



Overview of Double Tax Avoidance Agreements ('DTAA') Provisions

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Double Taxation

Double Taxation

Tax is paid more than once on the same taxable income or asset

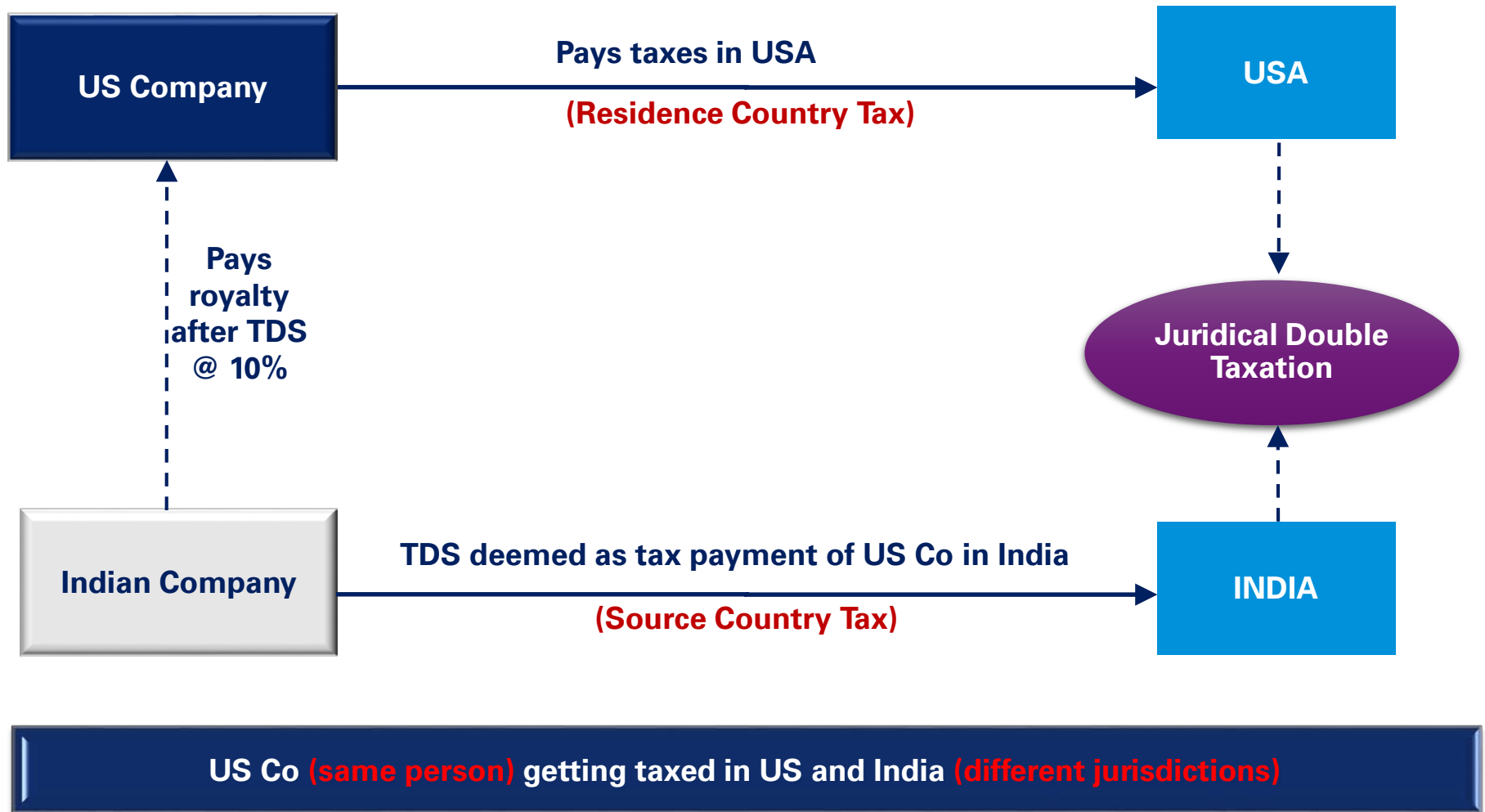
Jurisdictional Taxation

Same person is taxed twice on the same income by more than one state

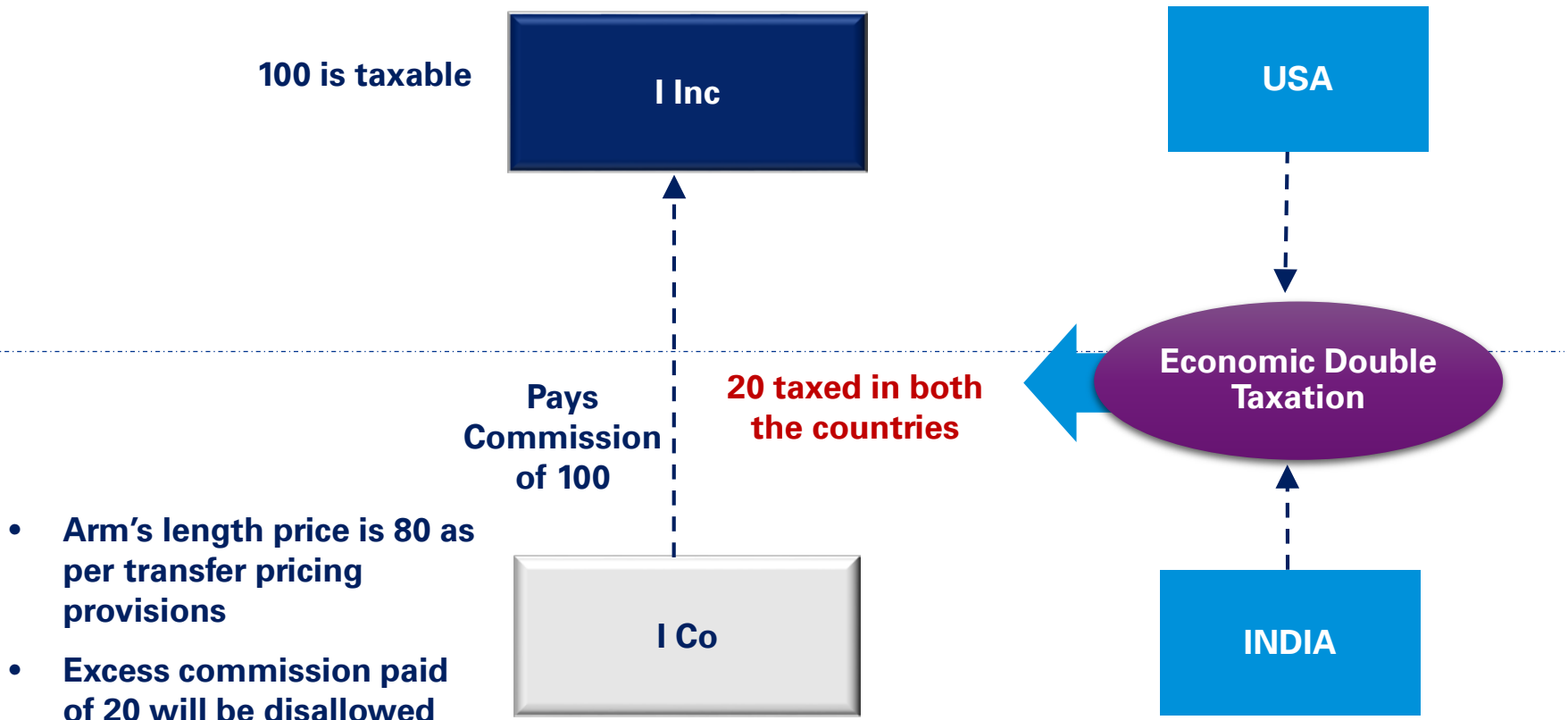
Economic Taxation

More than one person is taxed on same income

Types of Double Taxation - Juridical double taxation



Types of Double Taxation - Economic double taxation



I Co and I Inc (different persons) taxed in US and India (different jurisdictions) for same income

Need for Double Taxation Avoidance Agreement ('DTAA')

DTAA are entered into by countries to avoid double taxation

DTAA in most cases only resolves jurisdictional double taxation

DTAA is basically negotiated document and should be read as such



Double Taxation Avoidance Agreements

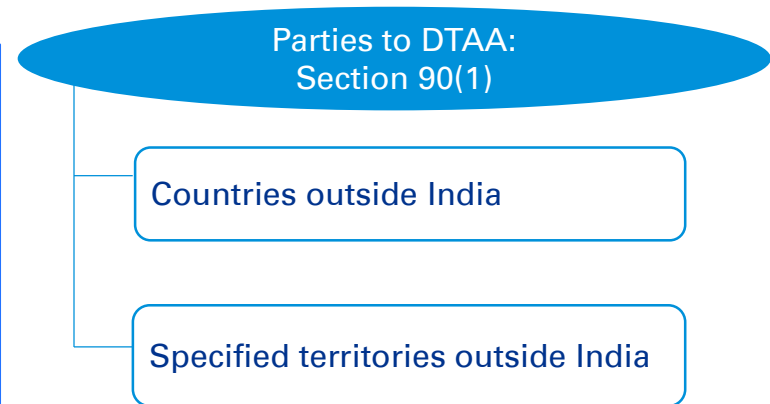
Double Taxation Avoidance Agreements

Indian tax laws

- Section 90 - Empowers Government of India ('GOI') to enter into a DTAA for avoidance of double taxation
- Section 90A - GOI can adopt agreement entered into between specified association in India and specified association in specified territory outside India

Statutory objective of Section 90(1) and 90A(1)

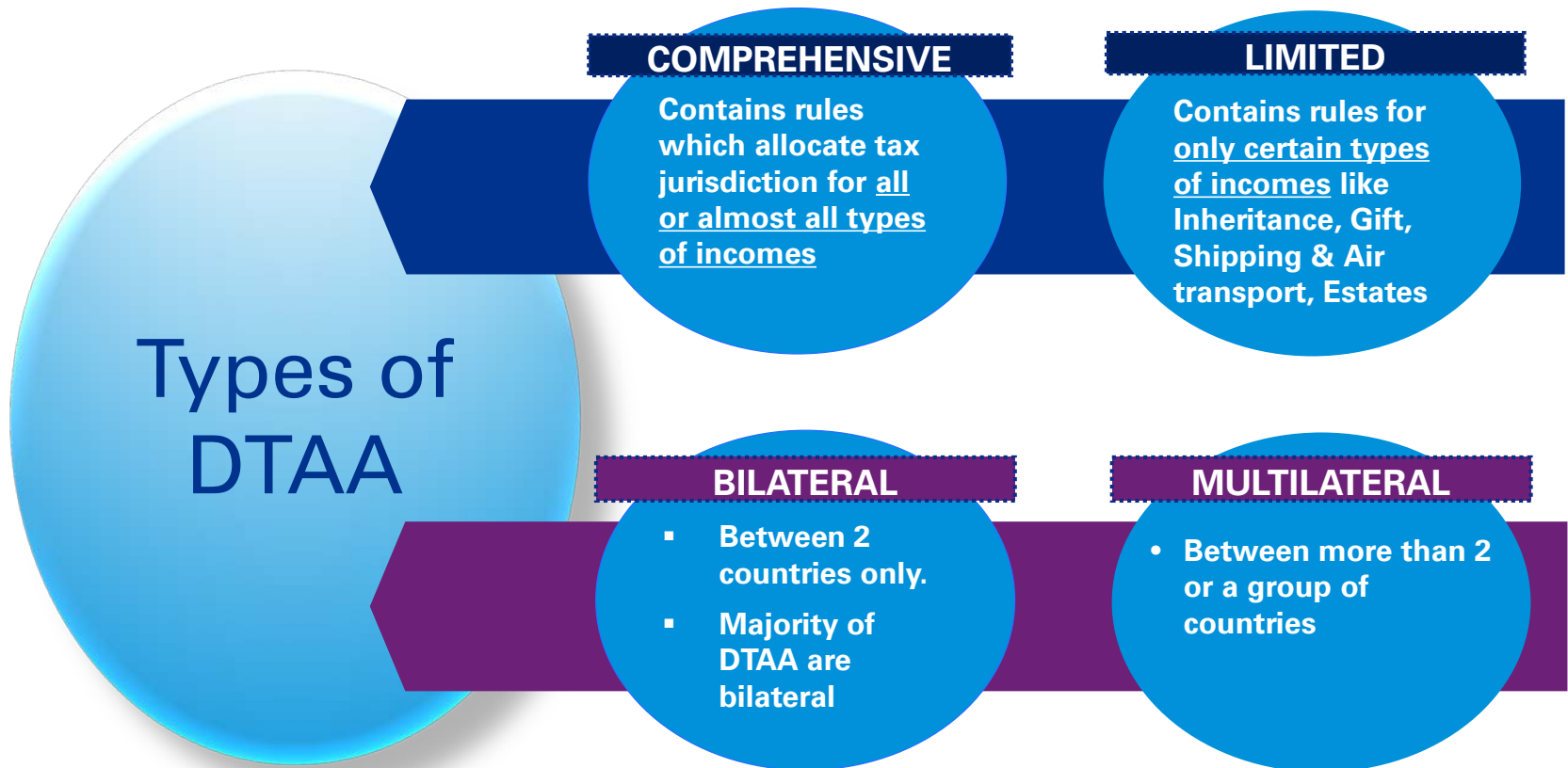
- Avoidance of Double Taxation
- Prevention of fiscal evasion
- Promotion of mutual economic relations, trade & investment
- Relief on doubly taxed income
- Exchange of information to combat tax avoidance and tax evasion
- Recovery of tax



DTAA vis a vis Domestic Tax Law

- Section 90 of the Income-tax Act, 1961 ('the Act'): Domestic tax law will apply to the extent it is more beneficial than the DTAA
- DTAA's override the domestic tax law

DTAA/ Convention / Charter



Principles of interpretation of DTAA

Protocol / Exchange of Notes

- Clarifies / elaborates DTAA text
- Binding force – equal to DTAA
- No limit to no. of protocols
- May be entered into even after DTAA is concluded

Model Commentaries

- OECD Model Commentary 2010
- UN Model Commentary
- US Technical Explanation

Sources of Interpretation

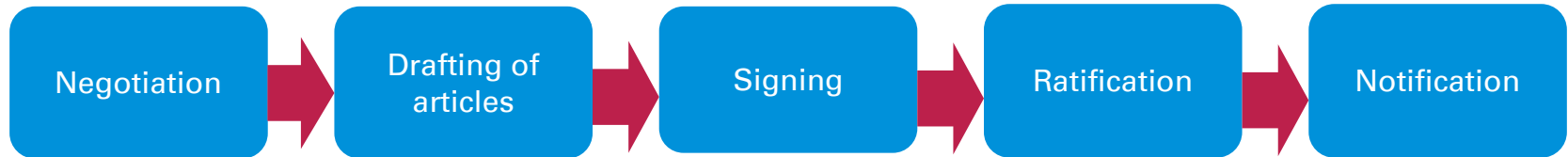
Public International Law

Vienna Convention on Law of DTAA

Other Sources

- Multilateral Instrument
- Mutual Agreement Procedure
- Judicial decisions
- Practices of tax authorities of both States

Stages in the life of a DTAA



Entry into Force of the Convention (Article 30)

Date of Convention	Date on which Convention is signed
Date of Ratification	Ratification of DTAA by legislative/ executive consent in each contracting state in accordance with domestic laws
Date of Exchange of Notes	Notes are exchanged between contracting states confirming ratification of DTAA in each state
Date of Entry into Force	DTAA enters into force either upon the date of exchange of notes or a period thereafter as specified in DTAA
Effective Date	DTAA provisions become effective in respective contracting states on the dates specified in relevant DTAA

Termination of Convention (Article 31)

- DTAA remains in force until terminated
- Some DTAA provide for a period during which DTAA cannot be terminated (eg India-US DTAA)
- Requires notice through Diplomatic Channels

Protocols & Memorandum of Understanding ('MoU')

- Provides for amendments to existing DTAA
- Provides for Explanation to the DTAA provisions (Eg India-US DTAA)

A close-up photograph of a person's hands in a professional setting. The person is wearing a white shirt. Their right hand holds a black pen, and their left hand holds a silver smartphone. They are positioned over a document that contains a table with numerical data. The background is softly blurred, showing a laptop keyboard and a dark object on the left. A blue arrow-shaped graphic points from the bottom left towards the right, containing the text 'Structure and Provisions of a DTAA'.

Structure and Provisions of a DTAA

Articles of a DTAA

SCOPE PROVISIONS

1. Article 1 - General Scope
2. Article 2 - Taxes covered
3. Article 29 - Entry into force
4. Article 30 - Termination

DEFINITION PROVISIONS

1. Article 3 - General definitions
2. Article 4 - Residence
3. Article 5 - Permanent Establishment

ELIMINATION OF DOUBLE

1. Article 23 - Elimination of double taxation
2. Article 25 - Mutual Agreement

ANTI-AVOIDANCE

1. Article 9 - Associated Enterprise
2. Article 26 - Exchange of Information

SUBSTANTIVE PROVISIONS

1. Article 6 - Immovable property
2. Article 7 - Business Profits
3. Article 8 - Shipping, etc
4. Article 10 - Dividends
5. Article 11 - Interest
6. Article 12 - Royalties & FTS
7. Article 13 - Capital gains
8. Article 14 - Independent Personal Services
9. Article 15 - Dependent Personal Services
10. Article 16 - Directors
11. Article 17 - Artistes & Sports persons
12. Article 18 - Pensions
13. Article 19 - Government service
14. Article 20 - Students
15. Article 21 - Other income
16. Article 22 - Capital

MISCELLANEOUS PROVISIONS

1. Article 24 - Non-discrimination
2. Article 27 - Diplomats
3. Article 28 - Territorial Extension

Integral part of DTAA

- Exchange of Notes / Protocol
- Memorandum of Understanding ('MoU')



Access to DTAA
- Article 1 to 4

Article 1 – General Scope

ARTICLE 1

To whom does
DTAA apply

- DTAA applies to ‘person’s who are residents of one or both of the Contracting States’

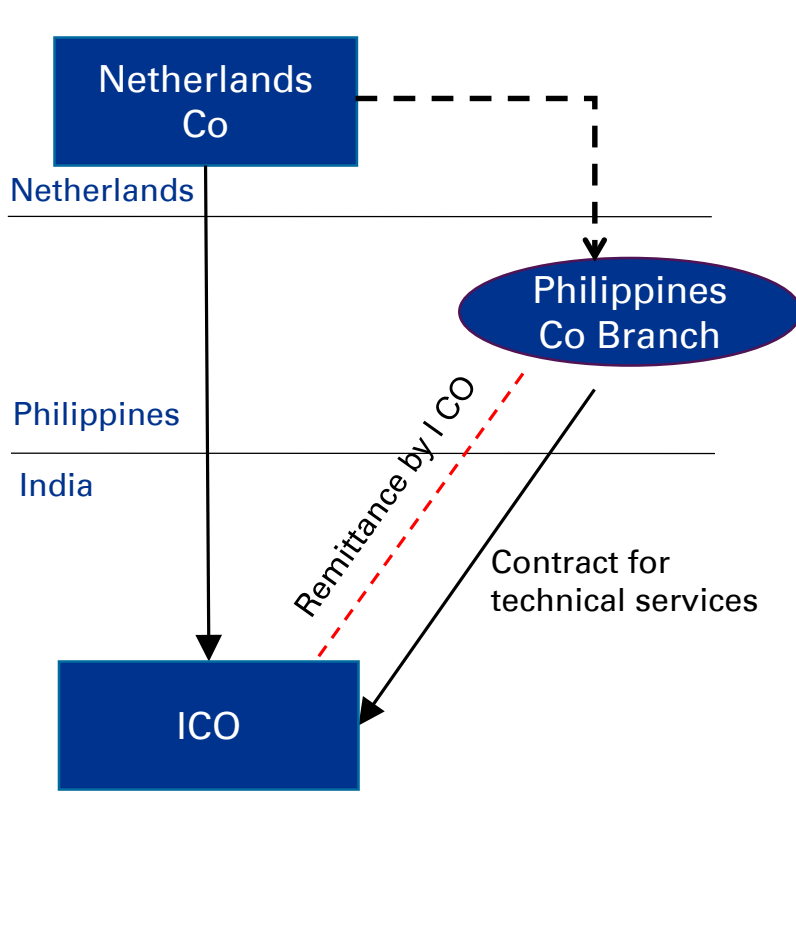
Exceptions

- Article 24(1) (Non-discrimination) - Applies to Residents of third states (Nationals)
- Article 19 (Government service) – Applicable to nationals of third state
- Article 25 (MAP) - Applies to Residents of third states (Nationals)
- Article 1 of OECD MC allows exchange of information in respect of Residents/ nationals of third state

Example of Non -discrimination

- A citizen of America and a non-resident, exported software from Permanent Establishment (‘PE’) in India and claimed deduction under section 80HHE in respect of profits from export of software by invoking non-discrimination clause under India – USA DTAA.
- Section 80HHE is only applicable to domestic companies and residents. However as per India – USA DTAA taxation of a PE of a USA resident shall not be less favorable than taxation of resident enterprise carrying on same activities. Accordingly, deduction under section 80HHE can be claimed.

Triangular case & DTAA applicability



Triangular cases : DTAA applicability

- Netherlands Company has branch in Philippines
- Philippines branch enters into contract for rendering technical services to ICO
- Services are rendered from Philippines

Issue

- Is benefit of India-Netherlands DTAA available?
- AAR in case of Shell Technology India Pvt Ltd (65 DTR 34)

Article 2 - Taxes Covered

ARTICLE 2 **Taxes Covered**

- Taxes on income and capital
- Wealth tax is included in certain DTAA's
- Indian taxes covered include income – tax and surtax
- Foreign 'taxes covered' vary for each DTAA
- Treaties apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes

Exceptions

- Indirect taxes, social security charges, monetary fines and penalties, interest for late payment are not regarded as taxes

Examples

- Foreign State and Local levies may vary for each DTAA (India – USA DTAA does not cover State level income taxes)
- Taxes under Direct Taxes Code ('DTC') would be same as under the Act

Article 3 - General Definitions

ARTICLE 3

Definitions

- Person, Company, National, Enterprise, Contracting State, Enterprise of a Contracting State and the Enterprise of the other Contracting State, International traffic, Competent Authority, and Business etc.

Terms generally defined in DTAA

Contracting State

- As per the respective DTAA

Person

- Includes an individual, a company and any other body of persons which is treated as taxable unit

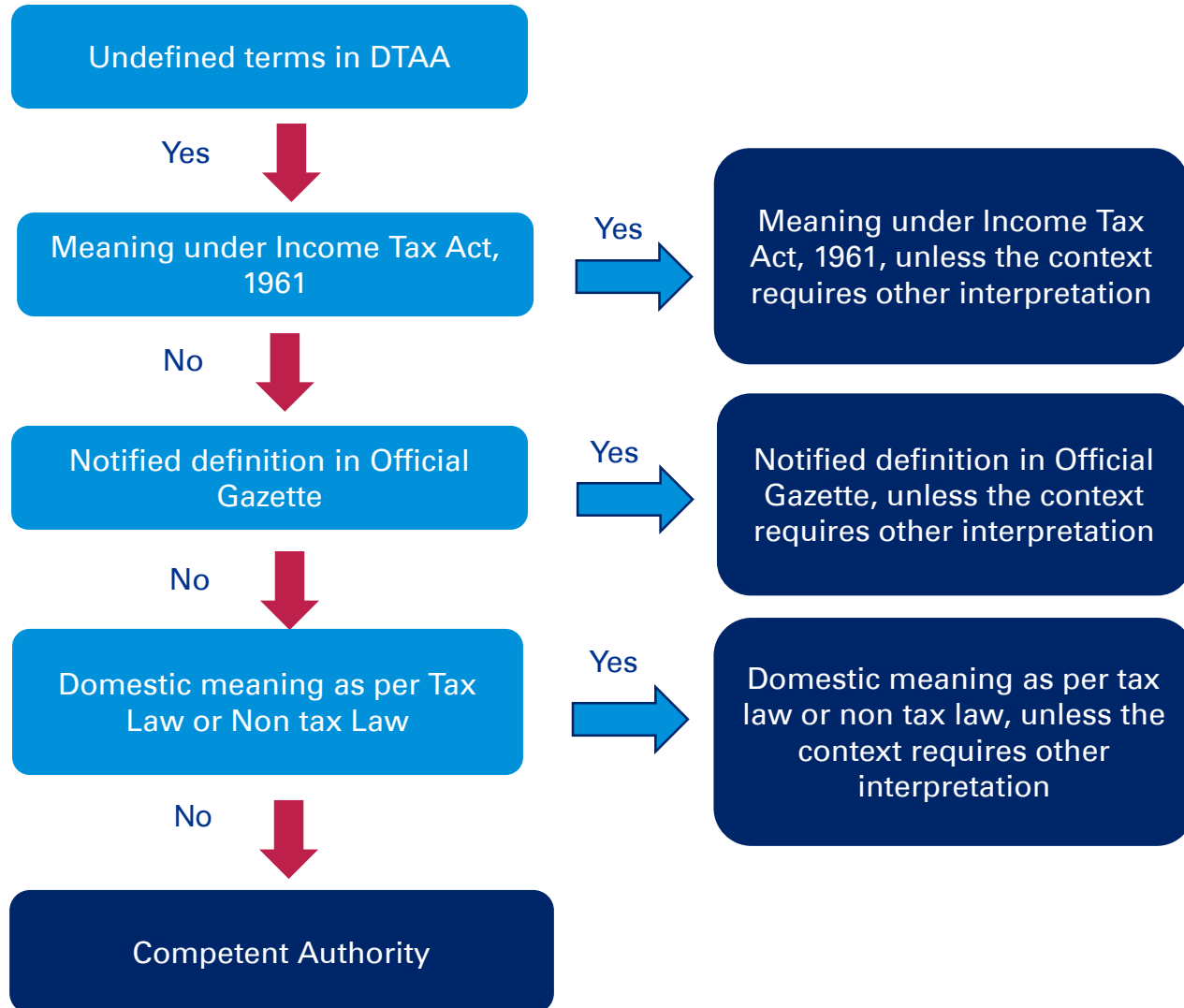
Company

- Means any body corporate or any entity that is treated as body corporate

National

- Individual possessing nationality or citizenship. Any legal person, partnership or association deriving its status as such from the laws in force.

Article 3 - General Definitions



Article 4 - Residence

ARTICLE 4

Residence

- Lays down criteria for determining residence of person
- “Resident of one of the States” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature

Objective

- The concept of 'resident of a Contracting State' is required
 - in solving cases where double taxation arises in consequence of double residence
 - in solving cases where double taxation arises as a consequence of taxation in the State of residence and in the State of source or situs.

Example

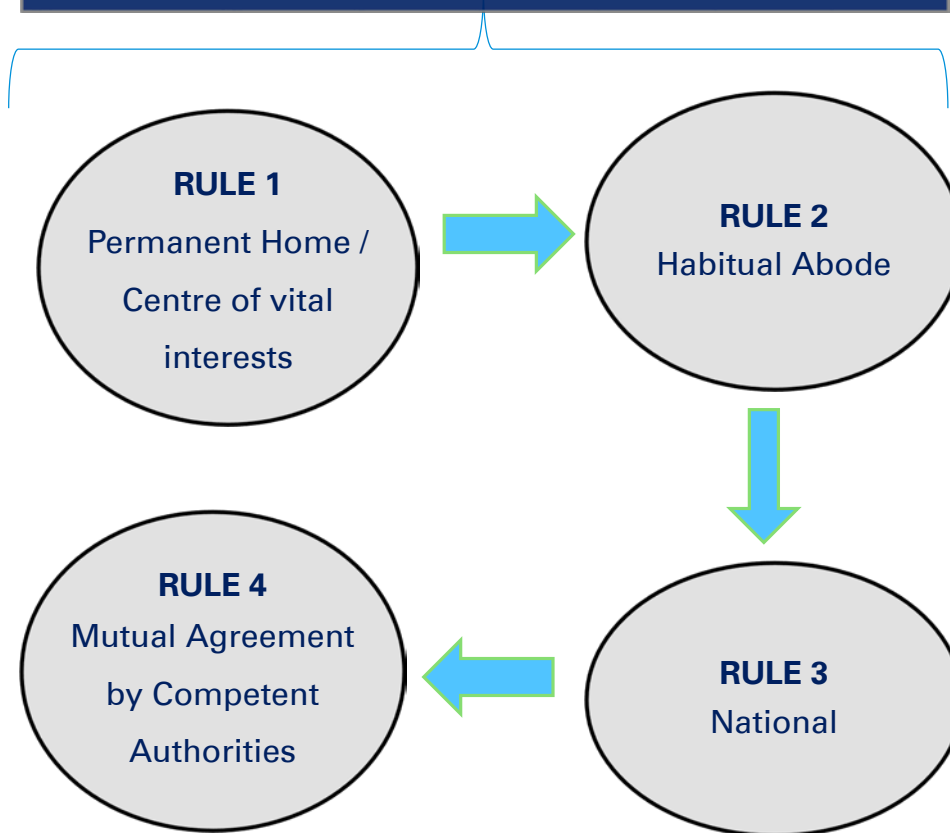
- An individual has his permanent home in Country A and makes payment of taxes on its worldwide income. He has had a stay of more than six months in Country B and according to the legislation of Country B he is, in consequence of the length of the stay, taxed as being a resident of Country B. Thus, both Country claim that the individual is resident of respective country. This conflict is solved by DTAA.

Article 4

What if person is a resident in both States ?

Tie-breaker applies if a person is resident in both States under Art. 4(1)

FOR INDIVIDUALS



OTHER THAN INDIVIDUALS

Person is resident of State where **Place of Effective Management** ('POEM') is situated. OECD Commentary says:

- Place where key management and commercial decisions that are necessary for conduct of business are in substance made
- An entity may have more than one place of management, but it can have only one POEM

MLI provides for tie breaking to be resolved by mutual consideration by competent authorities

Case Studies

CASE STUDY # 1:

Let us examine application of Tie-breaker rules in case of a Sri-Lankan Cricketer married to an Indian resident:

- a) By test of Permanent Home/ Centre of vital interests
- b) Habitual Abode
- c) By Nationality

**Residence – India or
Sri-Lanka?**

Internationally accepted standards on POEM

OECD Commentary

- POEM of an entity shall be determined by competent authorities of two countries by way of mutual agreement.
- POEM determination is based on factors such as :
 - where the meetings of its BOD are held,
 - where the CEO and other senior executives usually carry on their activities,
 - where the senior day-to-day management of the person is carried on,
 - where the person's headquarters are located, and
 - where its accounting records are kept.
- An entity may have more than one place of management, but it can have only one place of effective management at any one point of time

UN Commentary

- The place where the company is actually managed and controlled
- The place where the decision-making at the highest level on **the important policies essential for the management of the company takes place**
- **The place that plays a leading part in the management of a company from an economic and functional point of view**
- The place where the most important accounting books are kept

Tie breaker clause
in various DTAs

Case Studies

CASE STUDY # 2:



Netherlands



India

Facts & Assumptions:

- XYZ is a company incorporated in Netherlands and is a tax resident of the Netherlands
- Its CEO and the Board of Directors meet in India and exercise control over its activities
- How will residence be determined under the India-Netherlands DTAA? 

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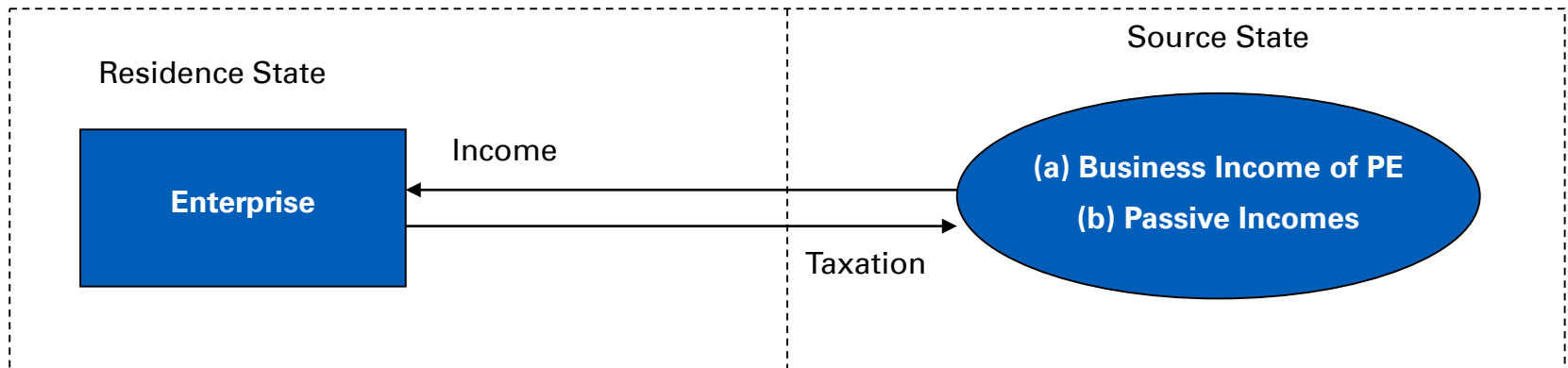
Article 5 - Permanent Establishment

Article 5 – Permanent Establishment

Concept of PE

- Entities increasingly engage in economic activities across several tax jurisdictions
- PE test determines the right of source state to tax business profits
- Defined concept under DTAA

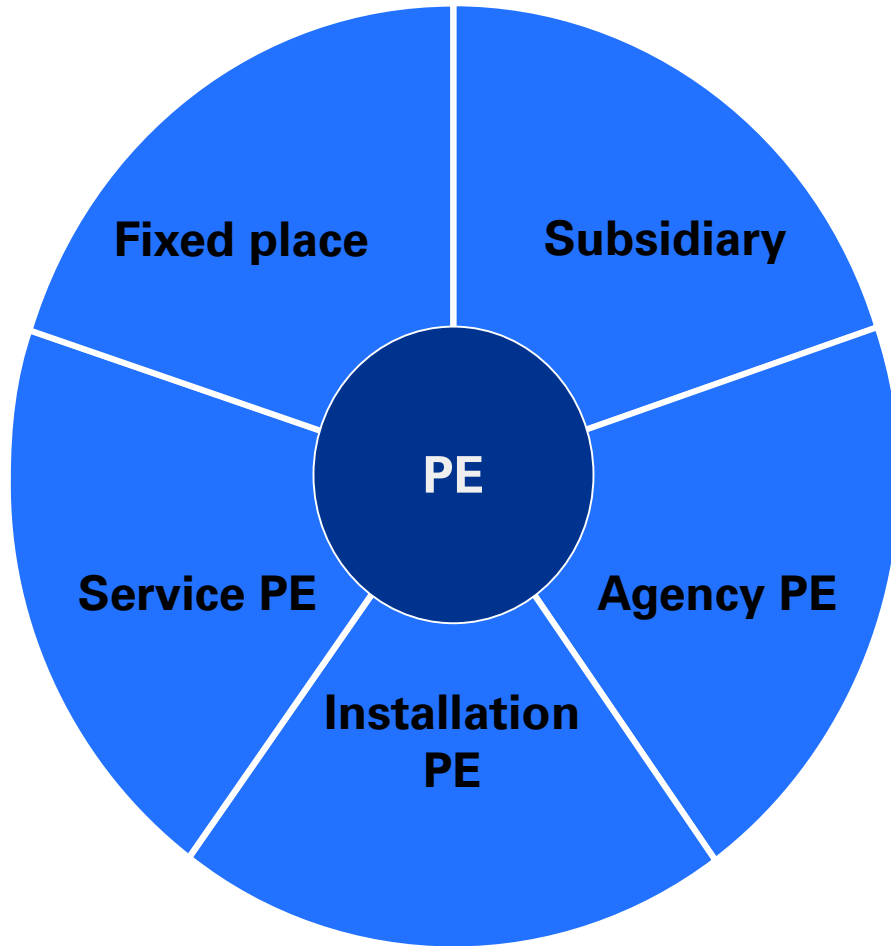
Concept of PE – under Article 5 of the OECD Model Convention (MC)



Source Country's right to tax Residents of Other Contracting State under DTAA:

- Taxation of passive income such as dividends, interest, royalties and fees for technical services on gross basis – income not effectively connected to PE
- Taxation of business income (including passive income) attributable to PE on net basis

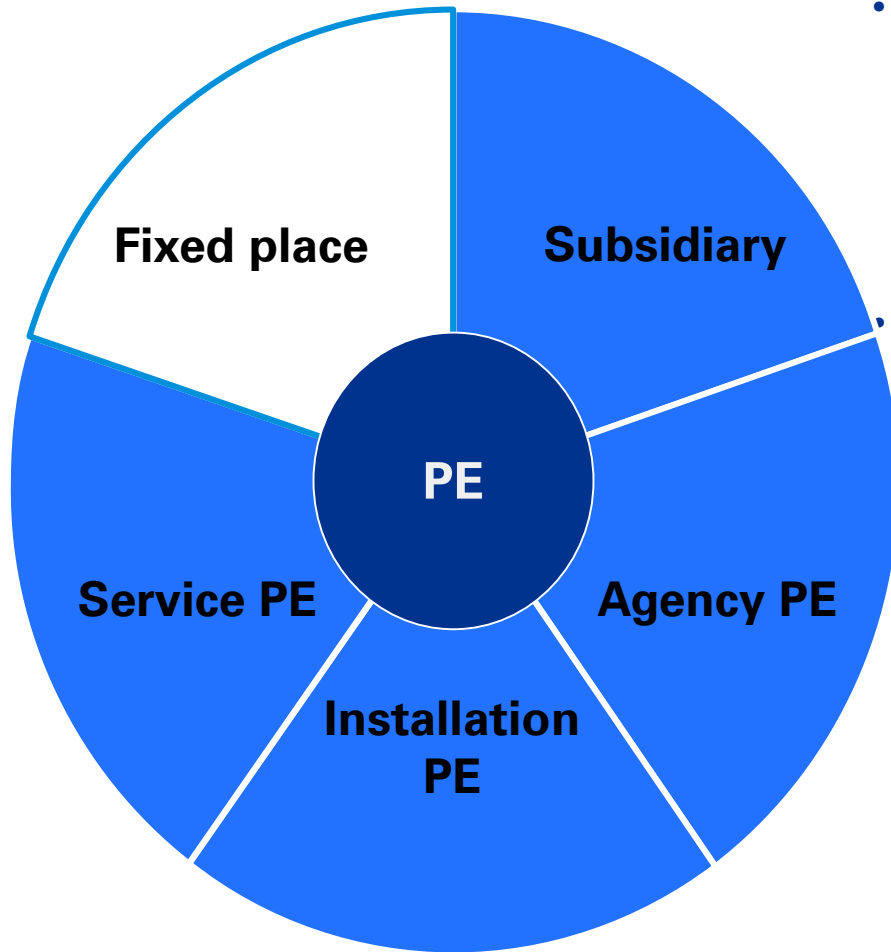
Article 5 - Permanent Establishment



PE definition under DTAA

Article	Particulars	Type of PE
Article 5(1)	Basic rule	Fixed base PE
Article 5(2)	Illustrative list of PE	Inclusions to fixed base PE
Article 5(3)	PE in relation to projects	Construction / Installation PE
Article 5(4)	List of exclusions	Exclusion from fixed base PE
Article 5(5) & (6)	Dependent / Independent agent	Agency PE
Article 5(7)	Associated enterprise	Subsidiary PE

Article 5 - Fixed Base PE



- **Article 5(1) of the OECD MC governs basic rule for Fixed base PE:**

*"For the purpose of this Convention, the term 'permanent establishment' means a **fixed place of business** through which the **business of an enterprise is wholly or partly carried on**"*

Identical definition under UN and US Model

Elements of Fixed base PE:

- Existence of 'place of business'
- Place of business is at disposal of the non-resident enterprise
- Place of business must be 'fixed'
- Business is carried on wholly or partly through fixed place of business

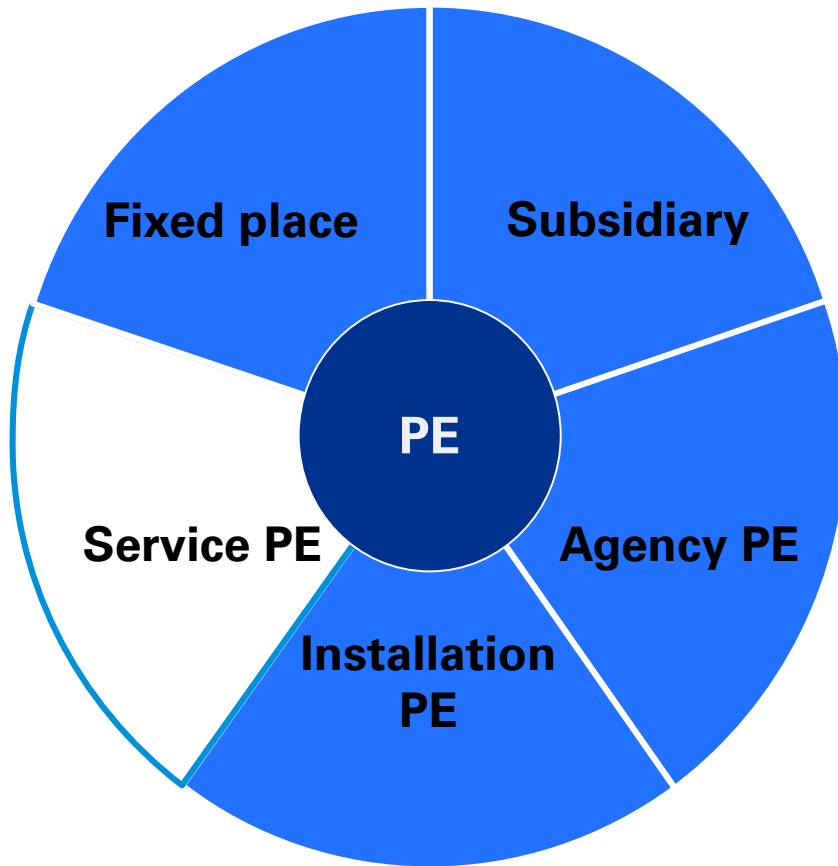
Above conditions need to be cumulatively satisfied

Article 5 - Inclusions to PE

- **Article 5(2) of the OECD MC provides an inclusive definition of PE which reads as under:**
 - a) *“The term ‘permanent establishment’ includes especially:*
 - b) *a place of management;*
 - c) *a branch;*
 - d) *an office;*
 - e) *a factory;*
 - f) *a workshop, and*
 - g) *a mine, an oil or gas well, a quarry or any other place of extraction of natural resources”*
- **The list is indicative and not exhaustive**

Article 5 - Service PE

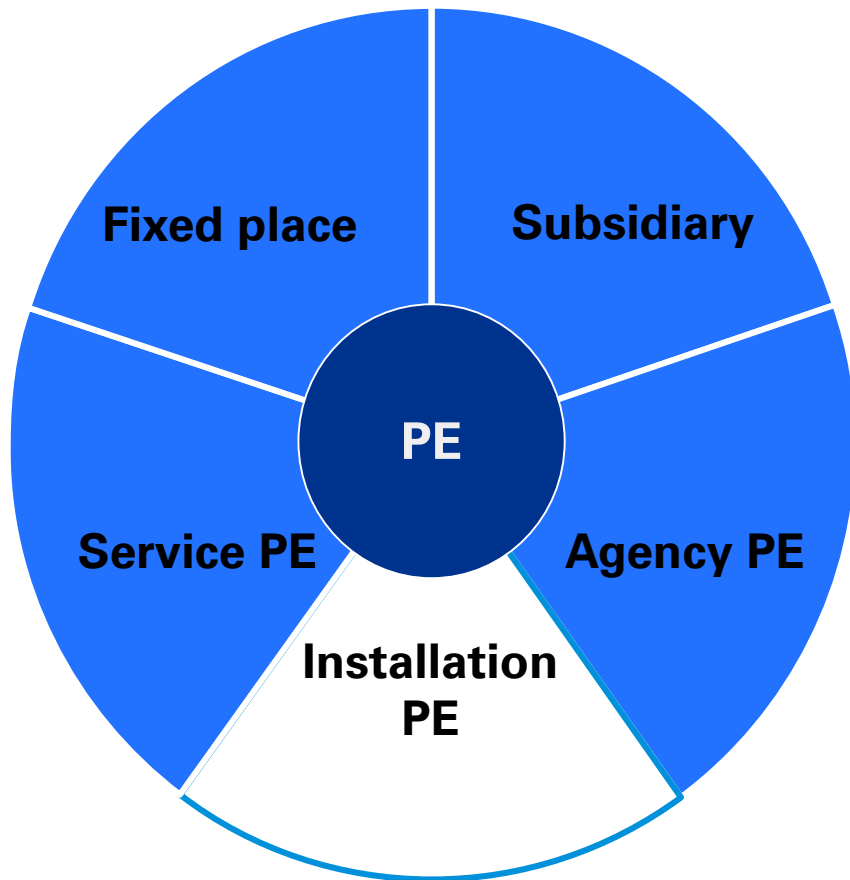
Service PE



- Furnishing of “services” within India
- Through employees or other personnel
- Residential status of recipient of service is an irrelevant factor
- Activities continue for a period exceeding 90 days (30 days or one day where services are rendered by associated enterprises)
- Services categorized as FTS / Royalty not covered
- No service PE clause in some DTAA – Netherlands, Denmark & France

Article 5 - Construction/ Installation PE

Construction / Installation PE



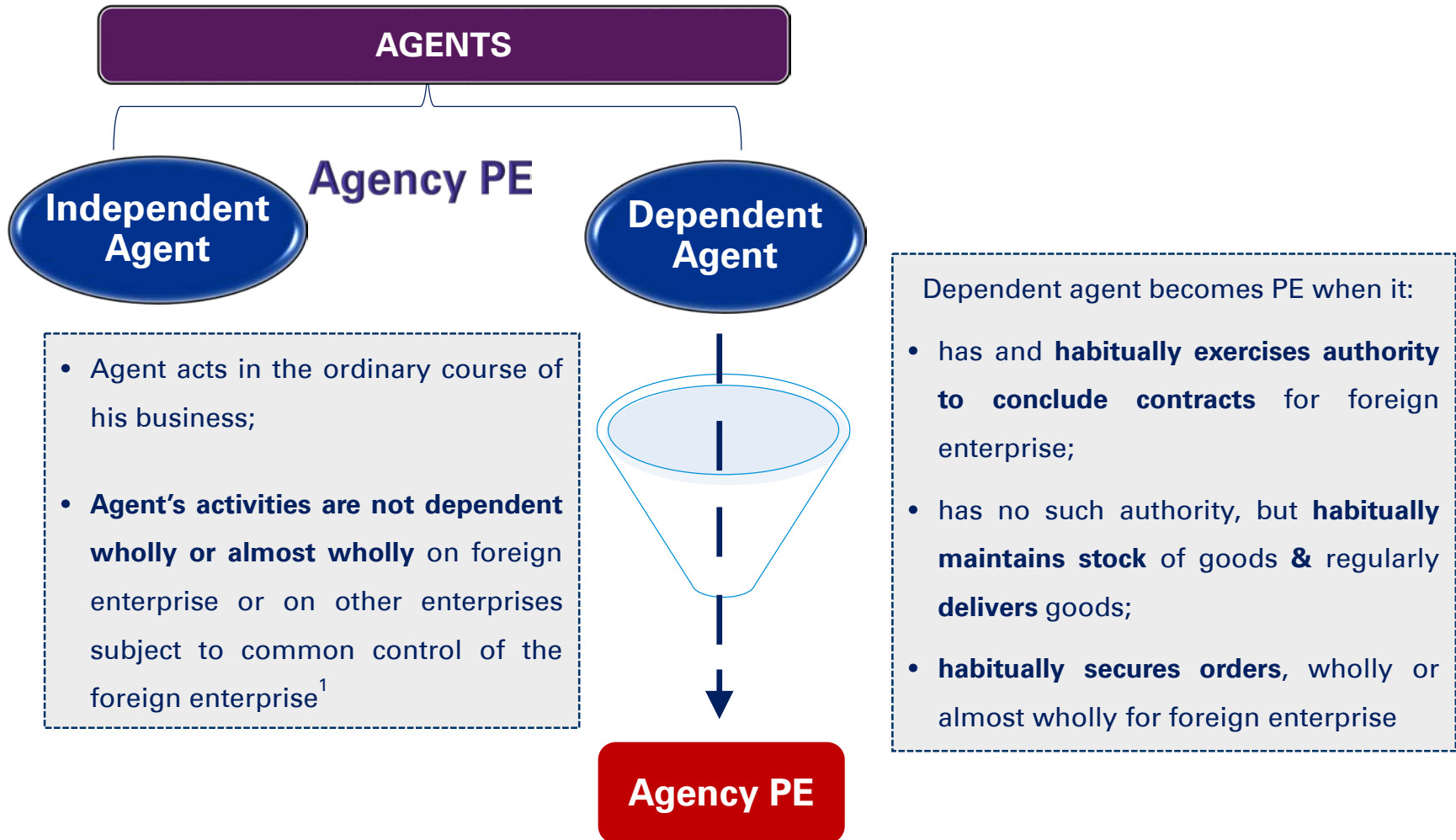
- **Article 5(3) of OECD Model Convention**

“A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months”

- **Includes:**

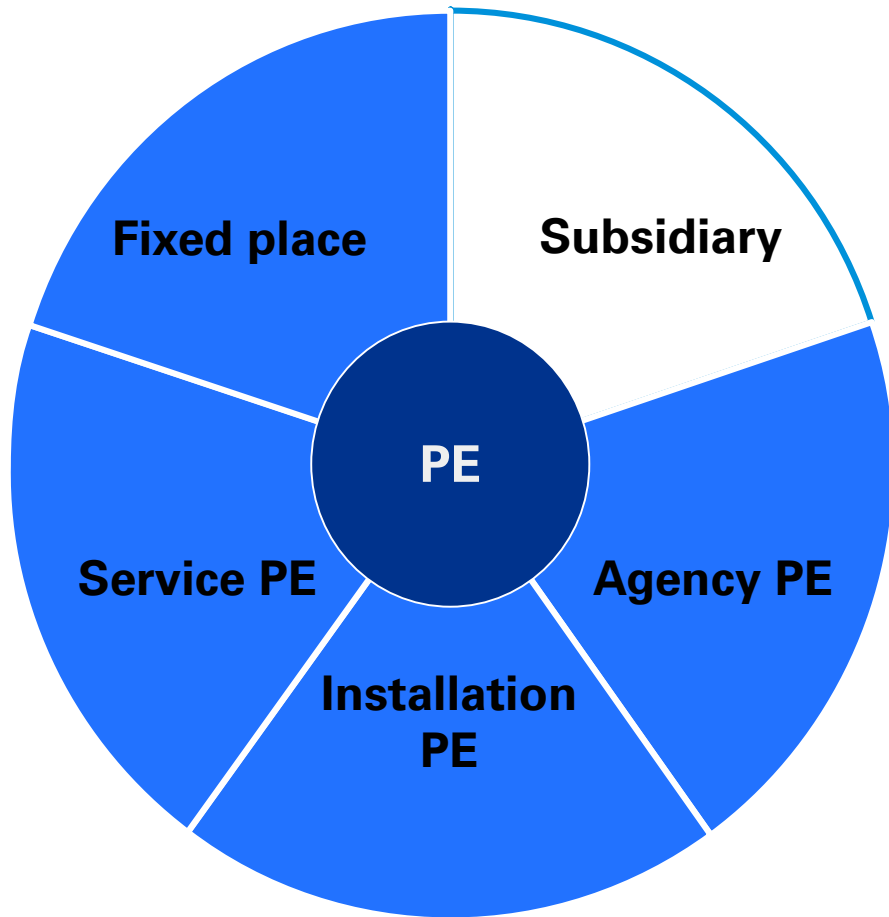
- Construction of roads, bridges, canals, including substantial renovation
- Laying of pipelines, excavating and dredging
- “Installation Project” includes installation of ‘new equipment’
- Includes assembly and supervisory activities
- Some of India’s DTAA prescribe a 9 month period while the DTAA with US prescribes a threshold of 120 days

Article 5 - Agency PE



¹United Nations Model Convention

Article 5 - Subsidiaries and PE

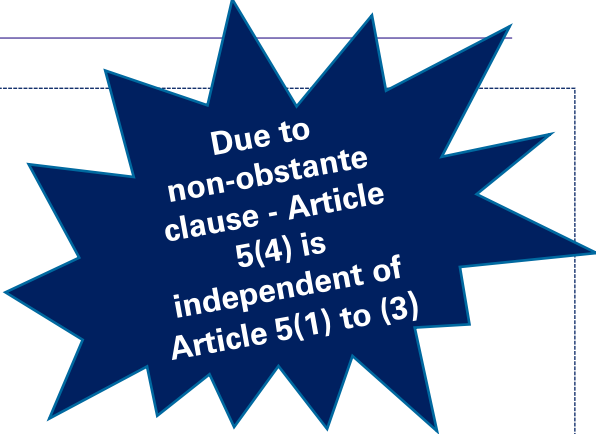


- **Article 5(7) of OECD MC reads as under:**
 - *“The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a PE or otherwise), shall not of itself constitute either company a PE of the other.”*
- **Existence of a subsidiary by itself does not constitute PE**
 - Legal independence of the subsidiary respected
- **Test of fixed base PE / service PE / agency PE need to be satisfied**

Article 5 - Activities that do not result in PE

Exceptions in Article 5(4)

- *Use of facilities for storage or display of goods*
- *Maintenance of stock of goods for storage or display*
- *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*



Due to
non-obstante
clause - Article
5(4) is
independent of
Article 5(1) to (3)

Quiz



• Whether an LLP in which a foreign company is partner be construed as a PE?



• Whether Project Office is a PE?



• Is duration important for analysis of Installation PE?



• Whether a dependent agent securing orders in India constitute a PE?



• Whether a Liaison office conducting preparatory activities constitute a PE?



Article 7 - Business Profits

Article 7 - Business Profits

ARTICLE 7

Business Profits

- Existence of PE must for attribution
- Only profits attributable to such PE is taxable in the source country
- PE test for each source of income
- Principle of "force of attraction" present in UN Model

Force of Attraction

- Primarily concerned with taxation of business profits in Source country
- Prevents tax evasion / avoidance through artificial contracts / business arrangement
- Identification of business transactions - source based taxation

Types of Force of Attraction

General Force of Attraction

Restricted Force of Attraction

A close-up photograph of a person's hands in a professional setting. The person is wearing a white shirt. Their right hand holds a black pen with a silver tip, poised over a document. Their left hand holds a silver smartphone. The document has some text and a green line. In the background, a laptop keyboard is visible. A blue arrow-shaped graphic points to the right, containing the text 'Article 9 - Associated Enterprise'.

Article 9 - Associated Enterprise

Article 9- Associated Enterprise

ARTICLE 9(1)

Applicability :

- (a) Direct or indirect participation by one entity into capital, management or control of other entity; OR
- (b) Same person participates directly or indirectly into capital, management or control of both enterprises



Transaction are not commensurate with a with a transaction as would have been carried out between independent enterprise (Arms' Length Price ('ALP'))

Impact

Profits which, but for those conditions would have accrued to one of the enterprises, but by reason of those conditions have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

ARTICLE 9(2)

- Where the transactions between two entities is not at ALP and
- Profits of one entity are re-determined on account of transfer pricing adjustments then
- Enhanced income shall be chargeable to tax in one country and the other country shall provide a tax relief to the extent of enhancement.
- Corresponding adjustment available to eliminate economic double taxation



Article 6 - Income from Immovable
Property

Article 6 - Income from Immovable Property

Article 6(1)

Charging Provision

Article 6(2)

Meaning of immovable property

Article 6(3)

Scope of article 6(1)

Article 6(4)

Additional Scope

Article 6 – Income from Immovable Property

Para 1 of Article 6 – Applicability

A resident of Contracting State (State of Residence) derives income;

Such income is derived from immovable property or agriculture or forestry; and

Such immovable property is situated in other Contracting State (State of Source)

Article 6 – Income from Immovable Property

Para 2 of Article 6 – Meaning of Immovable property

Para 2 of Article 6 – Inclusions and Exclusions

- **Inclusions as per DTAA**
 - property accessory to immovable property (e.g. Buildings)
 - livestock and equipment used in agriculture and forestry (e.g. Machinery used in Saw mill)
 - rights to which the provisions of general law respecting landed property apply (e.g. Rights covered under Transfer of Property Act)
 - usufruct of immovable property (i.e. income without ownership of the asset)
 - rights to variable or fixed payments as consideration relating to working of, or the right to work, mineral deposits, sources and other natural resources
- **Exclusions as per DTAA**
 - Ships, boats and aircrafts

General Rule – Whatever is affixed or attached to land becomes a part of the land

Article 6 – Income from Immovable Property

Para 3 of Article 6 – Meaning of ‘use’

- **Forms of Exploitation**
 - Direct use
 - Letting Out
 - **Use in any other form**

Para 4 of Article 6 – Additional scope

- **Extends scope of situs based taxation**
 - Income earned by an enterprise (PE of non resident in source country) from immovable property
 - E.g. relinquishment of property for use by a third party
- **Income from immovable property used for the purpose of Independent personnel services (under UN Model)**

Interplay between Article 6 and Article 13

A close-up photograph of a person's hands in a professional setting. The right hand holds a black pen, and the left hand holds a smartphone. The hands are positioned over a document with some text and a green line. In the background, a laptop keyboard is visible. A blue arrow-shaped banner is overlaid at the bottom of the image, containing the text 'Article 8 - Shipping And Air Transport'.

Article 8 - Shipping And Air Transport

Article 8 - Shipping And Air Transport

Article 8(1)

Profits from operation of ships or aircraft in international traffic taxable in contracting state in which
Place of effective management situated

KEY CONDITIONS

- Profits
- Operation of ships or aircraft
- International traffic
- Place of Effective Management (POEM)

Article 8 - Shipping, Inland Waterways Transport And Air Transport

Article 8(1) - Meaning of 'profits'...

Profits - directly connected with operation

- **Transportation of passengers or cargo** on ships operated by other enterprises under code-sharing, slot-chartering arrangements, pooling arrangements or to take advantage of earlier sailing
- Lease of containers by shipping lines or airlines

Profits – ancillary to operation

- **Make minor contribution relative to operation of ships**
- **So closely related that it cannot be regarded as separate business or source of income**
- Eg. Advertisement in magazines aboard ships, on board sale of products, etc.

Article 8 - Shipping, Inland Waterways Transport And Air Transport

'operation of ships or aircraft' ...

- Generally, not defined under DTAA
- Expressions not defined in DTAA - meaning to be ascertained as per domestic laws [Article 3(2)]
- 'Operation of ships' - defined u/s 115VB of IT Act
- **Company regarded as operating if it operates any ship (owned or chartered) by it and includes arrangement such as slot charter (i.e. a slot for a container on a ship)**

Bareboat charter hire

- Payment to owner for hire of bare vessel
- Not considered as 'operation of ship' by lessor - (crew of) lessee operating the ship
- Considered as 'Royalty' for use of equipment
- West Asia Maritime Ltd. v. ITO (109 TTJ 617)(ITAT, Chennai)
- Poompuhar Shipping Corporation Ltd. v. ITO (108 TTJ 970)(ITAT, Chennai)
 - Payment was for 'use and hire of vessel', not for services

Time charter hire

- Payment to owner for hire of vessel with crew and equipment - viz. provision of services
- Considered as 'operation of ship' by lessor - Article 8 benefit available to lessor
- OECD and Klaus Vogel clearly recognise time charter as operation of ships by lessor

Slot Charter

- Payment to owner for hire of slots (space), aboard a container ship
- Considered as 'operation of ship' by lessor - Article 8 benefit available to lessor - **Balaji Shipping (UK) Ltd.**

Article 8 - Shipping, Inland Waterways Transport And Air Transport

Meaning of 'international traffic'

- Defined under Article 3(e) of DTAA
 - Transport by ship or aircraft operated by enterprise which has its POEM in a contracting state (*prevailing assumption that operations shall be between both contracting states*)
 - Coastal traffic - operation solely between places in other contracting state not covered
 - Illustrations

International traffic

- Ships / aircraft plying :
 - Colombo (Sri Lanka) - Chennai (India)
 - Colombo (Sri Lanka) - Chennai (India) - Mumbai (India)
 - Colombo (Sri Lanka) - Chennai (India) - Dubai (UAE)

Not international traffic

- Ships / aircraft plying:
 - Chennai (India) - Colombo(Sri Lanka) (not stopping)- Mumbai (India)
 - Chennai (India) - Mumbai (India)



Article 10 - Dividend
Article 11 - Interest

Article 10 & 11- Dividend / Interest

ARTICLE 10

Dividend

- Income from shares, participating in profits rights, other rights not being debt claims, etc.
- Source based taxation
- DTAA imposes a limitation on the maximum rate to be charged by the source country
- If earned through a effectively connected PE taxable under Article 7

ARTICLE 11

Interest

- Income from debt claims of every kind, income from government securities, income from bonds and debentures
- Source based taxation
- DTAA imposes a limitation on the maximum rate to be charged by the source country
- If earned through a effectively connected PE taxable under Article 7

Section 194LC of the Act mandates deduction of tax @ 5% in respect of payment of interest by an Indian Company to a non – resident on borrowings in foreign currency.



Article 12 - Royalty /
Fees for Technical Services

Article 12- Royalty

- **OECD Model** - Payments of any kind received as a consideration for:

- **Use of or right to use:**

- Copyright of literary, artistic or scientific work including cinematograph films
- Patent, trademark, design or model, plan, secret formula or process

- **Information concerning**

- industrial, commercial or scientific experience

- **UN Model** - Payments of any kind received as a consideration for:

- **Use of or right to use:**

- Copyright of literary, artistic or scientific work including cinematograph films **or films or tapes used for radio or television broadcasting**
- Patent, trademark, design or model, plan, secret formula or process
- **industrial, commercial or scientific equipment**

- **Information concerning**

- industrial, commercial or scientific experience

Article 12 - Royalty

Article 12(1) and Article 12(2)

Royalty of source country may be taxed in other country of which recipient is a resident;

However they may also be charged in source country, but if Beneficial owner of royalty is a resident of other country the tax charged shall not exceed specified percent of gross amount of royalties.

Article 12(4)

Para (1) and (2) to not apply if beneficial owner of royalties,

- a) carries on business in the other country in which the royalties arise, through a PE or
- b) Performs in the other country independent personal services from a fixed base and the royalty is effectively connected with such PE

Article 12 – Fees for Technical Services

Fees for Technical Services

Payments to any person in consideration of managerial, consultancy and technical service or provision of services of technical or other personnel

Managerial services



Essentially involves controlling, directing or administering the business

Technical services



Provision of services which require special skills or knowledge related to a technical field

Consulting services



Provision of advice by someone, such as a professional, who has special qualifications allowing him to do so.

Article 12 – Fees for Technical Services

Fees for Included Services

- Payments of any kind to any person in consideration for the rendering of any technical or consultancy services if such services:
 - Are ancillary and subsidiary to application and enjoyment of right
 - Make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design

Excludes services ancillary to sale of property, rental of ships, aircraft, containers or other equipment's, teaching in or by educational institutions, for personal use and to an employee of person making the payment

Make Available

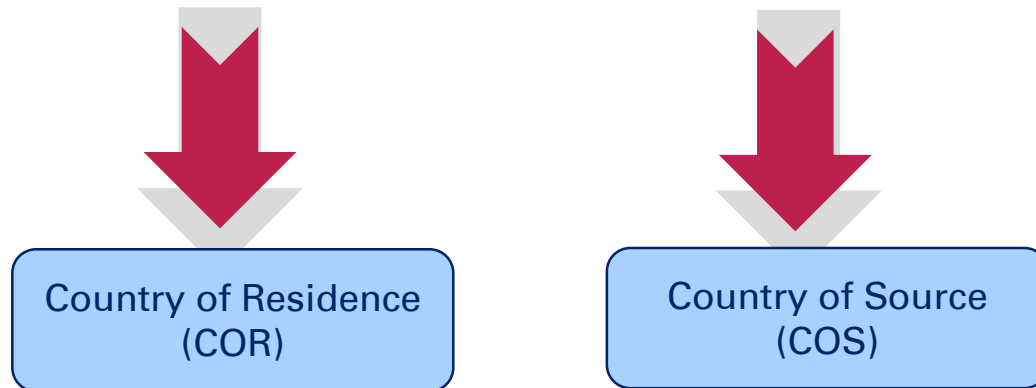
- Person acquiring the service is enabled to apply the technology
- Mere requirement of technical input by a person providing services does not necessarily mean that technical knowledge is “made available”

A close-up photograph of a person's hands. The right hand holds a black pen, and the left hand is positioned over a silver calculator. The calculator is resting on a document with some text and numbers. The background is blurred, showing a laptop keyboard and a white surface. A blue arrow-shaped graphic points from the left towards the right, containing the text 'Article 13 - Capital Gains'.

Article 13 - Capital Gains

Article 13- Capital Gains

Basis of Taxation of Capital Gains



- As per the basic principle of International taxation, COR always has the right to tax income. The COS may be given full / partial / or no rights to tax
- From capital gains tax perspective, gains from alienation of assets are as such always taxable in the COR, i.e. where the seller is a resident. For some assets, COS is also given the right to tax, i.e. where the asset is situated (situs of asset)
- Generally, the country which has the right to tax income derived from the asset, is given the right to tax gains arising from alienation (sale/ transfer) of such asset

Article 13- Capital Gains

Article 13	Type of capital asset	OECD Model	UN Model
Para 1	Alienation of immovable property	Taxable in COS	Taxable in COS
Para 2	Movable property forming part of business property of a PE, including gains from alienation of PE itself either alone or along with the entire enterprise	Taxable in COS	Taxable in COS
Para 3	Gains from alienation of ships, aircrafts, or boats or movable property relating to operations in international traffic	Taxable in country of POEM	Taxable in country of POEM
Para 4	Gains from alienation of shares of company resident in source country, deriving their value mainly from immovable property in source country	Taxable in COS	Taxable in COS
Para 5 (Para 6 in UN Model)	Gains from alienation of any other property not included in the Article	Taxable in COR	Taxable in COR
Para 5 in UN Model	Gains from sale of shares of a company resident in source country, other than discussion in point 4 above	Not found in OECD Model, taxable in COR	Found in UN Model, taxable in COS, subject to negotiation

A close-up photograph of a person's hands in a professional setting. The right hand holds a black pen, and the left hand holds a smartphone. The hands are positioned over a document with some text and a green line. In the background, a laptop keyboard and a black folder are visible. A blue arrow-shaped graphic points to the right, containing the text 'Article 14 - Independent Personal Services'.

Article 14 - Independent Personal Services

Article 14 – Independent Personal Services

Deals with taxation of income in respect of professional services or other activities of independent character

Taxable in source state if

If regular fixed base available in that state or;

Stay exceeds threshold period mentioned

Amount taxable – only amount attributable to fixed base or activities carried out in source state

Professional services includes especially independent scientific, literary, artistic, educational or teaching activities as well as independent activities of physicians, lawyers, engineers, architects, dentists and accountants

OECD deleted this article w.e.f. the year 2000

Case Study

Facts

- A Co. has appointed 'R', a resident of US, (a scientist by profession) as his consultant on retainer basis.
- As per the terms of appointment, 'R' is required to render consultancy services to A Co. for improvement of its products against payment of certain amount.
- Entire factory premises and its auxiliary space is made available to 'R' to carry out his work

Whether payments made to 'R' towards services rendered were covered by Article 15 of the Indo-US DTAA?



A close-up photograph of a person's hands in a white shirt. The right hand holds a black pen, and the left hand holds a silver smartphone. They are positioned over a document with some text and a green line. A laptop keyboard is visible in the background. A blue arrow-shaped banner is at the bottom.

Article 15 - Dependent Personal Services

Article 15 - Dependent personal services

Remuneration derived by a resident of a Contracting State in respect of an employment exercised in other Contracting State is taxable in the State of Residence

Taxable in source state if any one of the following conditions satisfied:

Presence in source state for period or periods exceeding specified threshold

Remuneration is paid by or on behalf of resident of source state

Remuneration is borne by PE which the employer has in the source state

**Similar provisions for Short stay exemption exist under the Act
Section 10(6)(vi)**



Article 16 - Director's Fees

Article 17 - Artists and sports persons

Article 18 - Pension

Article 19 - Government service

Article 20 - Student

Article 16, 17, 18 – Director's Fees / Artistes and Sportsperson/ Pension

ARTICLE 16

Director Fees

- Payments include Director's Fees, payments in cash or kind received in capacity as a Director, severance pay, annuity, etc.
- Taxable in country of residence of company

ARTICLE 17

Artistes and Sportsperson

- Overrides Article 7, Article 14 and Article 15 of the model conventions
- Income taxable in country in which activities are performed
- Deals with situations where their income accrues to another person (taxable in country in which activities are performed)

ARTICLE 18

Pension

- Applies to individuals only
- Covers private pension and other similar payments (annuity)
- Source of payment is immaterial
- Taxable only in Country of Residency

Article 16 , 17 ,18,19, & 20 - Director's Fees / Artistes and Sportsperson/ Pension / Government service and Student

ARTICLE 19

Government service

- Applies to Individuals only
- Covers salaries, wages and similar remuneration paid by Contracting Country, Political sub division or a local authority
- Pensions from Government
- Primary right to tax is of the Country that makes the payment
- Other contracting state has right to tax if recipient is national or resident of other state

ARTICLE 20

Student

- Period of stay to be in accordance with the education / training
- Payments not to exceed expenses likely to be incurred to ensure student's maintenance, education or training

A close-up photograph of a person's hands in a white shirt. The right hand holds a black pen, and the left hand is positioned over a silver calculator. Below the calculator is a document with a table. The table has several rows of numbers, with a green horizontal line highlighting one row. The background is blurred, showing a laptop keyboard and a dark object on the left.

Article 21 - Other Income

Article 21 - Other Income



- Residuary Article



- 'Element of income' to be present



- Any income not dealt with earlier articles covered here



- Other Income connected with PE will be covered under Article 7 or Article 14 respectively

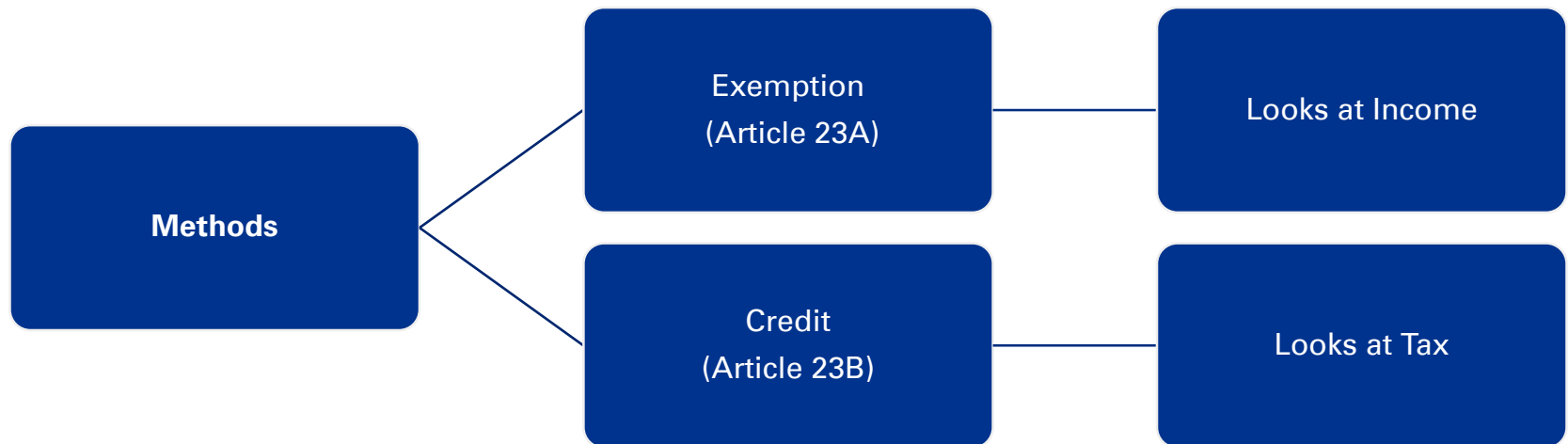


- Shared taxation rights between Source Country and Residence Country

A close-up photograph of a person's hands in a white shirt. The right hand holds a black pen, and the left hand is positioned over a silver calculator. The calculator is resting on a document with some printed text and a green line. In the background, a laptop keyboard is visible. A large blue arrow-shaped graphic points from the left towards the right, containing white text.

Article 23 - Elimination of Double Taxation

Article 23 - Elimination of Double Taxation



Article 23 - Elimination of Double Taxation

Article 23 A - Exemption Method – Principles

- Country R does not tax the income which may be taxed in Country S
- Income which may be taxed in Country S is not taken into account by Country R; but Country R reserves the right to take the income into consideration when determining the tax to be imposed on the rest of the income

Article 23 B. Credit Method – Principles

- Country R calculates tax on total income including income from Country S which may be taxed in Country S; it then allows a deduction from its own tax for the tax paid in other Country
- Methods:
 - Full Credit
 - Ordinary Credit
 - Underlying Credit

Article 23 - Elimination of Double Taxation

A Ltd, a resident of Country R, has earned a total income of Rs 1 Lac. Of its total income, Rs. 20000/- is derived from Country S. Country R imposes tax of 35%. Country S imposes tax of 40%. Credit would be computed as follows :

Particulars		Full credit	Ordinary Credit	Credit mechanism does not exist
Amount of income earned	A	1,00,000	1,00,000	1,00,000
Country R Tax (@ 35%)	B	35,000	35,000	35,000
Country S Tax (20000*40%)	C	8,000	8,000	8,000
Tax credit available	D	8000	*7,000 (20,000*35%)	-
Taxes due in State R	E = B-D	27,000 (35,000-8000)	28,000 (35,000-7000)	35,000
Total tax cost	F = C+E	35,000	36,000	43,000

**Maximum credit restricted to 7000 (35% which is tax rate in Country R on the income earned in Country S)*

Article 23 - Elimination of Double Taxation

Underlying Tax Credits (UTC)

Illustration:

Indian Company (I Co) has a wholly owned subsidiary in Singapore, ie S Co.

S Co intends to declare dividend out of the profits earned by it in Singapore and distribute the same to I Co. As per local laws of Singapore, S Co will have to pay 17% corporate tax on the profits earned by it. However, there is no Dividend Distribution Tax in Singapore.

Subsequently, I Co intends to declare and distribute dividends partially out of its own profits and partially out of the dividends received from S Co.

Whether I Co will be eligible to utilize underlying credit of the income tax paid by S Co against the tax chargeable under section 115BBD of the Act?

Article 23 - Elimination of Double Taxation

Underlying Tax Credits (UTC)

Particulars	UTC Mechanism
Calculation of dividends distributed by S Co	
Total income	100.00
Tax paid in Singapore @ 17%	17.00
Income distributed	83.00
Computation of underlying tax credit in the hands of I Co	
Total income (Dividend received from S Co: INR 83 and Underlying Tax Credit: INR 17)	100.00
Tax payable under section 115BBD	15.45
Less: Underlying tax credit for taxes paid in Singapore (restricted to tax payable in India)	(15.45)
Net Tax payable	NIL

Article 23 - Elimination of Double Taxation

Tax Sparing

- Need
 - Source Country may provide tax incentives on certain income
 - Country of Residence may tax that income
 - Result – Country of residence may collect taxes foregone by Source Country
- What does Tax Sparing mean?
 - Country of residence – grants credit for deemed tax paid on income otherwise exempt in Source Country considers tax payable; not tax paid

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Limitation of Benefits

Limitation of Benefits (LOB)

- LOB clause intends to **limit the benefits of the DTAA to legitimate residents** of the contracting countries.
- Generally, a LOB clause in a DTAA is designed to **test the substance of a claimant** to the DTAA
- LOB clause is intended to **prevent DTAA shopping and tax avoidance**
- LOB articles in DTAA **vary between each DTAA** in terms of conditions and complexity
- Generally, the LOB clause **denies DTAA benefits** if the person seeking to obtain DTAA benefits is **not a qualified person (resident)**
- Several 'safe harbor' tests are set out, which if met will result in DTAA benefit
 - Residential status of Shareholders / Listing Criteria
 - Active Trade and Business test

Limitation of Benefits (LOB)

Form of LOB

- Place of Effective Management
- Beneficial owner
- Subject-to-tax or liable-to-tax approach
- Specific article on LOB

Examples of Indian DTAA with LOB Clause:

- India USA DTAA
- India Singapore DTAA
- India Kuwait DTAA

- In the India – US DTAA (Article 24) are as follows:
 - Beneficial ownership test i.e. who are actual owners holding more than 50% of the company's shares
 - Base erosion test i.e. income is not used directly or indirectly to meet liabilities outside the contracting states of a DTAA
- Protocol to India-Singapore DTAA
 - Shell or conduit company set-up or where the affairs are arranged with a primary purpose to take the benefit of favorable capital gains clause
 - A resident person who conducts his affairs with primary purpose to take benefit of favorable capital gain clause
- India – Kuwait DTAA (Article 27)
 - A resident person who conducts his affairs with primary purpose to take benefit of DTAA

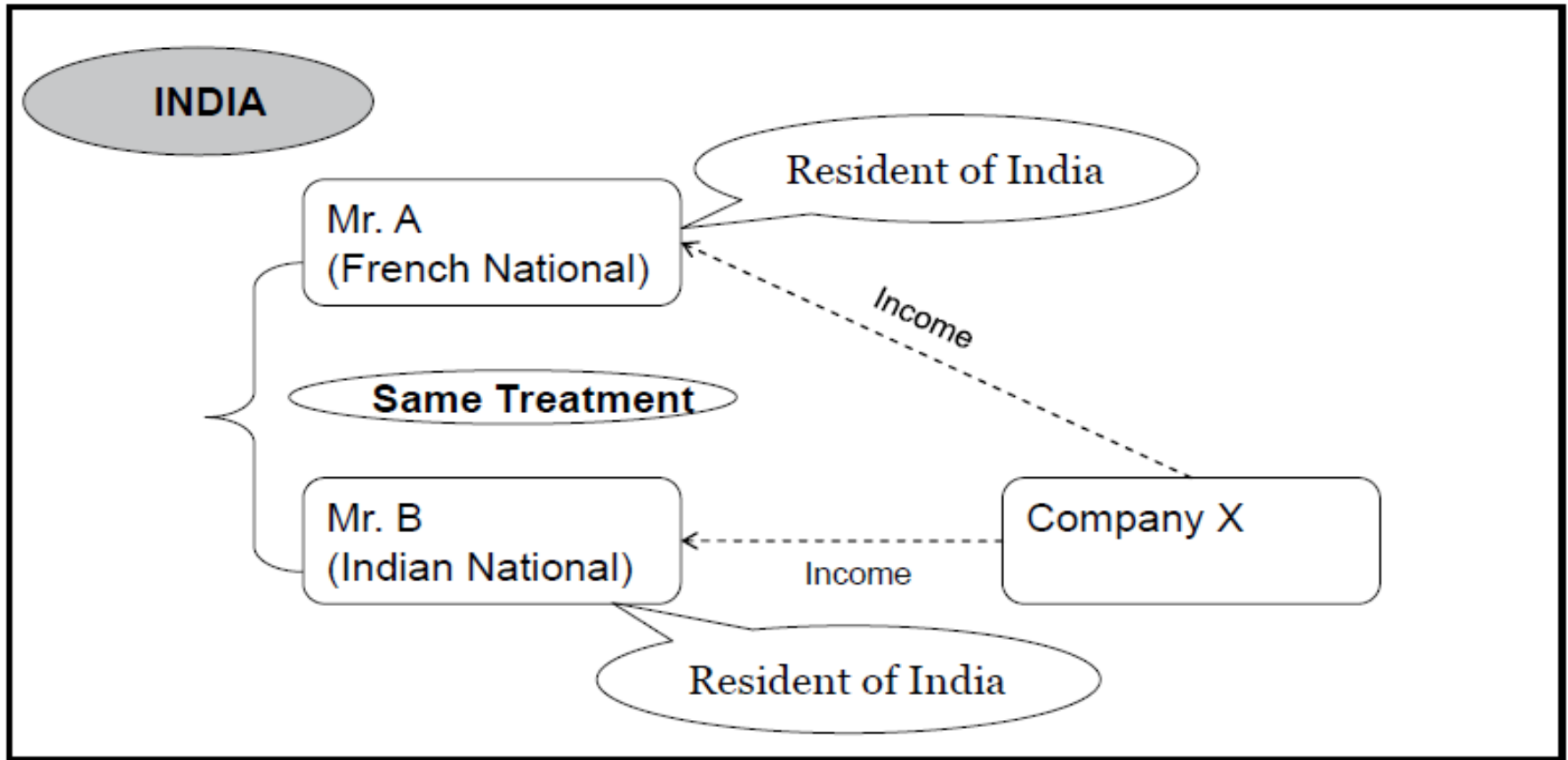
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Article 24 - Non-discrimination

Article 24 – Non-discrimination

- Prevention of discrimination under tax laws of the host country on account of the following four criteria:
 - Nationality of the taxpayer [Art 24(1)] – tax deductions?
 - PE in the host country [Art 24(3)]
 - Deduction - Payment of interest, royalties, other consideration, etc. to a recipient abroad [Art 24(4)]
 - Holding of shares in a resident enterprise by non-residents [Art 24(5)] – section 79?
- Other provisions:
 - Stateless Persons [Art 24(2)]
 - Inclusion of other taxes [Art 24(6)]

Illustration - Nationality of the taxpayer [Art 24(1)]



Mr. A should not be subjected to any taxation or any requirement which is other or more burdensome than taxation and connected requirement applicable to Mr. B in the same circumstance

Illustration - PE in the host country [Art 24(3)]

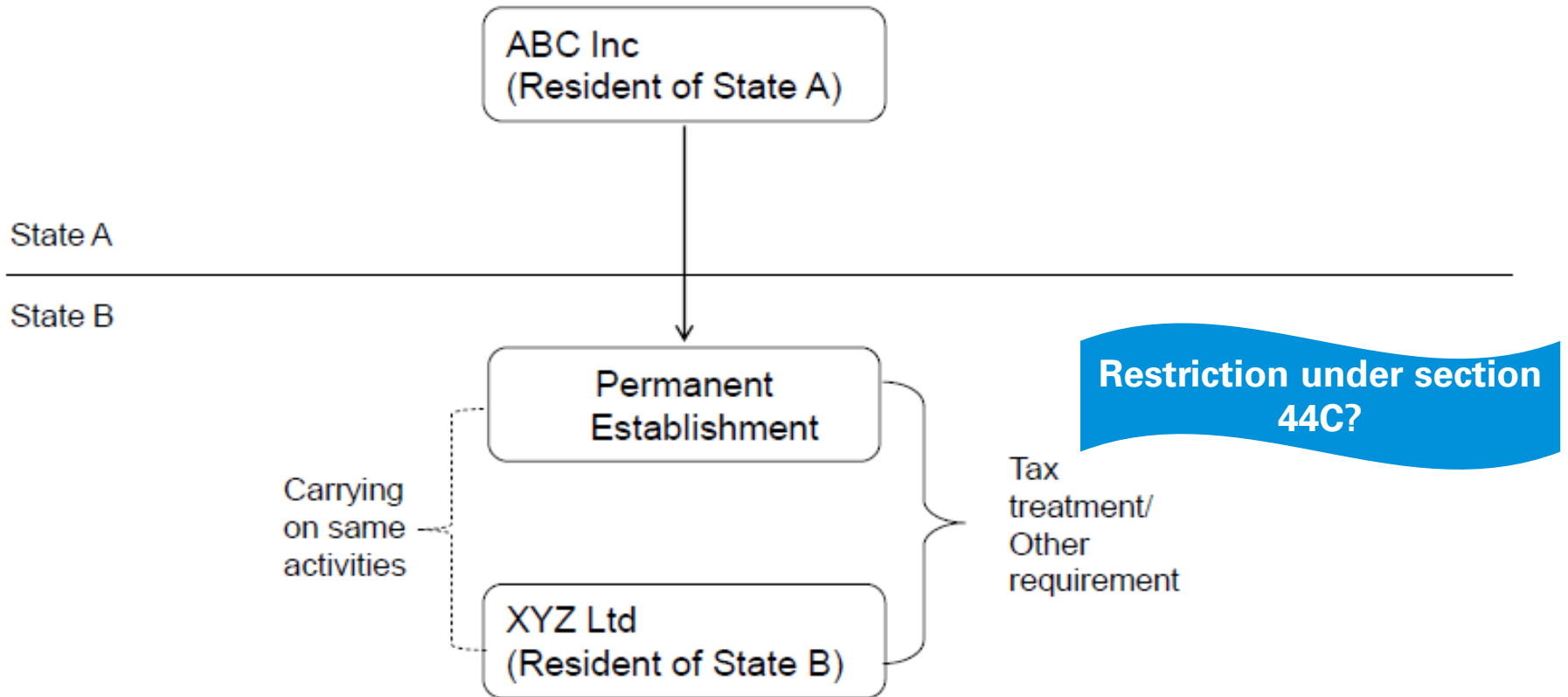
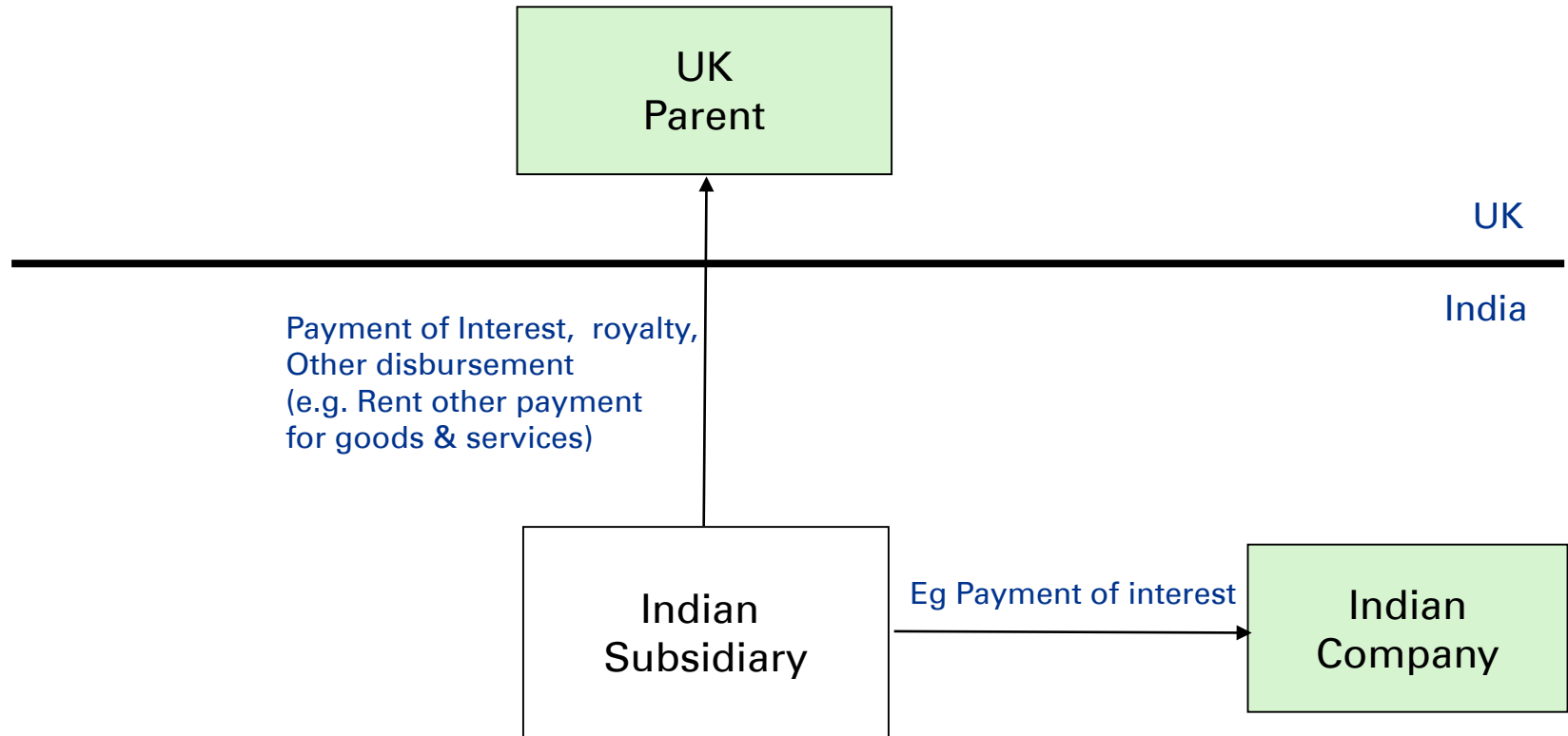
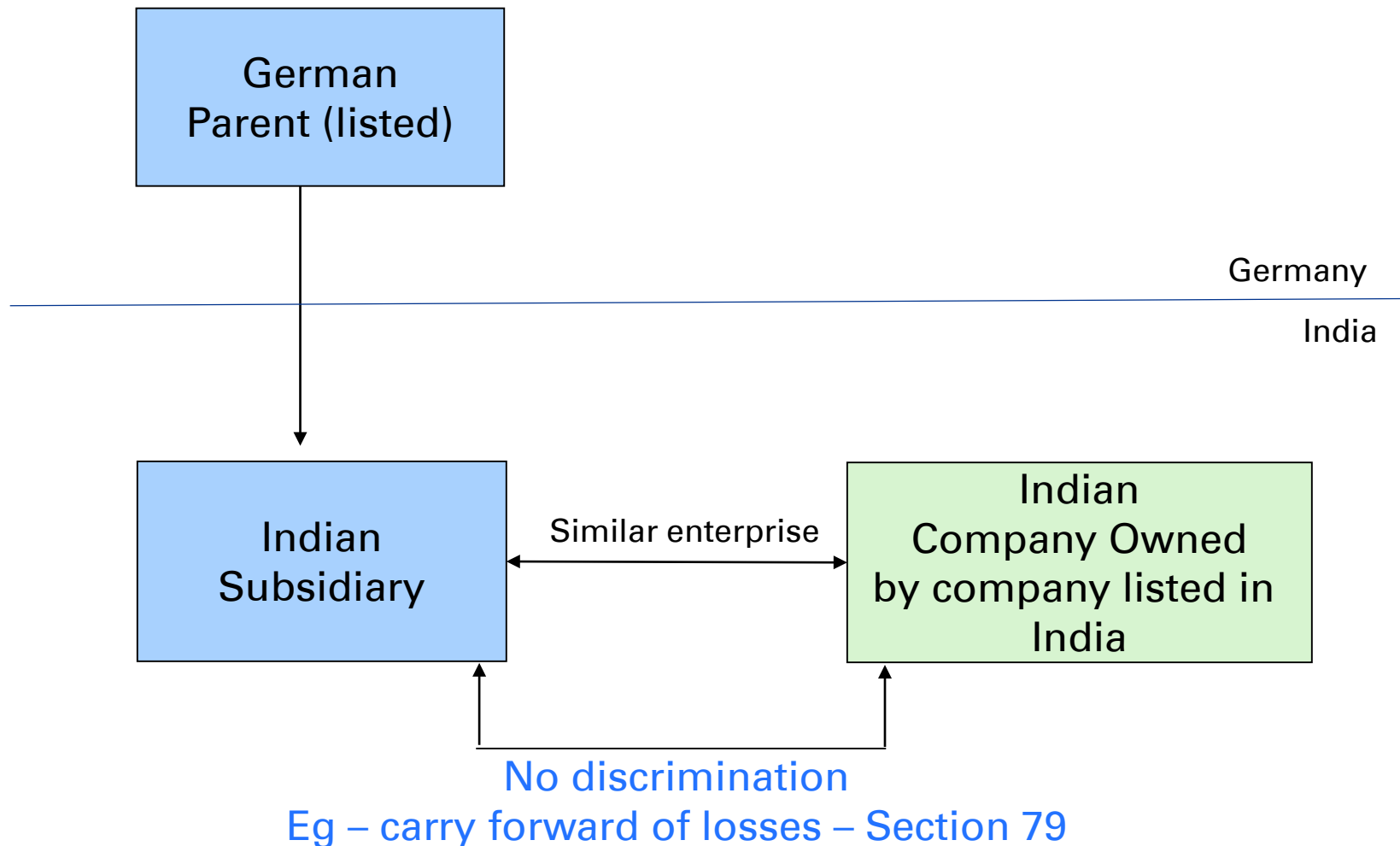


Illustration - Deductions [Art 24(4)]



No discrimination on deductibility of payment of interest in the hands of the Indian subsidiary i.e. Whether paid to UK parent or another Indian Company.

Illustration - Holding of shares in a resident enterprise by non - resident [Art 24(5)]





Most Favored Nation Clause

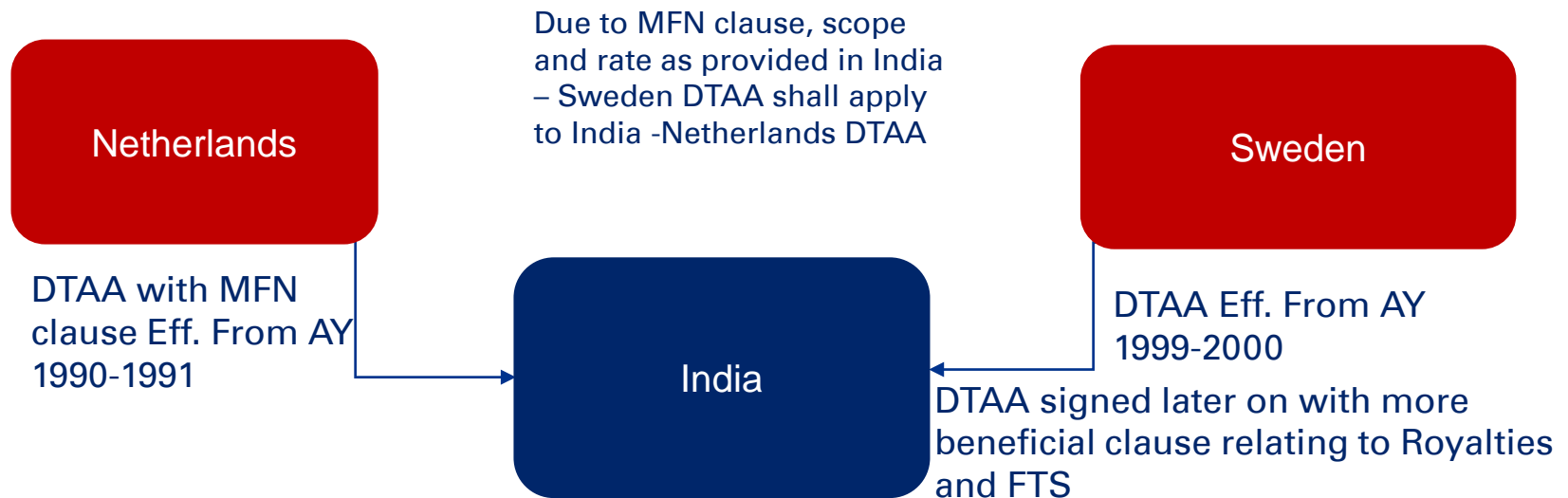
Most Favored Nation Clause (MFN Clause)

- Normally benefit under this clause is restricted to a specific group like OECD countries or developing countries
- Benefit provided is normally with respect to following:
 - Rates of taxes
 - Liability to tax
 - Deductions permissible
- Attempts to avoid discrimination between residents of different countries
- MFN clause usually found in Protocols and Exchange of notes
- Ensures equal treatment between a subset of countries
- Extends similar benefits to one country as extended to certain other countries

Most Favored Nation clause (MFN Clause)

- Applying the MFN Clause

Example: In a MFN situation, generally, one of the contracting states (say India) to the DTAA grants the residents of the other contracting state (say Netherlands), the same beneficial treatment made available by it (that is, by India) to the resident of a third country (say Sweden) with whom it has entered into a DTAA



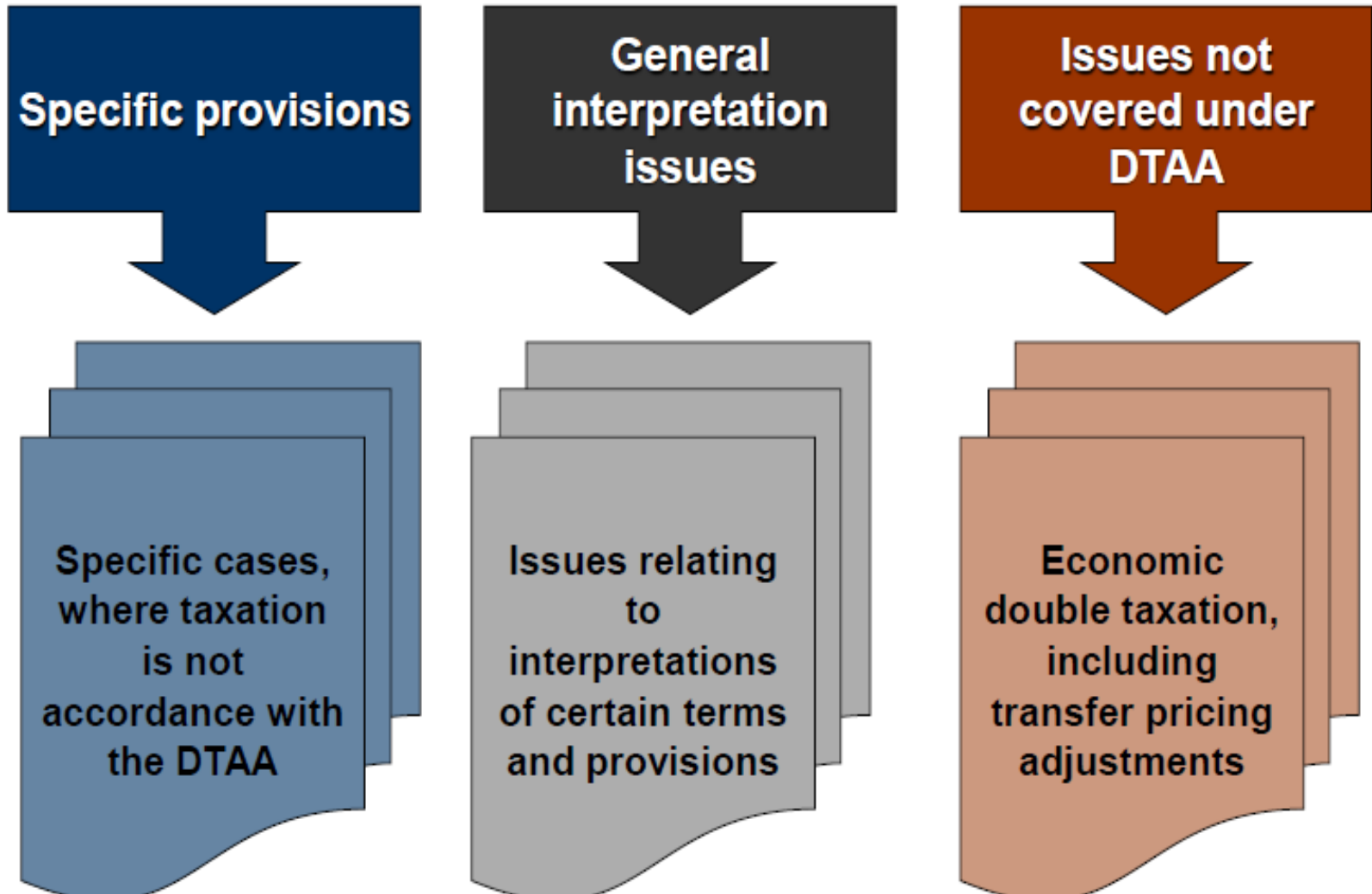
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Mutual Agreement Procedures ('MAP')

Mutual Agreement Procedures ('MAP')

- MAP is a **mechanism** provided under various DTAA between two countries, which provide an opportunity **to resident taxpayers** to approach the competent authorities ('**CA**') of their resident countries **to resolve disputes in consultation with the CA of the other country.**
- MAP is an **alternative process of dispute resolution** and is an option available to tax payers in addition to and concurrently with the existing appellate process under a country's law.
- **Administrative measure under the DTAA** which is designed **to eliminate or avoid double taxation.**
- Upon a complaint made by the taxpayer, the provisions authorizes the CA of the contracting states **to resolve, by mutual agreement, difficulties regarding the interpretation or application of the DTAA**

Mutual Agreement Procedures ('MAP')



Thank you

Article 4 - Residence

India – Netherlands DTAA

- Para 1 of Article 4 provides that resident of the Country means any person who, under the laws of that Country, is liable to tax therein by reason of his:
 - Domicile,
 - Residence,
 - Place of management or
 - Any other criterion of a similar nature
- Further Para 3 of Article 4 provides that where by reason of the provisions of para 1 a person other than an individual is a resident of both Countries, then it shall be deemed to be a resident of the Country in which its place of effective management is situated.

