
PE & FB

Concept and Case Study

OECD / UN – Art. 14

OECD Model Convention (pre-2000)

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 he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities. If he has such a fixed base, the income may be taxed in the other State but only so much as is attributable to that fixed base.

UN Model Convention (2011)

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 except in the following circumstances, when such income may also be taxed in the other Contracting State:

(a) If he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State; or

(b) If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelvemonth period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that State may be taxed in that other State

The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Understanding

- Taxability of services*
 - Concept of IPS and its applicability
 - Issue from the perspective of scope
 - Issue from the perspective of distribution of rights and attribution of income
 - Negative list in Article 14
 - OECD Commentary (1963) - a 'centre of activity of a fixed or permanent character'
 - Deleted Art. 14 - professional income defined in 'enterprise'
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Professional Services

- Profession implies attainments in special knowledge as distinguished from mere skill, study or investigation. Where services are carried on with heavy machinery, etc., it would be regarded as business income.
 - 'Profession' will imply any vocation carried on by an individual, or a group of individuals, requiring predominantly intellectual skills dependent on individual characteristics of person(s) pursuing that vocation, requiring specialized and advanced education or expertise
 - On a question whether firm of lawyers is a commercial establishment: The Supreme Court in *V. Sasidharan v. Peter & Karunakar* AIR 1984 SC 1700 states it should still be within the realm of a professional services.
 - The essence of 'other activities of an independent character' is dependent upon personal qualifications of the person by whom the activity is undertaken and that can only be the individual, that is, the activity carried on by an individual by his personal skill and intelligence.
 - The activities of professional entertainers, sports persons, film, radio, T.V. artists, musicians and such other activities are analogous to the aforementioned professional activities.
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India-US Tax Treaty

Income derived by a person who is an individual or firm of individuals (other than a company) who is a resident of a Contracting State from the performance in the other Contracting State of professional services or other independent activities of a similar character shall be taxable only in the first-mentioned State except in the following circumstances when such income may also be taxed in the other Contracting State:

- if such person has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or
 - if the person's stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 90 days in the relevant taxable year.
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India-UK DTAA

Income derived by an individual, whether in his own capacity or as a member of a partnership, who is a resident of a Contracting State in respect of professional services or other independent activities of a similar character may be taxed in that State. Such income may also be taxed in the other Contracting State if such services are performed in that other State and if

- he is present in that other State for a period or periods aggregating 90 days in the relevant fiscal year;
- he, or the partnership, has a fixed base regularly available to him, or it, in that other State for the purpose of performing his activities

but in each case only so much of the income as is attributable to those services.

For the purposes of paragraph 1 of this Article an individual who is a member of a partnership shall be regarded as being present in the other State during days on which, although he is not present, another individual member of the partnership is so present and performs professional services or other independent activities of a similar character in that State

India-South Africa

Income derived by an individual who is 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 he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities. If he has such a fixed base, the income may be taxed in the other State but only so much of it as is attributable to that fixed base. For the purposes of this Agreement, where an individual who is a resident of a Contracting State stays in the other Contracting State for a period or periods exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned, he shall be deemed to have a fixed base regularly available to him in that other State and the income that is derived from his activities that are performed in that other State shall be attributable to that fixed base.

India-Kenya Tax Treaty

Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State unless

- he has a fixed base regularly available to him in the other Contracting State for the purposes of performing his activities, in which case so much of the income may be taxed in that other State as is attributable to that fixed base; or
 - he is present in the other Contracting State for the purpose of performing his activities for a period or periods exceeding in the aggregate 183 days in the calendar year concerned in the case of Kenya or the previous year concerned in the case of India, in which case so much of the income may be taxed in that other State as is attributable to the activities performed in that other State.
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India-Thailand DTAA

Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State unless such activities were performed in the other Contracting State. Income in respect of professional services or independent activities performed within that other State may be taxed by that other State

Notwithstanding the provisions of paragraph 1, income derived by a resident of a Contracting State in respect of professional services or other independent activities performed in the other Contracting State shall not be taxable in the other State if

- the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the relevant "previous year" or "tax year" concerned, as the case may be, and
 - the recipient does not maintain a fixed base in the other State for a period or periods exceeding in the aggregate 183 days in such year, and
 - the income is not borne by an enterprise or a permanent establishment situated in that other State
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Cases – Whether Art. 14 apply?

- The Taxpayer was an international artist who was a foreign national and was resident in another State R. He bought a design studio in Belgium for producing his songs. Whether Art. 14 apply? Is it Fixed Base regularly available for the purpose of performing his services?
 - a Belgian model, received income from the UK for a participation in photo sessions published in catalogues and magazines (Belgium court)
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Cases – Whether Art. 14 apply?

- A freelance journalist resident in Australia reporting news from Australia to a radio station in Italy without any employment contract with the radio station (Australia ATO circular)
 - Non-permanent individual is regarded as dependent or independent (Canada case)
 - Control and supervision < expertise of contractor?
 - Tools and material and space of client < could be contractual
 - Financial risk and profits, promotion, health insurance, etc.*
 - Preparatory and auxiliary activities through fixed base whether exempt (IND EEIG resolution)
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Cases – Whether Art. 14 apply?

- German partnership with US partner and German partner. The profits of the partnership to be shared equally. The US partner performs services solely in US and German partner performs services solely in Germany. Is German partner having fixed base in US? (IRS Internal Ruling)
 - Would the answer change if German partner does not visit US for performing services to US or overseas clients in US?
 - Would the answer change if, in the above example, the US profits would be allocated to US partner and German profits would be allocated to German partner?
 - Indian company appoints a non-resident director as its sole foreign commission agent: a qualified architect with vast technical experience, especially in mobile communications. He provided services not in the ordinary course of business. Which article to apply Art. 7, Art. 12 or Art. 14? Whether the director has a fixed base regularly available in India? (Device Driven ITAT)
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Cases – Whether Art. 14 apply?

- The Taxpayer's employee, a US resident, worked for 300 days in 1994 and 40 days in 1995 in Canada. He provided training to PanCanadian Petroleum Limited's employees on its premises, where he had a room but his access was controlled. Part-way through the assignment, he was moved to another building. (Canada SC)* and (German SC)
 - German author of a legal commentary travelled with his caravan to Italy. He stayed there twice a year for five to six weeks and worked on his commentary. Whether the author has fixed base in Italy? (German SC)
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Cases – Whether Art. 14 apply?

A taxpayer was a computer consultant from Houston under contract to provide consulting services to a Canadian company. The Canadian company provided him with an office and everything he needed to perform his contract. He could only use the office during normal business hours and he could not do any work there except work for the company. He was not identified in any way as working there and had no office that was his exclusively. The location from which he did his work changed from time to time at the discretion of the company. The Federal Court of Appeal held that the following factors (non-exhaustive) should be taken into account: "...the actual use made of the premises that are alleged to be a fixed base, whether and by what legal right the person exercised or could exercise control over the premises, and the degree to which the premises were objectively identified with the person's business."

Applying these factors, the Federal Court of Appeal upheld the Tax Court of Canada's finding that the taxpayer did not have a fixed base at the company's premises, notwithstanding that he was there for more than 183 days in 1 year. The Federal Court of Appeal acknowledged that certain providers of independent personal services require very little in the way of a fixed place of business. The Federal Court of Appeal, however, determined that recognition of that fact does not justify the conclusion that a taxpayer must necessarily have a fixed place of business wherever his services are provided.

Cases – Whether Art. 14 apply?

- A Belgian independent computer consultant worked as subcontractor for a Belgian company and he gave for 1 year computer courses to civil servants of the European Parliament in Luxembourg. The consultant was resident in Belgium and had a bureau at a Luxembourg trust office. Belgium exempts income from tax if he has a fixed base in Luxembourg. Whether he has a fixed base in Luxembourg?
 - Decision: No. in absence of partial or temporary control of the bureau. Services were not performed from bureau.
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Cases – Whether Art. 14 apply?

The taxpayer is an Italian heart surgeon, who was a resident of Italy. For the 11 months, he signed a cooperation agreement with an institute in Ghent. The agreement stipulated that the surgeon only could make use of the infrastructure of the institute in the context of determined projects which were supervised and coordinated by third persons, and that he did not have keys to enter the institute's building.

Belgium SC rules that the fixed base exists if the following conditions are met:

- the taxpayer must have a base at his disposal, such as an office;
 - the base must be fixed with respect to place and time, i.e. the base must be established at the same place with some continuation; and
 - the taxpayer must carry out his profession fully or partially in and by means of that base.
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Case (continued)

- the Court deduced that the taxpayer must have the possibility to have the necessary infrastructure (offices) at his disposal. The Court considered that this does not mean that the taxpayer must be the owner or renter of the offices, but that the taxpayer must have the right to use the offices at any time for the execution of his profession. Pursuant to the fact that the taxpayer could only use the offices in the context of a determined project, which was fully managed and coordinated by third persons, and that he did not have an entrance key of the building, the Court held that the taxpayer did not have a fixed base in Belgium.
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Cases – Whether Art. 14 apply?

- An individual, who was a resident of France carried out activities as an independent commercial advisor for a Belgian IT company. His activities, inter alia, consisted of prospecting for the Belgian company, and taking care of the commercial relations with IBM. The taxpayer had entered into a service agreement with the Belgian company, and he was an unpaid manager of that company. The taxpayer carried out his activities in various offices in Belgium. He was provided with apartment in Belgium. He stayed 3 days per week. Does he have a fixed base in Belgium?
 - Decision: Yes. Exercised real management functions on a permanent basis. Board meetings were carried out at apartment in Belgium. Was furnished with office furniture, equipment and other accessories.
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Cases – Whether Art. 14 apply?

The Taxpayer was a resident of Luxembourg, who carried out activities as a self-employed business trainer in Belgium, where he visited Belgian companies. He stayed in a rented dwelling in Brugge, which he used as his contact address. He stayed in Belgium when training contracts are signed. Is there a fixed base?

Decision. Fixed base not defined by considering Article 5. FB has wider scope than PE.

- Yes (Fixed Base). The rented dwelling constitutes a fixed base on the presumption that the Taxpayer does a substantial part of his study and preparation work in that dwelling and used the same as his contact address for his clients.
 - The Taxpayer receives specialist journals and documentation at, and had purchased office equipment for, that dwelling; the Belgian address was stated on his invoices, as a result of which the court presumed that the administrative formalities were carried out there; and the electricity costs and building-constructor costs concerning the Belgian dwelling were deducted as professional costs.
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Cases – Whether Art. 14 apply?

A Belgian law firm recruited an Italian trainee lawyer (the taxpayer) for a period of 1 year. The taxpayer continuously worked on his own account at the firm's Brussels office; however, the firm's infrastructure was put at his disposal. According to the taxpayer, the fees he received from the law firm were not taxable in Belgium. He argued that he did not have a fixed base in Belgium as the "cooperation" was merely of a temporary nature, and an office remained at his disposal in Italy. A fixed base could only exist if the activities are carried out for a longer period of, say, 1½ to 2 years. The taxpayer highlighted the following facts to further support his argument that he did not have a fixed base in Belgium:

- had approximately 2 years of professional experience;
- was treated by the Brussels law firm as a trainee;
- did not have any business cards;

Where the trainee has a fixed base in Belgium?

Cases – Whether Art. 14 apply?

Writer (R) who is regarded for the purposes of the Ireland–State R tax treaty as resident in State R. R has a cottage in Ireland where he completes a series of short stories which he has been commissioned to write. While doing so, R keeps on his apartment in State R, where he stays from time to time when visiting State R for meetings with his publishers there. He sets aside one room in the cottage for use as a study.

The Irish Revenue Commissioners contend that the profits of R's literary activities in Ireland are subject to Irish income tax on the ground that they are "attributable" to R's "fixed base" in Ireland.

R contends that his use of the cottage is restricted to the "act of creativity" and that the cottage is consequently not a "fixed base".

In similar facts, the US Tax Court has held that such a cottage is a "fixed base": It is understood that the writer's literary works are widely recognised as having a high degree of literary value. But the writer's activity of marketing them was nevertheless a commercial activity. Petitioner has not established the affirmative proposition that he did no more than seclude himself in the ivory tower of his house in [Ireland] writing out plots and typing manuscripts, completely detached from the crass and practical activities of the writer in the business matters incident to the circulation, purchase and production of his stories.

Others

- Fish handling services? (Australia)
 - Management services? (Turkey)
 - computer programmer, system analyst, auctioneers, trustee services, designers, provision of personnel, etc.
 - Liquidators, economist, telecommunication consultant, other consultant/advisors
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Cases – Whether Art. 14 apply?

- Sweta Estates Private Limited (HC) and Paper Products Limited (ITAT)– Art. 14 applies to companies. But, companies cannot perform personal services (German Ruling I.R. 41/70).
 - Maharashtra State Electricity Board and Chadbourne & Parke LLP and Linklaters (ITAT): Art. 14 v. FTS, employees also to be counted, not man days
 - Paper Products: For EPC contract, applied Art. 14.
 - Graphite India: Consultancy services for improvement and updation of its products
 - INDCOM: Umpire and match referee;
 - Yash Raj Film: Foreign technician to arrange for making logistical arrangements
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Cases – Whether Art. 14 apply?

- Dieter Eberhard Gustav Von Der Mark: Applicant, who was a qualified and experienced engineering consultant in Germany, was non-resident - He entered into an agreement with Indian company for rendering technical and marketing consultancy service to Indian company in respect of their process equipment - Purpose of consultancy was for advancement of company's products and development of export potential in European market - Services were to be rendered from Germany - He was also appointed as a non - whole - time non - resident additional director of that company on payment of Rs. 4 lakhs per annum, one per cent commission on net profit, sitting fee and other perquisites - Whether it could be said that applicant had fixed base in India within meaning of article 14 of DTAA - Held, no
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Differences

- Fixed Base is similar but not identical to PE. And, more towards Art. 5(1): Fixed Place of Business.
 - Fixed base regularly available to the Taxpayer whereas business should be carried on 'through' the PE.
 - FB tests may have lower threshold than PE tests
 - Taxing rights conferred by Article 14 with respect to income from independent personal services is somewhat more limited than that provided in Article 7 for the taxation of business profits.
 - In Article 15, however the income must be attributable to that fixed base (India-USA TT) or services performed in the source State, while Article 7 does not require that all of the income-generating activities be performed in the State where the permanent establishment is located. Thus, force of attraction rule is not applicable while attributing profits to fixed base.
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Differences

- Both “fixed” - exist for some reasonable period sufficient to establish nexus with the place for carrying business operation.
 - “fixed base” should not only exist but also be regularly available for the purpose of performing of professional and other activities. Base should be at the disposal of the individual whenever he performs services; notwithstanding whether he makes its use.
 - Regular availability rather the actual user for performance of service is the requirement.
 - Other aspect of PE (agency PE / Construction PE / Pre-Aux activities)
 - Minor Difference between Fixed Place PE and Fixed Base
 - Artist and Director’s professional income and teaching activities when covered?
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Differences

- Ukraine-Tajikistan, the term “fixed base” means any fixed place, in particular, such as an office, through which the activity of a resident who provides independent personal services is wholly or partly carried on
 - US-Norway: services performed in connection with the exploration or exploitation of the seabed and sub-soil and their natural resources situated in that other Contracting State shall be deemed to be carrying on through a fixed base
 - China-Malaysia: The term “fixed base” means a fixed operating place where an individual is engaged in providing certain professional services.
 - Non-discriminatory article and other income article does not mention fixed base in many tax treaties
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India-US TE

- Article 15 applies to all such services performed by an individual for his own account or by a firm of individuals, where the individual or firm of individuals receives the income and bears the risk of loss arising from the services.
 - IRS guidelines: The terms fixed base and permanent establishment generally mean a fixed place of business, such as a place of management, a branch, an office, a factory, a warehouse, or a mining site, through which an enterprise carries on its business.
 - US based TT: Art. 14 apply to income received for personal services as independent contractors or self-employed individual professionals
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Variations

- No fixed base article: Brazil (paid by and remuneration test), Greece, Russia and Sri Lanka (days test)
 - India-Bangladesh – no borne by 'fixed base' in Dependent Personal Services.
 - Includes auditors, surgeons, etc.
 - India-Norway: Taxed if not taxed in R State
 - India-Thailand, US, UK: Performance based criteria.
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Brief

Case Study

- Company applicable and independent / professional service provider (not dependent service provider)
 - Services whether covered
 - Fixed Base v. Royalty / FTS
 - Specific exclusion in PE and / or FTS
 - Services overlap + Fixed Base
 - Services overlap + 183d+ but no mention of Fixed Base
 - Services overlap but no Fixed Base and less than 183d
 - Service PE and Fixed Base
 - Specific exclusion
 - If no specific exclusion
 - Where duration not the same (India-US Tax Treaty)
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Group Discussion A

Country	Construction / Supervisory PE	Service PE	Royalty / Fees For Technical Services	IPS (Art. 14)	Advantage
Iceland	9m/12m	90d/12m	Exclusion	FBRA or 183d/12m	
Switzerland	3m/12m	6m/12m	Exclusion	FBRA or 183/12m	
Netherlands	6m (assumed in any 12m)	-	Exclusion	FBRA or 183d/FY	
Canada	120d	90d/12m or 1d for related entity	Exclusion	FBRA or 183d/FY or Paid by resident or borned by PE and Remuneration test (RT) – usually low - \$2500	

Group Discussion B

Name	Construction / Supervisory PE	Service PE	Royalty / Fees For Technical Services	IPS (Art. 14)	Advantage
India-USA	120d / any 12 mths	90d / 12 mths or 1d related entity	FIS but scope excludes services paid for IPS	Performed; FBRA /90d+	
India-UK	6mth + 10% RT	90d / 12 or 30d / 12	FIS but scope excludes services paid for IPS	FBRA + Performed (P); or P+90d+	
India-Thailand	183d	183d	-	P+ FBRA; or P+ 183d/FY; or P+ Paid/Borne by	

Group Discussion C

Name	Construction / Supervisory PE	Service PE	Royalty / Fees For Technical Services	IPS (Art. 14)	Advantage
India-Zambia	9m	-	FTS and (Art. 12(3) does not include fixed base	FBRA or 183d or RT (usually low)	
India-Ukraine	6m	- (but 1d for services in connection with exploration of mineral oils	FTS (Art. 12(3) allows Art.14 to apply if FB)	FBRA or 183d	
India-UAE	9m	9m/12m	-	FBRA or 183d/FY	

Group Discussion D

Name	Construction / Supervisory PE	Service PE	Royalty / Fees For Technical Services	IPS (Art. 14)	Advantage
India-Singapore	183	183	-	FBRA or 90d	
India-China	183	183	FTS (but no FB in Art. 12(3))	FBRA or 183d/FY	
India-Germany	6m	-	FTS	FBRA or 120d	

Conclusions

- Results vary between PE and FB and therefore, arbitrage possible
- No priority when no deemed FB or without FB.