

# **How to read Tax Treaties**

*Salient features of select Indian DTAA*

**Arpit Jain**

*Chartered Accountant*

**K C Mehta & Co.**

Chartered Accountants

# Introduction



# Salient Features

- India has signed more than 90 DTAA's till date
- India does not have Model DTAA
  - DTAA's are negotiated instruments
- India follows a mix of OECD, UN and India approach
- Broadly, most of the Indian DTAA follows similar approach
- However, they are outliers and this presentation deals with some of such outliers which are important

# India – US DTAA



# Scope of Convention

## Article 1(3)

Notwithstanding any provision of the Convention except paragraph 4, a Contracting State may tax its residents [as determined under Article 4 (Residence)], and by reason of citizenship may tax its citizens, as if the Convention had not come into effect. For this purpose, the term "citizen" shall include a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of tax, but only for a period of 10 years following such loss.

# Residence for Partnership

## **Article 3(1)(e): Definition**

The term “person” includes an individual, an estate, a trust, a partnership, a company, any other body or person, or other taxable entity.

## **Article 4(1): Residence**

For the purposes of this convention, the term “resident of a Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that

- a) This term does not include any person who is liable to tax in that State in respect only of income of sources in that State; and
- b) In the case of income derived or paid by partnership, estate, or trust, this term applies only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that State as the income of that resident, either in its hands or in the hands of its partners or beneficiaries.



# Residence for Company

## **Article 4(3): Residence**

Where, by reason of paragraph 1, a company is a resident of both Contracting States, such company shall be considered to be outside the scope of this Convention except for purposes of paragraph 2 of Article 10 (Dividends), Article 26 (Non-Discrimination), Article 27 (Mutual Agreement Procedure), Article 28 (Exchange of Information and Administrative Assistance) and Article 30 (Entry into Force).

# Other Salient Features

- Only Federal Taxes are covered for US purposes
- Partnerships are covered only in certain circumstances
- Service PE for single day service to AE
- Corresponding relief for TP Adjustment
- Existence of Permanent Establishment Tax of US (similar to proposed Branch Profit Tax under DTC)
- Extensive Limitation of Benefit clause
- Elaborate examples on meaning of '*Fees for Included Services*' through Exchange of Notes
- No special provision in respect of Capital Gains
- Other income taxed in both countries except where sourced through third country



# India – Netherlands DTAA

# Capital Gains on Shares

## Article 13(5)

Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 shall be taxable only in the State of which the alienator is a resident.

However, gains from the alienation of shares issued by a company resident in the other State which shares form part of at least a 10 per cent interest in the capital stock of that company, may be taxed in that other State if the alienation takes place to a resident of that other State. However, such gains shall remain taxable only in the State of which the alienator is a resident if such gains are realised in the course of a corporate organisation, reorganization, amalgamation, division or similar transaction, and the buyer or the seller owns at least 10 per cent of the capital of the other.



# Force of Attraction excluded

## Protocol in relation to Article 7

1. In respect of paragraphs 1 and 2 of Article 7, where an enterprise of one of the States sells goods or merchandise or carries on business in the other State through a permanent establishment situated therein, the profits of that permanent establishment shall not be determined on the basis of the total amount received by the enterprise, but shall be determined only on the basis of the remuneration which is attributable to the actual activity of the permanent establishment for such sales or business. Especially, in the case of contracts for the survey, supply, installation or construction of industrial, commercial or scientific equipment or premises, or of public works, when the enterprise has a permanent establishment, **the profits of such permanent establishment shall not be determined on the basis of the total amount of the contract, but shall be determined only on the basis of that part of the contract which is effectively carried out by the permanent establishment in the State where the permanent establishment is situated. The profits related to that part of the contract which is carried out by the head office of the enterprise shall be taxable only in the State of which the enterprise is a resident.**

2. It is understood that with respect to paragraph 2 of Article 7, **no profits shall be attributed** to a permanent establishment **by reason of the facilitation of the conclusion of foreign trade or loan agreements or mere signing thereof.**

# India – UK DTAA



# Salient Features

- UK defined to mean Great Britain and Northern Ireland
  - India – Ireland DTAA only covers Southern Ireland
- Special provisions in relation to UK Partnerships
- DDT eligible for Underlying Tax Credit
- No special provision in respect of Capital Gains
- Other income taxed in both countries except where sourced through third country
- UK Tax Year ends on April 5

# India – Singapore DTAA



# Fees for Technical Services

## Article 12(4)

The term “fees for technical services” as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or

(b) make available technical knowledge, experience, skill, know-how or processes, **which enables the person acquiring the services to apply the technology contained therein** ; or

(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

# Limitation of Benefit

## Article 24(1)

Where this Agreement provides (with or without other conditions) that income from sources in a Contracting State shall be exempt from tax, or taxed at a reduced rate in that Contracting State and under the laws in force in the other Contracting State the said income is subject to tax by reference to the amount thereof which is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the **exemption or reduction of tax to be allowed under this Agreement in the first-mentioned Contracting State shall apply to so much of the income as is remitted to or received in that other Contracting State.**



# Capital Gains on Shares

## Protocol

ARTICLE 1 : Paragraphs 4, 5 and 6 of Article 13 (Capital Gains) of the Agreement shall be deleted and replaced by the following:

“4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs 1, 2 and 3 of this Article shall be taxable only in that State.”

ARTICLE 3 : 1. A resident of a Contracting State shall not be entitled to the benefits of Article 1 of this Protocol if its affairs were arranged with the primary purpose to take advantage of the benefits in Article 1 of this Protocol.

2. A shell/conduit company that claims it is a resident of a Contracting State shall not be entitled to the benefits of Article 1 of this Protocol. A shell/conduit company is any legal entity falling within the definition of resident with negligible or nil business operations or with no real and continuous business activities carried out in that Contracting State.

# Capital Gains on Shares

## Protocol

3. A resident of a Contracting State **is deemed to be a shell/conduit company** if its total annual expenditure on operations in that Contracting State is less than S\$200,000 or Indian Rs. 50,00,000 in the respective Contracting State as the case may be, in the immediately preceding period of 24 months from the date the gains arise.

4. A resident of a Contracting State **is deemed not to be a shell/conduit company** if:

(a) it is listed on a recognised stock exchange of the Contracting State;  
or

(b) its total annual expenditure on operations in that Contracting State is equal to or more than S\$200,000 or Indian Rs. 50,00,000 in the respective Contracting State as the case may be, in the immediately preceding period of 24 months from the date the gains arise.

(Explanation: The cases of legal entities not having bona fide business activities shall be covered by Article 3.1 of this Protocol.)



# Foreign Tax Credit

## Article 25

India grants underlying tax credit (of taxed paid by Singapore Sub) if the Indian shareholder holds more than 25% of share capital

India also grants credit for Tax Spared by Singapore Government in certain cases

Singapore also grants credit for Tax Spared by Indian Government u/s. 10A, 10B, 80-I, 80-IA or like provisions

# India – UAE DTAA



# Residence

## Article 4(1)

For the purposes of this Agreement the term 'resident of a Contracting State' means:

(a) in the case of India: any person who, under the laws of India, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. This term, however, does not include any person who is liable to tax in India in respect only of income from sources in India; and

(b) in the case of the United Arab Emirates: **an individual who is present in the UAE for a period or periods totalling in the aggregate at least 183 days in the calendar year** concerned, and **a company which is incorporated in the UAE and which is managed and controlled wholly in UAE.**

# India – Mauritius DTAA



# Interest

## Article 11

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. **However, subject to the provisions of paragraphs (3) and (4) of this article, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State.**
3. Interest arising in a Contracting State shall be exempt from tax in that State provided it is derived and beneficially owned by :
  - (a) the Government or a local authority of the other Contracting State ;
  - (b) any agency or entity created or organised by the Government of the other Contracting State; or
  - (c) any bank carrying on a bona fide banking business which is a resident of the other Contracting State.
4. Interest arising in a Contracting State shall be exempt from tax in that Contracting State to the extent approved by the Government of that State if it is derived and beneficially owned by any person [other than a person referred to in paragraph (3)] who is a resident of the other Contracting State provided that the transaction giving rise to the debt-claim has been approved in this regard by the Government of the first-mentioned Contracting State.

# Foreign Tax Credit

## Article 23

India grants underlying tax credit (of taxed paid by Mauritius Sub) if the Indian shareholder holds more than 10% of share capital

India also grants credit for Tax Spared by Mauritius Government in certain cases

Singapore also grants credit for Tax Spared by Indian Government u/s. 10A, 80-I, or like provisions

Potential for double benefit due to Foreign Tax Credit rules in Mauritius



# India – Brazil DTAA

# Independent Personal Services

## Article 14

Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State, unless the remuneration for such services or activities is paid by a resident of the other Contracting State or is borne by a permanent establishment situated therein. In such case, the income may be taxed in that other State.



# Royalties

## Article 12

India – Brazil DTAA does not have clause on FTS

## Protocol to Article 12

It is understood that the provisions of paragraph 3 of Article 12 shall apply to payments of any kind to any person, other than payments to an employee of a person making such payments, in consideration for the rendering of assistance or services of a managerial, administrative, scientific, technical or consultancy nature..

# India – Germany DTAA



# Relief from Double Taxation

## Article 23

1. Tax shall be determined in the case of a resident of the Federal Republic of Germany as follows :

(a) Unless foreign tax credit is to be allowed under sub-paragraph (b), **there shall be exempted from German tax any item of income arising in the Republic of India** and any item of capital situated within the Republic of India, which, according to this Agreement, may be taxed in the Republic of India. The Federal Republic of Germany, however, retains the right to take into account in the determination of its rate of tax the items of income and capital so exempted.

In the case of dividends exemption shall apply only to such dividends as are paid to a company (not including partnerships) being a resident of the Federal Republic of Germany by a company being a resident of the Republic of India at least 10 per cent of the capital of which is owned directly by the German company.

There shall be exempted from taxes on capital any shareholdings the dividends of which are exempted or, if paid, would be exempted, according to the immediately foregoing sentence.

# Relief from Double Taxation

## Article 23

(b) Subject to the provisions of German tax law regarding credit for foreign tax, there shall be allowed as a credit against German tax payable in respect of the following items of income arising in the Republic of India and the items of capital situated there, the Indian tax paid under the laws of the Republic of India and in accordance with this Agreement on :

- (i) dividends not dealt with in sub-paragraph (a) ;
- (ii) interest ;
- (iii) royalties and fees for technical services ;
- (iv) income in the meaning of paragraph 4 of Article 13 ;
- (v) directors' fees ;
- (vi) income of artistes and sports persons.

(c) For the purpose of credit referred to in letter (ii) of sub-paragraph (b), the Indian tax shall be deemed to be 10 per cent of the gross amount of the interest, if the Indian tax is reduced to a lower rate or totally waived according to domestic law, irrespective of the amount of tax actually paid.



# Relief from Double Taxation

## Article 23

(d) The provisions of sub-paragraph (c) shall apply for the first 12 fiscal years for which this Agreement is effective.

(e) Notwithstanding the provisions of sub-paragraph (a) items of income dealt with in Articles 7 and 10 and gains derived from the alienation of the business property of a permanent establishment as well as the items of capital underlying such income shall be exempted from German tax only if the resident of the Federal Republic of Germany can prove that the receipts of the permanent establishment or company are derived exclusively or almost exclusively from active operations.

# India – Hungary DTAA



# Dividend

## Protocol to Article 10

When the company paying the dividends is a resident of India the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend.

# India – South Africa DTAA



# Taxes Covered

## Article 2

The existing taxes to which this Agreement shall apply are :

- (a) in India, the income-tax (including any surcharge thereon);  
(hereinafter referred to as "Indian tax");
- (b) in South Africa :
  - (i) the income-tax (the normal tax); and
  - (ii) the secondary tax on companies;(hereinafter referred to as "South African tax").

Article on Dividend & Foreign Tax Credit similar to others  
No Underlying Tax Credit granted

**Thank You**

**Arpit Jain**  
Director

**arpit.jain@kcmehta.com**  
**+91 96876 00207**

**K C Mehta & Co.**  
Chartered Accountants