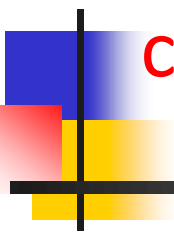


NAVI MUMBAI BRANCH OF WIRC OF ICAI

ICAI Intensive Course on International Taxation

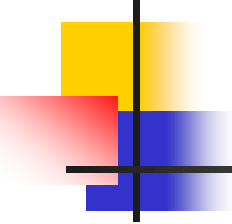
Presentation on Understanding tax treaties & credit for double tax including underlying tax credit



Presented by:
Mr. Paresh P. Shah

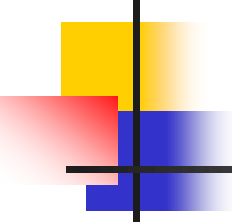
P.P. Shah & Associates
Chartered Accountants

Email: ppshahandassociates@gmail.com



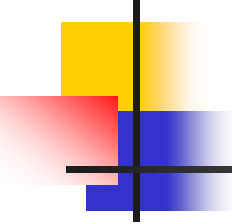
Overview of Presentation

- Treaties: Types of Double Tax Avoidance Treaties / Double Tax Convention (DTC)
- Purpose and Objective of the DTC
- Treaties – Legal Status and Model Tax Conventions
- Structure of Tax Treaties – OECD Model
- Tax Treaties and Domestic tax law
- Distributive Rule (Allocation of taxing rights)
- Application of Tax Treaty (Scope & entitlements to DTC)
- Model commentaries
- Interpretation of Tax Treaties
- OECD model & India



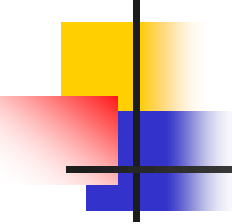
Types of Treaties

- Double Tax treaties
- Bilateral Investment treaties
- Preferential trade and investment agreements
- Shipping and Air Transport treaties
- Multilateral Tax treaties
- Multilateral directives on taxation and mergers



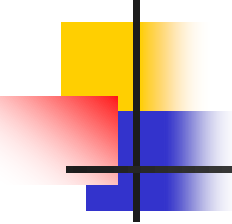
Purpose & Objective of DTC

- Elimination of Double taxation
- Certainty of tax treatment
- Prevention of Fiscal evasion
- Prevention of tax discrimination
- Resolution of tax disputes
- Lower compliance cost
- Limitation of taxation of cross border transactions / trade



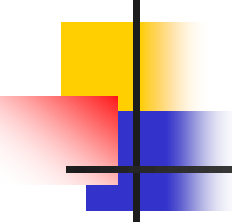
Treaties – Legal Status

- A formal agreement between two or more sovereign states
- Phases: Negotiations, Signature, ratifications and entry into force
- Country's view on these agreements and International law
 - Treaty prevails over domestic law
 - Treaty is nothing but the part of domestic law
- Restricts the national taxing powers of cross border transaction



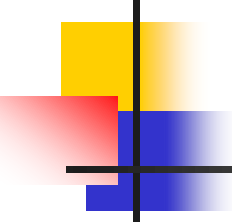
Model Tax Conventions

- Model Tax Convention – A need
- Scope of Model Conventions & its content
- Legal standing & acceptance of Model DTC
- League of Nations models 1928 -1946
- OECD Model – 1963, 1977, 1992 and so on
- UN Model – 1980 and 2001
- CIAT Model, ASEAN Model
- National Models e.g. US Model, Netherlands Model, etc.



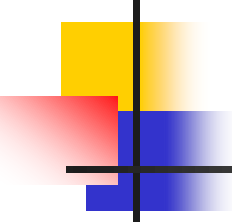
OECD Model Convention

- Provides uniform basis to address common problems that arise in cross border taxation, typically Source - Residence conflict situations [Need of a model]
- Nature of OECD Model Convention
 - It is a model agreement used to initiate negotiations
 - Interpretation of each Article is provided as commentary which is binding to the member nations
 - Members can declare their reservation on the model or the commentary



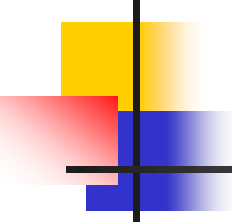
OECD Model Convention (con't)

- Revision and updates to OECD model
 - Changing business and transaction pattern
 - Changing members' thoughts and reflect their views, comments & reservations
- Significance of Commentary
 - Basic document with interpretation informed in advance
 - Non members' view included since 1997
 - India's view considered as observer in 2006



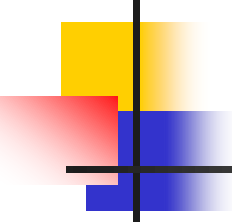
Structure of OECD Model

- Articles 1, 2 & 29: Scope of the Convention [Persons, Taxes covered & Territorial extension]
- Articles 3, 4, 5: Definitions (Misc. defn., Resident & PE)
- Articles 6 to 21: Taxation of various types of income
 - Shared allocation of taxes, and
 - Exclusive allocation of taxing rights
- Articles 23A & 23B: Elimination of Double taxation
 - Exemption method (Article 23A)
 - Credit method (Article 23B)
- Articles 24 to 28: Special provisions
 - Procedural rules (Articles 25, 26 & 27 resp. about MAP, information exchange & assistance in collection of taxes)
 - Principles (Article 24 & 28 resp. about non-discrimination of diplomatic persons)



Structure of OECD Model (con't)

- Articles 30 & 31: Final provisions (Entry into force & Termination resp.)
- Article 25: Can also be considered with Articles 23A & 23B
- Articles 9 & 26: Can also be considered as Anti-Avoidance provisions of the Treaty



Tax Treaties and Domestic Law

- Constitutional reference
- Information as to tax law & its position as to treaty in the domestic tax laws
- No interference of Domestic law
- Treaty derives support from tax laws as per Article 3(2) of the Model
- Domestic law comply with the Treaty
- Changes in Domestic law after execution of Treaty
- GAAR and specific Anti-Abuse provisions
- Most of administrative processes as to method for collection of tax, computational mechanism are left to DTC



Distributive rule (Allocation of taxing rights)

Exclusive Allocation	Shared Allocation
▪ Income shall be taxable only ➤ In state of Residence: Articles 7, 8, 12, 13 (3), 13(5), 15, 18, 21 ➤ In State of Source: Article 19 ▪ No Double Taxation	▪ Income may be taxed ➤ Articles 6, 7, 10, 11, 13(1), 13(2), 13(4), 15, 16, 17, 19 ▪ Both States tax the income ➤ Primary allocation is to Source State ➤ Secondary allocation is to State of Residence which may tax and give relief

Distributive rule (Allocation of taxing rights) con't

Article	Source State taxation & basis	Resident State taxation
6. Immovable Property: Income derived by a resident of a contracting state from immovable property (incl. income from agriculture or forestry) situated in the other contracting state may be taxed in that other state	"situation of immovable property" "may be taxed in that other state"	"in case derived by a resident" No specific mention of resident taxation
7. Business Profits: The profits of an enterprise of a contracting state shall be taxable only in that state unless the enterprise carries on business in the other contracting state through a PE situated therein in which case, the profits may be taxed in the other state but only so much as is attributable to PE	PE situated in source state "may be taxed in the other state"	"shall be taxable only in that state"



Distributive rule (Allocation of taxing rights) con't

Article	Source State taxation & basis	Resident State taxation
8. Profits from International Traffic: Profits from operation of ships or aircraft in international traffic shall be taxable only in the contracting state in which the place of effective management of the enterprise is situated	No source taxation	"shall be taxable only in the contracting state in which POEM of the enterprise is situated"
10. Dividends: Dividends paid by a company which is a resident of a contracting state to a resident of the other contracting state may be taxed in that other state	Dividend paid by a company "may also be taxable"	"may be taxed in that other state"



Distributive rule (Allocation of taxing rights) con't

Article	Source State taxation & basis	Resident State taxation
11. Interest: Interest arising in a contracting state and paid to a resident of the other state may be taxed in that other state 12. Royalties: Royalties arising in a contracting state and beneficially owned by a resident of the other contracting state shall be taxable only in that other state	"Interest arising in a contracting state" "may also be taxed in the state where it arises" No source taxation	"may also be taxed" "beneficially owned" "shall be taxable only in that other state"



Distributive rule (Allocation of taxing rights) con't

Article	Source State taxation & basis	Resident State taxation
13. Capital Gains: (1) Gains derived by a resident of a contracting state from the alienation of immovable property referred to in Article 6 and situated in the other contracting state may be taxed in that other state (2) Gains from alienation of movable property forming part of the business property of a PE may be taxed in that other state where PE is situated	Situation of immovable property "may be taxed in that other state" Situation of PE "may be taxed in that other state"	No specific mention Gains derived No specific mention



Distributive rule (Allocation of taxing rights) con't

Article	Source State taxation & basis	Resident State taxation
13. Capital Gains: (3) Gains from alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to such operation shall be taxable only in the contracting state in which place of effective management is situated (4) Gains derived by a resident from alienation of shares deriving more than 50% of their value directly or indirectly from immovable property situated in the other state may be taxed in that other state	No source taxation Situation of immovable property "may be taxed in that other state"	"POEM is situated" "shall be taxable only in contracting state" "Gains derived" No reference in resident state



Distributive rule (Allocation of taxing rights) con't

Article	Source State taxation & basis	Resident State taxation
13. Capital Gains: (5) Gains from the alienation of any property, other than that referred to in Para.s 1, 2, 3, & 4 shall be taxable only in the contracting state of which the alienator is a resident	No source taxation	Gains from all other properties "shall be taxable only in the contracting state"
15. Dependent Personal Services: Subject to Articles 16, 18 & 19, salaries, wages and other similar remuneration derived by a resident in respect of an employment shall be taxable only in that state unless employment is exercised in the other state in which case it may be taxed in that other state	"Employment is exercised in that other state" "may be taxed in that other state"	"Remuneration derived by a resident" "shall be taxable only in that state"



Distributive rule (Allocation of taxing rights) con't

Article	Source State taxation & basis	Resident State taxation
16. Directors' Fees: Directors' fees and other similar payments derived by a resident of a contracting state in his capacity as a member of the board of directors of a company which is a resident of the other state maybe taxed in that other state	Company resident in source state "may be taxed in that other state"	No reference to resident taxation of Directors' state
17. Artists and Sportspersons: Notwithstanding Articles 7 & 15, income derived by a resident of a state as an entertainer or as a sportsman from his personal activities as such exercised in the other state may be taxed in that other state	"Personal activities exercised in other state" "may be taxed in that other state"	Resident of a state No specific reference



Distributive rule (Allocation of taxing rights) con't

Article	Source State taxation & basis	Resident State taxation
18. Pensions & Social Security payments Subject to Article 19(2), pensions and similar remuneration paid to a resident of a contracting state in consideration of past employment shall be taxable only in that state	No source state taxation	“paid to a resident” “shall be taxable only in that state”
19. Government Service: Salaries, wages other than pension paid by a contracting state or a political subdivision or a local authority thereof to an individual in respect of services rendered shall be taxable only in that state	Services rendered to state “shall be taxable only in that state”	No reference to resident state taxation of the employee

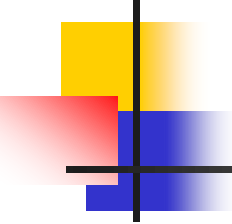


Distributive rule (Allocation of taxing rights) con't

Article	Source State taxation & basis	Resident State taxation
20. Students: Payments which a student or business apprentice who is or was immediately before visiting a contracting state a resident of the other contracting state and who is present in the first-mentioned state solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that state, provided that such payments arise from sources outside that state	"Payment arises from services outside that state" "shall not be taxed in that visiting state"	No reference to state from which payment is received Its taxation in the state where student was resident before his / her visit

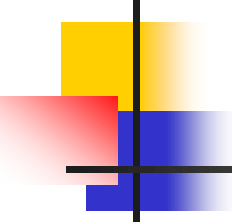
Distributive rule (Allocation of taxing rights) con't

Article	Source State taxation & basis	Resident State taxation
21. Other income: Items of income of a resident of a contracting state, wherever arising, not dealt with in the foregoing Articles shall be taxable only in that state	Irrespective of its accrual No Source taxation	"wherever arising" "shall be taxable only in that state"
22. Capital: Capital represented by immovable property referred to in Article 6, owned by a resident of a contracting state and situated in the other state, may be taxed in that other state	Situation of immovable property "may be taxed in that other state"	No reference to taxation in resident state



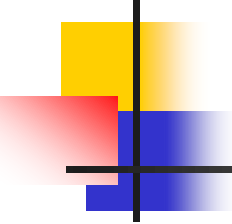
Article 12 of OECD Model

- Royalties arising in a contracting state and beneficially owned by a resident of the other contracting state shall be taxable only in “that other state”
 - Resident’s state exclusive right
 - “arising in a state and beneficially owned” by resident of “the other contracting state”



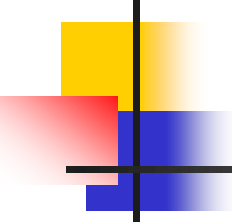
Article 11 of OECD Model

- Para 1: Interest arising in a contracting state and paid to a resident of the other contracting state may be taxed in that other state
- Para 2: However, such interest may also be taxed in the contracting state in which it arises but the tax so charged shall not exceed 10% of the gross amount of the interest
 - Shares taxation rights, primary right to source state arising in a state and paid to resident of the other contracting state



Articles 6(1) and 19(1) of OECD Model

- Article 6(1) of the Model:
Income derived by a resident of a contracting state from Immovable property situated in the other contracting state may be taxed in that other state
- Article 19(1) of the Model:
Salaries paid by a contracting state to an individual in respect of services rendered to that state “shall” be taxable only in that state
[Payment by contracting state itself]



Overall Allocation of Income

R State

S State

Article 12, 18, 21 (exclusive taxation of R state)

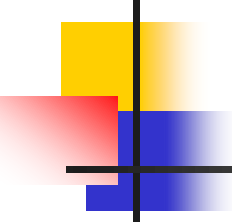
(a sharing rule) → Article 10, 11

(state shares income

only if conditions are satisfied)

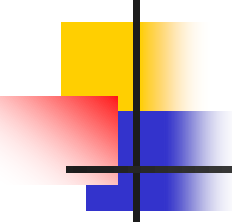
Article 6, 7 or 15

(exclusive taxation of S state) Article 19



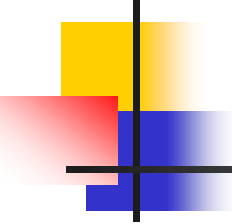
Scope and Entitlement to Treaty benefits

- Section 90 and 91 of the ITA-DTC or Act, Year wise(Business Income only), Head wise, or otherwise.-A common Sense Approach
- Article 1:Personal scope, Article 2:Taxes covered, Article 29:Territorial scope
- Article 3(1)(a): An individual, a company and any other body of persons
- Resident – Article 4: Liable to tax in a state by reason of domicile, residence or place of management and similar criteria Contracting State: A state which is/are party to the DTC



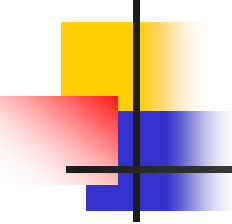
Scope and Entitlement to Treaty benefits (con't)

- Persons who are resident Article 1
- Person is defined Article 3(1)(a)
- Persons who are resident and liable to tax in the contracting state defined Article 4(1)



Scope and Entitlement to Treaty benefits (con't)

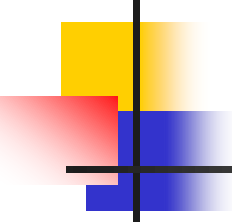
- Article 2(1)
Taxes covered: Taxes on Income or Capital irrespective of the body levying the taxes, except certain taxes
- List of Taxes: Income Tax, Corporation Tax, Wages tax, Dividend Tax
- Article 2(4)
 - Replacement of Tax by an another type of tax then Treaty remains applicable
 - Notification of changes required
- Article 29: Territorial scope: Land, Water, Continental Shelf and Economic Zone



Tax Credit

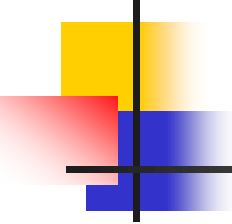
- Article 23A & Article 23B
- Two Methods
 - Exemption Method
 - Credit Method-

Each state provides ordinary credit in different form such as Unilateral Credit, Full Credit, Ordinary Credit, Tax sparing Credit and Underlying Tax credit. Credit with Progresion (Foreign Income included for Rate purposes)



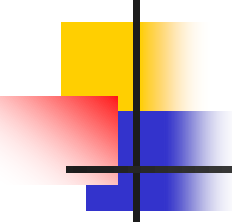
Tax Credit (con't)

- Article 23A – Exemption Method
1. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall, subject to the provisions of paragraphs 2 and 3, exempt such income or capital from tax.
 2. Where a resident of a Contracting State derives items of income which, in accordance with the provisions of Articles 10 and 11, may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the tax paid in that other State. Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is attributable to such items of income derived from that other State.



Tax Credit (con't)

- Article 23A – Exemption Method (con't)
-
3. Where in accordance with any provision of the Convention income derived or capital owned by a resident of a Contracting State is exempt from tax in that State, such State may nevertheless, in calculating the amount of tax on the remaining income or capital of such resident, take into account the exempted income or capital.
 4. The provisions of paragraph 1 shall not apply to income derived or capital owned by a resident of a Contracting State where the other Contracting State applies the provisions of this Convention to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10 or 11 to such income.



Tax Credit (con't)

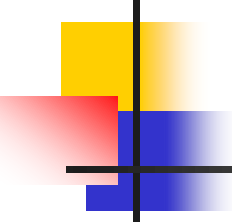
- Article 23B – Credit Method

1. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall allow:

(a) as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in that other State;

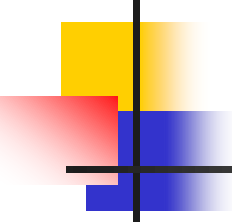
(b) as a deduction from the tax on the capital of that resident, an amount equal to the capital tax paid in that other State.

Such deduction in either case shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the capital which may be taxed in that other State.



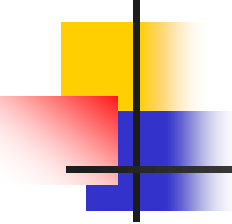
Tax Credit (con't)

- Article 23B – Credit Method (con't)
- 2. Where in accordance with any provision of the Convention income derived or capital owned by a resident of a Contracting State is exempt from tax in that State, such State may nevertheless, in calculating the amount of tax on the remaining income or capital of such resident, take into account the exempted income or capital.



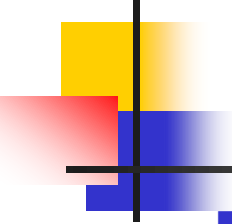
Tax Credit (con't)

- Issues arising in Tax Credits
 - Mismatch of timing
 - Conflict of Characterisation
 - Conflict of Attribution
 - Double Non-taxation
 - Domestic Tax Credit Rules-Attributable Foreign Income, MAT and Exempt Income. MAT on Exempt and Foreign Income ,Foreign Tax and MAT.
 - Controlled Foreign Company (CFC) Rules
 - Inappropriate application of Tax Treaty - TDS



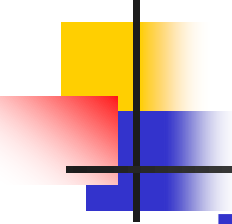
Interpretation of Tax Treaties and important phrases

- Principles of interpretation – General
- International law of states
- Vienna Convention
- Commentary on Model Code
- Role of Judicial decisions
- Protocols explaining the Article and its interpretation
- Treaty with similar provisions
- Treaty override
- Terms not defined in the Treaty [Article 3(2)]
- Ambulatory vs static approach
- Most favoured nation (MFN) clause in the Treaty
- Revised commentary and its implication
- Beneficial ownership [Articles 10, 11, 12]
- Treaty shopping & limitation of tax treaty
- Limitation on benefits Article in US Model



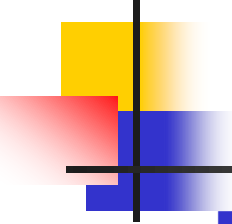
OECD's recent initiatives

- 2014 update to the OECD Model Tax Convention approved on 16 July 2014
- Reflects work on the Model Tax Convention that was carried out between 2010 and the end of 2013:
 - Changes to Article 26 and its Commentary (17 July 2012)
 - The application of Article 17 (Artistes and Sportsmen) of the OECD Model Tax Convention (23 April 2010)
 - Revised proposals concerning the meaning of “beneficial owner” (19 October 2012)
 - Revised discussion draft on tax treaty issues related to emissions permits and credits (19 October 2012)
 - Tax treaty treatment of termination payments (25 June 2013)
 - Technical changes to be included in the next Update to the Model Tax Convention (15 November 2013)



OECD's recent initiatives (con't)

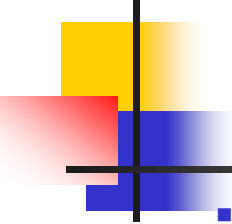
- BEPS Action Plan published in July 2013
- Action Plan on Base Erosion and Profit Shifting (BEPS) identifies 15 actions to address BEPS
- The Action Plan recognises the importance of addressing the digital economy, which offers a borderless world of products and services that too often do not fall within the tax regime of any specific country, leaving loopholes that allow profits to go untaxed
- The actions outlined in the plan to be delivered in coming 18 to 24 months by the joint OECD/G20 BEPS Project



OECD's recent initiatives (con't)

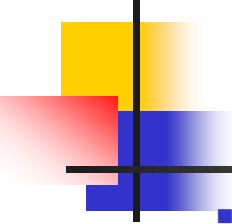
- Residence – the meaning of (Article 4)

- (a) Clarifications on “liable to tax” in respect of state and exempt entities
- (b) If a person is resident as per tax law but not resident as per tax law, then it may not be subjected to comprehensive tax liability in state where it is not resident for treaty purposes
- (c) Concept – Place of Effective Management
 - Dual resident co's - decision is left to Competent Authorities on a case to case basis; Shift in the definition of POEM
- (d) Treaty entitlements of Collective Investment vehicles - update in commentary to Article 4(1) completed
- (e) Revised commentary as Article 5 & 12 to address treatment of payment for satellite capacity, cable rights, phone lines, spectrum licenses and roaming payments
- (f) Treaty application to sovereign funds



OECD's recent initiatives (con't)

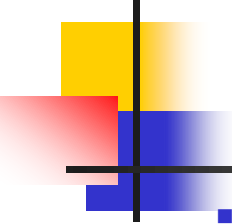
- Permanent establishment
 - ▶ Guidelines for taxing services by source State incorporated (Article 5)
 - ▶ Application of PE test to each source of profit in the PE State; no aggregation of profits
- Taxation of services (Article 5)
 - ▶ December 2006: Released discussion draft entitled 'The Tax Treaty Treatment of Services'
 - ▶ Suggests inclusion of new paragraph as extension of Permanent Establishment
 - ▶ Broad guidelines as recommended incorporated in the 2008 Update
- Guidelines for taxing services by source State incorporated in 2008 Update
 - ▶ Services performed outside the territory of the source State not covered
 - ▶ Application only to profits from services rather than to gross amount of service fees
 - ▶ A minimum level of presence in the source State, requiring minimum days presence and a nexus between the revenues and the nature of business activities performed
- Discussion draft on Trading of emissions permit report published on 16.11.2011



OECD's recent initiatives (con't)

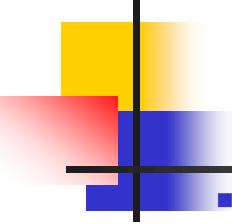
■ Attribution of profits (Article 7)

- ▶ Released 'Report on Attribution of Income' dt. 21.12.2006
 - Part I: on General Considerations
 - Part II: on Banks
 - Part III: on Global Trading
 - Part IV: on Insurance services
- ▶ New version of Article 7 included in the OECD MC Update dt. 22.01.2010 based on the view that tax authority should look into separate source of profit that the enterprise derive from their country as the basis and as if it is dealing with 'the separate enterprise' in other state, in place of dealing with "rest of the enterprise"



OECD's recent initiatives (con't) - PE (Article 5 & 7)

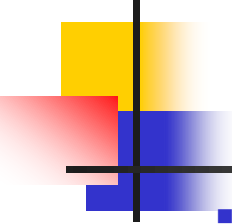
- Profit attribution to PE
 - ▶ PE State taxing rights limited to only profits which are attributable to PE
 - ▶ Reinforces notion of 'separate & distinct enterprise'
 - ▶ Two-step approach prescribed to determine profits attributable to a PE
 - ▶ Step 1: Functional & factual analysis to attribute functions, risk, capital & assets
 - ▶ Step 2: Determine profits by application of arms' length principles
 - ▶ No overall ceiling/limitation; could result in profits for PE even though loss for the enterprise as a whole or vice versa
 - ▶ Application of symmetrical approach by head office state and PE state
- Following Articles are deleted
 - ▶ Article 7(4): Use of apportionment methods
 - ▶ Article 7(5): No attribution for purchasing function
 - ▶ Article 7(6): Use of same method from year to year



OECD's recent initiatives (con't)

- Transfer pricing guidelines (TPG)
 - ▶ Review of comparability & profit-based methods
 - ▶ Advocates 'most appropriate method' analysis
 - ▶ Use of more than one method to corroborate or 'sanity check' the results
 - ▶ A new guidance on comparability

- Business re-structuring
 - ▶ Treaty & TP issues arising from business re-structuring/centralized structures
 - ▶ Constitution of a Working Group to look into three broad areas:
 - ▶ Recognition of transactions presented by a taxpayer
 - ▶ Transfer pricing consequences for transactions which are not subject to re-characterization
 - ▶ PE issues – General review
 - ▶ Report on TP aspects of BR
 - ▶ TP aspects of intangibles
 - ▶ New Chapter IX added in TPG



OECD's recent initiatives (con't)

- Tax treatment of Real Estate Investment Trusts (REIT) (Article 10 & 13)
 - ▶ Fundamental principle - State where real property is located should have the primary right to tax income
 - ▶ Concept of Portfolio Investor in REIT

- Interpretation of the term 'employer' (Article 15)
 - ▶ Absence of definition of 'employer' in the OECD MC led to conflicts in interpretation
 - ▶ Presently, OECD MC covers only abusive cases of international hiring-out of labour
 - ▶ March 2007: Revised earlier discussion draft to cover all cross-border secondments
 - ▶ Final report released on 21.05.2010
 - ▶ Commentary now revised as 2010 update



OECD Model – Profit Attribution to PE (Article 7)

■ Building site/construction/installation PE

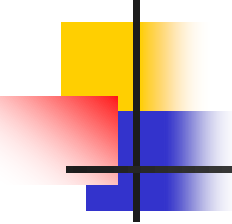
- ▶ Attribution only when activities carried on by the enterprise through the PE (Para 24 of MC)
- ▶ Goods supplied by other parts of the enterprise, though in connection with the PE are not 'carried on through the PE', hence supply profits not attributable (Para 25 of MC)
- ▶ Provision of services (planning, designing, drawing blueprints, technical advice) provided from outside the State of PE, hence such profits not attributable (Para 25 of MC)
[India is not in agreement with Para 25]

■ Agency PE

- ▶ Attribution to dependent agent (DA) PE based on activities undertaken on behalf of the enterprise
- ▶ Profits attributed will be separate from the income or profits attributable to the Dependent Agent

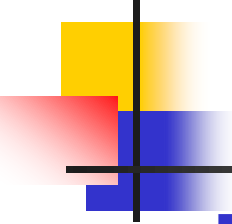
■ Expense/interest attribution

- ▶ Deductibility subject to domestic law provisions
- ▶ Interest on 'internal' loans not to be recognised by enterprises other than financial enterprises
- ▶ Approaches to attribution of arms' length interest after attribution of 'free' capital explained



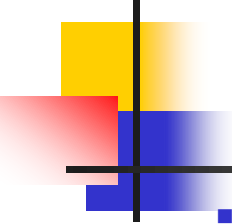
OECD Model – Royalties (Article 12)

- Royalties and know-how (clarifications introduced):
 - ▶ Transfer of full ownership of an element of property - not royalty
 - ▶ Difficulties can arise in case of software, alienation of time-limited/geographic-limited rights
 - ▶ Territory specific exclusive distribution rights of product/service – business profits
 - ▶ Royalty refers to pre-existing property (design, model or plan), else services
 - ▶ Right to modify/reproduce without actually performing any additional work – royalty
 - ▶ Information concerning industrial, commercial or scientific experience refers to know how / undivulged information arising from previous experience
 - ▶ Payments for new information, not royalty but provision for services (e.g. developing list of potential customers from available data); confidential customers list to which the payee has provided a particular product/services – Know-how
 - ▶ Software distribution to a distribution intermediary without right to reproduce – business income
- Discussion Draft on meaning of beneficial owner published on 29.4.2011
- India's position:
 - ▶ Some of the above payments may constitute Royalty and about information, it is not only confined to previous experience



OECD Model – Articles 15, 17 & 23

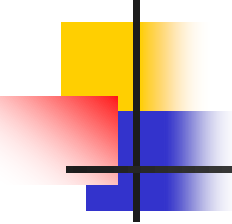
- Article (15)
 - ▶ How to calculate 183 days clarified
 - ▶ Taxation of stock option is clarified
 - ▶ Short term assignments and deputation to other states:
Commentary now revised
- Article (17)
 - ▶ Option provided to the recipient to opt for net basis taxation
 - ▶ Discussion Draft is published on 23.04.2010 and comments on 16.08.2010
- Article (23): TRACE Projects
 - ▶ Treaty relief and compliance enhancement project: Implementation Package endorsed in Jan. 2013



OECD Model – Other amendments

- Non discrimination (Article 24)
 - ▶ Amendments seeking to clarify interpretation
 - ▶ Could potentially dilute effect of non-discrimination principle in tax treaties
 - ▶ Work on Phase II is on

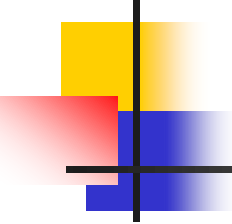
- Dispute resolution through Arbitration (Article 25)
 - ▶ Integral part of MAP, not an alternative or additional recourse, while case resolution takes place through MAP, a particular issue may be resolved through arbitration
 - ▶ Distinguishable from commercial or government-private party arbitration where the jurisdiction of the arbitral panel extends to resolving the whole case
 - ▶ Application can be restricted to a range of cases, for e.g. issues which are primarily factual in nature
 - ▶ Recourse to arbitration process is not automatic; initiation on request by taxpayer
 - ▶ Issues already resolved through domestic litigation process cannot be pursued
 - ▶ Sample mutual agreement on arbitration provided with notes on general approach



OECD Model – Other amendments (con't)

- Dispute resolution
 - ▶ Final report, including manual on effective MAP released in February 2007
 - ▶ Builds on EU Arbitration Convention
 - ▶ Broader access to MAP
 - ▶ If MAP not resolved within 2 years, arbitration process can be initiated
 - ▶ 25 'leading practices' for better application of dispute resolution
 - ▶ Incorporated in 2008 Update to OECD MC: new clause on arbitration introduced; consequential changes made in commentary

- MAP statistics 2010 published on 08.12.2011



OECD Model & India

Persons Covered [Article 1 & 3]

- Treaty benefits to 'pass through' entities
 - OECD MC amended in 2000 to address treaty eligibility to tax transparent entities; where entities denied, its members/partners to be considered as eligible
 - **India's position: This result is possible only and to the extent provisions to that effect are included in the tax treaty (e.g. Article 4(1)(b) of India – US tax treaty)**

Resident [Article 4]

- POEM in determining residence
 - Residency of dual resident entity is determined having regard to its POEM (place where key management/commercial decisions necessary for the conduct of the entity's business as a whole are in substance made)
 - **India's position: In determining POEM, place where the main and substantial activity of the entity is carried on is also to be considered**



OECD Model & India – Key deviations

– Fixed Place PE (Article 5)

OECD position	India's position
Stated examples (branch, factory, office, etc.) – PE only if business of the enterprise is carried on through it 2003 update provides guidance on - ➤ Existence of geographic and commercial coherence ➤ Illustrations included by examples – no coherence, no PE Mere leasing of tangible / intangible property without maintenance – no PE for lessor	Stated examples in all cases will necessarily be regarded as PE ➤ PE possible even where no geographical / commercial coherence ➤ Examples could also be regarded as PE Tangible / intangible properties by themselves could constitute PE in certain circumstances (No guidance on certain circumstances)



OECD Model & India – Key deviations

OECD position	India's position
<u>Agency PE</u> Mere attending or participating in the negotiations by itself not sufficient to conclude that authority to conclude contracts is exercised	<u>Agency PE</u> In certain circumstances, mere participation is sufficient for the conclusion. Authority to negotiate essential elements (not necessarily all) of a contract is sufficient



OECD Model & India – Key deviations

OECD position	India's position
<u>Electronic Commerce</u> 2003 update clarifies: (a) Server may constitute fixed PE for enterprises operating the server (b) Website on server which is at the disposal of enterprise may constitute PE (c) Website cannot create a PE as it is not a tangible property and lacks location (d) No 'place of business' merely by hosting a website on a particular server at a particular location (e) Hosting typically involves a service contract	<u>Electronic Commerce</u> In certain circumstances, website – (a) can create a PE (b) may be considered as having a 'place of business' by virtue of hosting a website on a particular server at a particular location Certain circumstances not clarified



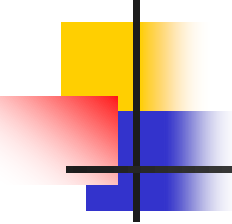
OECD Model & India – Key deviations

OECD position	India's position
<u>Services PE</u> No specific rule on PE creation on account of furnishing of services. 2008 update has provided guidance for including this concept, broadly: (a) Services performed outside the state – no taxation by source country (b) Requirement of minimum level of presence in source state (c) Taxation on gross basis not appropriate (d) On principle, no different than import of goods	<u>Services PE</u> Most of India's Tax Treaties contain this clause: (a) Taxation rights even when services are furnished from outside that state (b) Presence not relevant (c) Taxation on gross basis is also appropriate and should be provided as an alternative (d) Principle applicable to profit from sale of goods not applicable to taxation of services



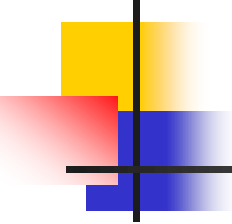
OECD Model & India – Key deviations

OECD position	India's position
<u>Subsidiary as PE</u> 2005 update clarifies that a company cannot have a PE in another country merely because it purchases goods manufactured by an affiliate in that country or the affiliate supplies services <u>Construction PE</u> For Construction PE, 12 month test applies to each individual project	<u>Subsidiary as PE</u> Where a group company manufactures goods or provides services for or on behalf of a foreign enterprise, the first mentioned company could constitute a PE if the other requirements of the definition are also satisfied <u>Construction PE</u> A series of consecutive short term sites or projects operated by a contractor would give rise to PE PE profits attributable to Construction PE commentary Para 25 is not acceptable to India (Refer to Slide 35)



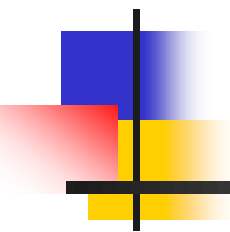
OECD Model & India

- Attribution of profits to a PE – Article 7
 - India does not concur with the OECD's view of limited circumstance for application of formulary apportionment
- Taxation of Royalties
 - OECD MC revised in 1992 to provide guidance on classification of software license transactions, refined in 2000 update. 2008 update includes clarifications on issues relating to classification of intangible transactions
 - India has reserved its position on the OECD's interpretation and classification of intangibles transactions as in its view some payments may constitute royalties [Refer to Slide 38]
- Invoking MAP to resolve double taxation disputes – Article 25Use of MAP to settle disputes from transfer pricing adjustments
 - India's position: In the absence of specific provision for correlative relief in a tax treaty, MAP cannot be invoked by a taxpayer-Now Being considered in favour of MAP



Implication of India's position

- Guide to taxpayers on likely approach of Indian tax authorities
- India's tax treaty policy in future tax treaty negotiations / renegotiations
- Could it be regarded as an aid for interpreting tax treaties by Courts in India?
 - Tax treaties entered into prior to July 2008
 - Tax treaties entered post July 2008
- Ambiguity / uncertainty in some of India's positions – use of 'in certain circumstances' while expressing reervations
- Significant departure from OECD's position on some key aspects
- Cause of concern for foreign companies doing business in India on the extent of deviations they may encounter in application of a tax treaty



Thank You
