

# Refresher Course on Basics of International Taxation

Major Articles in Tax Treaties and Taxability under the Income-tax Act, 1961

03 September 2022 (5:00 pm to 7:00 pm)

CA Sagar Joshi

## Provisions under the Act

# Provisions of the Act

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## Basis of charge

### Section 4 of the Income-tax Act, 1961 ('the Act') | Charging Section

income-tax shall be charged for any AY at the applicable tax rate in respect of the total income of the PY of every person

#### Total Income | Section 2(45)

Total amount of income referred to in section 5, computed in the manner laid down in this Act

#### Section 5 | Scope of total income

Scope of total income depends upon the residential status of person

#### Section 6 | Residence

Residence in India

#### Section 9 | Income deemed to accrue or arise in India

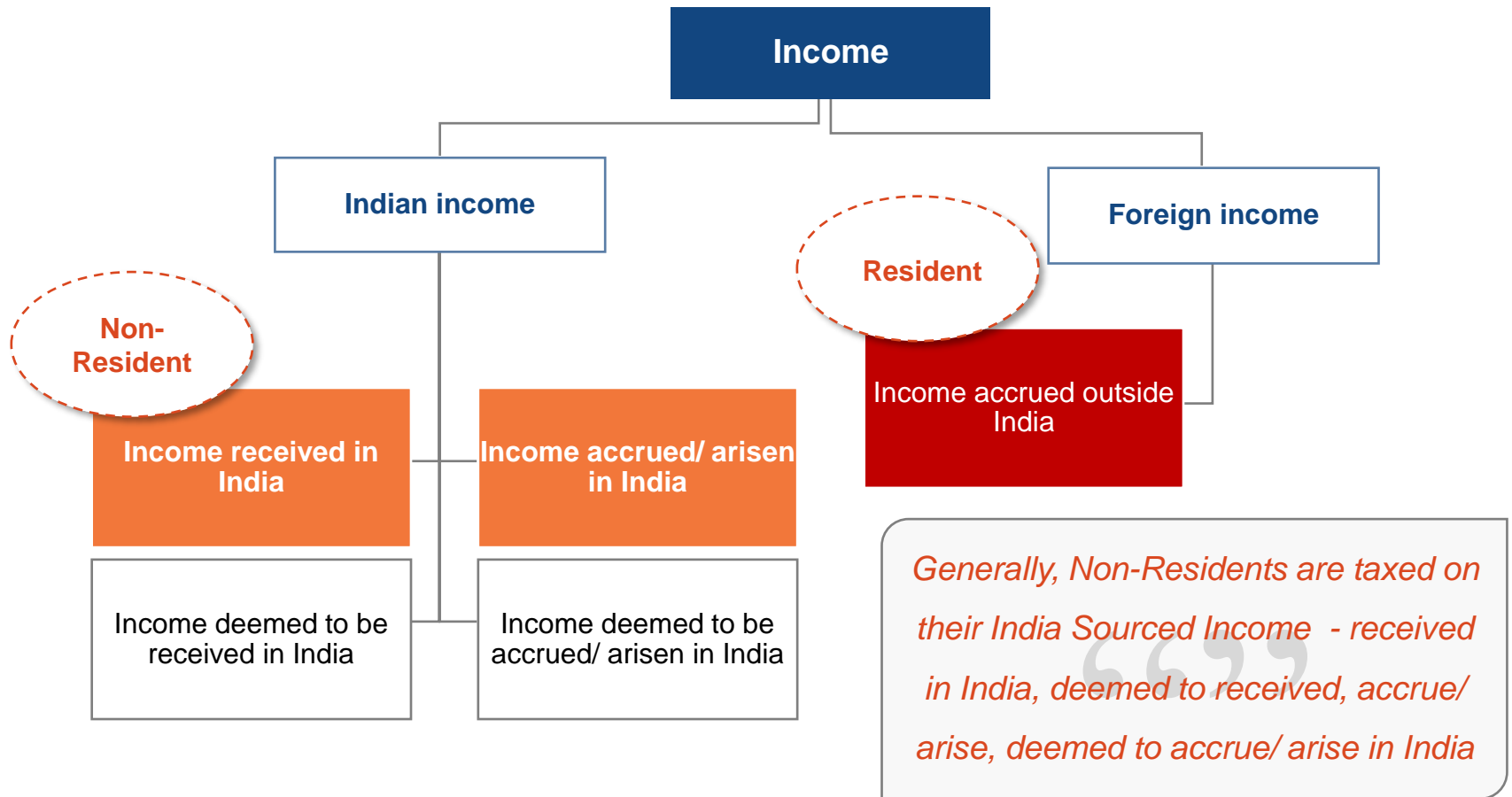
Business connection, interest, royalty, FTS

Section 115A | Tax on dividends, royalty and technical service fees in the case of foreign companies

#### Section 195 | Withholding of tax

# Domestic provisions

## Scope of total income – Dependent on residential status



# Interplay | Treaty and domestic provisions

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**Section 90** - Central Government may enter into a Tax Treaty with the Government of any country or specified territory outside India

**Section 90A** – Agreement entered into between specified association in India and specified association in specified territory outside India

- Granting relief on doubly taxed income
- Avoidance of double taxation
- For exchange of information for prevention of evasion or avoidance of tax
- For promotion of mutual economic relations, trade & investment
- For recovery of tax

**As per Section 90(2) of the Act, the provisions of the Act or the relevant Tax Treaty, whichever is more beneficial shall apply.**

Major Articles in Tax  
Treaty and Taxability  
under the Act

# Article 4 – Resident

## Residence rule

- A person should be resident of one of the contracting states in order to invoke the provisions of a tax treaty

## Determination of residence

- A person is a resident of a country if he is **liable to tax** (Refer Note) in the country by virtue of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature

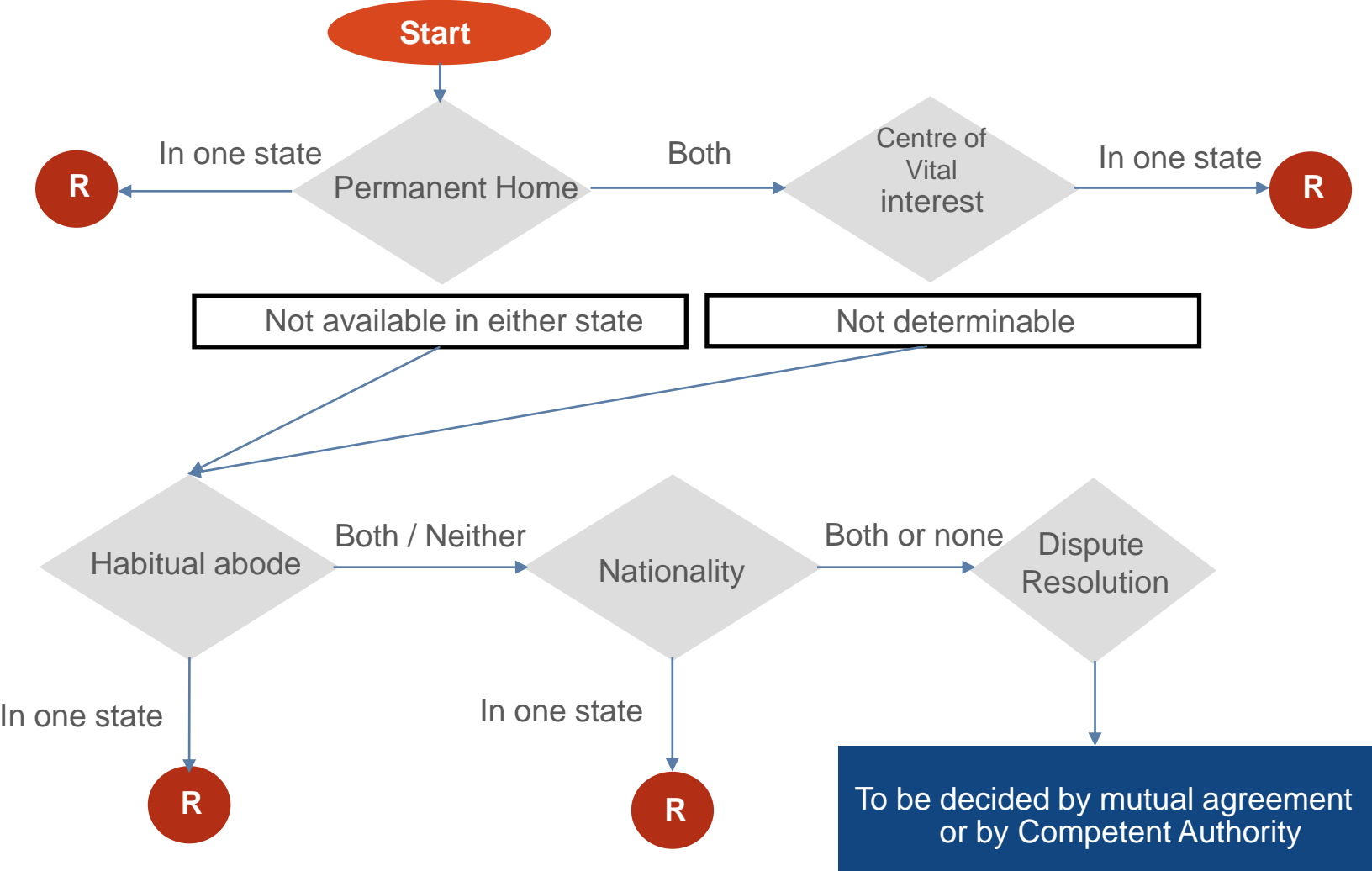
## Tie breaker

- When a person qualifies as resident of both countries, the tie breaker test needs to be applied to determine the residential status in favour of one country in order to apply the provisions of the treaty.
- In the case of Individual- tie breaker rule determines residency
- In any other case - the Place of Effective Management (also referred to as 'POEM') determines residency

### Note:

- Liable to tax = Must be a tax assessable entity
- Actual taxation not relevant – Exempt entities, loss making entities eligible

# Article 4- Tie-breaker Rule for Individuals





# Section 9 - Business Connection (1/2)

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## **Section 9(1)(i) – all income accruing or arising, whether directly or indirectly:**

- through or from any business connection in India or
- through or from any property in India or
- through or from any asset or source of income in India or
- through the transfer of a capital asset situated in India

## **Business connection involves a relation between:**

- A business carried on by a non-resident which yields profits or gains and
- Some activity in India which contributes to the earning of these profits or gains.



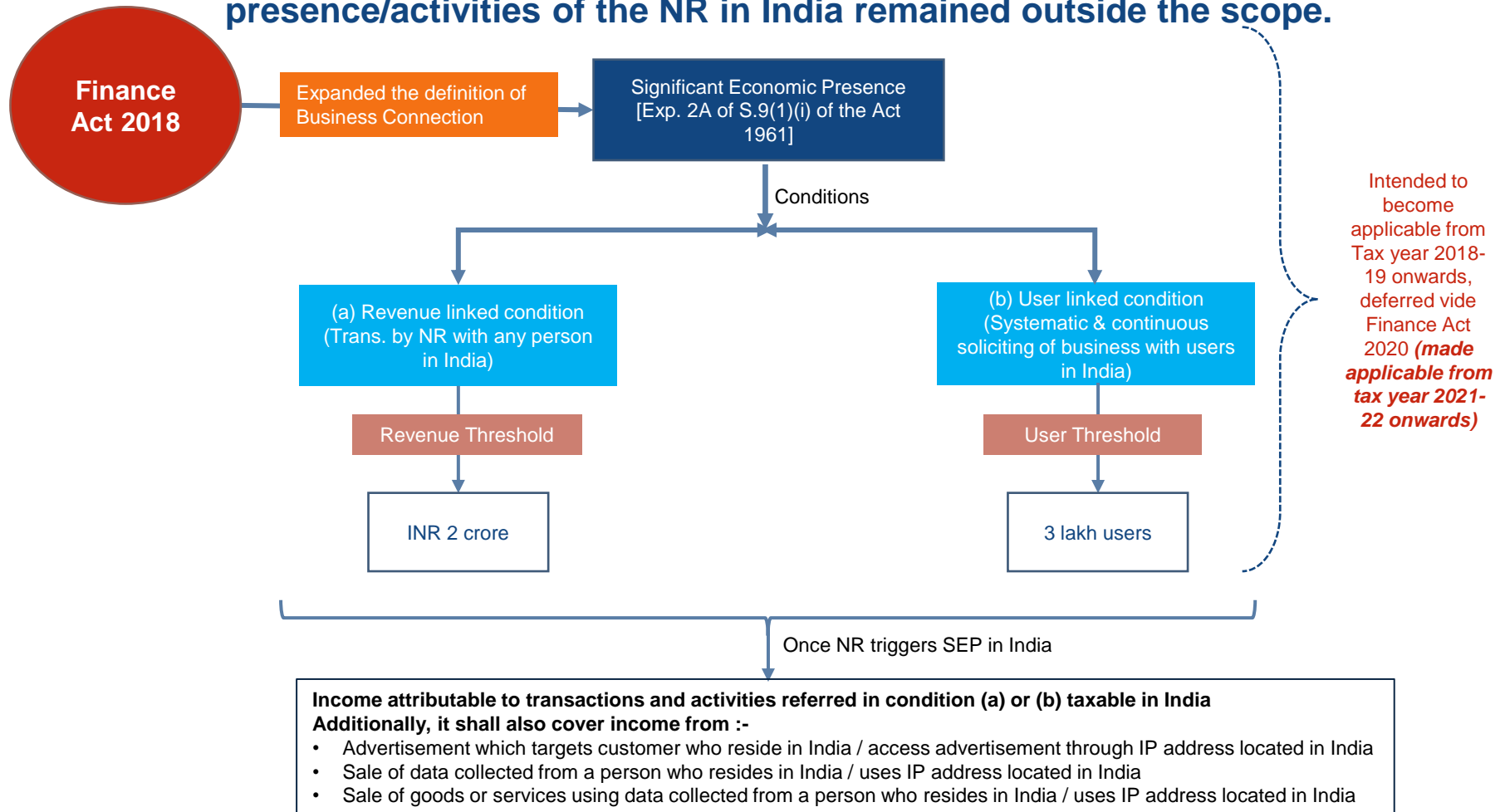
## Section 9 - Business Connection (2/2)

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- Supreme Court in R D Agarwal & Co. (56 ITR 20) defines this term
  - Real and intimate relations between the activities carried on in both the states
  - Relationship between two contribute to earn income in the hands of non-resident
  - An element of continuity between non-resident's business and Indian activities
- Business connection includes any business activity carried out through any person on behalf of NR:
  - An authority to conclude contracts
  - habitually plays the principal role leading to conclusion of contracts
  - has no such authority, but habitually maintains in India stock of goods
  - habitually secures orders in India
- No Business connection if the activities are carried by NR through Independent agent
- Significant Economic Presence - SEP

# Significant Economic Presence

Due to restrictive scope of the definition of business connection in India remote presence/activities of the NR in India remained outside the scope.

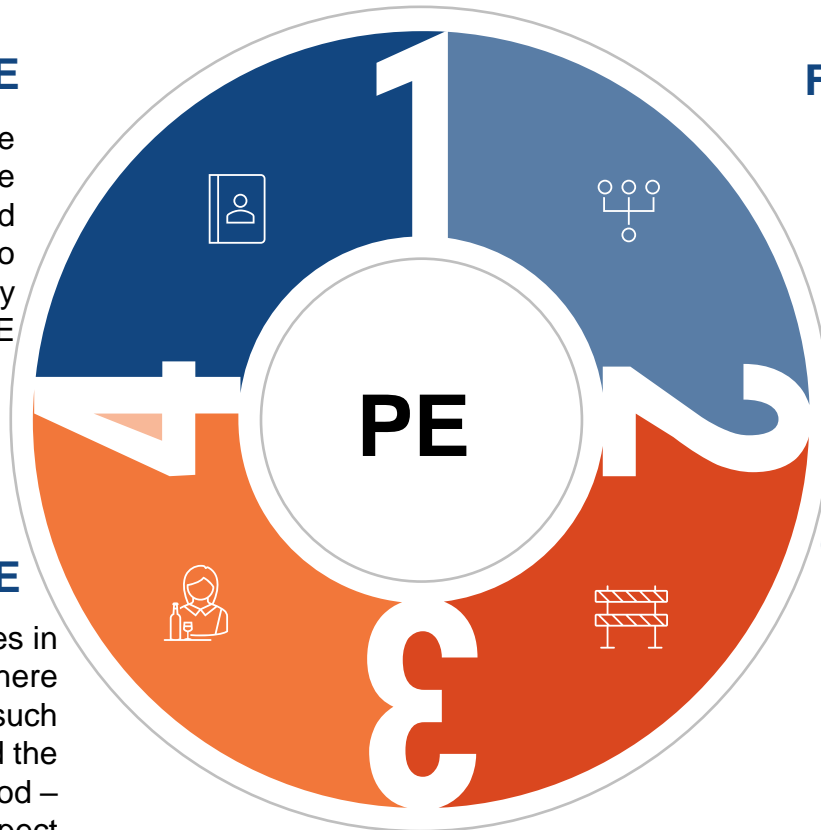


# Article 5 - Permanent Establishment

## Business with India versus Business in India

### Agency PE

If the agent is able to legally bind the principal to third party, it leads to creation of Agency PE



### Service PE

Furnishing of services in source country where the duration of such services exceed the specified period – Employment aspect required – Different from Independent Personal Services

### Fixed Place PE

A fixed place of business through which the business of an enterprise is wholly or partly carried on  
E.g.: Branch, Office, Factory, etc.

### Construction PE

Building site/ construction/ assembly/ installation project if it lasts for more than a specified duration

*Preparatory and auxiliary cases*

Appropriate exclusions are provided where only non-revenue generating activities undertaken in the source country

Eg: Storage activities, Sourcing activities, etc

# Article 5 - Permanent Establishment – Structure of Article

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Para	Overview
<b>Para 1</b>	Basic Rule for PE (Fixed Place PE)
<b>Para 2</b>	Illustrative list
<b>Para 3</b>	PE in relation to Construction /Installation projects / Furnishing of service
<b>Para 4</b>	List of excluded activities
<b>Para 5</b>	Dependent agents may be a PE
<b>Para 6</b>	Independent agents not a PE
<b>Para 7</b>	Associated enterprises – Control of a subsidiary does not constitute a PE

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# Fixed place PE

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## General definition of a PE:

- “A ‘fixed place of business’ through which the business of an enterprise is wholly or partly carried on...”
- **Under Article 5(1), PE exists if following conditions are satisfied:**
  - There is a **place of business** (“place of business test”)
  - Such place of business is at the **disposal** of enterprise (“disposal test”)
  - Such place of business is **fixed** (“location test” and “permanence test”)
  - The **business** of the enterprise is **carried on** (“business activity test”) wholly or partly through such fixed place of business

A PE can be constituted under “Basic Rule” only if **ALL** of above tests are cumulatively satisfied

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# PE in relation to Construction/ Installation projects

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- A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months
- A building site or construction or installation project includes:
  - construction of roads, bridges or canals
  - renovation (involving more than mere maintenance or redecoration) of buildings, roads, bridges or canals
  - laying of pipelines
  - excavating and dredging
  - installation of new equipment in an existing building or outdoors
  - onsite planning and supervision of the construction of a building
- Final assembly of movable objects (e.g. airplanes) also covered

**Threshold period for constituting construction PE may vary from treaty to treaty**

# PE in relation to Construction/ Installation projects

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- The permanence element of PE is replaced by a test of minimum length of time
- Site exists from the date on which the contractor begins work, including any preparatory work (e.g., planning office installed)
- A site exists until the work is completed or permanently abandoned
- A site should not be regarded as ceasing to exist when work is temporarily discontinued – for example, due to:
  - bad weather
  - shortage of material
  - labor difficulties
- Twelve-month test applies to each individual site or project
- A building site should be regarded as a single unit, even if it is based on several contracts
- Time taken for unconnected projects should not be considered for 12-month period
- Time spent by sub-contractor also included in above period [para 18 in OECD commentary to Article 5]
- Geographical and Commercial coherence



# Service PE

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- Service PE is included in UN MC, whereas OECD MC has no such provisions for service PE
- Furnishing of services by a non-resident in India through employees or other personnel may result in creation of 'Service PE', provided the duration of such services exceeds the specified period (normally 30 to 120 days )
- Services covered under FTS clause are generally excluded from Service PE definition
- Separate Service PE for each activity vs. combined
- "Other personnel" not defined under the Treaty or the Act
- Other personnel - should include only persons who work under direct instructions, supervision and control from the foreign enterprise and that the foreign enterprise is responsible for their performance

# Calculation of Days for PE

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- Calculation of number of days presence – Solar days v. Man Days
  - Solar days: each day where employee(s) are present in source state, should be considered (e.g. where 5 employees present in source state on the same day, number of days counted will be 1)
  - Man Days: Each employee's stay in source state should be separately counted (e.g. where 5 employees present in source state on the same day, number of days counted will be 5)
  - As per Indian judicial precedents, for the purpose of computing duration of presence, calculation should be as per solar days

# Exclusion from PE

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- **Exceptions in Article 5(4) – activities which do not result in PE**
- Exclusions
  - Use of facilities for storage, display (or delivery) of goods
  - Maintenance of stock of goods for storage, display (or delivery)
  - Maintenance of stock for processing of goods
  - Purchasing goods or merchandise or for collecting information for the enterprise
  - Carrying on, for the enterprise, any other activity of a preparatory or auxiliary character

# Exclusion from PE

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## Preparatory / auxiliary

Market survey / Industry analyses / economy evaluation

Furnishing of information including product information to prospective customers

Ensuring technical presentation to potential users

Development of market opportunities

Basic operation before commencement of business activities in India

## Non-preparatory / auxiliary

Managing an enterprise or its parts

A management office for supervisory and co-ordinating functions

Supervisory or control of performance of contract

After sales services to customers

A fixed place of business for the delivery of spare parts to customers

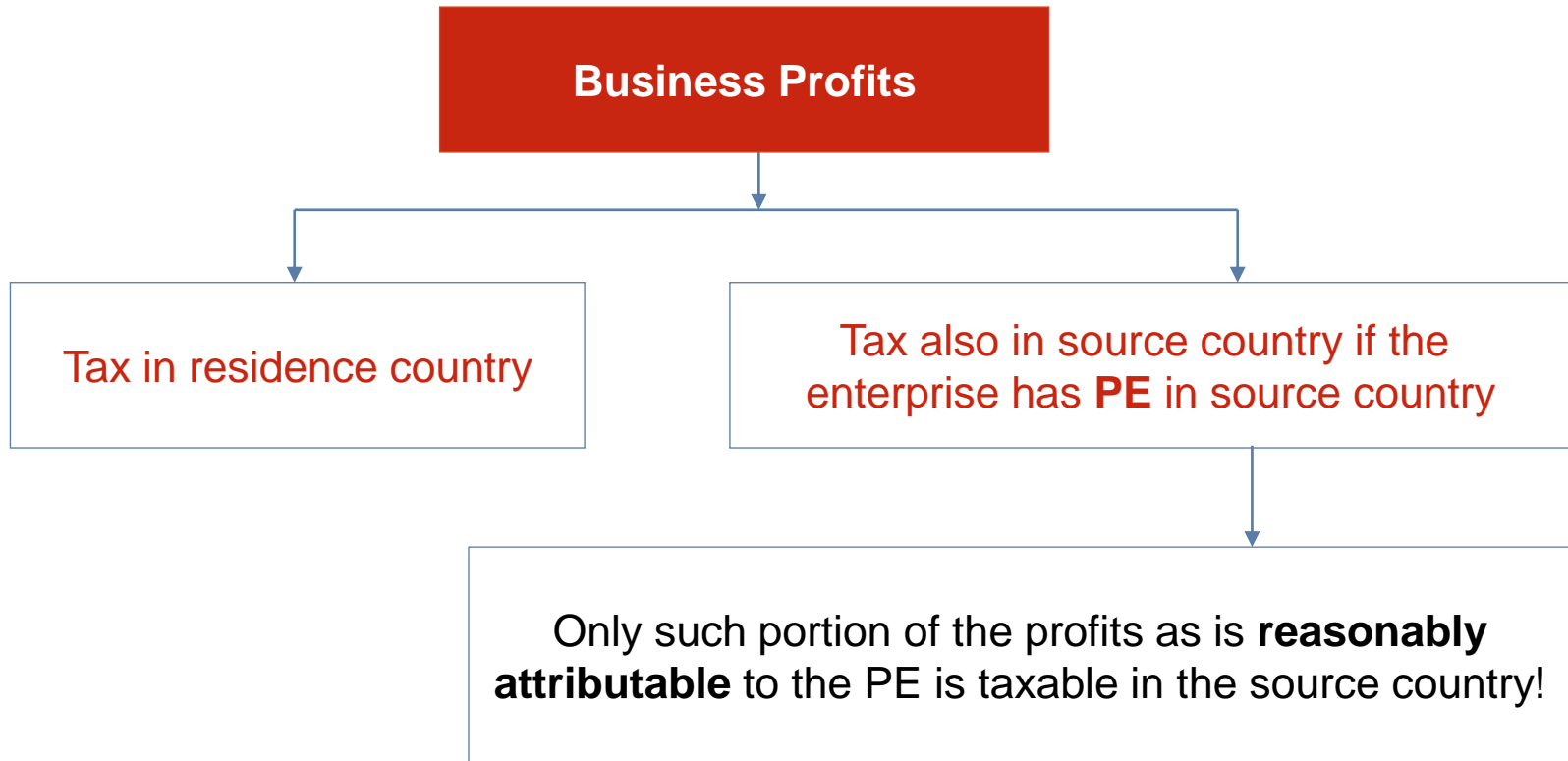
# Agency PE

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- Dependent agent will constitute a PE, if the agent
  - he has and **habitually exercises in that State an authority to conclude contracts** on behalf of the enterprise, **unless his activities are limited to the purchase of goods or merchandise for the enterprise** ;
  - he has no such authority, but **habitually maintains in the first-mentioned State a stock** of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise ; or
  - he habitually secures **orders** in the first-mentioned State, **wholly or almost wholly** for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise
  - Generally, a *dependent agent* will constitute a PE and an *independent agent* will not result in a PE.

# Article 7 – Business Profits

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# Article 7 - Business Profit

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- After it is determined that PE exists as per Article 5, Article 7 to be looked at to determine what profits are taxable for that PE
- Article 7(1) of the OECD Model convention states that
- *“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 permanent establishment situated therein. If the enterprise carries on business as aforesaid, the **profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment**”*
- Accordingly, only those profits “**attributable**” to the PE are taxable

# Business Profit

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- Article 7(2) – on attribution
- *“profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions”*
- However, no method has been prescribed to accurately determine profits
- Accordingly, attribution is a fact-based exercise entailing Function and Risk analysis
- OECD Report on Attribution of profits has considered two approaches to profit attribution:

## Relevant business activity approach

- Profit attribution cannot exceed profits of the enterprise as a whole from the activity in which PE has participation

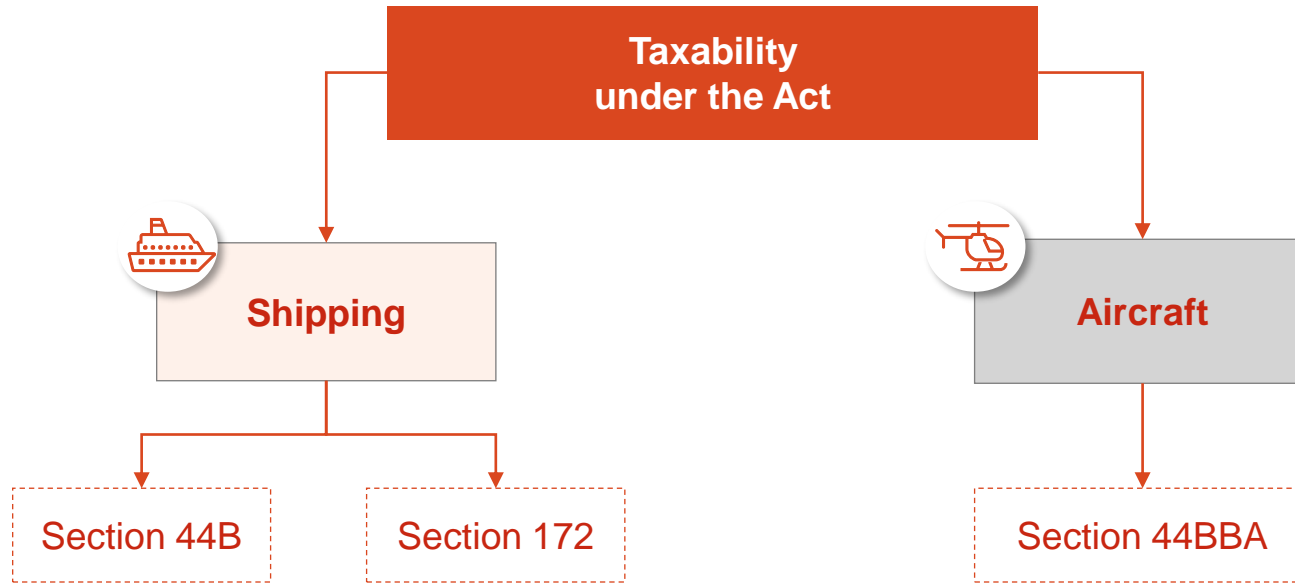
## Functionally Separate Entity approach (approach recommended by OECD)

- Enterprise and PE considered as separate legal entities. Accordingly, profits can be attributable to PE, even if for the enterprise as a whole, there is loss or no profit
- Arms length remuneration to PE – no further attribution



# Article 8 - Income from Shipping and Aircraft

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- Above sections deal with presumptive taxation
- Purpose - provide simple manner of calculation of income
- Section 44B and 44BBA are similarly worded

# Article 8 - Income from Shipping and Aircraft

**Section 44B and Section 172** of the analyzing Act deal with shipping profits of a non - resident

Section 44B	Section 172
Applies to <b>regular</b> shipping business	Applies to <b>occasional</b> shipping activities
Overrides <b>only</b> Section 28 to 43A of the Act	Overrides <b>all</b> other provisions of the Act
Income <b>deemed at 7.5%</b> of <ul style="list-style-type: none"><li>• Export freight (wherever received)</li><li>• <b>Import freight which is received in India</b></li><li>• Freight to include demurrage, handling charges or any other similar charges</li></ul>	Income <b>deemed at 7.5%</b> of <ul style="list-style-type: none"><li>• Export freight (wherever received)</li><li>• Freight to include demurrage, handling charges or any other similar charges</li></ul>
Procedure and time limit for assessment and collection of tax is <b>not</b> provided	Procedure and time limit for assessment and collection of tax <b>is provided</b>
Return to be filed as per due date specified under Section 139 of the Act	Return to be filed within 30 days of departure of ship

# Article 8 - Income from Shipping and Aircraft

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- **Objective of inserting specific article (Article 8 in most of the treaties) on Shipping & Aircraft**
  - Restrict taxing rights to One Country only
    - Exception- taxability in both States (albeit with some concessions)
  - Simplify taxability
  - Due to source rule of taxation, taxpayer can be liable to tax in various countries – fragmented taxation can be burdensome and hence needs to be mitigated
  - Mitigate burden of profit attribution for PE constituted in various countries
  - Overrides Article 7 (Business Profits) – limited override though
  - No need for detailed rules since taxing rights restricted to one State
  - **Plethora of interpretation issues**

# FTS – Under the Act (1/2)

Payable By	Fees for Technical Services (Deemed to Accrue/Arise in India)
Government	All payments
Resident	All payments, but excludes FTS payable <ul style="list-style-type: none"><li>For the purposes of a <b>business or profession carried on by the payer outside India</b> - in respect of services utilised; OR</li><li>For the purposes of making or earning <b>any income from any source outside India</b></li></ul>
Non-Resident	Covers only payments <ul style="list-style-type: none"><li>For the purposes of a business or profession carried on <b>by the payer in India</b> - in respect of services utilised; OR</li><li>For the purposes of making or earning any <b>income from any source in India</b></li></ul>

## Fees for Technical Services

- any consideration (*including any lump sum consideration*)
- for the rendering of any managerial, technical or consultancy services (*including the provision of services of technical or other personnel*) but
- does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries'

# FTS – Under the act (2/2)

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- **Fees for Technical Services** does not include
  - Services utilised in **business or profession outside India** by **such person** OR
  - Services utilised for the purpose of earning income from a **source outside** India
  - Reading of the Act – suggests payer (Indian party)
  - Such person refers to the **Indian party** and not the recipient - **Circular 202 of 1976**
  - **Contrary View - Grasim Industries Limited 10 Taxmann 355 (Bom) (2011)**
    - Taxability of non-resident's income considered under Section 9(1)(vii)
    - Such person refers to recipient as one has to consider whether his income is deemed to have accrued or arisen in India
    - No reference to the above-mentioned circular in this case

# FTS – Under Tax Treaty - Structure

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Article	Subject Matter
12(1)	Clarification – FTS arising in a source country may be taxed in the country of residence
12(2)	Taxability rights also given to source country, but with restriction on rate of tax
<b>12(3)</b>	<b>Definition of FTS</b>
12(4)	Provides that this article would not be applicable in case FTS is effectively connected with PE/fixed base in source country
12(5)	FTS shall be deemed to arise in the state in which PE incurring these expenses is situated
<b>12(6)</b>	<b>Concessional rate applicable only to portion of FTS which satisfies the arms length price paid to beneficial owner</b>

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# FTS – Under Tax Treaty – Key definitions

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## Under Tax Treaty (Israel)

“Fees for Technical Services” means payments of any kind received as a consideration for services of a managerial, technical or consultancy nature, including the provision of services by technical or other personnel, but does not include payments for services mentioned in Article 16 (DPS) of this Convention

## Under Tax Treaty (USA)

“Fees for Included Services” means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of 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, or consist of the development and transfer of a technical plan or technical design**

# FTS – Types of FTS articles

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Type	Variation
Type 1	the Act and Treaty definition is similar e.g. Japan
Type 2	Restricted Definition of FTS – Make Available clause present e.g. USA, UK, Canada, Netherlands, Singapore
Type 3	Protocol in treaties restricts scope/rate of taxation – Most Favoured Nation (MFN) e.g. Belgium, France, Hungary, Spain, etc
Type 4	India Australia Tax Treaty does not have article on FTS but definition of royalty includes FIS
Type 5	<b>Specific exclusion</b> of certain items from scope of FTS e.g. Singapore, Switzerland, UK , USA
Type 6	Absence of Clause on FTS e.g. Myanmar, Philippines, UAE

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# FTS – Make Available clause

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- Make Available means
  - When a person acquiring the service is enabled to apply the technology
  - The person availing the services should be in a position to apply the technology on its own in future independently
  - No recourse to service provider is required
  - Akin to training
- Make Available is explained in MoU between India and USA – Whether this can be relied for other Treaties?
  - It can be relied as these are the views of Indian Government – **DDIT vs Preroy AG 39 SOT 187 (Mum) (2010)**
  - It cannot be relied since this is a convention which was signed by both the countries – **ONGC vs ACIT 9 SOT 8 Delhi (2006)**
- If the services do not make available technical knowledge, etc., then, it is not FIS. The same may be considered as business income and taxable only if the foreign company has a PE in India.

# Royalty Under the Act

**Royalty includes any consideration including lump sum consideration paid for**

Use/transfer all any right/imparting of information concerning the use of, or the use of patent, invention, model, design, secret formula or process or trademark or similar property

Imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill

Use or the right to use any industrial, commercial or scientific equipment excluding Section 44BB

Transfer of all or any rights (including the granting of a licence), copyright, literary, artistic or scientific work.

**Excludes income chargeable under the head “Capital Gains”**

# Royalty Under the Act

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Payable by	Royalty deemed to Accrue/Arise in India
<b>Government</b>	All payments
<b>Resident</b>	All payments, but excludes royalty payable <ul style="list-style-type: none"><li>▪ For the purposes of a <b>business or profession carried on by the payer outside</b> India - in respect of rights, property or information used or services utilized; OR</li><li>▪ For the purposes of <b>making or earning any income from any source outside India</b></li></ul>
<b>Non-Resident</b>	Covers only payments <ul style="list-style-type: none"><li>▪ For the purposes of a business or profession carried on by the payer in India - in respect of rights, property or information used or services utilized; OR</li><li>▪ For the purposes of making or earning any income from any source in India</li></ul>

# Royalty – Types of Royalty clause under Tax Treaty

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Type	Variation
<b>Type 1</b>	Includes gains derived from alienation of IPRs e.g. Singapore
<b>Type 2</b>	Excludes equipment royalty e.g. Greece, Israel, Sweden, Netherlands, Belgium
<b>Type 3</b>	Includes gains derived from the alienation of IPR which are contingent on the productivity, use or disposition thereof e.g. Canada, USA
<b>Type 4</b>	Specifically includes software/computer program e.g. Malaysia, Trinidad and Tobago, Turkmenistan, Kazakhstan, Kyrgyz Republic, etc
<b>Type 5</b>	Excludes rental and other income from cinematograph films in the definition of royalty e.g. Libya, UAE
<b>Type 6</b>	Taxes royalty only in source state e.g. Greece, Libya, UAE
<b>Type 7</b>	Includes transmission by way of satellite, cable, optic fibre or similar technology e.g. Hungary

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# Article 14 - Independent Personal Services (1/3)

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- Refers to services rendered in the course of carrying on an independent profession
- Income derived from professional services/other independent activities of similar character taxable in the source state if
  - He/she has a **fixed base** regularly available in the Source State or
  - His/her **stay** in the Source State exceeds specified period
- India-Singapore Tax Treaty – Relevant Extract

## Article 14 - Independent Personal Services (2/3)

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- Income derived by an individual who is a resident of a Contracting State from the performance of professional services or other independent activities of a similar 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 State ; or
  - B. if his stay in the other Contracting State is for a period or periods amounting to or **exceeding in the aggregate 90 days** in the relevant fiscal year, in that case, only so much of the income, as is derived from his activities, performed in that other State may be taxed in that other State.
- *The term "professional services" **includes** independent scientific, literary, artistic, educational or teaching activities, as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.*

# Article 14 - Independent Personal Services (3/3)

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- **Professional services include**

- Independent scientific, literary, artistic, educational or teaching activities
- Independent activities of physicians, lawyers, engineers, architects, dentists and accountants

- **OECD deleted IPS article in 2000 to eliminate differences in approach to tax business and professional income**

- However, most of the Indian tax treaties still contain an Article dealing with IPS

- **MSEB vs DCIT 83 TTJ 325 (Bom)**

- India-UK Tax Treaty – IPS definition covered any resident
- Tax payer – partnership firm claimed beneficial provisions of the Treaty
- Where tax treaties define IPS to mean services rendered by a “resident”, the term could include, inter alia, individuals, corporate entities, etc.

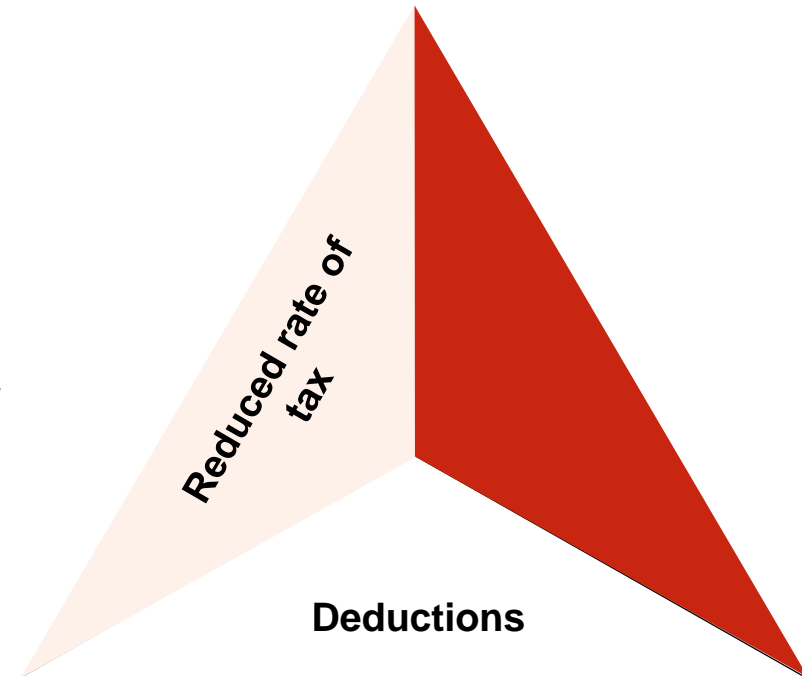
(Treaty definition amended in 1994 - “an individual, whether in his/her own capacity or as a member of a partnership”)

# Most Favored Nation (MFN) Clause (1/5)

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- Extends similar benefits to one country as extended to certain other countries - Ensures non-discrimination between a group of countries
- India has MFN clauses in tax treaties with Netherlands, Belgium, France, Sweden, Norway, Switzerland, Spain, Kazakhstan, Philippines and Hungary
- Advantage of more favourable rate and scope granted to other countries is extended to existing Tax Treaty - the *Lower tax rate of withholding and /or Restricted scope of taxable income*

**Benefit provided is normally with respect to following:**





# Most Favored Nation (MFN) Clause (2/5)

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## MFN clause in the protocol to India-France Tax Treaty

*“In respect of Dividends, Interest, Royalties, FTS and payment for use of equipment's, if under the Convention, Agreement or Protocol signed after 1st Sept 1989 between India and a third State which is a member of the OECD, India limits its taxation at source 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 on the said items of income shall also apply under this Convention ...”*

Country	Rate / Scope Change
Spain	<ul style="list-style-type: none"><li>▪ FTS Rate reduced from 20% to 10% because of USA, UK and Germany Tax Treaty</li><li>▪ Scope of FTS is restricted as 'Make available' clause under Canada and Portugal Tax Treaty applies</li><li>▪ Dependent Personal Services (DPS) will be excluded from the purview of FTS because of Swiss, Germany and Sweden Tax Treaty</li></ul>
Netherland	<ul style="list-style-type: none"><li>▪ DPS will be excluded from the purview of FTS because of Swiss, Germany and Sweden Tax Treaty</li></ul>
France	<ul style="list-style-type: none"><li>▪ Scope of FTS is restricted as 'Make available' clause under USA and UK Tax Treaty applies</li><li>▪ DPS will be excluded from the purview of FTS because of Swiss, Germany and Sweden Tax Treaty</li></ul>

# Most Favored Nation (MFN) Clause (3/5)

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## MFN clause in the protocol to India-France Tax Treaty

*“In respect of Dividends, Interest, Royalties, FTS and payment for use of equipment's, if under the Convention, Agreement or Protocol signed after 1st Sept 1989 between India and a third State which is a member of the OECD, India limits its taxation at source 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 on the said items of income shall also apply under this Convention ...”*

<b>Particulars</b>	<b>Indo-France w.e.f 1.4.95</b>	<b>Indo-German w.e.f.1.4.97</b>	<b>Indo-Sweden w.e.f. 1.4.98</b>
Interest	15%	10%	10%
Royalty/FTS	20%	10%	10%
Use of Equipment	20%	10%	Not taxable

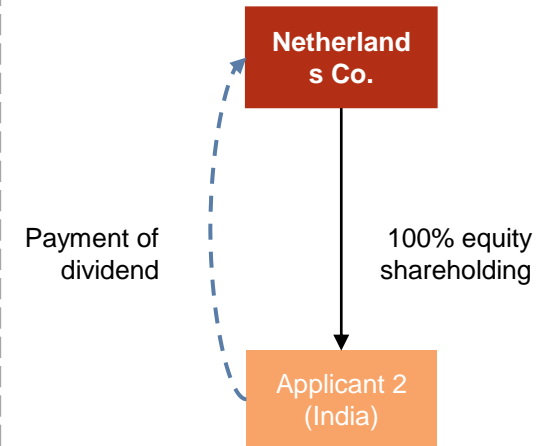
# MFN clause (4/5)

## Concentrix Services Netherlands B.V. v. ITO (TDS) & Anr\*

### Issue:

- Taxpayer, NL resident applied for lower WHT @5% (as against 10% in Tax Treaty) in respect of dividend income from its Indian subsidiaries:
  - Basis MFN clause read with Tax Treaty between India and Slovenia / Lithuania / Columbia.
- Revenue contended MFN clause not to trigger since:
  - Slovenia, Lithuania and Columbia not member of OECD at the **time of execution** of Tax Treaty
  - No notification has been issued to give effect to MFN clause of the India-NL Tax Treaty.
- Principles of common interpretation to apply

### Simplified structure



# MFN clause (5/5)

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## Key observations of the Delhi HC

- Protocol forms part of tax treaty and hence no requirement to issue a notification
- MFN clause applicable from the date third country becomes member of OECD
- Similar ruling rendered by **Delhi HC** in case of Nestle SA v. AO (International Taxation) 2(2)(2), New Delhi, [WP(C) 3243/2021].

### *Thoughts for consideration / deliberation:*

- *Ruling is of significance as many tax treaties entered into by India with countries such as France, Spain, Switzerland, Sweden and Hungary have comparable MFN clauses.*
- *MFN clauses also extend to other streams of income, namely interest, royalties and fees for technical services.*
- *Basis the Delhi HC ruling, impact on taxability of dividend and other streams of income, from a lower tax rate / restricted scope perspective, may be evaluated.*

# Article 24 - Limitation of Benefits

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Article to prevent treaty shopping ie, setting up of shell entities only to take advantage of beneficial treaties

Typically provides for fulfillment of certain conditions/ tests by resident companies in order to be eligible to claim benefits of the treaty

## Examples:

Protocol to **India-Singapore treaty** provides that benefits of favorable capital gains clause would not be available to a shell/ conduit company. Applies the following 3 tests:

- **Motive test** : Primary purpose to take advantage of capital gains Article
- **Expenditure test** : Annual expenditure is less than S\$ 200,000 or INR 50,00,000 in immediately preceding 2 years
- **Activity test** : negligible or *nil* business operations or with no real and continuous business activities carried out

## India – UAE Tax Treaty:

- *An entity which is a resident of a Contracting State shall not be entitled to the benefits of this Agreement **if the main purpose or one of the main purposes** of the creation of such entity was to obtain the benefits of this Agreement that would not be otherwise available*

**Q&A**



**Thank you**