



Most Favored Nation

Certificate Course on International Taxation, Chennai

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MFN Principle

- State A binds itself to State B with respect to favorable treatment afforded by it in future to State C
- Generally arises on account of differences in tax structure
 - Passive v. active income
 - Source v. Residence based tax systems
 - Rates of taxation of passive income
- When one country does not achieve its goal in bilateral tax treaty (on account that the other country does not follow such practice), it seeks that if the other country adopts such practice with any third country, such benefit should also be granted to it.



India – France DTAA

- Protocol [29th September 1992]
 - If under any Convention, Agreement or Protocol **signed after** September 1, 1989, between India and a third State which is a member of the OECD, India **limits its taxation** at source on **dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted** than the rate or scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply under this Convention.
- India US DTAA signed on 12th September 1989
 - Covers only services that ‘make available’ technology
- India Sweden DTAA signed on 24th June 1997
 - Does not include use of equipment as part of FTS



India – Netherlands DTAA

- Protocol IV
 - If after the signature of this convention under any Convention or Agreement between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the **rate or scope** provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention.
- Notification issued to amend India Dutch DTAA to reduce scope to include 'make available' concept and also to reduce tax rates



India – Netherlands DTAA

- **Protocol V**

- It is understood that in case India applies a levy, not being a levy covered by Article 2, such as the **Research and Development Cess**, on payments meant in Article 12, and if after the signature of this Convention under any Convention or Agreement between India and a third State which is a member of the OECD India should give relief from such levy, directly, by reducing the rate or the scope of the levy, either in full or in part, or, indirectly, by reducing the rate of the scope of the Indian tax allowed under the Convention or Agreement in question on payments as meant in article 12 of this Convention with the levy, either in full or in part, then, as from the date on which the relevant Indian Convention or Agreement enters into force, such relief as provided for in that Convention or agreement shall also apply under this Convention.



India – Swiss DTAA

- **Protocol – Para 4 [Notification GSR 74(E) dated 7-2-2001]**
 - *With reference to Articles 10, 11 and 12.* - If after the signature of the Protocol of 16th February, 2000 under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Agreement on the said items of income, then, Switzerland and India **shall enter into negotiations without undue delay** in order to provide the same treatment to Switzerland as that provided to the third State.



India – Swiss DTAA

- **Protocol – Revised Para 4 [Notification GSR 62/2011 dated 27-12-2011]**
 - *In respect of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties and fees for technical services), if under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD signed after the signature of this Amending Protocol, India limits its taxation at source on dividends, interest, royalties or fees for technical services **to a rate lower than** the rate provided for in this Agreement on the said items of income, the same rate as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply between both Contracting States under this Agreement as from the date on which such Convention, Agreement or Protocol enters into force.*
 - *If after the date of signature this Amending Protocol, India under any Convention, Agreement or Protocol with a third State which is a member of the OECD, restricts the scope in respect of royalties or fees for technical services than the **scope for these items of income** provided for in Article 12 of this Agreement, then Switzerland and India **shall enter into negotiations without undue delay** in order to provide the same treatment to Switzerland as that provided to the third State.*



India – Kazakhstan DTAA

- **Protocol**

- In respect of Articles 10, 11 and 12, if under any Convention, Agreement or Protocol between the Governments of Republic of Kazakhstan and the Republic of India with a third State, **either Kazakhstan or India** limit their taxation on dividends (single rate), interest, royalties or fees for technical services to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention. Agreement or Protocol on the said items of income shall also apply under this Convention.



India – Israel DTAA

- **Protocol 3**

- In respect of paragraph 2 of Article 25, it is understood that if India enters into an Agreement or Convention for the avoidance of double taxation with a third State after 1-1-1995, whereby the **difference in the rates of tax** between enterprises of a permanent establishment of a company of a country other than India and that of India is removed or reduced, then, a corresponding reduction shall be effected in respect of rates of taxes on profits according to the enterprises of a company which is a resident of Israel.



India – France DTAA

- **Article 7 (3) (a) – Business Profits**
 - Provided that where the law of the Contracting State in which the permanent establishment is situated imposes a restriction on the amount of the **executive and general administrative expenses** which may be allowed, and that restriction is relaxed or overridden by any Convention, Agreement or Protocol signed after 1st January, 1990, between that Contracting State and a third State which is a member of the OECD, **the competent authority of that Contracting State shall notify** the competent authority of the other Contracting State of the terms of the corresponding paragraph in the Convention, Agreement or Protocol with that third State immediately after the entry into force of that Convention, Agreement or Protocol and, **if the competent authority of the other Contracting State so requests**, the provisions of that paragraph **shall apply under this Convention from that entry into force.**



Some Other Cases

- UK
 - Only for Allocation of Head Office Expenses [Part of Article 7]
 - Favourable treaty by India with any other OECD Country or country which is at a comparable stage of development
 - In line with France (i.e. at the request of the other country)
- Philippines
 - MFN Status granted to India by Philippines for Air Transport and Shipping
 - To be negotiated and not automatic
- Saudi Arabia
 - HO Expenses [royalties, fees or other similar services, etc. not included]
- Other countries
 - Belgium, Finland, Hungary, Norway, Spain, Sweden, Thailand



India Singapore DTAA

- By Protocol dated 29th June 2005, Singapore made capital gains of residuary assets [including shares and securities] based on residence of the transferor [Like Mauritius, etc.]
- Provisions relating to substantive presence test [Shell / Conduit Company Test introduced for seeking benefit]
- While amending the said provision the following Article 6 was also inserted.

Articles 1, 2, 3 and 5 of this Protocol shall remain in force so long as any Convention or Agreement for the Avoidance of Double Taxation between the Government of the Republic of India and the Government of Mauritius provides that any gains from the alienation of shares in any company which is a resident of a Contracting State shall be taxable only in the Contracting State in which the alienator is a resident.

- Therefore, once Mauritius Treaty is amended, Singapore Treaty will automatically get amended.



India – Israel DTAA

- **Protocol 2**

- The competent authorities of the Contracting States shall initiate the proper procedure to review the provisions of Articles 12 and 13 (Royalties and fees for technical services, respectively) after a period of five years from the date of entry into force of this Convention. However, if under any Convention or Agreement between India and any third State which enters into force after 1-1-1995, India limits its taxation at source or Royalties or Fees for Technical Services or Interest or Dividends to a rate lower or a scope more restricted than the rate or scope provided for in this Convention, the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention with effect from the date on which the present Convention comes into force or the relevant Indian Convention or Agreement, whichever enters into force later.



Case Study 1

- ABC India is wholly owned subsidiary of ABC Israel
- ABC India obtained managerial services from ABC Israel
- India – Israel DTAA defines FTS on lines with Section 9
- India – Canada DTAA entered into force in AY 1999-2000
- India – Canada DTAA provides for ‘make available’ condition in taxing FTS
- However, notification for the same has not been issued by CBDT on lines with Netherlands, France, Belgium, etc.
- Can benefit of MFN clause be taken?



Case Study 2

- The person rendering services was in India for 100 days
- Article 5(2) of India – Canada DTAA reads as under:

The term ‘permanent establishment’ shall include especially :

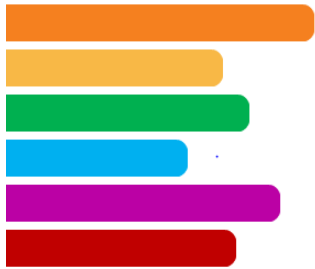
- (i) the furnishing of services other than included services as defined in Article 12, within a Contracting State by an enterprise through employees or other personnel, and only if:
 - (i) activities of that nature continue within that State for a period or periods aggregating to more than 90 days within any twelve-month period; or
 - (ii) the services are performed within that State for a related enterprise (within the meaning of paragraph 1 of Article 9).

Whether the answer would be different this time?



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