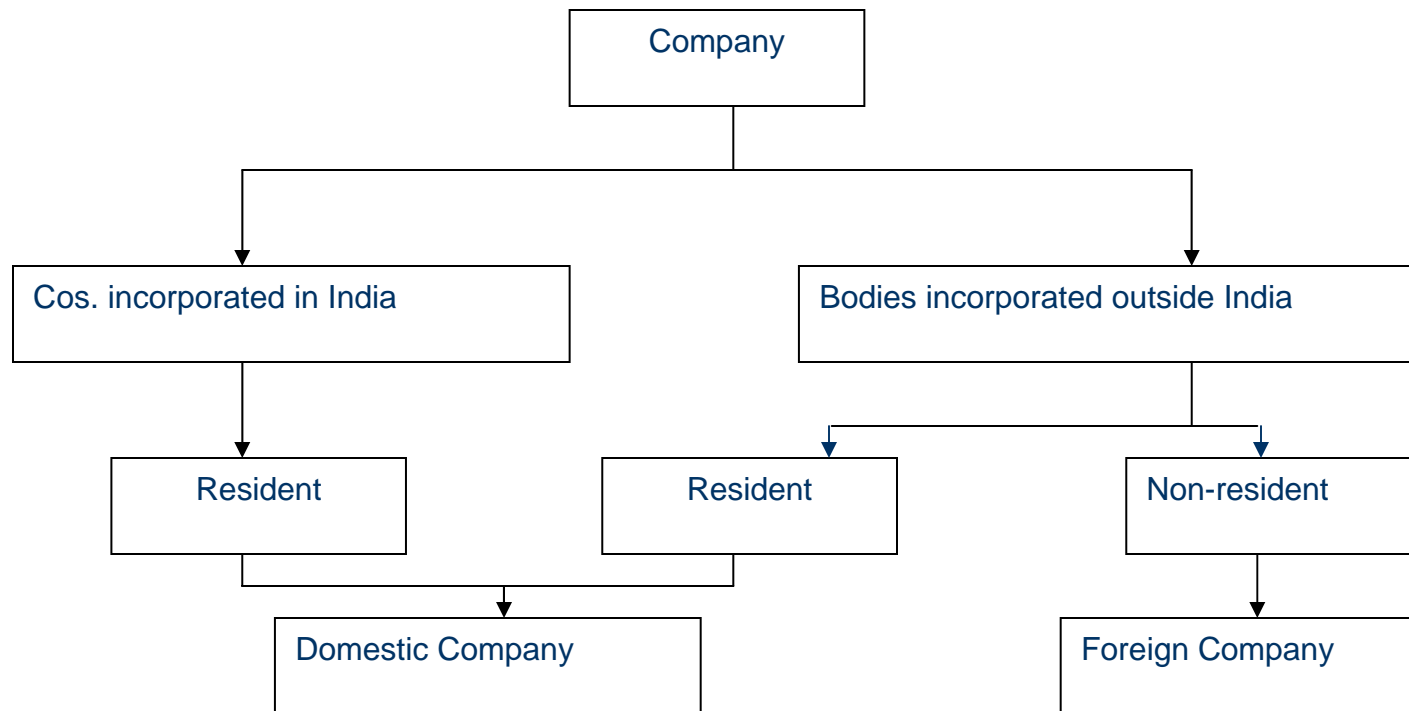
New (Amended) Definitions [Changes only] (Contd.)

- Interest
 - means
 - any “amount” payable
 - to any person
 - in any manner
 - in respect of
 - any borrowings or debt incurred
 - or any other similar right or obligation

New (Amended) Definitions [Changes only] (Contd.)

- Interest Issues:
 - ‘Arrangers’ fees
 - ‘Upfront fees’
 - ‘Commitment charges’
 - ‘Penalty for late payment’

Foreign Company



Note: Indian LLP = Firm but Foreign LLP = Company (R / NR)

August 28, 2009

Branch Profit Tax

- Salient Provisions:
 - applies to any Foreign Company
 - BPT @ 15% on “Branch Profits”
 - $BP = TI - \text{Income Tax on TI}$
 - No other definition of “Branch Profits”
- Concept:
 - Subsidiary v/s Branch
 - Dividend equivalent e.g. applies on income taxed on net basis
 - Indo-US DTAA – Article 14

Branch Profit Tax (contd)

- Issues
 - applies to all F.C., whether or not PE in India?
 - Applies to Special source Income like Royalty, FTS, Interest etc.?

Transfer Pricing

- ITA 92A(1) & 92A(2) – recap
- Article 9 of DTAA – recap
- DTC 113(5) – “participation” criteria omitted
- Objective Tests only
 - 10% shareholding (present 26%)
 - Common shareholder – 10%

Transfer Pricing (contd.)

- Loan – 26% of BV of assets of borrower (present 51%)
- Guarantee – 10% of borrowings of borrower
- Board appointment – 1/3rd (present 1/2)
- Common enterprise – board appoint – 1/3rd
- Manufacturing / processing wholly dependent on IPR of another enterprise
- Purchase of raw materials/consumables – 2/3rd (present 90%) & price/conditions influenced by the seller/other enterprise

Transfer Pricing (contd.)

- Sale of finished goods & price/conditions influenced by buyer / other enterprise
- Enterprise “controlled” by an individual, his relatives (definition of relatives broad based)
 - “Control” – different from “ownership”
- Enterprises controlled by HUF/member of HUF/relatives
- Interest in unincorporated body – 10%
- Other prescribed relationships

Transfer Pricing (contd.)

- Furnish Accountants' Report on International Transaction to T.P.O (not A.O.) – Before due date
- S.130 – TPO is an “Income-tax Authority”
- S.160 – Determination of ALP :
 - TPO may select any international Transaction for determining ALP
 - Selection based on risk management strategy formed by CBDT

Transfer Pricing (contd.)

- TPO to communicate to assessee within 2 months from end of F.Y. in which report is furnished [i.e. 31st May]
- TPO also to communicate to A.O.
- Opportunity of hearing
- TPO to determine ALP
- For using material in possession of TPO; assessee must be given opportunity
- Best judgement determination if assessee does not cooperate
- TPO to serve report of determination of ALP on AO and on assessee

Transfer Pricing (contd.)

- Time limit : 42 months from end of F.Y. in which International Transaction is entered into (e.g. F.Y.2010-11 – on or before 30.9.2014)
- Risk Management strategy framed by CBDT – not to be revealed to any assessee / public – regardless of any contrary provision in any other Act.
- Maintenance of information and documents
 - as may be prescribed. [S.83(2) of DTC].

Advance Pricing Agreements

- 'A' enters into an International Transaction with AE.
A or AE may enter into an APA with CBDT
- Prior approval of CG required by CBDT! [S. 107(1)]
- CBDT to determine ALP
 - As per prescribed methods
 - CBDT may make "other adjustments"
- APA valid for ≤ 5 years
- APA binding only:
 - On applicant

Advance Pricing Agreements (cont'd)

- The relevant transaction
- On CIT and IT Authorities below him
- APA not binding if there is a change in law on the basis of which the APA has been entered into
 - Q. Change of law – prospective or retrospective
 - Q. Estoppel – applies to Executive.
- APA void if obtained by fraud / misrepresentation
- CBDT to frame scheme for APA
- Preferred international practice – bilateral or multilateral APA – but DTC unilateral

Advance Pricing Agreements (cont'd)

- If unilateral APA – competent authority of other jurisdiction should be informed – they may like to consider bilateral arrangement under MAP
- Rules may provide for:
 - Filing annual compliance report for conditions in the APA
 - Critical assumptions have not been changed
 - AO / TPO may monitor the conditions / representations made to CBDT

Advance Pricing Agreements (cont'd)

- Reduces uncertainty in TP assessments
- Unilateral – other country may not permit corresponding adjustments – double taxation
- APA likely to delay transactions
- Setting up precedent (though not binding)
- High levels of skills with CBDT
- To consider – common APA for customs duty purposes, other regulations (e.g. FEMA) given due consideration

Agreements with Foreign Countries

- 258(1)(e) – “for carrying out any other purpose of this Act (Code) or the corresponding law of the other country”.
- 258(4) – “CG may by notification, make such provisions as may be necessary for implementing the agreements”
- 258(5) – TRC must to avail DTAA benefits – TRC in prescribed form
 - One time payments
 - TDS obligations – workability

Agreements with Foreign Countries (cont'd)

- Is it conclusive? Necessary and sufficient OR Necessary but not sufficient?
- Language needs re-look – a resident may also claim DTAA benefit – TRC NA to him ???
- 258(8) – DTAA v/s. DTC
 - Neither to have preferential status
 - Provision which is later in time will prevail
- 282(2)(j) – Repeal & Savings
 - DTAA u/s 90/90A of ITA – deemed DTAA u/s 258 of DTC – continue in force “accordingly” – “so far as it is not inconsistent with S. 258”

Rates of Tax

- Special Source – First Schedule
 - Investment Income by way of:
 - Interest : 20%
 - Dividend on which DDT is not paid : 20%
 - Capital Gains : 30%
 - Any other investment income : 20%
 - Royalty / FTS : 20%
 - NR (& non citizen) sportsman : 10%
 - Participation in India
 - Advertisements
 - Articles

Rates of Tax (cont'd)

- Lotteries / Horse Races etc. : 30%
- Whole of other Income : @
@ First Schedule silent, Fourth Schedule: 35%??
- No threshold exemption available for Special Source
- Above rates are applicable on Gross income
- Ordinary source
 - Companies (domestic or foreign) :25%
 - Foreign LLP (= Company) : 25%
- Branch Profits Tax @ 15% on TI – IT

TDS on payments to NR

- At the time of “payment”
- “payment” shall be deemed to have been made if the amount payable has been settled – in cash,,,cheque...”by credit to any account, whether called “Suspense A/c” or by any other name...any other prescribed mode”.
- Certificate of no TDS
 - Application by Deductee
 - Application by Deductor
 - Certificate by AO valid till cancelled or time limit stated

Foreign Ships

- Definition of Transport Charges
 - Includes Import freight even if not received in India
 - Carriage, demurrage, handling charges or any other amount of similar nature covered
 - Charter including slot charter, space charter included along with crew. Bare Boat Charter?
 - Time Charter not specifically included. Effect?
- Income – 7.5 % of TC “on account of carriage of goods, passengers, livestock, mail”
- Tax @ 25% thereon – whether BPT applicable??

Foreign Tax Credit

- Income accrued outside India – Indian IT payable thereon – FTC as per DTAA
- If no DTAA – FTC at Indian Rate of tax or Foreign Rate whichever is lower. No FTC if income also deemed to accrue in India
- CG to prescribe
 - Method of computing FTC
 - Manner of claiming FTC
 - Other particulars necessary for relief



Thank you