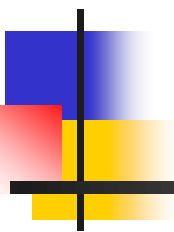


CHAMBER OF TAX CONSULTANTS WORKSHOP ON FOREIGN REMMITANCE

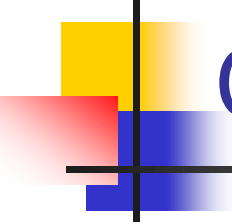
Expatriate Taxation-Inbound and Out bound Deputation



Presented by:
Mr. Paresh P. Shah

P.P. Shah & Associates
Chartered Accountants

Email: ppshahandassociates@gmail.com



OVERVIEW

Expatriate Meaning

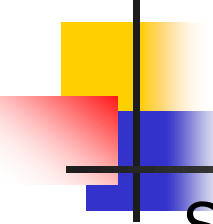
Residential Status under ITA & DTAA & Issues related thereto

Taxability of Remuneration under ITA –

S 5(ii), S 9, S 15 to 17, Article 15 of DTAA

Issues pertaining to Inbound Expat

Issues pertaining to Outbound Expat



OVERVIEW (con't)

Secondment Meaning

Issues relating to Inbound Secondment

- Income Tax (FTS, Service PE)
- Service Tax
- FEMA

Issues relating to Outbound Secondment

- Income Tax
- Service Tax
- FEMA

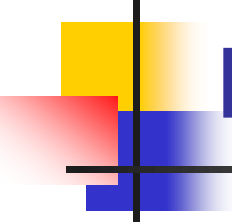
International Secondment Agreement – Important features



OVERVIEW (con't)

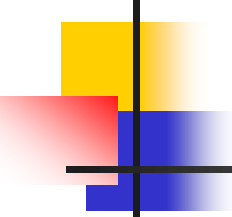
Other Issues

- TDS from Salary
- Tax Residency Certificate
- Foreign Asset Disclosures in IT Return



Expatriate

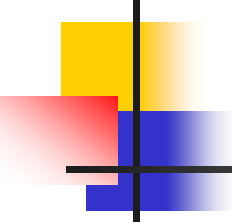
- ☐ The word expatriate is not defined
- ☐ Usually, it refers to an employee working abroad and who comes to work in a country for a short period (say between 6 months to 5 years). They do not intend to become permanent residents
- ☐ Under Indian context, it includes NRI's



Residential Status in India

- Section 6 of ITA

Status	Conditions	Avg Stay in India
Resident [S 6(1)]	Present in India for atleast 182 days in the previous year OR atleast 60 days in the previous year AND atleast 365 days in the 4 years preceding the previous year	106 days in 4 years
Resident but not Ordinary Resident [S 6(6)]	Present in India for less than 729 days during the preceding seven years OR who was a non resident in nine out of ten preceding previous years <i>(not a Resident v Non Resident)</i>	104 days in 7 years
Non Resident	One who does not satisfy the above conditions	



Residential Status in India

- Section 6 (1) of ITA

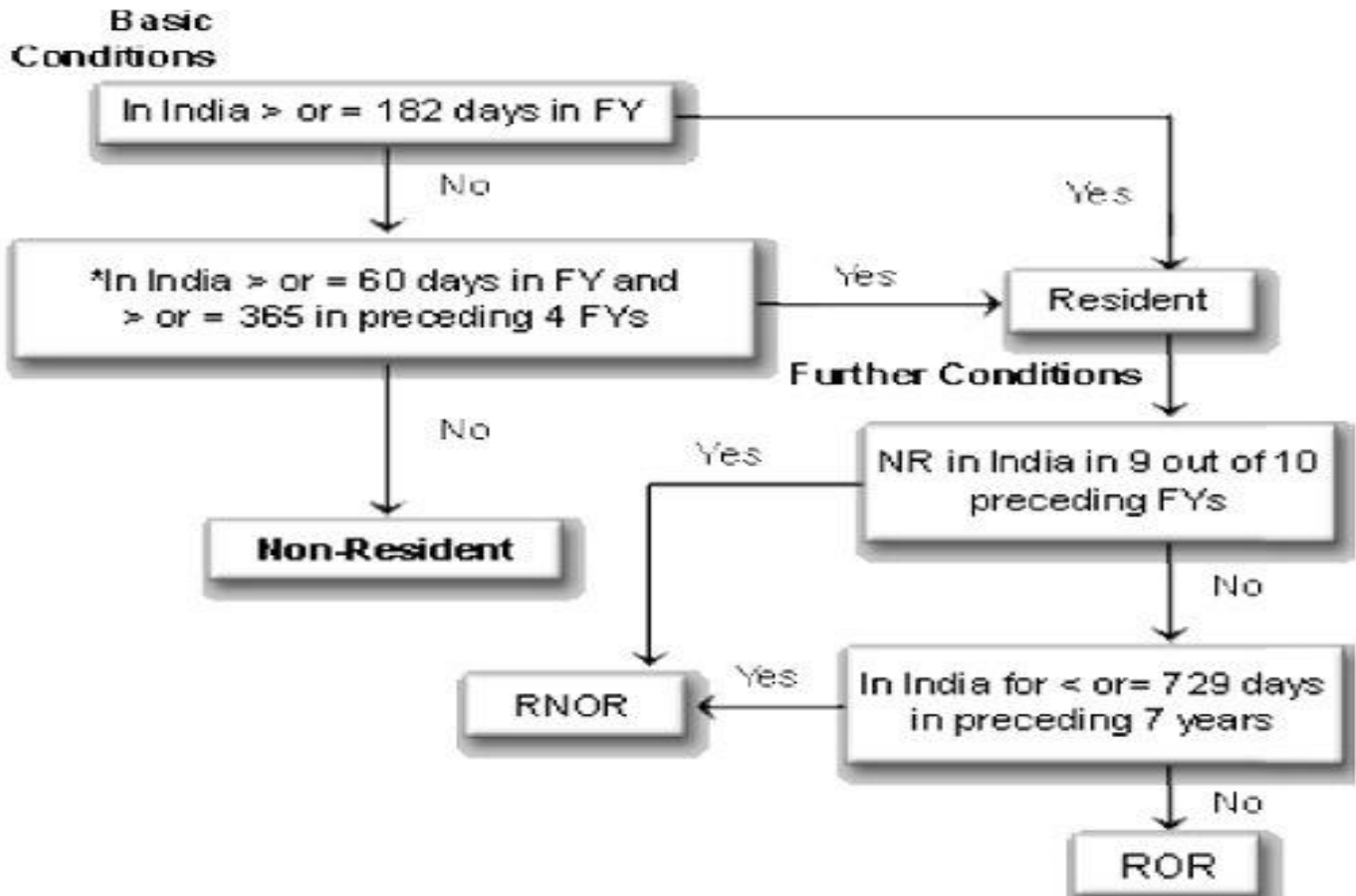
The Explanation to section 6(1) of the Act provides that –

- (a) in case of an individual, being citizen of India, who leaves India in any previous year as a member of crew of any Indian ship or for the purposes of employment outside India, then the above-mentioned 60 days would be substituted by 182 days;
- (b) in case of an individual, being citizen of India or a individual of Indian origin who being outside India, comes on a 'visit' to India in any previous year, then the abovementioned 60 days would be substituted by 182 days.

Non Resident Indian (NRI) as defined u/s 115C (e) means an individual who is a Non Resident and an Indian Citizen or a Person of Indian Origin (PIO)

A PIO means a person who himself, or either of his parents, or either of his grandparents, were born in undivided India.

Overall Residential Test



If the circumstances are as stated in Explanation to section 6(1) – Test of 60 days is extended to 182 days. However, the test does not apply to returning Indians for good in the year of return



Residential Status in India

- Section 6 (1) of ITA

Further, to determine the residential status, while calculating the no. of days of stay in India of an individual;

❑ One must include both, the day of entry in India as well as day of exit from India.
[Petition No. 7 of 1995 225 ITR 462 (AAR)]

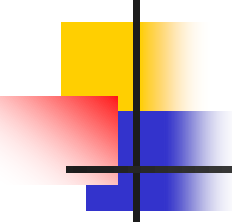
❑ Both days should be counted as “in India”
AAR 233 ITR 462

❑ Day of arrival is to be excluded
Fausta C. Corderio [2012] 53 SOT 522 (Mum ITAT)
[Manoj Kumar Reddy v. ITO [2009] 34 SOT 180 (Bang.) wherein reference was made to section 9 of General Clauses Act, the first day in series of days had to be excluded]

❑ Only day of departure has to be considered as “in India”
ITO v Dr. R.K Sharma (Jaipur Tribunal No. 1230 dated 22.08.86)

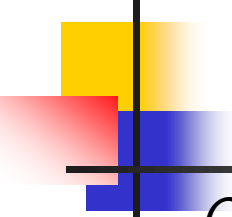
A better view is to include both the day of entry as well as exit.

Generally, an expatriate coming to India for the first time will qualify as ROR from 3rd year onwards



Person leaving India for Employment

1. An Indian employee leaving India in the course of his existing employment on a business visit. He continues to be on the payroll of the Indian company.
NOT ENTITLED to the benefit of the explanation.
2. An Indian employee leaving India for taking up a new employment with his existing employer; (e.g. on deputation). He continues to be on the payroll of the Indian company
ENTITLED to the benefit of the explanation.
3. An Indian employee leaving India for taking up a new employment with his existing employer; (e.g. on deputation). His payroll is transferred to the payroll of the overseas entity.
ENTITLED to the benefit of the explanation.
4. An Indian employee leaving India for taking up a new employment, with a new employer
ENTITLED to the benefit of the explanation



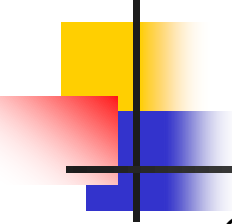
Person leaving India for Employment

Case Law: Second ITO vs. KY Patel 33 ITD 714 (Bom)

It was held that the intention of staying abroad should be on a permanent or semi-permanent basis. Hence, the undertaking of tours abroad could not be said to be 'leaving India'. Further, it has been held that 'for the purposes of' should be distinguished from 'in connection with' employment outside India. It was held that since the tours abroad were in connection with employment in India, they could not be said to be for the purposes of employment outside India. Further, the word 'purposes' appears to have a wider meaning, and may cover situations where the employer continues in India.

Case Law: ITO vs. Abbott Laboratories (P) Ltd. 31 ITD 183 (Mum) (SB)

It was held that when an employee working in India goes abroad for a few days, he cannot be said to have an "employment outside India". On the other hand, if an individual has taken an employment and posted abroad, he would be employed abroad or outside India.



Person leaving India for Employment

Case Law: CIT vs. Indo Oceanic Shipping Co. Ltd. 114 Taxman 722 (Mum)

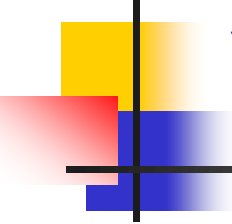
The High Court held that the place where the contract was entered into, was not important for determining whether employment was outside India.

Case Law: K. Sambasiva Rao v ITO [2014] 42 taxmann.com 115 (ITAT)

Going abroad for the purpose of employment only means that the visit and stay abroad should not be for other purposes such as a tourist or for medical treatment or for studies or the like. Going abroad for the purpose of employment therefore, means going abroad to take-up employment or any vocation.

Case Law: DCIT v Shri Ashok Kumar (ITA No. 2398/Del/2007)

ONGC India seconded its employee to ONGC NG (A Dutch Company), employee was present for 98 days in the year of departure. During secondment, employee was paid partly in India and partly overseas. Entire salary cost was borne by Dutch Company. The Tribunal held that employee left Indian Co. to join a Dutch Co. which is a separate entity. Employee left India for employment outside India. Hence, 60 days was to be substituted with 182 days for residency. So, the employee was a Non Resident in India. Salary paid during the period of secondment not taxable in India.



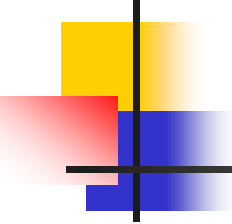
'Visit to India'

Case Law: Mrs. Smita Anand [2014] 42 taxmann.com 366 (AAR)

In case a person leaves India for the purpose of employment but comes back to India in the same year after resigning from her job abroad, then it cannot be said that the person has come to India on a "visit" to India. Hence, extension of 60 days to 182 days cannot be availed in such cases.

Case Law: DIT v Manoj Kumar Reddy [2011] 12 taxmann.com 326 (Kar. HC)

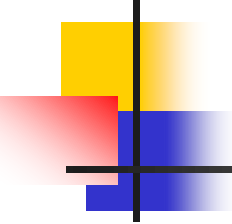
For computing the period of 60 days for determining the residential status u/s 6(1)(c) of the ITA, period spent on visit in India was to be excluded.



Residential Status under DTAA

- ☐ Not prescribed
- ☐ Makes reference to domestic tax law
- ☐ *"A person who under the laws of that State is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of similar nature."*
- ☐ Does not include person liable to tax only on income from sources in that State.
- ☐ An individual can be a resident of 2 countries (dual residency)
- ☐ The relevant treaty to be applied is the treaty with the country in which employee is resident and not where the employer is resident
- ☐ Tie Breaker Test as per DTAA in case of Dual Residency (to be applied sequentially)

Tie Breaker Test		
Sr. No	Connecting factor	Treaty Residence in
1	Permanent home in a Contracting State	The State in which the permanent home is located
2	Permanent home in both Contracting State, and:	
	(a) Centre of vital interests in one Contracting State	The State in which the centre of vital interests are located
	(b) Where the centre of vital interests cannot be determined	The State in which the individual has habitual abode
3	No permanent home in either Contracting State	The State in which the individual has habitual abode
4	Habitual abode in both Contracting States or in neither of them	The State of which the individual is a national
5	National of both Contracting States or of neither of them	The State which the competent authorities determine by mutual agreement



Exemptions under ITA

Section 10(6)(vi) – Short stay exemption

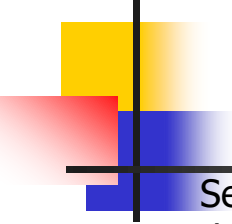
It provides that remuneration received by a non resident as an employee of a foreign enterprise for services rendered in India is not taxable in India if **all** the following conditions are satisfied:

- ☐ The foreign enterprise is **not engaged** in any **trade or business** in India;
- ☐ Employee's **stay < 90 days** in a previous year in India; **and**
- ☐ Such remuneration is **not liable to be deducted** from the **income of the employer** chargeable to tax in India.

Section 10(6)(viii) – Ship stay exemption

It provides that the salary income earned by a foreign citizen, will be exempt if **all** the following conditions are satisfied:

- ☐ The individual is a '**non-resident**';
- ☐ Salary is earned **in connection with the employment on a foreign ship; and**
- ☐ Employee's **stay < 90 days** in a previous year in India



Exemptions under DTAA

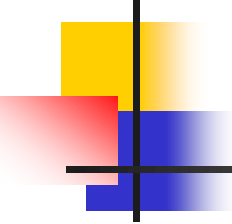
Section 90 of the ITA states that the provisions of ITA or DTAA, whichever is more beneficial to the expatriate employee, will prevail.

Most DTAA's provide for exemption from income tax if an expatriate stays in India for less than 183 days in a tax year. This is generally subject to the fact that the salary is paid by an employer who is not a resident of India, and the salary is not claimed as tax deductible expense in India.

Article 15(2) (Income from Employment) of the OECD states that remuneration derived by a resident of a contracting state (say Singapore) in respect of an employment exercised in the other contracting state (say India) shall be taxable only in the first-mentioned state (Singapore) if:

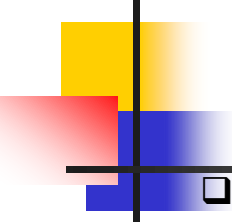
- the recipient is present in the other state (India) for a period or periods not exceeding in aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned; and
- the remuneration is paid by, or on behalf of, an employer who is not a resident of the other state (India); and
- the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other state (India).

Article 15(3) further states that the 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.



Article 15: India's DTAA

Indo - US Treaty	Indo - UK Treaty	Indo – Australia Treaty	Indo – Swiss Treaty
183 days in the relevant <i>taxable</i> year	183 days during the relevant <i>fiscal</i> year	183 days in the year of <i>earning income</i> in India	183 days in <i>any 12 month period commencing or ending in the fiscal year concerned</i>
Salary paid by employer who is NR in India	Salary paid by employer who is NR in India	Salary paid by employer who is NR in India	Salary paid by employer who is NR in India
Remuneration <i>not borne</i> by PE	Remuneration <i>not deductible</i> while computing <i>profits of enterprise</i> in India	Remuneration <i>not deductible</i> while computing <i>profits of PE/Fixed base</i> in India	Remuneration <i>not borne</i> by PE / Fixed Base



Borne By / Deductible

- ❑ Its an economic concept rather than an accounting concept. Remuneration having direct and proximate relation with the PE and attribution to PE is "borne by" PE (OECD & Klaus Vogel's)

Case Law: DHV Consultants BV 227 ITR 97 (AAR) (Cost incurred for rendering FTS)

Lloyd Helicopters International Pty Ltd [2001] 249 ITR 162 (AAR)

(Presumptive Taxation & Attributable to)

Pride Foramer S.A vs ACIT [2005] 97 ITD 86 (Delhi)

(Presumptive Taxation & Attributable to)

- ❑ Emphasis on deductibility and not actual deduction. If the expense is attributable to or deductible by PE, it should be considered as "borne by" PE, whether deduction is claimed or not is irrelevant.

Case Law: Sedco Forex International Inc v CIT [2005] 147 Taxmann 389(SC)

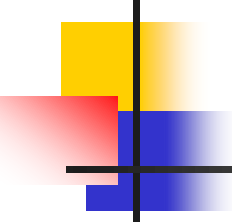
- ❑ Borne by means expense is actually paid

Case Law: CIT v Elitos S.P.A [2005] 145 Taxmann 210 (Allahabad HC)

(Services were not borne by PE)

Ensco Maritime Ltd vs DCIT [2004] 91 ITD 459 (Delhi)

(Services were rendered by PE)



Article 15 – India's DTAA

Deductible vs Actually Deducted

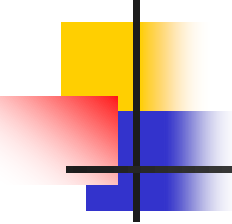
India - USA – Borne by PE

India - UK – Deductible in computing profit chargeable to tax in
Other State

India - Singapore – Borne by PE

India - Australia – Deductible in determining taxable profits of PE

India - Swiss – Borne by PE



Computing No. of Days

As per OECD, while counting the 'days of physical presence';

Include:

- Part of a day, day of arrival, day of departure
- All other days spent inside the State of activity such as Saturdays and Sundays, national holidays, holidays before, during and after the activity, short breaks (training, strikes, lock-out, delays in supplies), days of sickness (unless they prevent the individual from leaving and he would have otherwise qualified for the exemption) and death or sickness in the family.

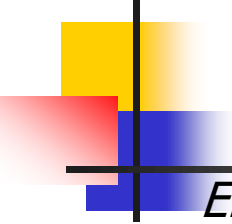
Exclude:

- Days in transit
- Any entire day spent outside the Source State, whether for holidays, business trips, or any other reason

Scope of Income

- Section 5 of ITA

Nature of Income	Resident & Ordinary Resident	Resident but not Ordinary Resident	Non-Resident
Income received in India	Included	Included	Included
Income deemed to be received in India	Included	Included	Included
Income accruing or arising in India	Included	Included	Included
Income deemed to accrue or arise in India	Included	Included	Included
Income accruing or arising outside India and received outside India i.e foreign income;			
From business controlled in India or profession set up in India	Included	Included	Excluded
From business controlled outside India or profession set up outside India	Included	Excluded	Excluded



Taxability of Remuneration under ITA

Employee employed in India

Section 5 – Income accrues/arises/received in India

Where services are rendered outside India, mere receipt of salary in India is not 'receipt' as 'constructive receipt' was outside India.

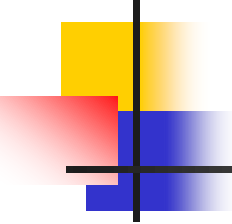
Case Law: Arvind Singh Chauhan v ITO 42 taxmann.com 285 (Agra ITAT)

Employee employed abroad but renders services in India

Section 9(1)(ii) – income is deemed to accrue or arise in India for services rendered in India, including rest periods (i.e. salary income for rest or leave period which is preceded and succeeded by the services rendered in India and forms part of the service contract of the employment is also taxable in India.)

Residential status of the recipient, duration of employment and the place of receipt of the remuneration is irrelevant.

S 9(1)(iii) Salary paid by Gov. to Citizen of India for Services rendered outside India



Taxability of Remuneration under ITA

Section 15 of ITA

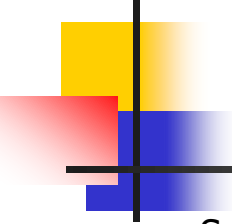
Salary is taxable on receipt or due basis

Advance or Arrears of salary paid is only taxable on receipt basis.

Receipt basis only if services are otherwise rendered in India.

Section 17 of ITA – Perquisites / Profits in lieu of salary

Section 17(2)(1) - Rent Free Accommodation vs Section 10(13)(A) House Rent Allowance



Taxability of Remuneration under ITA

Section 10(10CC) – Non monetary perquisites(NMP)

❑ Perquisite is an advantage received by the holder of an office over and above the salary. Any benefit received incidental to employment in excess of salary is a Perquisite. Perquisite postulates relationship of employer and employee.

Case Law: Shalilendra Kumar vs. Union of India [1989] 175 ITR 494

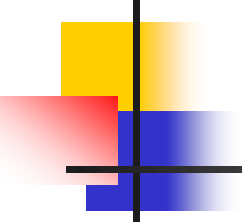
❑ Tax paid by the employer on behalf of the employee is NMP covered and exempt u/s 10(10CC)

Case Law: Yoshio Kubo v CIT [2013] 36 Taxmann.com 1(Delhi HC)

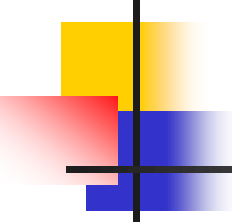
❑ Tax on salary paid by the employer on behalf of employee, it is a perquisite provided for by way of non-monetary payment and therefore, exemption under the provisions of Sec. 10(10CC) will be applicable.

Case Law: RBF Rig Corporation LLC (RBFRC) v. CIT (2007) 165 Taxman 101(Delhi)

❑ Payment made to outside parties directly by the employer may be classified as a NMP



Issues pertaining to Inbound Expat



Per Diem Allowance

Section 2(24)(iiia) of ITA

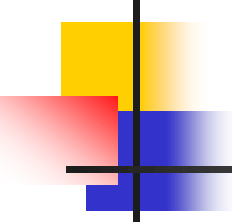
Income includes any special allowance or benefit, other than perquisite included u/s 17(2) specifically granted to the assessee to meet expenses wholly, necessarily and exclusively for the performance of the duties of an office or employment of profit.

Section 10(14) of ITA read with Rule 2BB

Any allowance or benefit (not being in the nature of perquisite u/s 17(2)) granted to meet the expenses wholly, necessarily and exclusively incurred in performance of duties of office or employment of profit, to the extent to which it is actually incurred, will be exempt from tax.

Rule 2BB (1)

Any allowance granted on tour to meet the ordinary daily charges incurred by an employee on account of absence from his normal place of duty.



Per Diem Allowance

Case Law: CIT v Goslino Mario and Others [2000] 241 ITR 312,
Daily allowances were received by foreign technician for meeting expenses (i.e. food and other expenses) while on assignment in India. The technicians were required to stay away from their homes (normal place of residence) during their stay in India. The HC held that the daily allowances provided were wholly and necessarily incurred in performance of duties. Accordingly, the same was exempt u/s 10(14) to the extent such expenses are actually incurred for that purpose

Case Law: Hindustan Powerplus 271 ITR 433
AAR held that living expenses, furnished house, air fare and per diem for rest period, home travel, car etc is exempt u/s 10(14)(i) in the hands of foreign deputees

Hypothetical Tax and Tax Equalization

Suppose employee is drawing salary of \$ 1,000 p.m and is liable to income tax @ 30% in Home Country

Particulars	USD
Basic Salary	12,000
Less: Inc Tax @ 35%	3,600
Net Salary	8,400

Now, employee is taxed @ 40% in Host Country

Particulars	USD
Basic Salary	12,000
Less: Inc Tax @ 40%	4,800
Net Salary	7,200

Thus, the employee is worse off by \$ 1,200 (\$ 8,400-\$ 7,200) if he accepts the assignment of going abroad on same terms

Hypothetical Tax and Tax Equalization

To eliminate this, the salary of employee is recalculated as the amount net of notional tax in the Home Country . This notional tax is known as "Hypothetical Tax".

Particulars	USD
Basic Salary	12,000
Less: Hypo Tax @ 30%	3,600
Net Salary	8,400
Add: Tax in Host Country ($8,400 \times 40/60$)	5,600
Revised Salary (includes tax equalization of 2,000)	14,000
Income Tax @ 30% in Home Country	4,200
Less: Credit for tax in Host Country (to the extent of 4,200)	

Thus, the tax payable in the Home Country is \$ 4,200 against which tax credit available is \$ 5,600 paid in Host Country and as a result no tax is payable in Home Country

Hypothetical Tax and Tax Equalization

Amount of remuneration taxable in Host Country (India)

Particulars	USD
Gross Salary received in Host Country	14,000
Less: Hypo Tax	3,600
Taxable Salary in India	10,400

Case Law: CIT v Percy Batlivala and Others (2010 TIOL 175)

It was held that "In our opinion, the income arising in India in the present case is actual salary plus the incremental tax liability arising on account of Indian assignment. Hypo tax never accrued to the assessee and thus is deductible."

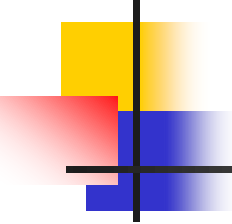
Case Law: Roy Marshal v ACIT [2011] 11 taxmann.com 135 (ITAT)

Jaydev H. Raja [2012] 211 Taxmann 188

Anand Kumar Dutta v JCIT (ITA No. 943/Del/2005)

Yoshio Kubo v CIT [2013] 36 Taxmann.com 1 (Delhi HC)

It was held that the hypothetical tax amount was not received from the employer and did not constitute income. As the employees were only paid a net salary and the taxes borne by the employer were already included in the taxable salary, deduction of hypothetical taxes would be allowed.



Provident Fund & Miscellaneous Provisions Act, 1952

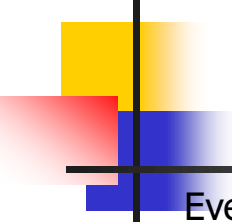
Provident Fund & Pension Fund (India)

International Workers (IW's) are defined to include foreign nationals working for an establishment in India to which the Provident Fund Regulation applies and Indian employees seconded to a country with which India has entered into a Social Security Agreement (SSA).

A relief has been provided in case of "Excluded Employee" which primarily refers to IWs coming from a country with which India has entered into a (SSA) and who are contributing to a social security programme in his country of origin, either as a citizen or a resident and who enjoys the status of a detached worker.

Broadly, with respect to every IW, other than an Excluded Employee, both the IW and the employer would be required to make contributions as per the PF Act.

Hence, all IWs are required to become members of the PF Scheme, the Pension Scheme and Employees Deposit Linked Insurance Scheme (EDLIS) unless they qualify as Excluded Employees.



Provident Fund & Pension Fund

Every eligible IW is required to enroll from his first day of employment in India.

Accordingly, subject to applicability of PF Act, all IW's (other than Excluded Employees) have to contribute to the PF Scheme at the rate of 12 percent of his salary. The employer is also required to make a matching contribution of 12 percent.

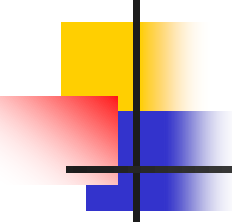
These aforesaid rules will apply irrespective of the place where salary is paid (in India or abroad) and in any currency. It depends on whether the establishment in India is liable to PF or no.

Social Security Agreements

SSA's are bilateral agreements between India and other countries designed to protect the interests of cross border workers. They provide for equality of treatment of the workers of both the countries. India has entered into 18 SSA's till date out of which only 9 are in force.

The list of countries with which India has signed SSA's can be found on www.moia.gov.in

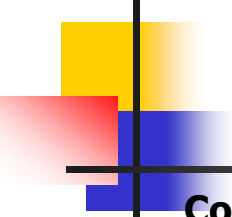
i.e Ministry of Overseas Indian Affairs



Provident Fund & Pension Fund

Taxability of Contribution to Pension & Social Security Funds in India

- ☐ Indian Co. is liable to PF and deducts the same.
- ☐ Contribution to PF is exempt from tax u/s 80C
- ☐ Employer's contribution is also exempt
- ☐ If the deputation is for less than 5 years, at the time of withdrawal of the balance in PF A/c, the following will be taxed;
 - Employer contribution
 - accrued interest and
 - employee contributions to the extent of 80C deduction
- ☐ Refund of PF is allowed for expatriates coming from countries with which India has SSA.
- ☐ He is not required to contribute to the PF Scheme if SSA is in force.
- ☐ If contribution is made then he is allowed to get refund if treaty is available
- ☐ Contribution is payable if SSA is not in force



Pension & Social Security Funds

Contribution to Pension & Social Security Funds in Home Country

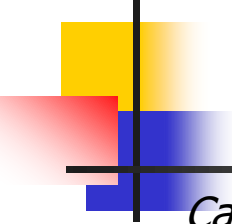
Case Law: AAR Ruling -P-12 of 1995 [1997-228 ITR 61]

Taxability of withdrawals from the individual retirements arrangement (IRA) of an NRI: Contributions made to the IRA were tax deferred i.e. they were tax deductible at the time of contribution but liable to tax at the time of withdrawal. As the applicant planned to shift to India, he intended to invest part of his IRA funds in a non-resident non-repatriable rupee deposit (NR-NR-RD) scheme. It was held that no Indian Income-tax would be payable on withdrawals from NR-NR-RD account as such withdrawals do not at all constitute income in his hands.

Case Law: Yoshio Kubo v CIT [2013] 36 Taxmann.com 1(Delhi HC)

In the said case, a Japanese national ("**Employee Y**") employed by Sony Corporation of Japan ("**SCJ**") was deputed to work in Sony India Ltd. SCJ made contributions in compliance with legal requirements in Japan, towards social security benefits of Employee Y.

The Delhi HC rejected the tax department's argument that the payments fell within the scope of perquisite. Section 17(2)(v) of the Income tax Act, 1961 ("**ITA**") deals with any sum payable by the employer to effect an assurance on the life of the employee or to effect a contract for an annuity, barring payments made through recognized funds and certain statutory funds. The court held Employee Y does not get any vested right at the time of contribution of the fund by the SCJ. Being a contingent payment, the contribution does not qualify as a perquisite until the contingency occurs.



Pension & Social Security Funds

Case Law: ACIT vs Harashima Naoki Tashio, ITA No. 4634/Del

In case of a foreign national, working as employee of Indian Co., employer's contribution towards social security, health insurance, etc. in Japan was held not liable to tax in the hands of the employee in India as it was made under statutory provisions of Japan, did not give any vested right to the employee in the year of contribution and it was a contingent benefit i.e. the employee may or may not get any benefit depending upon happening or non-happening of an event which is beyond the control of the employee. Therefore, the amount contributed by the employer was not treated as a taxable perquisite in the hands of the employee.

Other Similar Cases:

ACIT vs Eric Matthew Gottesman (2007) 15 SOT 301 (Del) ACIT

Circle 47(1) vs Hideki Ishihara in ITA No. 1906/Del/08

ITO vs Lukas Fole (2009) 124 TTJ (Pune) 965

Gallotti Raoul vs ACIT 61 ITD (Bom.) 453

Refer : Circular No. 4 [F. No. 73-A/2/69-IT (A-II)]



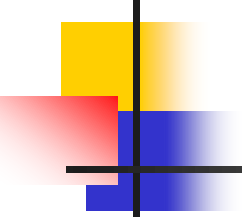
Medical Insurance, Tax Consultancy Fees Etc

Medical Insurance, Tax Consultancy Fees Etc

Case Law: Yoshio Kubo v CIT [2013] 36 Taxmann.com 1(Delhi HC)

- Payment of Medical Insurance by employer for the expat employee is not a perquisite
- Payment by employer of tax consultant fees for filing expat's returns not perquisite as tax was borne by employer
- Tax refund received by expat employee not income in his hands as tax was to be borne by employer and thus the refund was a loan to employee
- Employer's contribution to overseas social security, pension and medical/ health insurance do not qualify as perquisite under Section 17(1)(v) of the Act and are not taxable in the hands of the employees.

Circular: No. 707, dated 11/07/1995 – Where non-residents are deputed to work in India and taxes are borne by employers, in certain cases if an employee to whom refunds are due has already left India and has no bank account here by the time assessment orders are passed, refund can be issued to employer as tax has been borne by it.



EMPLOYEE STOCK OPTION PLAN (ESOP's)

There are four key events in a ESOP — grant, vesting, exercise and sale.

Grant Date: Date on which employer and employee agree on terms of ESOP

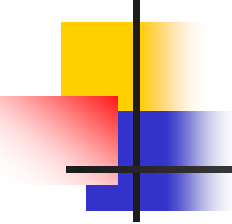
Vesting Date: Date when the employee is entitled to receive the shares after satisfying the specified conditions

Vesting Period: Period between grant date and vesting date. Also called lock-in period

Exercise the option: employees can buy shares by exercising their option anytime after the vesting period

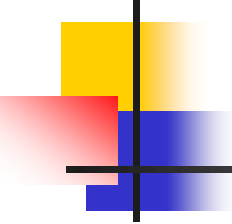
Taxable as Perquisite/Salary – at the time of exercise of option when shares are allotted, difference between FMV as on date of exercise and the exercise price

Taxable as Capital Gain – at the time of sale of shares, difference between sale price and FMV as on date of exercise is treated as gain. Period of holding from date of allotment.



ESOP's

Events		Tax Impact
Grant of Options	—————→	No Tax
Vesting of Options	—————→	No Tax
Exercise of Options	(relevant for valuation of shares)	No Tax
Allotment of Shares	—————→	Taxable Perquisite
Sale of Share	—————→	Capital Gains



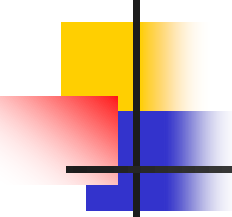
Tie Breaker Test – TDS on Other Income

ISSUES

Resident under Tie Breaker Test : For Treaty purposes only

Resident in Source (Host) State : For other income not covered by Treaty including income in Resident (Home) State

Third Country Income / Source State Income paid by Resident of Home Country



ESOP's

Issues involved in ESOP's

1. Accrual

At the time of exercise of options

2. Source

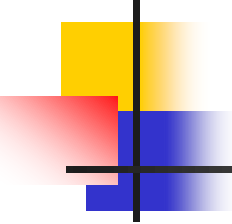
Where is it arising – In India or Foreign Country

3. Due

At the time of Sale

4. TDS u/s 192

- An employer is required to compute the benefit under the stock options, as perquisite, include the same as part of the salary income and withhold the tax on the same from the employee.
- It may include options of Subsidiary Company or that of Parent company outside India
- Short Term Gain in most cases where exercise time is based upon the liquidity event.

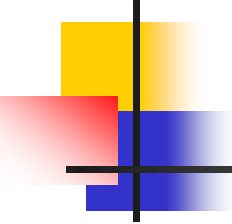


ESOP's

Depending on where an individual is at the time of these key events, the taxing implications in India may differ.

For Resident– taxed on global income therefore, taxable both at time of exercise (as salary income) and at time of sale (as capital gains)

For Non Resident and RNOR - Only the perquisite value proportionate to their accrual in India is taxable in India (as salary income) and on sale only if consideration is received in India (assuming shares of a foreign company)

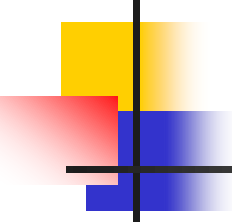


ESOP's

Tax Implications of Stock Options granted by Foreign Co. to employees of Indian Sub.

Case Law: ACIT v Robert Arthur Keltz [2013] 35 taxmann.com 424 (ITAT)

The principle laid down by the Delhi 'T' Benches in the case of Asstt. CIT v. Ellin 'D' Rozario [IT Appeal No. 2918 (Delhi) of 2005, dated 5-12-2008] is that only proportionate salary would be taxable in India, if a part of activity done by the assessee has no relation to any India specific job or activity. In this case, it is not in dispute that the assessee was in India only for a short period and that prior to it, he has not done any service connected with any activity in India. Thus, applying the same propositions to the facts of the case on hand, as the assessee has not rendered service in India for the whole grant period, only such proportion of the ESOP perquisite as is relatable to the service rendered by the assessee in India is taxable in India.



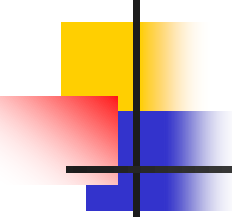
ESOP's

Tax Implications of Stock Options granted by Foreign Co. to Returning employees

Case Law: Mrs. Smita Anand [2014] 42 taxmann.com 366 (AAR)

An Indian citizen used to work with a China based company during which she was granted some ESOPs. Vesting and exercise took place during her employment in China after which she resigned from the employment and came to India and received the proceeds of the exercise. It was held that the assessee was resident in India in the year during which exercise took place and perquisite is received; the entire receipt is liable to tax in India on the principle of taxation of global income in India. The perquisite income was taxed on the receipt basis in India despite the fact that ESOPs used to vest in her (i.e. income accrued) while working outside India.

Sr. No.	Status at the taxable event (i.e. exercise of ESOPs) in India	Whether stayed in India during any part of the vesting period	Whether taxable in India [India ESOP Plan (IEP)]	Whether taxable in India [Foreign ESOP Plan (FEP)]	Extent of taxation
1	Resident	Yes	Yes	Yes	Fully taxed
		No	Yes	No	IEP-Fully taxed FEP – NA
2	Non-Resident	Yes	Yes	Yes	Proportionate
		No	No	No	NA
3	RNOR	Yes	Yes	Yes	IEP - Fully taxed FEP- Proportionate
		No	Yes	No	IEP - Fully taxed FEP - NA

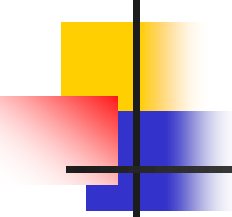


ESOP's

Reference can be made to Para 15-06 on "Payments relating to prior employment", of Article 15 to the commentary by Philip Baker;

"Issues have arisen regarding payments to an employee for prior service and paid after the employee has changed his country of residence. Two cases illustrate this. In a Canadian case the employee had acquired various stock option rights while he was an employee of an American company and resident of the United States. After he left that employment and moved to Canada he exercised those rights. When the Revenue in Canada sought to tax the profits, he attempted to rely upon the equivalent of Article 15 on the basis that he derived the remuneration while resident in the United States. The Tax Court rejected this, holding that he derived the remuneration when he exercised the rights, and he was then a resident of Canada.

The second case, a decision of the Bundesfinanzhof, concerned an "anniversary bonus" paid to a German resident employee after 25 years, five of which had been spent in the United States or Canada. The court held that the bonus relating to those five years derived from employment abroad, and were therefore taxable where the employment had been exercised."



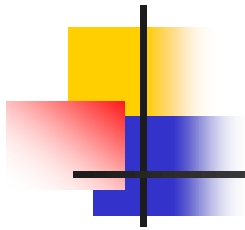
Income from Third State

Q: Can it be an option for Home State Resident to elect a residential status for a Third State where he is a Resident under that State's domestic laws also?

For Eg. Mr. X is a Resident of India as well as U.A.E as per the domestic tax laws of both these countries. He earns income from US and Germany.

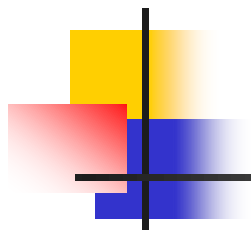
Can Mr. X opt to be Resident of U.A.E for the income sourced in US and apply US-U.A.E tax treaty and opt to be a Resident of India for the German sourced income and apply India-Germany tax treaty?

A reference can be made to Para 12 (3) of Article 4 to the commentary of Klaus Vogel which reads as;
"The State of which the taxpayer is a resident by virtue only of that State's domestic law rather than by virtue of treaty law as well., is thus restricted by Article 4(2), read in conjunction with the distributive rules , to taxing no more than such items of income and /or capital as are attributed to the State of source and/or of situs. This, however, does not mean that in such a case the latter State must(or will) apply its domestic rules on taxation of non-residents. Since the taxpayer is 'deemed' to be a non-resident only in regard to the application of the treaty's distributive rules, he continues to be generally subject to those taxation procedural provisions of his State of secondary residence which apply to all other taxpayers who are residents thereof (cf. OstBMF of 29 May 1992,2 SWI 205(1992): DTC Austria/Germany; Hof Den Haag, Rolno. 39/82 M 2 BNB 1985/49; Munch Pedersen, B., 53 R&R 167(1983))."



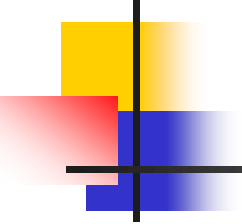
Further, a reference can be made to Para 12 (4) of Article 4 to the commentary of Klaus Vogel which reads as;

"Income from sources in third states: Where a person who under the Article 4(1) is a Resident of both the States receives income from sources in a third state, Article 21 has to be considered in conjunction with Article 4(2). This results in such income being taxable only in the contracting state in which that person has his treaty residence. In this particular situation, therefore, determination of residence under Article 4(2) is also a determination of which of the two contracting states is entitled to tax income from sources in a third state. While the third state is the state of source in relation to the contracting states, the "State of Source" in the relationship between the two contracting states is deemed to be that State in which the person concerned has no treaty residence (cf. supra m.nos 12f.). That State is thus barred from taxing income from sources in a third state."

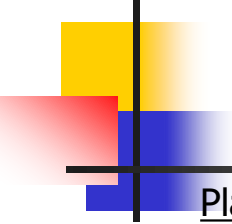


Q: What happens if one of the State where he is a Resident has to apply source state tax?

- He should not have any income in both the States where he is claiming to be a Resident
- This situation is helpful only in case of territorial based taxation (like Singapore, India will not help)



Issues pertaining to Outbound Expat



Employment exercised outside India

Place of Payment - Relevance

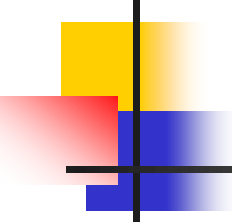
OECD commentary on Article 15 "Paragraph 1 establishes the general rule as to the taxation of income of employment (other than pensions), namely that such income is taxable in the State, where the employment is actually exercised. Employment is exercised in the place where the employee is physically present when performing the activities for which employment income is paid".

Commentary by Klaus Vogel states that as a rule, the place where the employment is exercised is the place where the assignee is personally present for the purpose of exercising his employment. If the assignee is physically present in the host country during the duration of assignment, this means employment is exercised in that country and therefore, salary accrues in host country.

It is irrelevant for the application of DTAA that the remuneration is physically paid to the assignees in India as long as it pertains to employment exercised outside India.

Case Law: British Gas India Pvt Ltd [2006] 287 ITR 462

Sunil Muncif ITA No. 2346/Ahd/2012

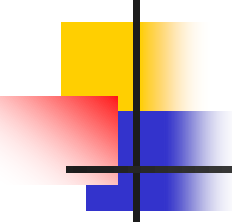


Per Diem Allowance

Deputation vs Tour

Case Law: ITO v Saptarshi Ghosh [2011] 15 taxmann.com 328 (Kolkata)

It was held that employees should be considered to be on tour where employees were sent on deputation by TCS Ltd, an Indian company to USA as they are not transferred to USA. Further, the period of deputation or the fact that the family accompanies during the deputation does not alter the position even if they are sent for more than 12 months.



Body Shopping – Deduction for Exports

Outbound Deputation on Projects by Software Companies – Section 10A deduction

If the employees of Ind Co. are deputed to F Co. then 2 situations arise:

Supervision & Control with US Co.
10A deduction may not be available

Supervision & Control with Ind Co.
10A deduction available

Case Law: IDS Software Solutions (India) Pvt Ltd 2009 TIOL 82 Bang
Ind Co. was employer and not F Co.



International Secondment Agreement – Important features

Scope of Agreement

- ❑ Employer shall be an independent contractor engaged by the Company to make the Secondees available for the purposes of the Agreement
- ❑ Neither the Employer nor any Secondee shall be a servant or employee of the Company
- ❑ The Company shall have the right to exercise supervision, control and direction over each Secondee, but each such Secondee shall remain an employee of the Employer for all purposes (other than for U.S. tax purposes), including promotion and career planning.
- ❑ The Company shall have no authority to terminate employment or to administer disciplinary action with respect to any Secondee, except to terminate the secondment as provided in the Agreement
- ❑ No Secondee shall retain the authority to negotiate or enter into contracts on behalf of Employer during the course of the Secondment
- ❑ All responsibilities to the Employer prior to assignment of Secondee shall be suspended during the course of their secondment



International Secondment Agreement – Important features (con't)

Duties of Secondees

- ☐ Secondee to carry out his or her assigned functions, subject to direction and management of the Company
- ☐ However, any disciplinary action shall be taken only by Employer

Duties of Company & Employer

- ☐ Company to provide suitable accommodation, equipment and other facilities to Secondees
- ☐ Company to provide administrative assistance in connection to travel, transport, import & export of personal effects, immigration, customs
- ☐ Company to provide for local transport for business purposes
- ☐ Company to pay fees to the Employer for each Secondee calculated based on a formula set forth in the Agreement
- ☐ Employer to maintain payroll responsibility for payment of all salary and benefits as per compensation package applicable to the Secondee during the assignment



International Secondment Agreement – Important features (con't)

Liability & Indemnity

- ❑ Employer responsible for, and shall keep Company indemnified from all costs, claims, etc. arising out of or incidental to the provision of services by the Secondees relating to (i) injuries, death, illnesses of Secondees, and (ii) all damages to or losses of the property of Secondees
- ❑ Company responsible for, and shall keep Employer indemnified from all costs, claims, etc. arising out of or incidental to the provision of services by the Secondees relating to (i) injuries, death, illnesses of employees of the Company (other than Secondees), and (ii) all damages to or losses of the property of employees of the Company (other than Secondees)

Assignment of rights under the Agreement

- ❑ Company cannot transfer or assign without prior written approval of Employer
- ❑ Employer has the right to assign or transfer its rights & obligations under the Agreement to an Affiliate provided notice of such assignment or transfer is given to the Company



International Secondment Agreement – Important features (con't)

Other provisions

- ❑ Solely for the purposes of compliance with the laws of parent country, the Company will make any necessary payments on behalf of Secondees to taxing authorities of parent country as may be required.
- ❑ Notwithstanding the foregoing, for tax purposes of parent country, the Parties agree to treat the Company as the employer of the Secondees during the secondment period.
- ❑ In case there is Totalization Agreement between country of which Secondee is resident and parent country / host country, Employer to obtain on behalf of such Secondee a 'certificate of coverage' to establish the Secondee's entitlement to such exemption.



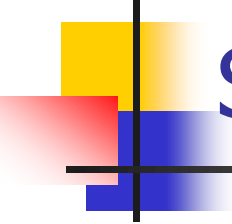
Characteristics of employer-employee relationship or 'contract of service'

- Relationship of master-servant between employer and employee
- I. Co. (employer) to exercise control and supervision, give instructions and directions regarding the work of employee (without any interference from F. Co.)
- I. Co. has right to terminate services of employee
- Obligation to pay salary / other employment costs of employee vests with I. Co. alone which should be expressly specified in the secondment agreement and other legal documents.
- Standard policies and procedures applicable to I. Co.'s domestic employees should apply to seconded employees
- Place of work, tools, material to be provided by I. Co.
- During secondment, I. Co. has the right to relocate employees in any of its plants / offices and / or change work profile



Characteristics of employer-employee relationship or 'contract of service' (con't)

- Seconded employees should have legal recourse to I. Co. in case of default in salary payments, or any disputes arising in relation to his secondment in India
- Obligation of withholding tax vests with I. Co.
- Documents to explicitly clarify that disbursement of salary through F. Co. (if any), is done only for administrative convenience and it is done on behalf of I. Co.

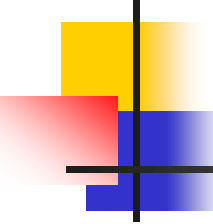


Secondment

Secondment, a common practice in employment, is created when employees are brought on contracts from overseas entities to their Indian affiliates for a fixed tenure. In terms of the secondment agreement, seconded employees work under the direction, control and supervision of the Indian affiliate's board and management. Such employees receive salaries overseas in their home country, that is, they remain on the payroll of the overseas entities. The Indian affiliates reimburse their overseas principals or partners for such salary costs. This arrangement or the salary reimbursement is purely on cost basis.

Under this, the F Co. is the Legal Employer and the I Co. is the Economic Employer

Q: Whether reimbursement of salary received by F Co. amounts to Fees for Technical Services (FTS) and hence taxable in its hands?



Secondment

Yes. It amounts to FTS.

F Co. was the real employer of the secondees as it retains right over the employees and has power to remove/replace them.

Pursuant to foreign collaboration agreement, F Co. had undertaken to render the services to I Co. and hence, lent the services of its seconded employees on payment of compensation by I Co.

The recipient of the compensation was F Co. and not the seconded employees. Further, the payment was not merely reimbursement of salary, it also included other costs.

Thus, compensation referred to in the secondment agreement was for rendering 'services of technical or other personnel' —hence taxable as FTS and liable to withholding of tax u/s.195.

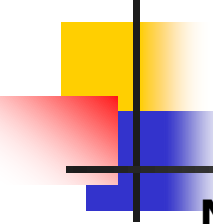
Case Laws:

AT&S India Pvt Ltd [2006] 287 ITR 421 (AAR)

Verizon Data Services India Pvt Ltd [2011] 337 ITR 192 (AAR)

Centrica India Offshore Pvt Ltd [2012] 249 CTR 11 (AAR)

Target Corporation India Pvt Ltd [2012] 348 ITR 61 (AAR)



Secondment

No. It does not amount to FTS.

As Expats are deputed to work under the control and supervision of the I Co., F Co is not responsible for the actions of the expats. Thus, F Co. does not render any technical service to the I Co.

Since payment by I Co. is towards reimbursement of salary cost borne by F Co., no income can be said to accrue to F Co. in India.

Referring to Klaus Vogel's commentary and the relevant facts, I Co. could be regarded as an 'economic employer' of the secondees. Agreement constituted an independent contract of service.

Since the deputed employees were not subject to the control and supervision of the F Co., there would be no Service PE.

Case Laws:

IDS Software Solutions v. ITO [2009] TII 22 (ITAT)

Cholamandalam MS General Insurance Co. Ltd. [2009] TIOL 02 ARA-IT (AAR)

ACIT v. Karlstorz Endoscopy India Pvt. Ltd. ('KI') (ITA No. 2929/Del/2009)

ADIT v Marks & Spencer Reliance India Pvt Ltd [2013] 27 ITR(T) 448 (Mum ITAT)

Tekmark Global Solutions LLC [2010] 131 TTJ 173 (Mum)

Temasek Holdings Advisors (I) Pvt Ltd v DCIT[2013] 60 SOT 134 (Mum ITAT)

CMS (India) Operations & Maintenance Co. (P) Ltd [2012] 135 ITD 386 (Chennai)



Service PE

Q: Whether the foreign entities have a PE in India by virtue of the employees presence in India?

Case Law: DIT v Morgan Stanley and Company Inc [2007] 292 ITR 416 (SC)

F. Co sends its employees to its associated enterprise in India I Co. , for undertaking stewardship activities which included activities performed to monitor the quality and confidentiality of the outsourcing work. Further, F. Co also sends its employees on deputation for different periods, even extending more than one year at the request of I Co. The deputed employees had a lien on his employment with F. Co by virtue of which F. Co retained control over the employee's terms and employment.

The Supreme Court ruled that the stewardship activities constituted activities to protect the internal interests of F. Co in relation to the quality and confidentiality of work done and do not include '*furnishing of services*' to the I Co. Since *no services* were rendered through stewardship activities, there would be no Service PE for F. Co in relation to its employees performing stewardship activities. The Apex Court noted that employees deputed by F. Co for more than the specified period of time as given in the Indo-US DTAA would attract Service PE in India and thus I Co. would be the Service PE for F Co. in India.



Service PE

Case Law: JCB Bamford (ITA No. 540/Del/2011) dated 14.03.2014

The Delhi ITAT examined the following to determine existence of service PE

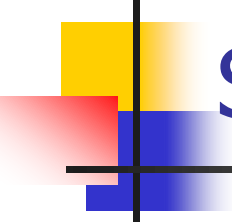
- There must be furnishing of services, including managerial services
- The services should be taxable as royalty or FTS
- Be rendered by the employees of Overseas State entity to entity in India
- The services should be rendered in India
- Threshold period of stay of 90 days or more should be satisfied

Employees seconded by JCB UK (assessee) to JCB India for doing stewardship activities, testing / inspection not to be considered for holding constitution of "service PE" as activity of inspection for the interest of supplier of know-how and not for benefit of user.

However, 8 employees seconded by JCB UK to JCB India (such as MD, Deputy MD, GM for Marketing, Quality etc) responsible for operations of JCB India, satisfy 5 tests laid under Article 5(2)(k) of India-UK treaty and constitute service PE.

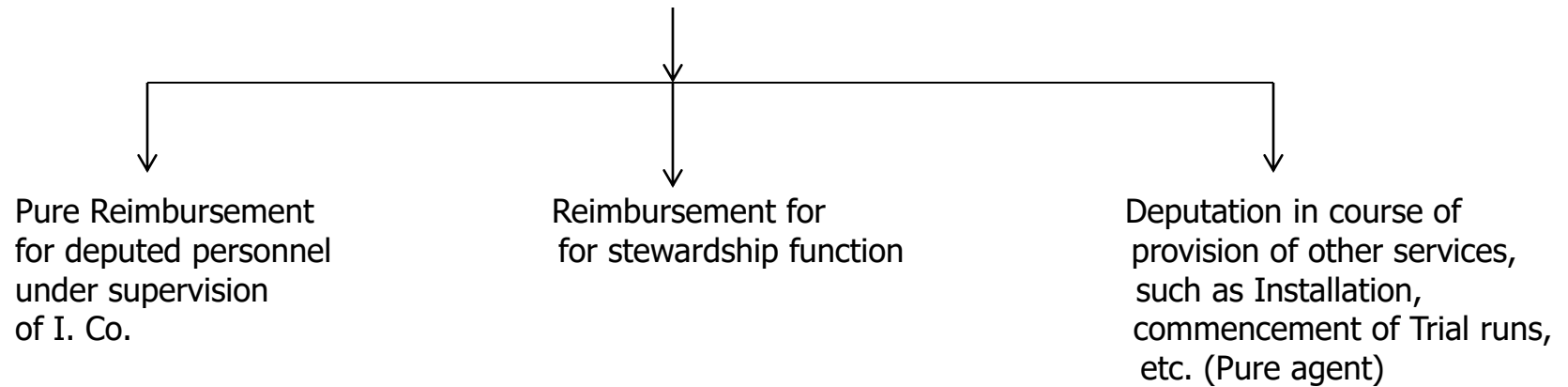
Deputed personnel continued to remain on payroll of JCB UK, maintained lien on their employment.

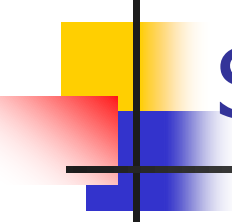
Relies on SC ruling in Morgan Stanley, rejects assessee's reliance on Mumbai ITAT ruling in Tekmark Global Solutions LLC as wholly distinguishable on facts; ITAT interprets 'effectively connected' under Article 13(6) as akin to 'really connected'; To tax FTS under Article 13(6) read with Article 7, "effective connection" is required between PE and 'contract' from which such fees resulted and not such fees for technical services per se; FTS arising out of Technology Transfer Agreement (TTA) read with International Personnel Assignment Agreement (IPAA) taxable under Article 7; However, holds composite consideration for royalty arising out of IP rights & consideration for employees rendering stewardship services, not effectively connected to PE in India



Secondment & Service Tax

Secondment / Assignment / Deputation

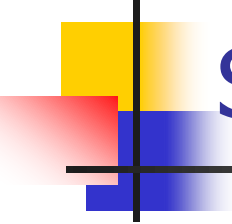




Secondment & Service Tax

If held to be contract for service (FTS or other services), Service Tax liability is triggered

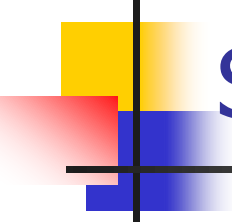
If it is contract of Employer – Employee relationship which is under negative list, payment to F. Co. may be treated as covered under negative list of services and not liable to Service Tax



Secondment & Service Tax

Issues under Service Tax:

- Service tax authorities have sought to levy service tax considering that I. Co. has received the service of 'manpower supply'.
- Such applicability is made on reverse charge mechanism on the payments made by the I. Co. whether to seconded employee or to F. Co.
- With effect from 1 July 2012, service tax is applicable on all services except for those covered in the negative list of services or exempted list of services – 'however services' specifically excludes 'services provided by an employee to an employer'



Secondment & Service Tax

Arguments in favour of Contract for Service:

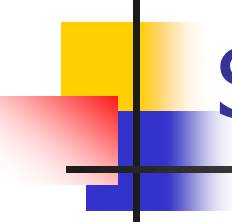
- Services are contracted with F. Co.
- F. Co. receives the remuneration for deputed employees
- No Master – Servant relationship of deputed employees with I. Co.
- Deputed employees retain the lien on their job & position with F. Co.



Secondment & Service Tax

Arguments in favour of Contract of Service:

- Pure Deputation
- Master – Servant relationship of deputed employees with I. Co.
- I. Co. (employer) exercises control and supervision, gives instructions and directions regarding the work of employee (without any interference from F. Co.)
- I. Co. has right to terminate services of employee through secondment agreement
- Obligation to pay salary / other employment costs of employee vests with I. Co. alone

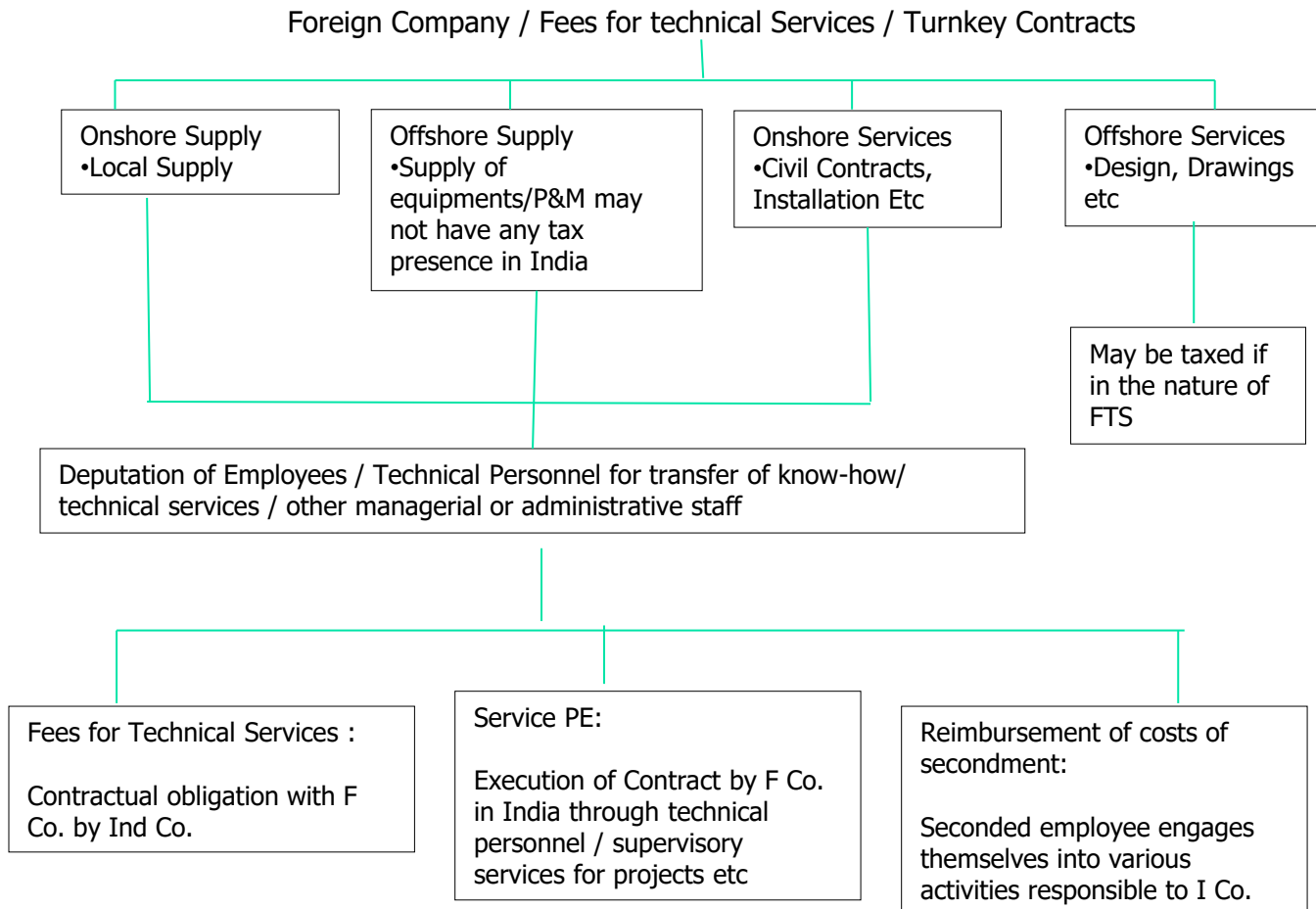


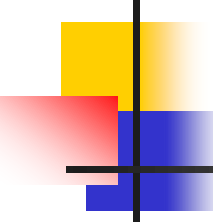
Secondment & Service Tax

Some recent Rulings:

- In case there is an employer-employee relationship between the seconded employees and the I. Co., service tax should not be applicable since the foreign company would not qualify as a 'manpower recruitment or supply agency'. Also, remittance to F. Co. towards social security benefits payable to expatriate employees under foreign laws not liable to service tax {*Computer Sciences Corp. India Pvt. Ltd. vs Commissioner of Central Excise [2014] 52 taxmann.com 256 (Allahabad)*}
- Deputation of employee makes up 'joint employment' of employee with many employers; hence sharing of employee-costs on 'actual basis' between such employers cannot amount to 'service', as there is no intention to provide /receive any service inter se between employers {*Franco Indian Pharmaceutical Pvt. Ltd. vs Commissioner of Service-Tax, Mumbai [2016] 69 taxmann.com 198 (Mumbai - CESTAT)*}

Deputation/Secondment – Scope





Deputation/Secondment – Precaution (ITA 1961)

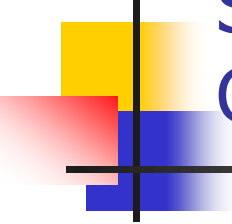
Agreement of Secondment

- ☐ All rights & rewards are with Ind Co.
- ☐ Seconded employees has no role to play in provisions of FTS
- ☐ I Co. will reimburse the cost of seconded employees borne by F Co.
- ☐ Independent Employee Agreement between I Co. & seconded personnel

EPC Contract

In case of presence of Branch/Installation PE/Sub Co. of a parent company

- ☐ Offshore Supply Contract : Local Office may avoid engaging into any negotiations or other incidental activity except a mail box type of service
- ☐ Avoid handling of clearing & forwarding activity
- ☐ FOB Contract is preferred to C&F
- ☐ Avoid any contract with F Co. where subsidiary is acting in India on behalf of F Co.
- ☐ Clear specification of role of Subsidiary Co. in the contract



Secondment – International Employment Companies

Payment by NRI from NRE A/c. on behalf F. Co. in India:

- There have been cases where the NRI shareholder of F. Co. makes payments in India on behalf of F. Co. by utilizing the balance in his NRE A/c. Such payments may be towards salary to the employees of F. Co. who are deputed outside India but are of Indian origin.
- NRI also seeks reimbursement in INR of such payments from F. Co. The issue that arises is whether the NRI has provided any service to F. Co. as payment is made in INR which is chargeable to service tax.



Secondment – International Employment Companies

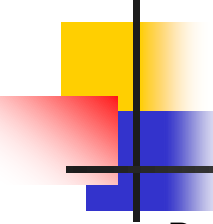
Payment by NRI from NRE A/c. on behalf F. Co. in India (con't):

Implications under Service Tax provisions:

- No employer-employee relationship exists between the NRI and the seconded employees and hence exemption from service tax cannot be claimed.

- If the NRI can establish that he is acting as 'pure agent' of F. Co. for incurring the expenditure, such reimbursement thereafter may be excluded from the value of taxable services. However, the services of the 'pure agent' should be in addition to the provision of services on his own account which may not be the case and hence he may not be able to take recourse under this method resulting in incidence of service tax.

- Since payment is made by concerned NRI on behalf of F. Co. and services of employment is between two non-residents, payment in India may not give rise to any service tax liability



Secondment – International Employment Companies

Payment by NRI from NRE A/c. on behalf F. Co. in India (con't):

Implications under FEMA:

➤ Balances in NRE A/c. can be utilized only for the NRI's bona fide purposes such as local disbursements, transfer to other NRE / FCNR (B) accounts, investments in India and remittance outside India. Payments in India on behalf of F. Co. whether as salary of employees or other expenses would not qualify as bona fide purpose and hence it may be tantamount to violation of FEMA



Secondment – International Employment Companies (con't)

Payment by F. Co. outside India on behalf of Indian resident shareholder:

There have been cases where F. Co. makes payments outside India on behalf of Indian resident shareholder. Such payments may be towards salary to the employees seconded to F. Co. or reimbursement of other expenses incurred on behalf of Indian resident shareholder such as travel, accommodation, etc.

Subsequently, F. Co. seeks reimbursement of such payments from Indian resident shareholder. The issue that arises is whether F. Co. has provided any service to Indian resident shareholder which is chargeable to service tax.



Secondment – International Employment Companies (con't)

Payment by F. Co. outside India on behalf of Indian resident shareholder (con't):

Implications under Service Tax provisions:

- If employer-employee relationship exists Indian resident shareholder and the seconded employees, service tax may not be applicable on payments made by F. Co. to such employees on behalf of the Indian resident shareholder. However, if such employer - employee relationship does not exist, as the location of recipient of service i.e. Indian resident shareholder is within the taxable territory, it may result in incidence of service tax on reverse charge basis.

- In case of other expenses, if F. Co. can establish that it is acting as 'pure agent' of Indian resident shareholder, such reimbursement may be excluded from the value of taxable services. However, as listed in Para 2.2 above, the services of the 'pure agent' i.e. F. Co. should be in addition to the provision of services on its own account which may not be the case and hence reimbursement of such expenses may result in incidence of service tax.



Secondment – International Employment Companies (con't)

Payment by F. Co. outside India on behalf of Indian resident shareholder (con't):

Issue under FEMA provisions:

- Payment by F. Co. to I. Co. as advances in nature of loan to I. Co. which is a resident Indian.

Issue under Tax provisions:

- Payment by F. Co. to I. Co. as advances - deemed dividends under Section 2(22)(e) of the Income-Tax Act, 1964



Section 192 - TDS on Salary

Salary payable for services rendered in India should be subjected to tax withholding / tax deduction at source provisions even if salaries were paid abroad

Case Law: Eli Lilly & Co. (India) Pvt Ltd [2009] 312 ITR 225

Salaries paid overseas to Managing Director for services rendered by him in India will be taxable in India as income earned in India and hence, section 192 will apply

Case Law: Kinetic Technology (India) Ltd v ITO [2005] 96 ITD 441 (Delhi)

Payment made to expatriate technicians by foreign employer, having PE in India, on account of remuneration for services rendered by them in India, is liable to tax in India irrespective of their stay in India. Therefore, foreign employer is liable to deduct tax at source U/s 192 while making such payments to expatriates.

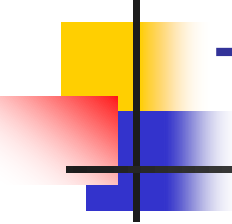
Case Law : Pride Foramer S.A. v. ACIT, [2005] 97 ITD 86 (Delhi)

Therefore, TDS has to be deducted as per provisions of section 192 for inbound expatriates.

Section 206AA of the ITA read with Circular No. 8 dtd 13.12.2010 states that in case the recipient of income does not have a PAN in India then the payer is required to apply higher of the following rates while working out TDS;

1. The normal rates in force
2. 20%

Therefore, all inbound expatriates must apply for and obtain PANo. in India



TDS on Salary

Can the employer consider the relief available to the employee under the relevant DTAA while deducting TDS from salary payments?

The Act does not specifically provide whether a relief under the provisions of DTAA between India and foreign country can be considered by the employer, while estimating the taxes to be withheld from the employee's salary.

Case Law: Rajagopal (P.V) v Union of India (233 ITR 678)

The scheme of deduction of tax at source is intended to be of benefit to the taxpayer as well, apart from regularly collecting the tax painlessly. But such a scheme cannot be abused by collecting more than the tax leviable and driving the assessee to wait indefinitely for refunds.

Case Law: British Gas India Ltd[2006] 285 ITR 218 (AAR)

Indian Co. was not required to withhold taxes on the salary paid in India to employees deputed to UK if it is satisfied that such salary is taxable in UK and not in India.



Conversion Rate for Salary earned in Foreign Currency

Rule 26 – applies for TDS provisions

Rule 26

For the purpose of **deduction of tax at source** on any income payable in foreign currency, the rate of exchange for the calculation of the value in rupees of such income payable to an assessee outside India shall be the **telegraphic transfer buying rate** of such currency as on the **date on which the tax is required to be deducted at source** under the provisions of Chapter XVIIB by the person responsible for paying such income.

Section 192 - TDS on Salary

Any person responsible for paying any income chargeable under the head "Salaries" shall, at the **time of payment, deduct income-tax** on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the **assessee** under this head for that financial year

Therefore, TDS on Salary is to be deducted at the time of payment at the exchange rate in force on that date



Conversion Rate for Salary earned in Foreign Currency

Rule 115 – read w.r.t Section 15

Rule 115

The **rate of exchange** for the calculation of the value in rupees of any income accruing or arising or deemed to accrue or arise to the assessee in foreign currency or received or deemed to be received by him or on his behalf in foreign currency shall be **the telegraphic transfer buying rate** of such currency **as on the specified date**.

(Specified Date for Income chargeable under the head Salaries is the **last day of the month** immediately **preceding the month** in which the **salary is due** or in advance or in arrears)

Section 15

The following income shall be chargeable to income-tax under the head “Salaries” —

- (a) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;
- (b) any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became due to him;
- (c) any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer, if not charged to income-tax for any earlier previous year.

Therefore, Salary is chargeable to tax on accrual basis at the exchange rate in force on that date



Tax Residency Certificate (TRC)

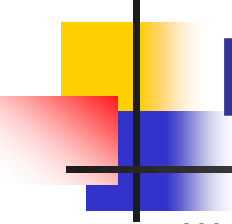
Any Non Resident assessee who is availing the benefits of the DTAA needs to obtain a TRC from the government of the foreign nation in which he is a resident. The TRC is to be duly verified by the revenue authority issuing such certificate.

The Finance Act, 2012 inserted sub-section (4) to section 90 and 90A of the ITA w.e.f 01.04.2013, which makes it mandatory for Non Resident assessees to submit TRC for availing the benefits of the DTAA. If the TRC is not produced, then the assessee shall not be able to apply the beneficial provisions of the DTAA. Also, if Non Resident has not obtained PAN in India, penal withholding of section 206AA may apply.

The Finance Act, 2013 inserted sub-section (5) to section 90 and 90A of the ITA w.e.f 01.04.2013, which provide that the Non Resident assessees shall submit such documents and information as may be prescribed in addition to TRC. Such particulars have been prescribed in Form 10F.

Further, taxpayers, who are residents of India, requiring a TRC to be furnished in other foreign countries, can make an application to the concerned Assessing Officer in Form 10FA along with the relevant documents supporting the information stated therein. Upon receipt of TRC request, the tax authorities will issue the TRC in Form 10FB after being duly satisfied of the claim.

TRC is valid for a period as specified in the Form 10FB, generally 1 financial year.



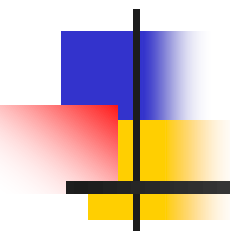
Foreign Asset Disclosure in Return

W.e.f F.Y 2011-12, while filing the Income Tax Return, details of foreign assets held by Residents of India has to be disclosed.

This applies to both Indian as well as Foreign Citizens who are Residents as per the Income Tax Act.

Details of assets in foreign country to be disclosed are as under;

1. Foreign Bank accounts (Name & Address of Bank, Name appearing in account, Peak Balance during the year (in Rs.))
2. Financial Interest in any entity (Name & Address of Entity, Total Investment at cost (in Rs.))
3. Immovable properties or other assets located outside India (Nature of asset, address of property, Total investment at cost (in Rs.))
4. Any account located outside India in which assessee has signing authority (Name & Address of Account, Name appearing in account, Peak Balance or Investment during the year (in Rs.))



Thank You
