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TAXATION OF EXPATRIATES

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I. Introduction

Meaning of expatriate:

An expatriate is a person temporarily residing and employed in another country while still remaining citizen of his home country.

Types of expatriates

In instances where a person is resident in one country and derives income from another country, there are chances of that person getting taxed in both countries. In other words, there can be 'double taxation' of the same income.

There are two cases as regards an expatriate in which double taxation can arise:

- He/she is a resident of two countries and each state seeks to tax the individual on worldwide income;
- He/she is a resident of one country deriving income from another country.

II. Double Tax Avoidance

1) [Section 90]

In order to prevent double taxation, the Central Government of India is empowered by Section 90 of the Income Tax Act, 1961 to engage with other countries to form Double Taxation Avoidance Agreements/ Tax Treaties (DTAA). There are two types of DTAA's:

- Comprehensive DTAA, which cover all income flows;

  &

- Limited DTAA that cover only shipping and/ or air transport income.

So far, India has formed comprehensive DTAA's with over 90 other countries. These can be referred to here: http://law.incometaxindia.gov.in/DIT/intDtaa.aspx.

India has also entered into 'Tax Information Exchange Agreements' with few countries namely Bermuda, Isle of Man, British Virgin Islands, Bahamas and Cayman Island.

Where the provisions of a DTAA are more beneficial to any assessee, the assessee would be governed by such provisions of the treaty. Where there is no specific provision in the agreement, it is the Income-tax Act that will govern the taxation of income.

2) [Section 91]

If in any country with which there is no DTAA under Section 90, and any person if he has earned income from such country in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India, he has paid income-tax, by deduction or otherwise, under the law in force in that country, he shall be entitled to the deduction from the Indian income-tax payable by him of a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever is the lower.

3) The most common methodology for avoidance of double taxation used in Indian tax treaties are:

- Exemption method — under this method, the country of Residence does not tax the income, which according to DTAA may be taxed in the country of Source of income. Alternatively, the Country of source limits its right to tax income from sources in its country.

- Credit method — under this method, country of Residence includes income from country of Source in the taxable total income of the tax payer and calculates its tax on the basis of such taxpayer's total income (including income from country of Source). It then allows a deduction from its own taxes for taxes paid in Country of Source with respect to income earned there.

III. Basic Residency Test

The foremost step is to determine whether the assessee is a resident in India or not. Accordingly, we will be able to understand the scope of taxable income depending on the residential status.

[Section 6]

Determining residential status as per Income Tax Act, 1961

Note:
[Section 3]
Previous year = Financial year in which income is earned, from 1st April – 31st March

Determining residential status as per DTAA

Article 4 of a treaty defines the term 'resident'.

In order to qualify as a resident under a DTAA entered into by India an expatriate should enjoy residential status either in the overseas country or in India **under the domestic laws.**

However, if by virtue of the above provision, an individual is a resident of both the contracting countries, Clause 2 provides for a '*Tie-breaker test'* for determining which

of the two contracting countries the person would be deemed to be a resident as per the treaty. The relevant factors to be considered are as follows:

- In which country does the assessee have a PERMANENT HOME?
- In which country are her personal and economic RELATIONS closer?
- In which country is the assessee HABITUALLY ABODE?
- NATIONALITY of the assessee?
- What has been determined by the COMPETENT AUTHORITIES of both countries in mutual agreement?

IV. Scope of Income

[Section 5]

Section 5 of the Act has been explained in table format given below:

Nature of income	Taxability in case of		
	ROR	RBNOR	NR
Income received or deemed to be received in India	√	√	√
Income accruing or deemed to be accrued in India	√	√	√
Income from a business controlled from India or from a profession set up in India but not received or accrued in India	√	√	X
Income not received or not deemed to be received in India	√	X	X
Income not accruing or not deemed to be accrued in India	√	X	X

V. Nature of Income

As per the provisions of Section 14 of Income Tax Act, 1956, there are 5 heads of Income under which the income of a person can be classified. These are:

(A) Salary
(B) Income from House Property
(C) Income from Business and Profession

(D) Capital Gains
(E) Income from Other sources

Analysis of income under each head for expatriates has been done with respect to the domestic tax laws and provisions given in the Double Tax Avoidance Agreements of India with other countries.

(A) SALARY

Salary income of expatriates would be taxable in India under the provisions of the Income Tax Act, in case the same is either received or deemed to be received in India or in case it accrues or is deemed to be accrued in India.

SALARY	ROR	RBNOR	NR
Salary received in India	√	√	√
Salary received outside India for services rendered in India	√	√	√
Salary received outside India for services rendered outside India	√	X	X

The taxability of income from salary for expatriates is discussed in detail below:

Salary components

1) Basic Salary and allowances
   Taxable salary is within the scope of Section 17(1) of the Act.

2) Perquisites
   Perquisites taxable are as per Section 17(2) of the Act.

Provident fund as applicable to Expats:

It is mandatory for international workers i.e. non-Indian passport holders working in India and Indian employee going for work in a foreign country with which India has entered into a **Social Security Agreement (SSA),** who are employed with an establishment to which the provisions of the Provident Fund Act apply, to contribute to Provident Fund in India.

An international worker, who is contributing to a social security programme of his/her country of origin, either as a citizen or resident, with whom India

has entered into a social security agreement on reciprocity basis and enjoying the status of detached worker for the period and terms as specified in such agreement are excluded from contributing to Indian social security schemes.

Countries with which India has Social Security Agreements can be found here:
http://www.moia.gov.in/services.aspx?ID1=285&id=m4&idp=81&mainid=73

The balance held in the provident fund (i.e., employer's contribution plus employee's contribution plus accrued interest thereon) can only be withdrawn on retirement or after the expatriate reaches 58 years of age or on incapacity to work and not at the time of repatriation to home country.

Further, the claim for withdrawal of Pension is possible only if India has entered into SSA with the country of residence of the expatriate or he/she has completed 10 years of contributory service to Family Pension Scheme.

Exemptions

1) [Section 10(6)(vi)]

Short-stay exemption: In case of an individual who is not a citizen of India. The remuneration received by him/ her as an employee of a foreign entity, for services rendered by him/ her during his/ her stay in India is exempt from tax subject to fulfillment of all the following conditions:

- The foreign enterprise is not engaged in any trade or business in India;
- His/her stay in India does not exceed in the aggregate a period of 90 days in such previous year; and
- Such remuneration is not deductible from the income of the employer chargeable under the Act.

2) [Section 10(7)]

Allowances and perquisites paid or provided abroad by the Government to a citizen of India for rendering service outside India are fully exempt.

3) [Section 10(10CC)]

Expatriates coming into India and working in various companies are generally demand ***'tax equalization'*** i.e., the tax payable in India on their salary and

perquisites is borne by the employer. This is to ensure that they remain tax neutral in respect of their Indian assignment.

- The expatriate employees are assured net-of-tax salary income.
- The Indian taxes in respect of income from employment in India would be borne by the employer and not by the employee

Notwithstanding Section 200 of the Companies Act, 1956 the employer could, at his option pay taxes on the non-monetary perquisites provided to employees, and such taxes need not be grossed up i.e. shall not be included in the taxable income of the employee. The downside of such relief is that the employer is not eligible to claim corporate tax deduction for such tax paid by it.

4) [Section 10(14)]

Daily allowances specifically granted by third party customer to the expatriate, to meet necessary expenses exclusively incurred in the performance of the duties of an office are exempt to the extent to which such expenses are actually incurred for that purpose.

Dependent Personal Services - Article 15 of DTAA

Generally, Article 15 or 16 of the tax treaties deal with taxation of employment income.

The said Article provides that salaries, wages and other similar remuneration derived by a resident in respect of employment exercised in the host country would be taxable in the host country; however such income would be taxed exclusively in the home country/country of residence provided:

- The employee is present in the host country for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned depending upon the relevant clause of the respective DTAA;
- The remuneration is paid by, or on behalf of, an employer who is not a resident of the host country; and
- The remuneration is not deductible in computing the profits of an enterprise chargeable to tax in the host country. In other words, such

remuneration is neither deductible nor borne by the PE of the foreign employer in the host country.

The aforesaid conditions may differ from country to country and the relevant treaty should be referred to before application. A claim for the beneficial provisions under this Article should also be substantiated with evidence.

Thus, inbound expatriates whose presence in India is for a short-term duration could be exempt from tax in India under the relevant treaty subject to fulfilment of all the conditions mentioned in the relevant clause of the respective tax treaty.

A situational analysis of most common expatriate employment contracts has been done in the table below:

Nature of assignments		**India Tax implications**	
	Characteristics	**Inbound expatriate** [SOURCE country - Foreign HOST country - India]	**Outbound expatriate** [SOURCE country - India HOST country - Foreign]
Business Visits	▪ Employee visiting HOST country for short business visits of 20-30 days spread over the year. ▪ Purely for the limited purpose of attending meetings/ conferences in the capacity of employee of SOURCE country.	▪ No tax implications for foreign entity as well as for the expatriate	▪ Employee would remain a resident in India and hence salary in respect of period of foreign visits would continue to be taxable in India. ▪ No distinct tax implication for the Indian employer as well as for the employee.
Short term	▪ Employee would be sent to HOST country for short periods of 6-8 months. ▪ He/ she would be working in HOST country but as an employee of the company of SOURCE country & would continue to be on its	▪ There could be Service Permanent Establishment exposure for the foreign entity depending upon the relevant clause of the tax treaty entered into between India and the respective country. ▪ Consequently, the	▪ There could be Service Permanent Establishment exposure for the Indian entity in the foreign country depending upon the relevant clause of the tax treaty entered into between India and the respective country. ▪ Outbound expatriate

	payroll. ▪ Normally entity in HOST country would compensate the foreign counterpart for the services rendered by the expatriate. ▪ Generally, such arrangement is made for performing training or supervisory functions.	foreign entity would be taxable in India & will have to comply with the local tax laws including withholding tax Formalities. ▪ Employees will be taxable on the salary income earned. They may be eligible for short stay exemption subject to fulfilment of certain conditions under the Treaty or under the domestic law.	may qualify as non-resident in India under the domestic law in which case tax credit can be claimed. ▪ However, if salary is received in India, the same may be taxable and accordingly subjected to withholding tax in India. ▪ In case the employee continues to be resident in India, short stay exemption can be claimed in the host country.
Medium-term & Long-term assignments — Secondment	▪ Employee would be deputed to HOST country for rendering services to the entity in HOST country for a period of 2 – 3 years or more. ▪ He/ she would be working in HOST country in the capacity of Employee of Company of that country. ▪ He/ she would be on the payroll of the entity in HOST country and the remuneration would be solely borne by that entity.	▪ Indian entity will have to comply with all the regular legal formalities in respect of the expatriate. ▪ By and large the foreign entity will not have any Permanent Establishment exposure in India. ▪ Since economic employment lies with Indian entity the expatriate would be taxable on the salary income earned.	▪ Host country will have to comply with all the local formalities in respect of the employee. ▪ Generally such outbound expatriate would qualify as non-resident in India under the domestic law during such term. ▪ Possibility of dual residency in the year of transfer depending upon their stay pattern in the year of leaving or repatriating back. ▪ Salary for the period services are rendered abroad would not be taxable in India.

Foreign currency income

Generally, expatriates receive part of their salaries in foreign currency especially when they continue to remain on the payroll of the foreign employer. In such cases, the salary denominated in foreign currency is to be converted to Indian rupees using the telegraphic transfer buying rate of such foreign currency as on the following dates:

- In case where tax is deductible at source by the employer-the date on which tax is required to be deducted at source i.e. at the time of payment of such salary[1]
- In other cases — the last day of the month immediately preceding the month in which the salary is due, or is paid in advance or in arrears.[2]

Telegraphic Transfer Buying Rate in relation to a foreign currency means the rate of exchange adopted by the State Bank of India for buying such currency having regard to the guidelines specified from time to time by the Reserve Bank of India.

(B) INCOME FROM HOUSE PROPERTY

(Sections 22 to 25) deal with Income from House Property under the domestic laws. The scope of income covered depending on the residential status of an assessee is as under:

SITUATION	ROR	RBNOR	NR
House property is situated in India, income is received in India	√	√	√
House property is situated in India, income is received outside India	√	√	√
House property is situated in foreign country, income is received in India	√	√	√
House property is situated in foreign country, income is received outside India	√	X	X

Thus, if the house property is situated in a foreign country –

[1] Rule 26 of the Income Tax Rules
[2] Rule 115 of the Income Tax Rules

1) A Resident assessee is taxable under section 22 in respect of the annual value of a property situated in a foreign country. Its *annual value* will be computed as if the property is situated in India.

2) A RBNOR or NR is, however chargeable under section 22 in respect of income of a house property situated abroad; if income is received in India during the previous year.

Non-residents should be careful about taxation of *deemed let out property*. If they own more than one residential house, and if either is not given on rent, one of them will be still be taxable as deemed let out property. This condition applies to immoveable properties owned globally. Say, if a self-occupied house was owned abroad, and the other house was in India, the assessee would have to pay tax on deemed rent in India if it is not let out.

Article 6 of DTAA

Article 6 of the DTAA explains taxation of Income from immoveable property, which includes Income from house property.

1) If income is derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State, it may be taxed in that other Contracting State. Here, the location of the property is the determinant for the right of the Contracting state to tax income from such property.

2) The provisions of this Clause also apply to income derived from the direct use, letting, or use in any other form of immovable property.

(C) INCOME FROM BUSINESS OR PROFESSION

According to the domestic law, the taxation of business profits of non-residents in India is kicked off with a **business connection** in India. The inference of business connection in India as per the Income Tax Act is quite wide and would lead to deeming the Income *'to accrue or arise'* for the foreign enterprise in India.

1) Global Income is taxable for Residents.

2) For RBNOR and NR, taxability of Income from business or profession depends on whether such business or profession is carried out via a "Permanent Establishment" (PE) situated in India.

The existence of a PE determines the right of a contracting state to tax the profits of an enterprise of the other contracting state. There are three major types of PE which usually exist in double tax treaties:

- Fixed PE
- Agency PE
- Service PE

Article 7 of the Double Taxation Avoidance Agreements

Article 7 covers income from business.

It states that only the profits directly or indirectly attributable to the Permanent Establishment in India would be taxed in India. Hence, the Permanent Establishment that generates income with a business connection in India will be taxable in India. The Permanent Establishment of the foreign enterprise in India may use its assets and resources to earn income both in India and outside India, but **only the segment of Income that relates to the business connection in India is taxed**.

Deductions in relation to business expenditure incurred to earn such income can be claimed as illustrated in Clause 3 of the Article.

The term business profits means income derived from any trade or business including income from the furnishing of services other than included services as defined in Article 12 (Royalties and Fees for Included Services).

In the absence of business connection in India, the Permanent Establishment would just be a taxable entity and not a tax paying entity. The meaning of business connection in the domestic law would be a blend of Fixed Place Permanent Establishment and Agency Permanent Establishment as set in the Double Taxation Avoidance Agreements.

Article 14 or 15 of the DTAA

Income from Profession is covered under Article 14 or 15 – for Independent Personal Services.

Here, professional services include independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.

Professional income will be taxable in the country of residence unless:

i. There is a fixed base regularly available in the other Contracting State for the purpose of performing activities

OR

ii. The assessee's stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any period of twelve months;

In either of the above cases, so much of the income as is attributable to that fixed base or derived from his activities performed in that other State may be taxed in that other State.

(D) CAPITAL GAINS

Capital gains are taxable as per domestic law as follows:

SITUATION	ROR	RBNOR	NR
Capital Asset is situated in India, income is received in India	√	√	√
Capital Asset is situated in India, income is received outside India	√	√	√
Capital Asset is situated in foreign country, income is received in India	√	√	√
Capital Asset is situated in foreign country, income is received outside India	√	X	X

Non Residents are subject to capital gains tax in India only in respect of capital gains accruing or arising or received in India (including capital gains deemed to be accruing, arising or received in India).

1) [Section 48]

<u>In case of shares or debentures of an Indian company acquired in foreign currency by non residents</u>, the cost of acquisition, expenditure incurred wholly and exclusively in connection with the transfer and full value of consideration are converted back into foreign currency and gains are calculated and taxed at a rate of 20%. Long term capital gains arising from sale of shares and securities through a recognised stock exchange are exempt from tax [Section 10(38)].

This provision intends to protect non-residents from fluctuation of rupee value against foreign currency, in order that he pays tax only on the actual capital gains in foreign currency and not on the gains computed in rupees.

However, the benefit of cost indexation is not available to non resident Indians who claim special tax rate of 10% and to other non residents where capital gains on the transfer of shares in, and debentures of, Indian companies are determined in foreign currency.

2) [Section 112]

The amount of income-tax calculated on long-term capital gains arising to non-residents will be calculated at the rate of 20%.

From 01.04.2013, the amount of income-tax on long-term capital gains arising from the transfer of a capital asset, being unlisted securities, will be calculated at the rate of 10% on the capital gains in respect of such asset as computed without giving effect to the first and second proviso to Section 48.

3) [Sec. 115AC]

Special Rate of Tax on Income and Capital gains from Euro Issues/ Global Depository Receipts.

4) [Sections 115C to 115I]

The **Non Resident Indians** are offered special provisions under the Income-tax Act, 1961 whereby they are -

- Offered procedural simplification
- Fixed rate of taxation.
- Tax on real income i.e. income is computed in Foreign Exchange (so that rupee depreciation do not increase taxes)
- Deduction of tax at source the amount at which he is liable for taxation.

NRIs have been offered a separate concessional tax regime in respect of certain types of income under Chapter XIIA comprising section 115C to 115I. The said chapter has been introduced in the Income tax Act with a view to encouraging and inviting Non-residents Indian to invest their foreign earnings in India.

Specified assets are defined under Section 115C (f) as:

i. Shares in an Indian company.

ii. Debentures and deposits in an Indian company (which is not a private company).

iii. Any security of the Central Government.

iv. Any other notified asset (no asset has been notified as yet).

However, if an NRI opts for the concessional tax treatment, he is taxed at a flat rate and he is denied [As per Section 115D] -

- Any deduction in respect of any expenditure or allowance under any provisions of this Act (like interest on over draft, Bank charges for collection).
- Deduction under Chapter VIA (like section 80L).
- Benefit of cost indexation for capital gains.

Article 13 or 14 of DTAA

Capital gains derived from immoveable property are covered under Article 6 of DTAA, while capital gains from other than immoveable properties are covered under this separate Article 13 of the agreement.

Taxability either depends on the location of the capital asset or the residence of the alienator of the Capital Asset. In most cases, it is the country in which the Capital Asset is situated, which has the right to tax capital gains from transfer of such asset.

(E) INCOME FROM OTHER SOURCES

1) Income from other sources includes interests, dividends (excluding exempt dividend u/s 10), fees for technical services, etc not covered under the other heads of income.

2) As per the domestic tax law, they are taxable as provided under Section 56 of the Act.

3) Income of Non-residents will be taxable if it arises in India.

Exemptions

Exemptions that can be availed by non-residents are:

1) [Section 10(4)(ii)]

   Interest on Non-resident (external) account maintained in accordance with the Foreign Exchange Management Act in the hands of individual non-resident is exempt.

2) [Section 10(15)(iv)(fa)]

   Interest on approved foreign currency (FCNR) deposits is exempt in the hands of individual who are non-resident or resident but not ordinarily resident.

3) [Section 10(15)(viii)]

   Interest received by a non-resident or resident but not ordinarily resident from deposit made in an Offshore Banking Unit. Offshore banking unit (OBU) is the branch of an Indian bank located in a special economic zone (SEZ), which undertakes international banking business aimed at facilitating exports from the region.

Articles covering Other Income in the DTAA

The manner and rate of tax is given in respective clauses of the DTAA.

The Articles covering major types of income from other sources are:

Article 10	Dividend	Definition and taxation of dividends; Concessional rate of tax in certain situations;
Article 11	Interest	Definition and taxation of interest; Concessional rate of tax in certain situations; Taxation of interest paid in excess of reasonable rate, on account of special relationship;
Article 12	Royalties	Definition of Royalties- what it includes and covers, and its taxation; Treatment of excessive payment of royalties due to special relationship; Country where taxable.

VI. SECTION 195 OF THE ACT

Procedure for remittance to the non-resident — issued vides CBDT circular no. 4/2009 dated 29th June, 2009[3]*:*

- Obtain certificate in Form No. 15CB from a Chartered Accountant
- Obtain PAN for the Non-Resident else 20% rate u/s 206AA
- Tax calculated should be increased by surcharges except where treaty rates are applied.
- Tax has to be grossed up u/s 195A for all agreements entered after 2.6.2002 where tax is agreed to be borne by the payer.
- Tax has to be deducted only if it is required to be deducted on sums chargeable to tax in India under the Income-tax Act. Circular No. 786 dated 7th February, 2000.
- TDS on salary to non-residents (including Indian NR) is governed by sec. 192 and not 195.
- Non-residents making payments to non-residents are liable to TDS if the payments are chargeable to tax in India (228 ITR 487-AAR).
- Exchange rate on the day on which TDS is required to be deducted has to be considered.

[3] As per WIRC Reference Manual

- Payer can make a reference by simple letter on letter head/plain paper to Assessing Officer u/s. 195(2) of the Act (under Rule 10) if he opines that only portion of payment is going to be taxed and hence a request is made for determination of the amount on which tax has to be deducted.

- An application u/s 195(3) can be made by the payee to the AO for no deduction of tax for receipt of sums other than dividends or interest. (Form 15D). Certificate is valid for the financial year specified therein unless cancelled by AO anytime before the expiry of the financial year.

- An application u/s 197 can be made by the payee to the AO for no deduction of tax or at a lower rate of tax than rate prescribed to be deducted. (Form 13).

- Certificates u/s 195(3) and u/s 197 are not appealable.

- U/s 195 a non-resident is not entitled to basic/threshold exemption in respect of LTCG.

- Tax has to be deducted at rates prescribed under relevant Finance Act or at the rates prescribed/specified in treaty, whichever are beneficial to the assessee. Treaty is an option to the assessee.

- In case treaty rates are opted by the remittee/payee/recipient, take residency certificate of payee/receiver to determine DTAA of which country has to be applied.

- Furnish the information in Form 15CA, verified in the manner prescribed. Rule 37BB.

- Form No. 15CA to be then electronically uploaded on designated website

- Take printout of Form No. 15CA, sign and manually file with bankers/authorized dealers of the payee along with copy of Form 15CB. Approach Bank and ask them for remittance with cheque/account debit.

- Refund of TDS u/s 195 in certain circumstances – Circulars 790/20.4.2000 & 7/23.10.2007