

Bombay Chartered Accountants' Society

Taxation of Expatriates

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Broad scope

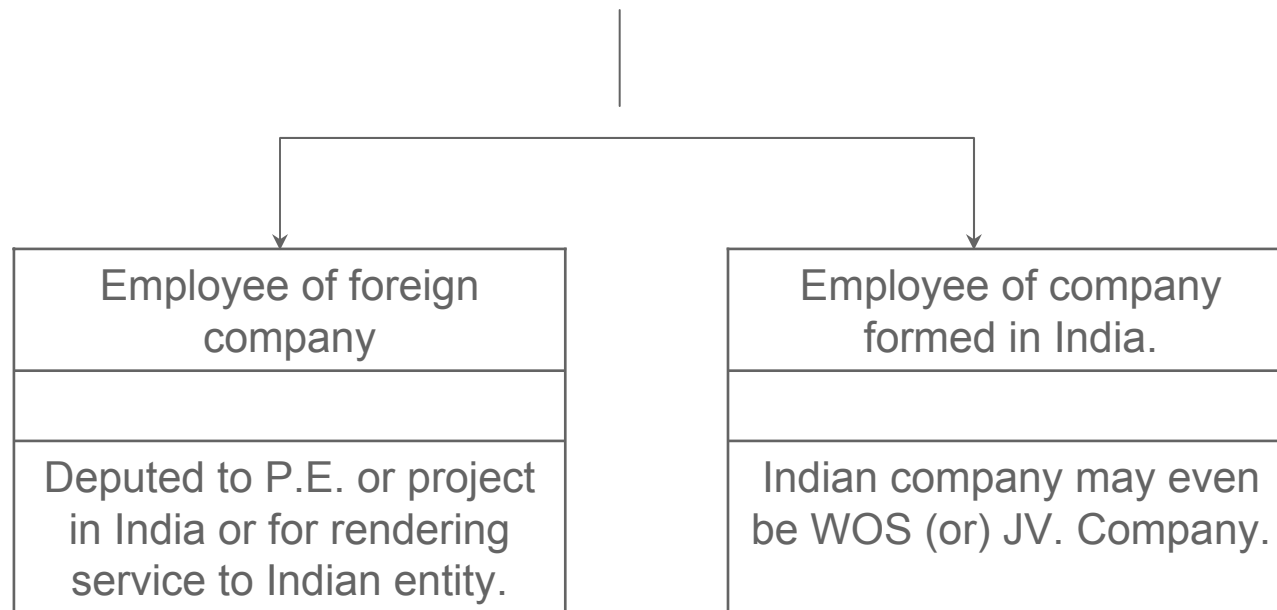
- ▶ Ex-pat in India, liability in India is source based.
- ▶ Option of determination of tax in source country under tax treaty (DTAA) or under domestic tax law.
- ▶ DTAA is normally more beneficial.
- ▶ Primary (versus) secondary tax liability as employer.
- ▶ Credit in home country for tax paid in source country.
- ▶ Non treaty country: Refer to domestic law.

Meaning of Ex-Pat Employee

- ▶ Ex-pat employee coming to India could be:

Foreign citizen (OR) Indian settled abroad

- ▶ While in India, person could be:



Meaning of Ex-Pat Employee.....Contd..

▶ Dictionary meaning of the term “Expatriate”

Oxford

- ▶ Remove oneself from homeland.
- ▶ Persons living abroad.

Webster

- ▶ Residing in a foreign country
- ▶ Pre-supposes reference to a person who, for treaty purposes, continues to be a person resident in his home country.

Domestic Tax Law Provisions

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

- ▶ Reference is to salary “**earned**” in India by a non resident.
- ▶ Salary to the extent **services rendered in India** taxable; overseas visits in course of employment by NR or NOR.
- ▶ **Rest period** preceding and succeeding period of services rendered in India covered specifically.
- ▶ Exemption under **section 10(6)(vi)** applicable where employee of **Foreign Enterprise (FE)** renders services in India provided :
 - i. FE is not engaged in any trade/business in India;
 - ii. Stay in India does not exceed 90 days;
 - iii. Remuneration is not deductible from income of employer.

DTAA Provisions

Broad scope of Article

- ▶ Governed by Article titled “Dependent Personal Services”; “Income from Employment”.
- ▶ Application restricted to employer – employee relationship established as per source country understanding.
- ▶ Treaty of relevance is that of country of residence of the employee.
- ▶ Concerned with cases of general applicability; not concerned with special categories of employees such as consulate staff, UN employees,
- ▶ Necessity and significance of the Article.

Key Trigger Point: Employer – Employee Relationship

- ▶ 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”

- ▶ Performance of duties subject to directions, instructions and superintendence of the employer.
- ▶ Does not include
 - : Professionals, freelancers
 - : Working partner
 - : Director in his capacity as a Board member

Illustrative Treaty Clause

- ▶ Select: India-USA treaty Article 16: Dependent Personal Services.
- ▶ Select: Article 16(1)

“Subject to the provisions of article 17 (Directors’ Fees), 18 (Income Earned by Entertainers and Athletes), 19 (Remuneration and Pensions in Respect of Government Service), 20 (Private Pensions, Annuities, Alimony and Child Support), 21 (Payments Received by Students and Apprentices) and 22 (Payment Received by Professors, Teachers and Research Scholars), **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 there from may be taxed in that other State.**

Key factor: Place of Exercise of Employment

- ▶ Employee presence is pre-condition to exercise of employment.
- ▶ What is not relevant:
 - ▶ Place where the result of work is exploited.
 - ▶ Place of signing contract.
 - ▶ Place of H.Q. of Employer.
 - ▶ Residence of employer.
 - ▶ Nationality of Employee.
 - ▶ Place of remittance of emoluments.
- ▶ Visits in connection with employment \neq exercise of employment.

Right To Tax : Source Country

▶ Article 16(2) : India- USA treaty.

“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 relevant taxable year,
- 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 or a trade or business which the employer has in the other State.

Article 16(2) : Positive Version of Conditions

- ▶ India can tax remuneration derived by a US resident in respect of an employment exercised in India if :
 - a) US resident is present in India during the relevant previous year for more than 183 days.

(OR)
 - b) Remuneration to US resident is paid by, or on behalf of employer who is resident in India.

(OR)
 - c) Remuneration to US resident is borne by PE or Fixed base or business or trade which the employer has in India.

- ▶ Provided employment is exercised in India.

- ▶ Taxation in country of residence (US) not affected.

Physical Presence Test

- ▶ Physical presence irrespective of time spent on activities.
- ▶ Include : Day of arrival; day of departure; holidays; vacations in India; voluntary or involuntary interruptions, short breaks, sickness, etc.
- ▶ Exception : sickness hindering return.
- ▶ Exclude : Days outside India even while on duty; leave/vacation outside India.

Resident Employer Test

Who is the real / economic employer?

- ▶ Employment contract.
- ▶ Control, superintendence, instruction, directions, manner of work provisioning of tools and material for work, etc.
- ▶ Code of conduct, Dress code, service rules, who controls place of work, reporting.
- ▶ Who enjoys confidentiality and fruits of labour / IPR generated.
- ▶ Responsible for conduct / risks of result of work.
- ▶ Bearing economic burden of salary cost.

PE Connect Test

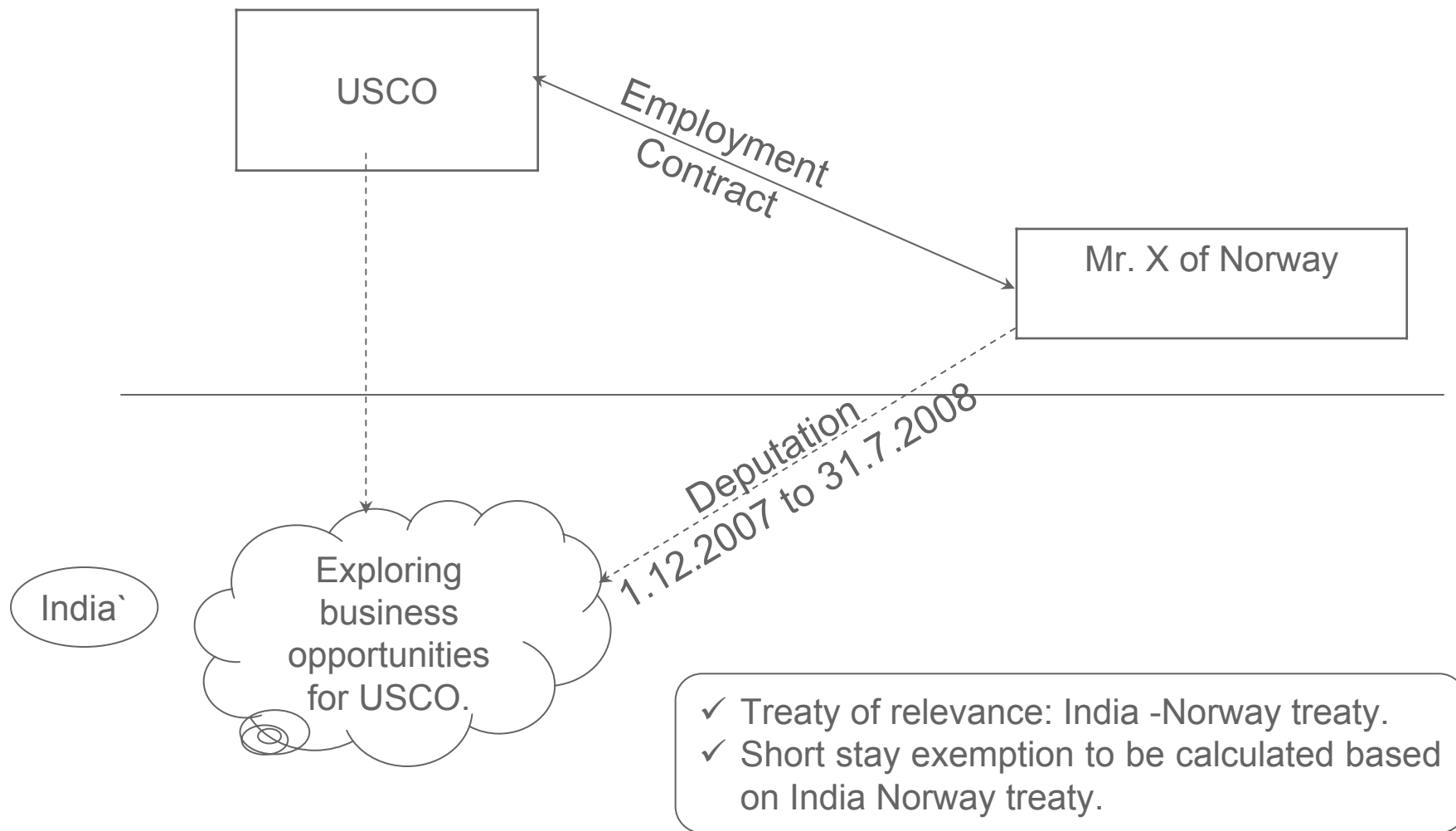
- ▶ Remuneration 'borne' by P.E.
- ▶ Logic : To compensate India for Tax Revenue lost through deduction.
- ▶ Employee functionally and economically connected with PE.
- ▶ Not relevant:
 - ▶ Defrayal by HO and no charge back to PE
 - ▶ Not debited to PE Book
 - ▶ Deduction forgone by PE by choice
 - ▶ Capitalisation of amount in PE book.
- ▶ Impact of presumptive taxation.

How To Compute Salary ?

- ▶ Taxable as per source country rules (including perquisite rules).
- ▶ Perquisites also taxable.
- ▶ FBT charge relieves the charge.
- ▶ Exemptions can be enjoyed.
- ▶ Circumstance of receipt in or outside not a relevant criterion for DTAA.
- ▶ Bonus, pension, deferred wages, stock options, social security, hypo tax etc.

Some Issues of relevance

Triangular situation



Split residency / dual residency

- ▶ X, UK national on assignment to India during 1-4-2005 to 30-9-2007. leaves India in Oct, 2007.
- ▶ X has permanent home in UK.
- ▶ Residential status : Domestic Act.

Period	India	UK ¹
1-4-07 to 30-9-07	Resident	Non-Resident
Oct'07 to Mar' 08	Resident	Resident

- ▶ Tie-breaker clause in the following order of preference to apply:
 - ▶ Permanent Home
 - ▶ Centre of Vital Interests (Personal and Economic Interest)
 - ▶ Habitual Abode
 - ▶ Nationality
 - ▶ Competent authorities

¹ In terms of split residency system.

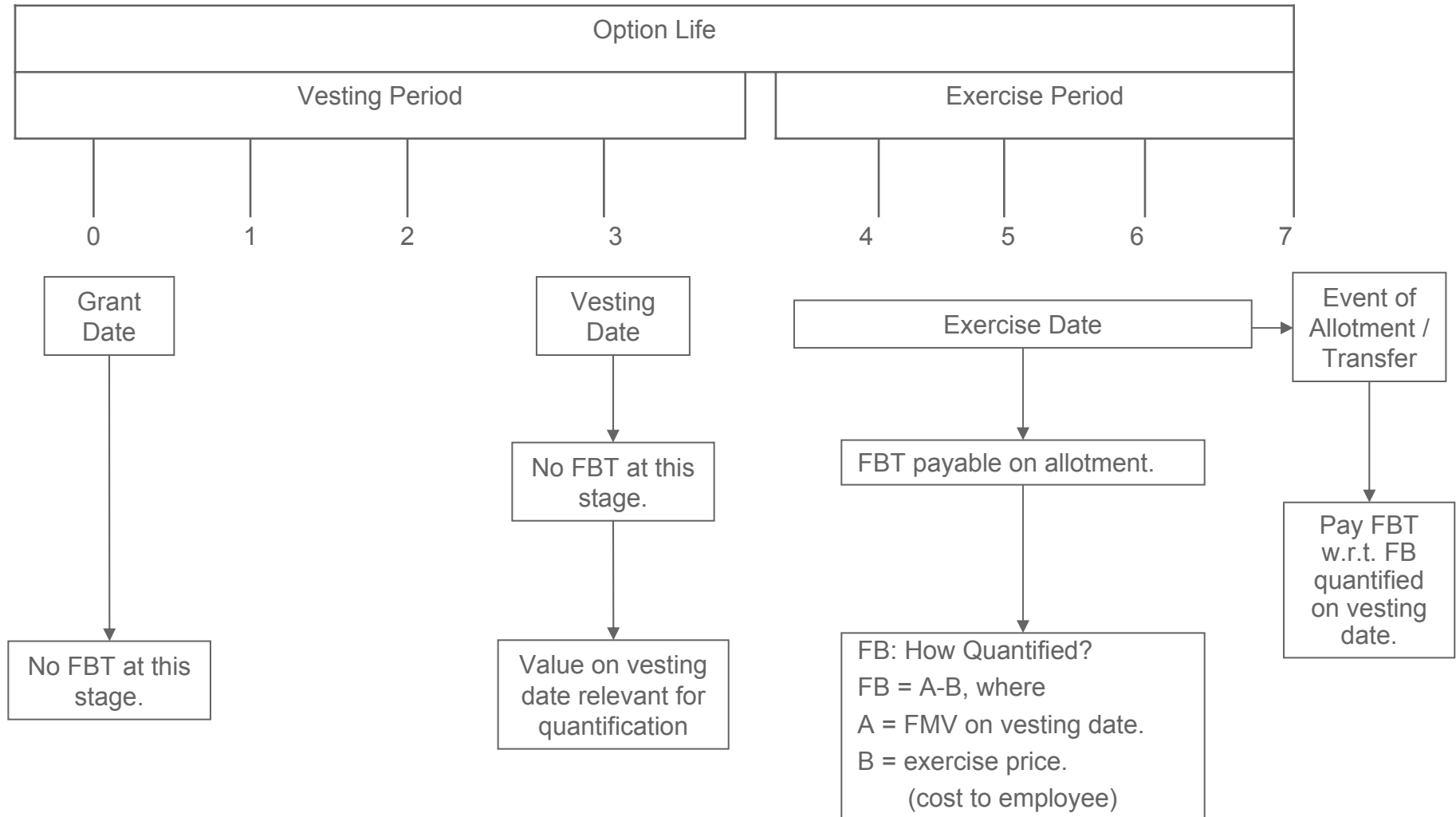
OECD, 2008 amendment impact.

Overseas Social Security contribution.

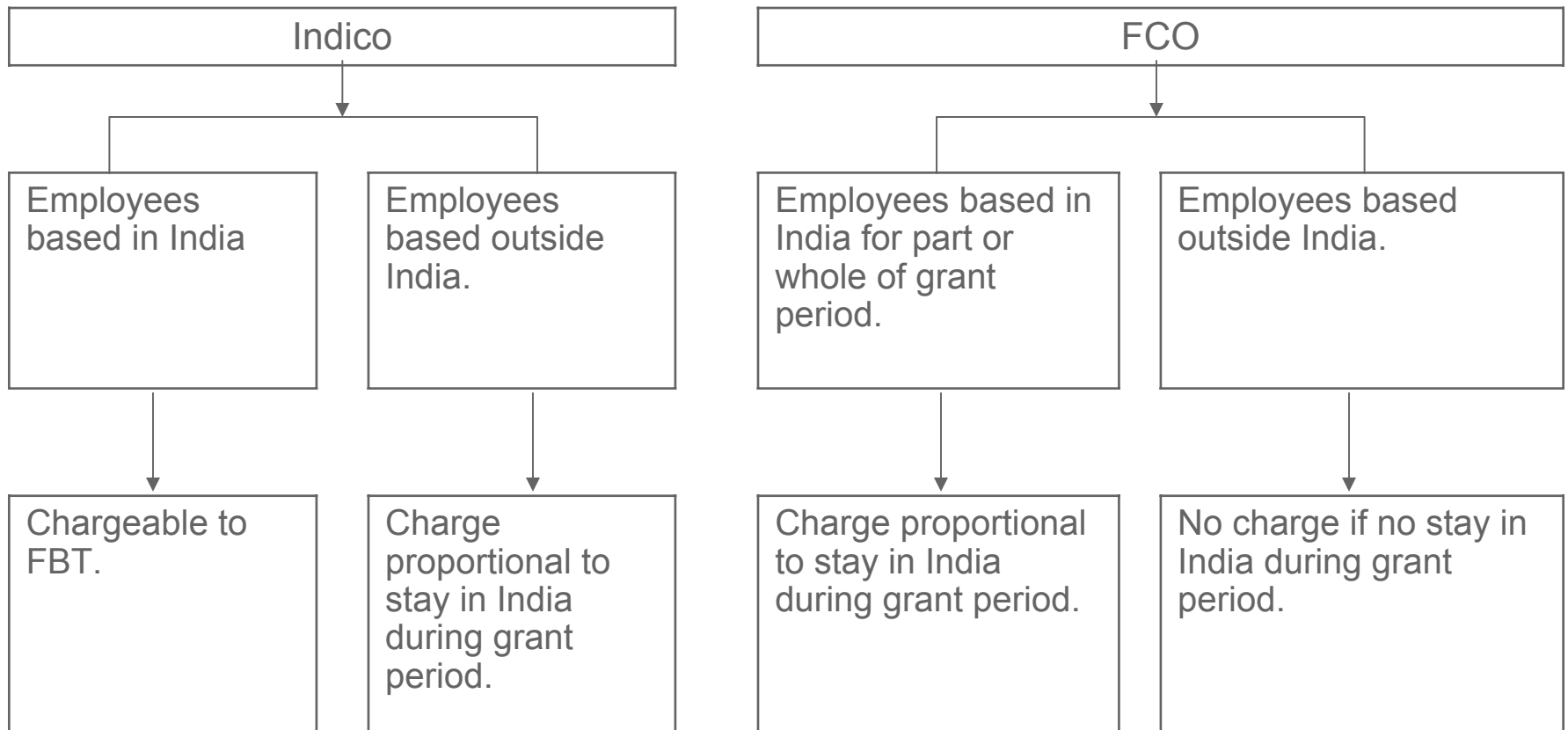
Gallotti Raoul [61 ITD 453] (Mum) / Eric Moroux [2008 – TIOL-145- Del]

- ▶ Employee of France company to India.
- ▶ Mandatory contribution for all French Nationals.
- ▶ Social Security to cover all costs including impairment in earning potential, medical, old age, professional sickness etc.
- ▶ Not a saving scheme for benefit of employee.
- ▶ No income potential to employee.
- ▶ French IT Act treats as deduction from taxable salary.
- ▶ Diversion of income by overriding title.

ESOP levy – Key events and triggers



Reigning Cross Border Fringe Benefit of ESOP.



- ▶ Grant period = Period beginning with grant of option and ending with date of vesting.
- ▶ Location at the time of grant / exercise / allotment not relevant.
- ▶ Employer liable to FBT irrespective of employee taxation overseas.

Cross Border Tax Credit in respect of FBT levy

A.7¹ : No set-off to employer against FBT for taxes paid on ESOP by employee in other countries.

A.8¹ : “FBT introduced as a surrogate tax on employer in respect of FB to employee”.

: FBT recovered from employee = Tax paid by employee in India

: Credit can be claimed in foreign country if borne by the employee.

1) Refer Circular No.9 of 2007 dt. 20-12-07

Conversion rate for salary earned in foreign currency

- ▶ General Rule : Conversion of chargeable salary at rate as on last date of preceding month. [Explanation 2(a) to Rule 115(1)].
- ▶ Tax deduction in terms of Chapter XVII- B, TT conversion rate of the date of TDS relevant. [Proviso to Explanation to Rule 115(1)].
- ▶ Credit in respect of overseas taxes paid **not** covered by Rule 115.
The exchange rate on the date of payment of overseas tax is relevant.

Credit for overseas taxation for TDS under section 192

- ▶ ICO (Say, Software company) deputing 'R' to its overseas branch for short stay.
- ▶ Tax payable outside India in host country due to PE connect.
- ▶ Salary TDS : credit for tax paid outside India?.
- ▶ CBDT Circular on deduction of tax at source u/s.192 is silent.
- ▶ Can employer who estimates salary income also estimate tax liability?
- ▶ Section 90/91 may support ? Final tax v/s. provisional tax?



Thank you!