

How to start International Taxation Practice from scratch ?

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Ground Rules

- **Why** : Belief that SMP can include “International Taxation” in their portfolio
- **What** : 2 hrs session- **awareness**- before you go for in-depth sessions
- **How** : No Case Laws - Just **Principles and concepts** - and some **examples**
- **Limitation** : VC - Queries/Suggestions/Comments/Answers on **Chat Box/Q&A**
- **Advice** : Don't write, PPT available - Focus on **understanding the concept**
- **Disclaimer** : Order of discussion may change. May skip something
- **Caution**: Remember we are trying to learn 100 hrs concept in 2 hrs



Agenda for today

- Taxability of Income in India.
- Residential status and recent amendments.
- Income deemed to accrue or arise in India - Section 9.
- Tax relief u/s 90 & 91 of the Income Tax act
- Overview of DTAA
- Section 195 and 15CA/CB
- MLI
- Guide to set-up international taxation practice.

What is International Taxation ??





Taxability of Income in India



Section 4 and 5

- **Section 4: Charge of Income Tax-**

Deals with how the income earned will be taxed under the Income tax wherein sub section 1 of the section states: “Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person.”

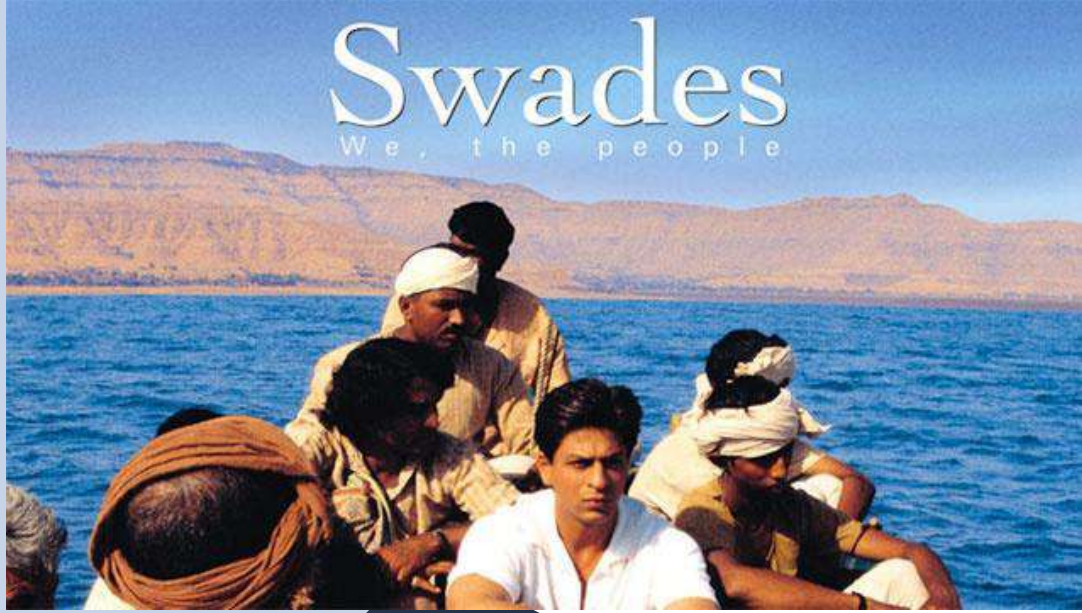
- **Section 5: Scope of Total Income-**

Deals with scope and which income of a resident or non resident person shall be included in total income for Income tax purpose. The summary of which is as under:



Taxability of Income based on residential status

Taxability of Income	Resident	Resident but not ordinary	Non-Resident
Income received or deemed to be receive in India	Taxable	Taxable	Taxable
Income accrue/ arise or deemed to accrue/ arise in India	Taxable	Taxable	Taxable
Income (other than above) earned outside India from Business controlled from India or profession set up in India	Taxable	Taxable	Non-Taxable
Income accrue or arise outside India	Taxable	Non-Taxable	Non-Taxable



Residential Status & Recent Amendments



Section 6: Residential status in India

- **Section 6 was recently amended by Finance Bill, 2020** and after incorporating the amendment in Finance Bill, 2020 sub section 1 of section 6 would read as under:
“An individual is said to be resident in India in any previous year, if he—
 - (a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or*
 - (b) [***]*
 - (c) having within the four years preceding that year been in India for a period or periods amounting in all to **three hundred and sixty-five days or more**, is in India for a period or periods amounting in all to **sixty days or more in that year.***



Section 6: Residential status in India

- *Explanation. 1—In the case of an individual,—*
 - ▷ (a) *being a citizen of India, **who leaves India** in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted ;*
 - ▷ (b) ***being a citizen of India, or a person of Indian origin** within the meaning of Explanation to clause (e) of section 115C, who, being outside India, **comes on a visit to India in any previous year**, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted **and in case of such person earning more than 15 lakh total income other than income from foreign source, 60 days shall be substituted for 120 days.***



Section 6: Residential status in India

- After sub section 1, sub-section 1A has been inserted which deals with deemed resident status for various individual which is as under:
- ***“Notwithstanding anything contained in clause (1), an individual, being a citizen of India, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be deemed to be resident in India in that previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.”***

Not Liable to tax vs Liable to Tax vs Subject to Tax



Not in the Team

**In the team of 15
but not in playing
11**

**In Playing 11- but
did not get chance
to bat**

**In playing 11 - Also
did batting - Played**

**Country does not
have IT act - Not
liable to Tax in any
country - can be
Resident in India**

**Has IT act, but
does not cover
individual -
Litigative - Middle
East - Maybe**

**Below taxable
Limit, Exempt
Income - Liable to
Tax - Not resident
in India**

**Paid Tax - Subject
to Tax - Not
resident in India**



Resident but not ordinary resident - Section 6(6)

- **Sub-section 6 of section 6** deals with the condition for a person to be **not ordinary resident**:
 - ▷ “A person is said to be "not ordinarily resident" in India in any previous year if such person is-
 - ▷ (a) an individual who has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less; **or**
 - ▷ (b)
 - ▷ (c) **a citizen of India, or a person of Indian origin, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, as referred to in clause (b) of Explanation 1 to clause (1), who has been in India for a period or periods amounting in all to one hundred and twenty days or more but less than one hundred and eighty-two days; or**
 - ▷ (d) **a citizen of India who is deemed to be resident in India under clause (1A)**

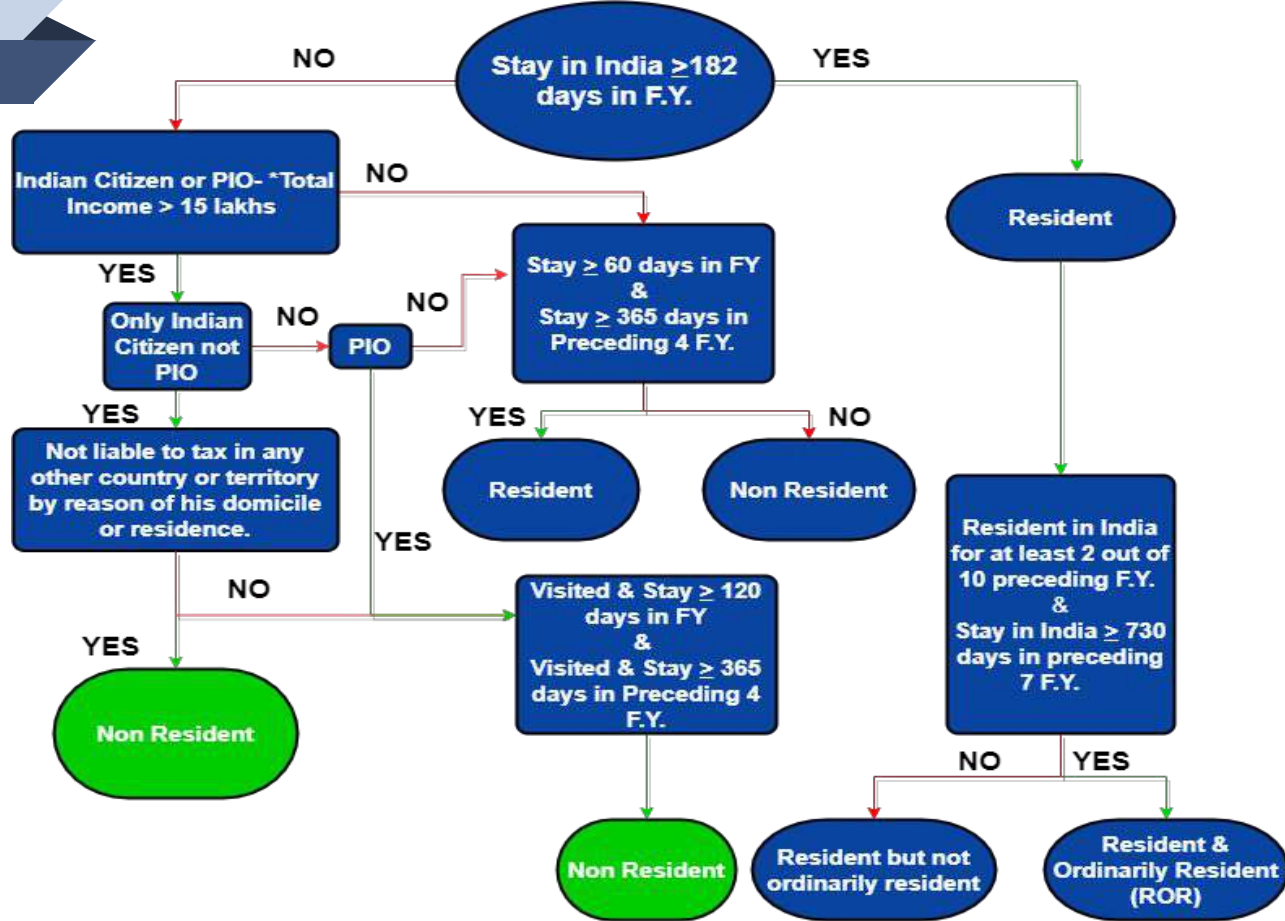


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Before Budget 2020



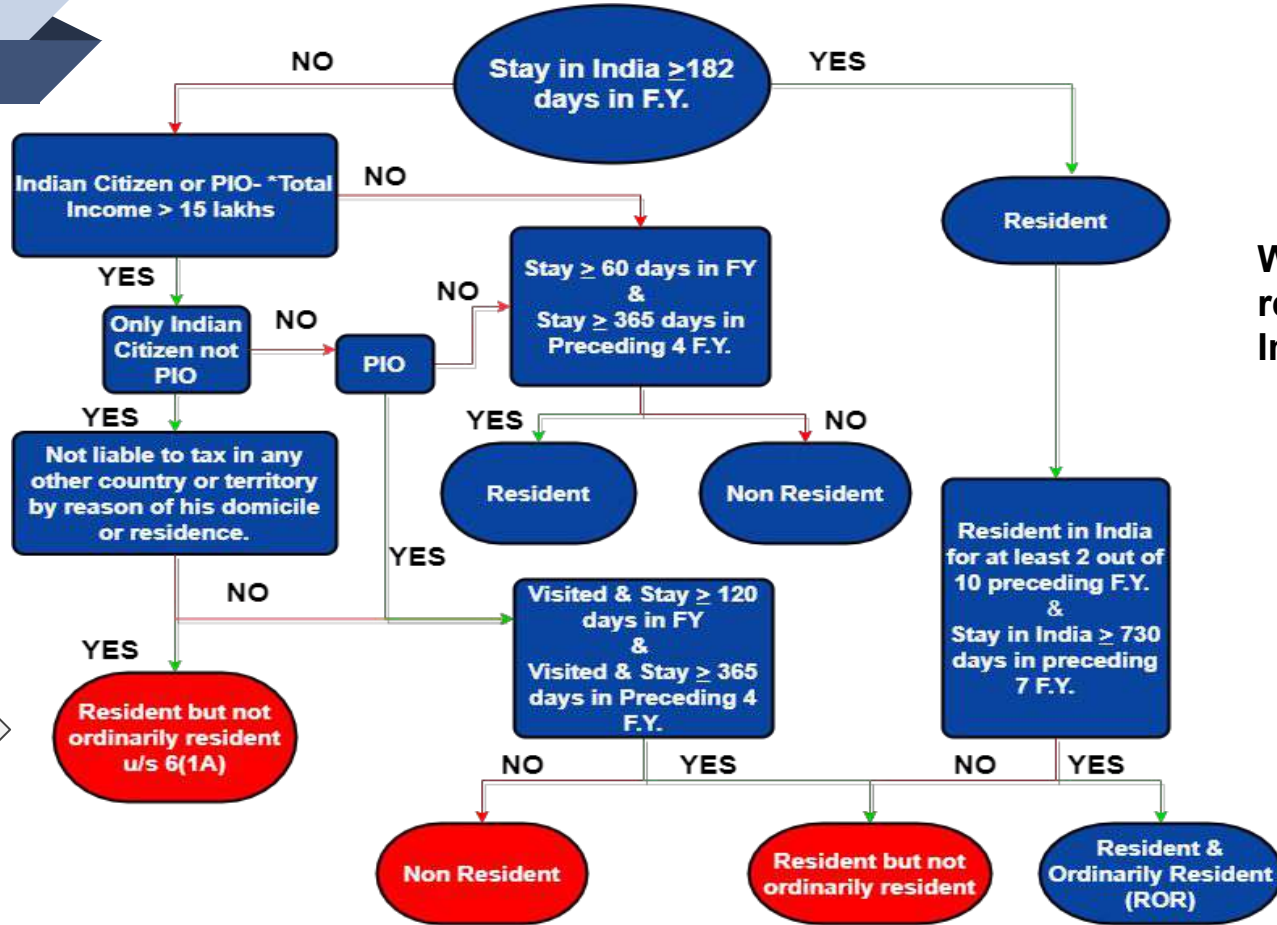
*Total income other than income from foreign sources

PIO- Person of Indian Origin
F.Y.- Financial Year



After Finance Act 2020

Non-obstante clause -



Will effect returning Indians

*Total income other than income from foreign sources

PIO- Person of Indian Origin
F.Y.- Financial Year



Covid Impact on Residency

- CBDT has issued a circular Dt 08.05.2020 providing clarification on calculation of stay in India because of Covid-19 which is as follows for those who visited India before 22.03.2020:
 1. has been unable to leave India on or before 31.03.2020 his period of stay from 22.03.2020 to 31.03.2020 won't be taken into account.
 2. **has been quarantined** in India on account of Covid-19 on or after 01.03.2020 and has departed on evacuation flight on or before 31.03.2020 or has been unable to leave India on or before 31.03.2020, his period of stay from quarantine till the date of departure or 31.03.2020 as the case may be shall not be taken into account.
 3. has departed in evacuation flight on or before 31.03.2020, his period of stay from 22.03.2020 to date of departure shall not be taken into account.



Income deemed to accrue or arise in India - Section 9



Section 9: Income deemed to accrue or arise in India

The following income shall be deemed to accrue or arise in India:

- ▷ **All income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.**
- ▷ Income chargeable under the head "Salaries" payable by the Government to a citizen of India for service outside India.
- ▷ **A dividend paid by an Indian company outside India.**
- ▷ **Income by way of interest.**
- ▷ **Income by way of royalty.**
- ▷ **Income by way of fees for technical services.**
- ▷ Income arising outside India, being any sum of money referred to in sub-clause (xviiia) of clause (24) of section 2 (gift income relating to immovable property), paid on or after the 5th day of July, 2019 by a person resident in India to a non-resident, not being a company, or to a foreign company.



Important Concepts u/s 9

- Business Connection (ACT) - Not defined
 - ▷ Something more than business
 - ▷ Activity in India
 - ▷ Element of Continuity
- PE (Section 92F(iia))
 - ▷ Includes
 - ▷ Place of Business
 - ▷ Business of enterprise partially or wholly carried on
- Business connection has been expanded by various explanations
- Concept looks outdated - Threshold is an issue - Needs Regular Update



Important Concepts u/s 9

- Agency PE
 - ▷ Habitually exercises authority to conclude contract
 - ▷ Habitually concludes contract
 - ▷ Habitually plays **principal role leading to conclusion of contract**
 - ▷ Habitually maintains a stock of goods or merchandise in India on behalf of NR for delivery
 - ▷ Habitually secures orders in India for the non-resident - have common control based interconnection
 - ▷ **Dependent status** is important
- DTAA - Generally have narrower
- Other PE - Not specifically defined - covers in business connection



Important Concepts u/s 9

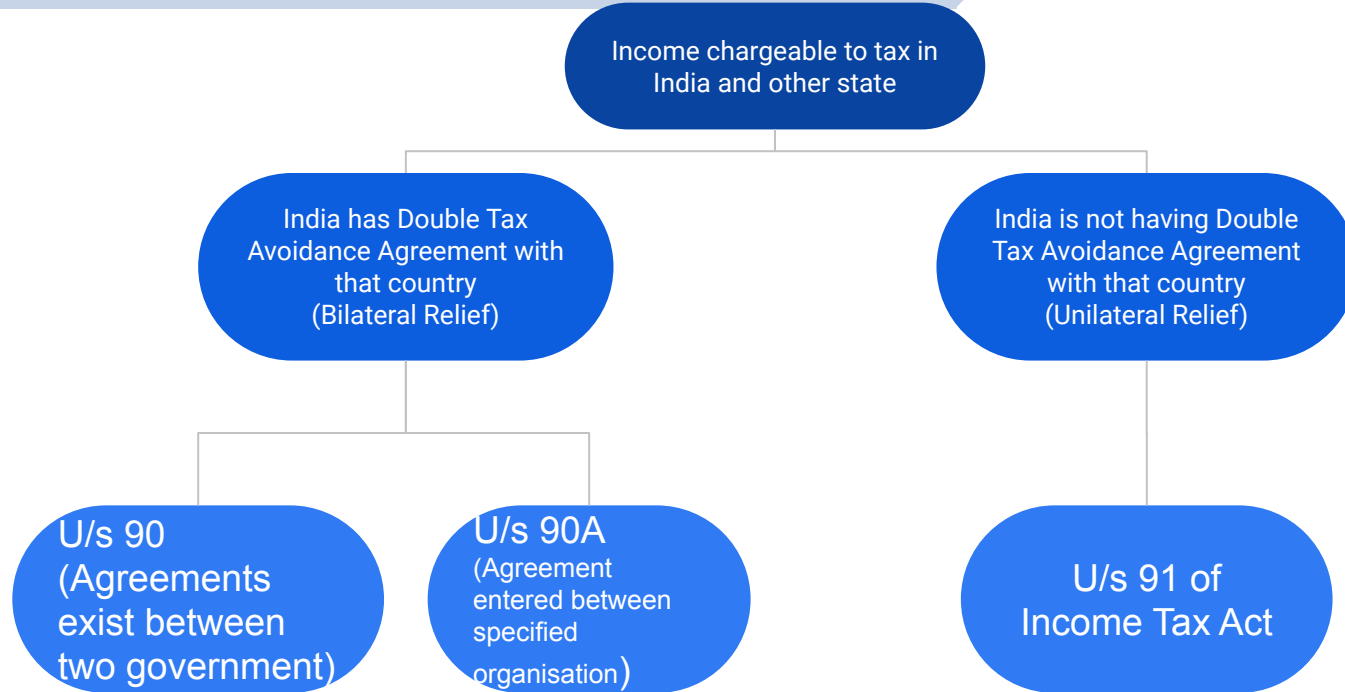
- Capital Asset Situated in India - Includes - Share of company incorporated outside India - Vodafone Case - 10 CR + 50%
- Royalty
 - ▷ Concept - Usage
 - ▷ **Very Very Very** Wide Definition - Includes - Exp 3,4,5,6
 - ▷ Usage and **Transfer**
 - ▷ Recurring and **Lump Sum**
 - ▷ Can even include buying of software CD
- Fees for technical services -
 - ▷ Concept - **Human Element**
 - ▷ Managerial, Technical and Consultancy Services



**Tax relief u/s 90 & 91 of The IT
Act and Section 206AA
interplay**



Relief from Income earned outside India by Resident





Section 90/91 of the Income Tax Act:

- **Sub section 2** - The provision of DTAA or Income tax shall apply whichever is more beneficial to the assessee.
- **Sub section 4** - to claim relief from double taxation is to provide Tax Residency certificate (TRC) of the country where he/ she is a resident and if the TRC is in foreign language or is not providing all the information as required in Form 10F is assessee will also have to file Form 10F to claim relief. Thus if one wish to claim relief and take benefit of DTAA TRC is the most important thing.
- **Section 91 - Credit method** - At Indian rate of tax or foreign rate of tax, whichever is lower

Form No. 67 - Foreign Tax credit

- CBDT has released [Form 67](#), which needs to be filed by the assessee online when he needs to claim credit of tax whether u/s 90/ 90A/ 91. This needs to be filed by the assessee to take foreign tax credit in the year in which he offers corresponding income to tax in India.
- Form 67 shall be available to all the assessee's login. The assessee is required to login into the e-filing portal. Then under E-file drop down assessee needs to select **Prepare and submit online Forms (Other than ITR)**. Select Form 67 from the drop down and the instructions to fill the same would also be available there.
- In the end attach certificate or statement and proof of payment/deduction of foreign tax as referred to in clause (ii) of sub-rule (8) of rule 128.

Form No. 67 - Foreign Tax credit

■ The attachment you need to submit the following statement and certificate:

1. A statement of income from the country or specified territory outside India offered for tax for the previous year and of foreign tax deducted or paid on such income in Form No.67 and verified in the manner specified therein.
2. Certificate or statement specifying the nature of income and the amount of tax deducted therefrom or paid by the assessee,—
 - a. from the tax authority of the country or the specified territory outside India; or
 - b. from the person responsible for deduction of such tax; or
 - c. signed by the assessee:

Provided that the statement furnished by the assessee in clause (c) shall be valid if it is accompanied by,—

(A) an acknowledgement of online payment or bank counter foil or challan for **payment of tax** where the payment has been made by the assessee;

(B) proof of deduction where the tax has been **deducted**.

COS



COR

Overview of DTAA



DTAA - Double tax avoidance agreement

- A tax treaty between two or more countries to avoid taxing the same income twice is known as Double Taxation Avoidance Agreement (DTAA). This means that there are agreed rates of tax and jurisdiction on specified types of income arising in a country. When a tax-payer resides in one country and earns income in another country, he is covered under DTAA, if those two countries have one in place. DTAA's can be either comprehensive, i.e. covering all types of income or specifically target certain types of income. This depends on the types of businesses/holdings of citizens of one country in another.

Basically, the DTAA's are majorly based on Four Models, namely,

1. **OECD Model Tax Convention –**

Based on Residence principle.

2. **UN Model Double Taxation Convention -**

Based on combination of Residence and Source. Principle with key emphasis on the latter.



DTAA - Double tax avoidance agreement

3. US Model Income Tax Convention -

Followed for entering into DTAA with the US

4. Andean Community Income and Capital Tax Convention -

Adopted by Member State, namely, Bolivia, Chile, Ecuador, Columbia, Peru and Venezuela.

Various types of DTAA includes:

- Comprehensive agreements.
- Intergovernmental agreement to improve international tax compliance and to implement FATCA.
- Limited agreements.
- Limited multilateral agreements.
- Other agreements.
- Specified associations agreement.
- Synthesised Text
- Tax Information Exchange Agreement (TIEA)

As on date India has entered into 100 comprehensive agreements.



DTAA - Double tax avoidance agreement

Articles in the Model Conventions keeping in view the UN convention:

- | | |
|--|---|
| <ul style="list-style-type: none">➤ Article 1 - Persons Covered➤ Article 2 - Taxes Covered➤ Article 3 - General Definition➤ Article 4 - Resident➤ Article 5 - Permanent Establishment➤ Article 6 - Income from Immovable Property➤ Article 7 - Business Profits➤ Article 8 - Shipping, inland waterways transport and air transport | <ul style="list-style-type: none">➤ Article 9 - Associated Enterprises➤ Article 10 - Dividend➤ Article 11 - Interest➤ Article 12 - Royalties and Fees for Technical Services➤ Article 13 - Capital Gains➤ Article 14 - Independent Personal Services➤ Article 15 - Dependent Personal Services➤ Article 16 - Director's Fees |
|--|---|



DTAA - Double tax avoidance agreement

Articles in the Model Conventions keeping in view the UN convention:

- | | |
|---|---|
| <ul style="list-style-type: none">➤ Article 17 - Artistes and Sportsmen➤ Article 18 - Pensions➤ Article 19 - Government service➤ Article 20 - Students➤ Article 21 - Other Income➤ Article 22 - Capital➤ Article 23 - Methods of Elimination of Double Taxation: A - Exemption Method B - Credit Method | <ul style="list-style-type: none">➤ Article 24 - Non – Discrimination➤ Article 25 - Mutual Agreement Procedure➤ Article 26 - Exchange of Information➤ Article 27 - Assistance in the collection of Taxes➤ Article 28 - Members of Diplomatic missions and consular posts➤ Article 29 - Territorial Extensions➤ Article 30 - Entry into force➤ Article 31 – Termination |
|---|---|



DTAA - General Distribution Pattern

Type of Income (Most Used Clauses)	General Taxability (Please check treaty)
Immovable Property	COS
Business Profits and Independent Personal Services	When PE/FB/Number of Days crossed in COS
Dividend, Interest, Royalty, Fees for Technical Services	COS share restricted to %
Capital gains	Immovable Property/Shares/Movable business Property - COS, Others COR
Dependent Personal Services	If employment exercised in source country, then COS, otherwise COR



Important Concepts - DTAA

- Most Favoured Nation - Example
- Some- Sweden, France, Israel, Philippines, Belgium, Netherlands, Hungary, Spain.
- Example - France - *Protocol Point - 7-* In respect of articles 11 (Dividends), 12 (Interest) and 13 (Royalties, fees for technical services and payments for the use of equipment), if under any Convention, Agreement or Protocol signed after 1-9-1989, between India and a third State **which is a member of the OECD**, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a **rate lower or a scope more restricted** than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later.



Important Concept - DTAA

- Make Available - Example
- Some- UK. Singapore, Australia, USA, Netherlands .
- USA - 12(4) - "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services
 - (a)
 - (b) **make available** technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design



Concepts Discussed- DTAA

- Tax Heaven
- DAPE
- Beneficial Ownership
- May vs Shall vs Shall only be
- Treaty Shopping - Example
- Tie Breaker
- Limitation of Benefits (LOB) - Singapore Treaty - Example
- Tax Avoidance due to Income Characterisation
- Tax Avoidance due to Entity Characterisation
- Ambulatory vs Static Approach
- Vienna Convention on law of treaties

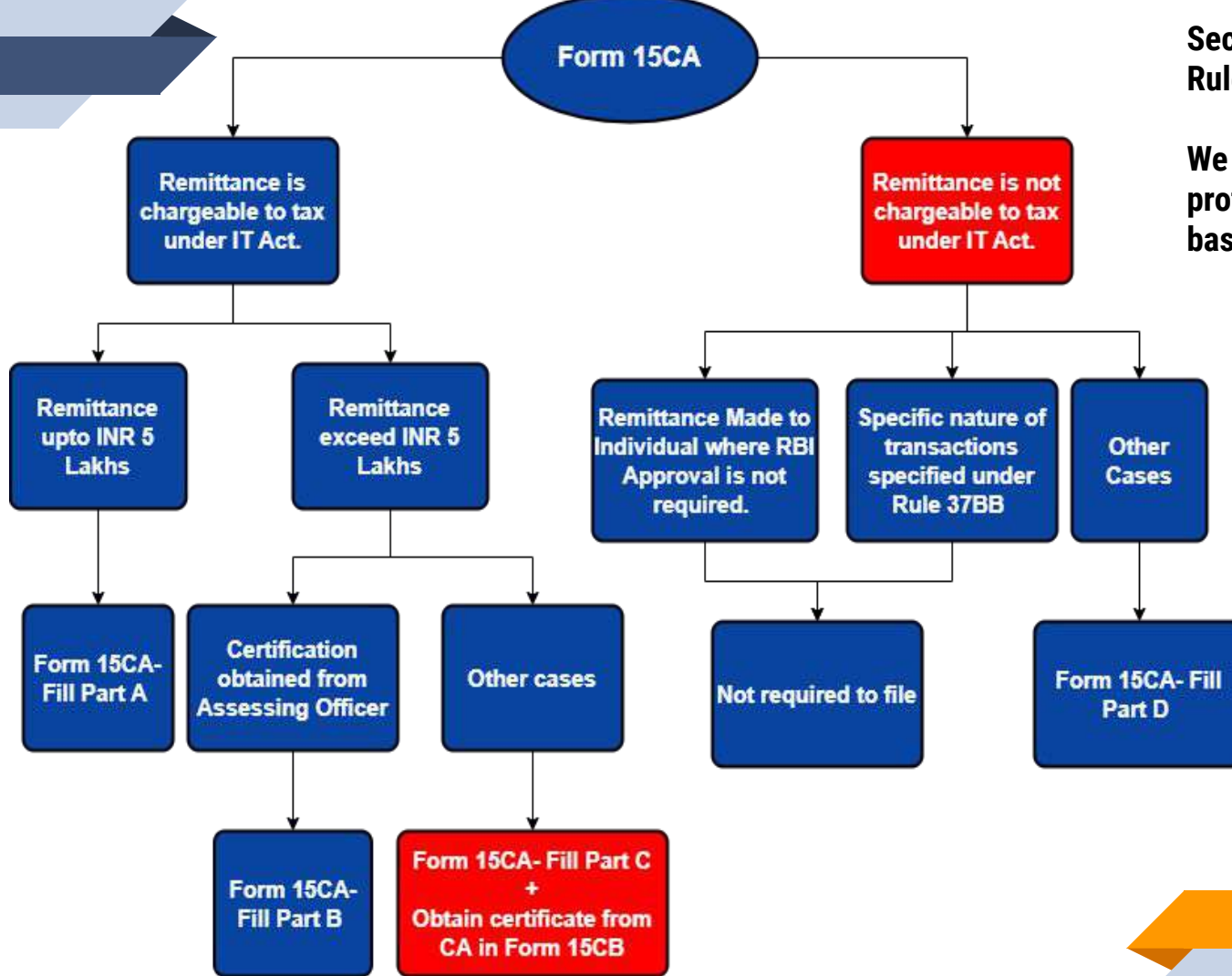


Section 195 and 15CA/CB



Section 195: TDS on payment to Non resident

- “**Any person** responsible for paying to a **non-resident**,
- not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or **any other sum chargeable under the provisions of this Act** (not being income chargeable under the head "Salaries") shall,
- at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, **whichever is earlier**,
- deduct income-tax thereon at the **rates in force.**”



**Section 195(6) r.w.
Rule 37BB**

**We have a duty to
protect country's tax
base**



Section 206AA read with rule 37BC

- Section 206AA states that a person who is receiving any income which is liable for TDS shall furnish his Permanent Account Number to the person responsible for deducting such tax, if not provided tax shall be deducted at higher of the following:
 - ▷ at the rate specified in the relevant provision of this Act; or
 - ▷ at the rate or rates in force; or
 - ▷ **at the rate of twenty per cent.**
- Rule 37BC was introduced by Finance Bill, 2016 w.e.f. 24.06.2016 which provides relief on deduction in case of certain payments i.e. **payments in the nature of interest, royalty, fees for technical services and payments on transfer of any capital asset.**
- However to **avail this benefit** deductee needs to furnish the following details:
 - ▷ Name, Email-id, Contact number.
 - ▷ Address of the country where he is a resident.
 - ▷ TRC.
 - ▷ Tax identification number or any other unique number identified by government.



Steps to keep in mind while making foreign remittance

- Verify the original invoice or agreement to know about the transaction.
- Make classification of transaction on the basis of nature of income.
- Check taxability as per Domestic Law.
- Check taxability as per DTAA along with availability of TRC/Form 10F and no PE certificate.
- Also check the website of the supplier to get additional details about their Indian operations if any.
- Check the rates of TDS applicable & Exchange rate.
- Form 15CA/15CB -Whatever applicable
- Remit the amount.



Multilateral Instrument

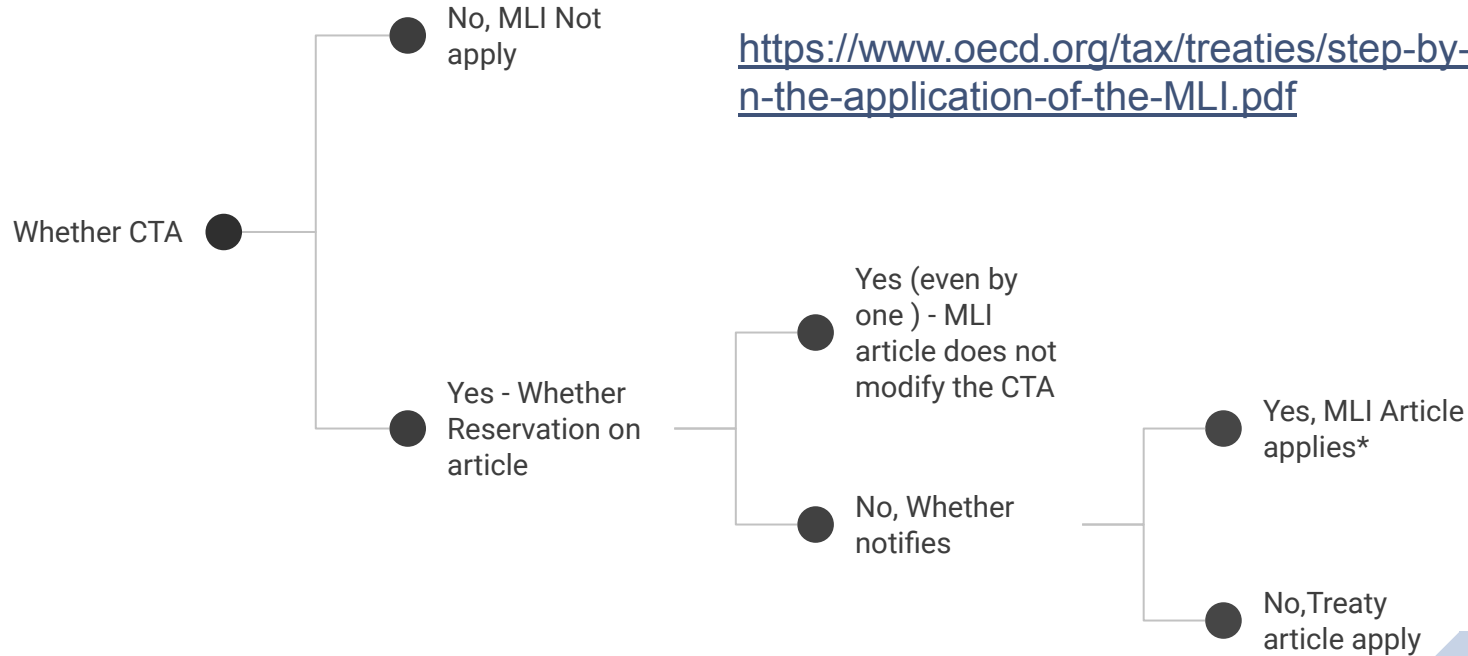


Multilateral Instruments (MLI)

- BEPS
- BEPS Action Plan 15
- Countries are signatory to Treaty - Currently does not Include USA
- Steps -
 - ▷ Entry Into Force
 - ▷ Covered Tax agreement - Some Imp ones India does not cover - Germany, Mauritius, Switzerland
 - ▷ Reservations and Choice of Optional Agreement
 - ▷ Notification of Existing Positions
 - ▷ Entry into effect of MLI



Multilateral Instruments - Broad Application - Basic Understanding



<https://www.oecd.org/tax/treaties/step-by-step-tool-on-the-application-of-the-MLI.pdf>

“* Applicability will vary “



Multilateral Instruments

- Take it easy
- Take help of Synthesized Text
- Remember the Objective- Common standard - “**without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance** (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the Agreement for the indirect benefit of residents of third jurisdictions)”
- Major trade partner treaty change - UAE, UK, Singapore, Australia and Japan



Other Concepts

- Chapter XII and XII-A
- POEM
- GAAR
- Equalisation Levy
- Specific Economic Presence
- Vienna Convention on the Law of Treaties (VCLT)
- **Transfer Pricing - Section 115BAB expands its scope**
- And Many more.....



Guide to Develop International Tax Practice



Initial Resources

- <https://www.youtube.com/watch?v=PDzDSPGY0Bo&list=PLzugOrS2Z8orHcjh8T3zvqcBX45kLnkle>-Rethinking International TaxLaw - Leiden University
- <https://www.incometaxindia.gov.in/pages/international-taxation/dtaa.aspx>
- ICAI - Course material on International Taxation
- Book on Payment to Non-resident by BCAS
- Compendium by CTC - New Edition slated to come soon
- UN/OECD Model Commentary
- Various youtube session by ICAI,BCAS, CTC, Other Forums
- Important Case Laws



Typical First Transactions & Clients

■ Transactions

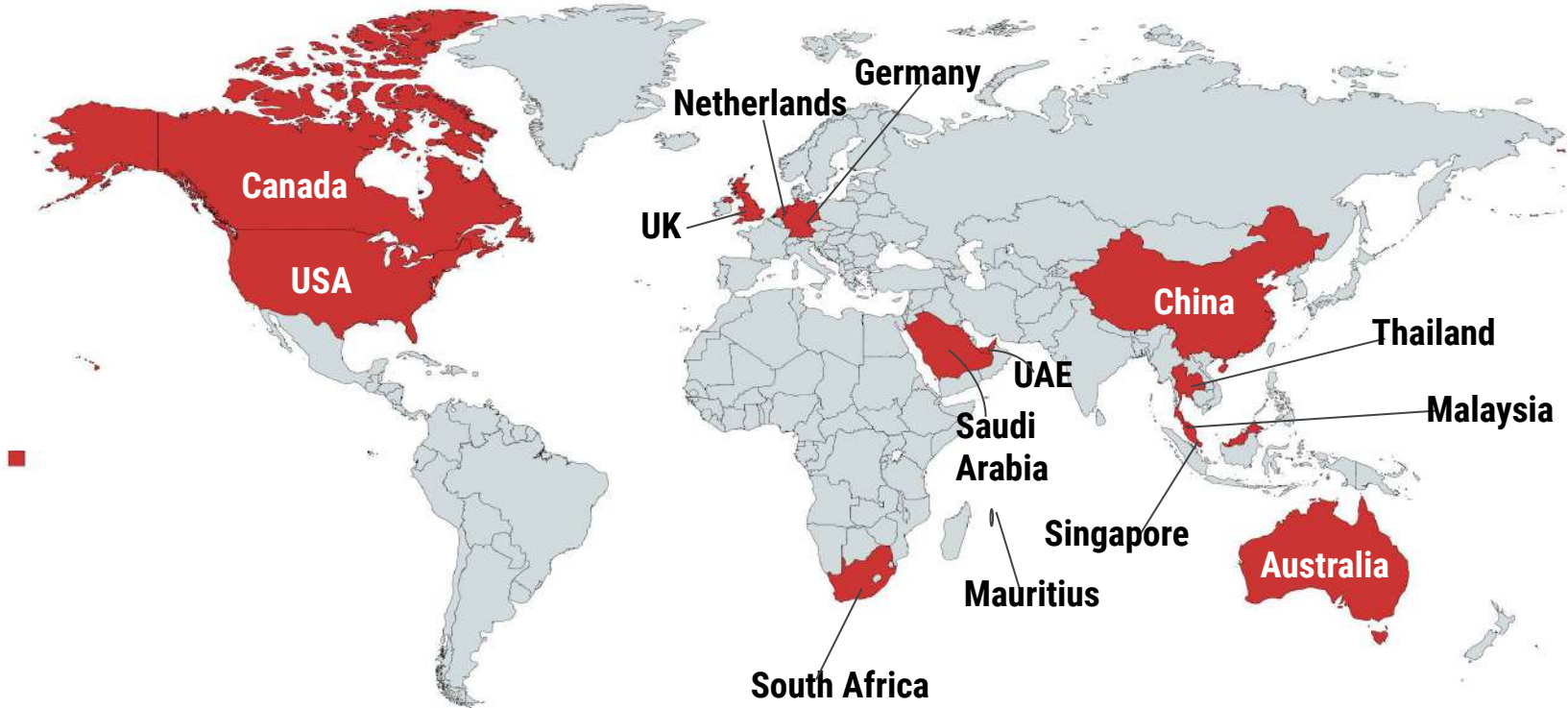
- ▷ NRI Returns
- ▷ 15CA/CB Certificate
 - NRO to NRE
 - Export Commission
 - Exhibition Stalls
 - Software Purchase
- ▷ 27Q - TDS Return
- ▷ TP - Section 115BAB

■ Clients

- ▷ NRI
- ▷ Software
- ▷ Jewelry
- ▷ Pharma
- ▷ Textile
- ▷ Services
- ▷ Foreign market place



Typical First Countries





Guide to Develop International Tax Practice

- Referral Practice - Network Locally - Speak Regularly
- Regular knowledge update - Network Nationally/Internationally
- Location - Advantage
- Work Anonymously
- Understand world economics
- Read International articles
- Be ready for a long term haul



Practical Tips

- Agreement not law
- Logic not theory
- Interplay of Act(s) and Treaties
- Based on Socio-Economic Consideration, Understand the tax wars
- Rapid Changes
- Read, Read and Read !!!!!
- At the end it's only two house owners fighting for fruits of overhanging tree



THANKS!

Let's Stay Connected



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