

# Deloitte.

## Article 15, Article 16 and Article 17 of DTAA

Rajesh Patil  
14 December 2014  
Western India Regional Council  
ICAI



# Contents

**Article 15 – Income from Employment  
(Dependent Personal Services)**

**Article 16 –Taxation of Directors Fees**

**Article 17- Artistes and Sportsmen**



# Article 15 – Income from Employment (Dependent Personal Services)

# Article 15 – Dependent Personal Services

## Article 15(1) of the UN Model reads as follows:

*“Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.”*

## Article 15(2) of the UN Model reads as follows:

*“Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:*

- a. The recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; and*
- b. The remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and*
- c. The remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.*

There is no difference in Article 15(1), Article 15(2)(a) and (b) of the OECD Model and the UN Model

Unlike the UN Model, Article 15(2)(c) of the OECD Model does not refer to a fixed base

# Article 15 – Dependent Personal Services

## Article 15(3) of the UN Model reads as follows:

*“Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.”*

There are no differences between Article 15(3) of the OECD Model and the UN Model

# Overview of Article 15(1)

- ❑ Meaning of term “salaries, wages and other similar remuneration”
  - Includes benefits in kind or perquisites received in respect of employment
    - Yogesh Modak, AAR, 268 ITR 26
  
- ❑ Meaning of the term “exercise”
  - The employment is exercised in the place where the employee is physically present while performing the activities.
  
  - “Exercise” means “perform, carry out”.
  
  - The place where the result of work is exploited or enjoyed or the source of salary or the country of residence of the employer is irrelevant.
  
- ❑ Meaning of the term “derived from”
  - Derived from exercise of employment
    - proportionate to countries where employment exercised

## Overview of Article 15(2)(a) (1/2)

- Para 2 overrides Para 1 and thus state of residence has exclusive right to tax if all the three conditions are fulfilled:
  - (a) the employee is not present for more than 183 days in other state
  - (b) The payer is not resident in other state
  - (c) The payment is not borne by the employer's PE of fixed base in other state.

# Overview of Article 15(2)(a) (2/2)

□ *Period of 183 days:*

- **Days included**

- Part of a day
- Day of arrival or departure
- Saturday and Sunday (post arrival), holidays.
- All other days spent inside the state such as:
  - Saturdays, Sundays and national holidays
  - Holidays before, during and after the activity
  - Short breaks (training, strikes, lock-out, delays in supplies)
  - Days of sickness (unless they prevent the individual from leaving and he would have otherwise qualified for the exemption), death or sickness in the family.

- **Days excluded:**

- transit between two different point outside the State of activity if the individual is present in the State of activity for less than 24hrs.



## Overview of Article 15(2)(b) (1/3)

- ❑ Meaning of the term “employer”
  - The term “employer” is not defined in the Convention
  
- ❑ Model commentaries suggest that substance over form test should be applied
  
- ❑ Employer is the person who has rights on the work produced and bears the responsibility and risk. It needs to be seen whether employee provides services which are an integral part of business of the employer.
  
- ❑ Real Employer in case of secondment contracts, deputation contracts and international hiring of labour will be the employer for Article 15

## Overview of Article 15(2)(b) (2/3)

### □ Following are the additional factors to determine the “employer”:

- Who has an authority to instruct employee for manner in which work is to be performed
- Who has the control and responsibility for the place at which work is performed
- Whether the remuneration to the hirer of personnel is calculated on the basis of the time utilized, or is there a link between his (hirer's) remuneration and salaries received by the employee
- Who provides the tools and other resources at the disposal of the employee
- Who determines the number of employees required
- Who determines the qualifications of the employees required
- Who has the right to select the individual who will perform the work
- Who has authority to take disciplinary action or terminate the contractual arrangement
- Who determines the holidays and work schedule of the employee
- Who makes payment to the employee for the work

# Overview of Article 15(2)(b) (3/3)

## □ Residential status of employer:

- Definition provided in Article 4
- Fiscally transparent partnerships
  - The employer should be determined with reference to partners and not partnerships
  - If the partners reside in different states, the state in which the partners collectively hold the majority share in partnership, reside should be considered.

# Overview of Article 15(2) (c) (1/2)

## □ Meaning of the term “borne by”

- Model commentaries and the judicial rulings have interpreted the meaning as follows:
  - considered in determining profits attributable to PE
  - economically incurred by PE
  - commercial liability of PE
  - deductible/deducted by PE for tax purposes
  - actually paid by PE

## Article 15(2) (c) (2/2) – Judicial Pronouncements

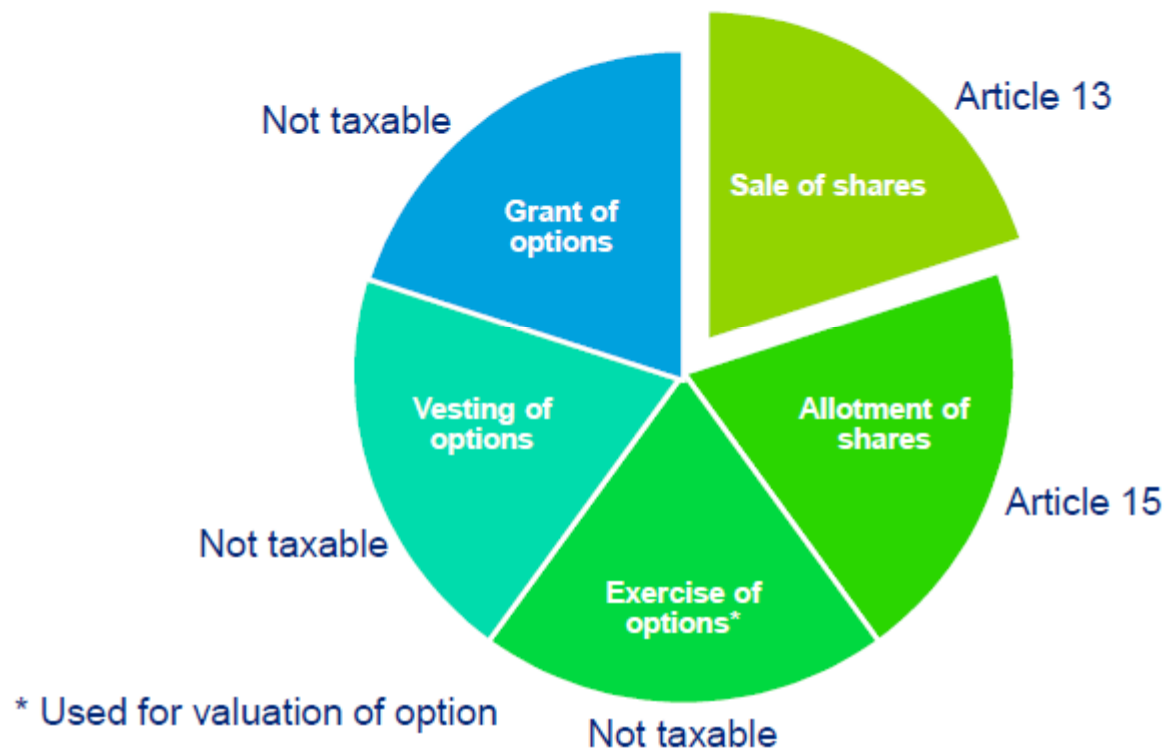
### Judicial precedents for the meaning of the term “borne by”

- Salaries relatable to activities of the PE are paid by head office outside State S and not debited in books of PE. Since the liability for payment of remuneration devolves upon the PE, services have been rendered to the PE and thus the expenses are clearly the expenses incurred by the PE.
  - EnSCO Maritime Ltd v. DCIT [2004] 91 ITD 459 (Del)
- When a non-resident employer is taxed as per section 44BB of the Act, then the salary of the short term expatriate would be deemed to be deducted while determining taxable profits under section 44BB, hence condition as laid down in clause (c) of the Dependent Personnel Services Article is not satisfied and the short stay exemption cannot be availed.
  - Pride Foramer S.A. 97 ITD 86 (Del)
- Following two situations are considered as "borne by the enterprise":
  - The enterprise may voluntarily not claim it as deduction or
  - Even if the deduction is available it is not liable to tax due to absence of PE
    - Sedco Forex International Inc v. CIT 147 Taxman 389 (Uttaranchal)

## Overview of Article 15(3)

- ❑ It makes special provisions in respect of remuneration derived from employment exercised aboard a ship or aircraft operated in international traffic
- ❑ The country in which the employer has place of effective management gets the right to tax
- ❑ It does not apply to the ground staff, whose customary place of work is not aboard the ship or aircraft

# Taxation of ESOP under Model Commentary



## Other Issues for Consideration

- To determine which part of salaries, wages and other similar remuneration paid to an individual is derived from the exercise of employment in a given State.
- Termination of employment e.g. encashment, notice pay, severance payment, medical benefits etc.



# Article 16 –Taxation of Directors’ Fees

## Article 16 – Directors’ Fees

### ❑ Need for a separate Article

- To determine the roles and functions of directors and from the provisions of Company Law in different jurisdictions.
- It is sometimes difficult to ascertain where the services of Director’s or top-level managerial personnel are performed.
- Also, one country may regard it as ‘Independent Personal Services’ while the other country may regard it as ‘Dependent Personal Services’.
- This Article has been introduced to provide common rules for interpretation.

### Article 16(1) of the OECD/UN Model reads as follow:

*“Directors’ fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a Company which is a resident of the Other Contracting State may be taxed in the that other State.”*

# Overview of Article 16 (1/2)

## ❑ Article 16 deals with

- remuneration derived by a resident of a country,
- while acting as a member of the board of directors of a company
- which is a resident of the other Country

## ❑ Following payments are covered:

- directors fees and other similar payments and also includes remuneration paid in connection with the supervision of company's management,
- directors commission,
- benefits in kind like:
  - a. use of automobile and residence
  - b. vehicle insurance
  - c. insurance coverage
  - d. club membership
  - e. stock options

## ❑ Following payments are not covered:

- consultancy fees received for rendering professional services

# Overview of Article 16 (2/2)

## ❑ **Following payments are not covered (cont'd):**

- that remuneration received by Directors' in other capacity such as consultants, employees, advisors, etc. are not covered
- manager not being a director is not covered
- disguised profit distributions by a company to ex-Chairman
- fees received in the capacity of a member of certain committees

## ❑ **Article 16(2) of UN Model**

- reference to top-level managerial position

# Comparison of Tax Models

| OECD MODEL  | UN MODEL  | US MODEL  |
|---|---|---|
| <ul style="list-style-type: none"><li>• Directors fees and other similar payments</li></ul> | <ul style="list-style-type: none"><li>• Directors fees and other similar payments</li><li>• Salaries, wages and other similar remuneration to a person at top-level managerial position</li></ul> | <ul style="list-style-type: none"><li>• Directors fees and other compensation</li></ul> |

# Indian Tax Treaties (Illustrative)

## Tax Treaty with Denmark and Korea, Norway and Poland

- Article 16 covers both directors fees and top level managerial remuneration

## Tax Treaty with UK and USA

- Article 16 covers only the directors fees and not top level managerial remuneration

# Issues for Consideration

- In case of a director acting in a dual capacity receives an overall remuneration for all his activities, what shall be the treatment?
- Whether Article 16 of the OCED covers payments made only during the tenure of directorship or also covers payments made later?

# Case Study 1

Mr. A is a foreign Director on the Board of an Indian Company

- Board meeting of the said Company is held in India
- Mr. A receives sitting fees for attending the said Board Meeting held in India

**Whether the sitting fees received by Mr. A would be taxable in India?**



# Case Study 2

Mr. A is a foreign Director on the Board of an Foreign Company

- Board meeting of the said Company is held in India
- Mr. A receives sitting fees for attending the said Board Meeting held in India

**Whether the sitting fees paid would be taxable in India?**

# Case Study 3

Mr. A is a foreign Director on the Board of an Indian Company

- Board meeting of the said Company is held outside India
- Mr. A receives sitting fees for attending the said Board Meeting held outside India

**Whether the sitting fees received by Mr. A would be taxable in India?**

# Article 17 – Artistes and Sportsman

# Article 17 – Artistes and Sportsman

## ❑ Need for a specific Article

- Cross-border cultural programmers and sports events
- Foreign source income
- High international mobility
- Possibility of double non-taxation
- Complex and creative structured contracts

## Article 17(1) of the OECD Model reads as follows:

*“Notwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.”*

## Article 17(2) of the OECD Model reads as follows:

*“Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised”*

Article 17(1) and Article 17(2) of the OECD Model refers to word “sportsman” and Article 7 as against “sportsperson” and Article 14 respectively in the UN Model

# Overview of Article 17 (1/5)

## ❑ Article 17(1) applies to a person if:

- He is a resident of a contracting state
- He is an entertainer or a sportsperson
- He derives income as an entertainer or sportsperson from personal activities; and
- Such personal activities are exercised in the other contracting state.

❑ If all these conditions are satisfied, income derived through such personal activities 'may be taxed' in country of source.

❑ The term resident is not specifically defined in Article 17 as against definition of resident defined under Article 21 to apply specifically for Article 20 and 21. Thus, the definition of "resident" under Article 4 is only pertinent for determining taxability under Article 17 and not under Article 21

-Abdul Razak A. Meman, In re [2005] 276 ITR 306 (AAR)

# Overview of Article 17 (2/5)

## □ Applicability of Article 17(1):

- To an entertainer or sportsman who performs services on his own behalf or on behalf of another person, either as an employee or in any other manner,
- Irrespective of whether such person performs individually or as a member of a troupe,
- Irrespective of who employs the artiste,
- Irrespective of the smallness of quantum,
- Irrespective of the duration of the visit of the entertainer,
- Regardless of the timing of payment for services,
- Regardless of who pays the income

## Overview of Article 17 (3/5)

- ❑ OECD defines the term “Entertainer” to include theatre, motion picture, radio or television artiste, or a musician.
- ❑ Income received from activities involving a political, social, religious or charitable nature are covered if an entertainment character is present.
- ❑ The scope of this article does not extend to visiting conference speaker, a model performing as such rather than as an entertainer or administrative or support staff (e.g. cameramen for a film, producers, film directors, choreographers, technical staff, road crew for a pop group, etc).
- ❑ Individuals who facilitate appearances of entertainers are not “entertainers”. However, circus artistes are entertainers.

## Overview of Article 17 (4/5)

- ❑ Meaning of “Sportsman” is not restricted to participants in traditional athletic events (e.g. runners, jumpers, swimmers).
- ❑ OECD covers golfers, jockeys, footballers, cricketers, tennis players and racing drivers.
- ❑ OECD states that this article also applies to income derived from billiards and snooker, chess and bridge tournaments, as being regarded as of an entertainment character.
- ❑ Umpires and match referee renders professional or technical services and cannot be regarded as sports person (including athlete)  
-Indcom v. CIT [2011] 11 Taxman.com 109 (Cal)
- ❑ Guarantee fees paid by the BCCI to the cricket boards of overseas countries while the overseas cricketers are on a tour of India, is liable to tax in India under this article. (BCCI v. DIT [2005] 96 ITD 263 (Mum. Trib.))
- ❑ Payments received upon cancellation of a performance are not taxable under Article 17(1)



# Overview of Article 17 (5/5)

## Scope of Article 17(2)

- ❑ Payments received on behalf of jockey or race car driver by the owner may be taxed in the hands of the jockey or race car driver under article 17(1).
- ❑ This article does not apply to prize money derived by the owner of a horse or a race car from the results of the horse or car during a race as the prize money is not sufficiently related to personal activities of the jockey or race car driver

# India's reservation on OECD Model Commentary

- ❑ India reserves the right to exclude from the application of paragraphs 1 and 2 the income from activities performed in a Contracting State by entertainers or sportspersons if the activities are substantially supported by public funds and to provide for residence based taxation of such income

# Issues for Consideration

- ❑ Applicability of Article 17 of the tax treaty in case of triangular treaty scenarios. For instance, payments made by Mumbai Indians, an Indian Company to Michael Hussey, an Australian resident for participating in IPL2014 played in Dubai.
- ❑ Apportionment of amounts taxable in source country in a situation where multiple geographies and revenue streams are involved.
- ❑ Tax implications on player transfer fees.

# Case Study 1

Mr A, an artist from Singapore has agreed to perform in India for various stage shows.

But before his performance, the stage shows were cancelled.

He received an amount of 0.5 USD million for the cancellation of performance.

**Whether payments received upon cancellation of performance are taxable?**

## **Case Study 2**

XYZ LLC USA is an artist management company

Indian Co. has requested XYZ LLC to refer certain artists for its advertisement.

Indian Co pays referral fee of 15% of the fees to be charged by the artists

**Whether referral fee is taxable in India ?**

Open House

Thank You





Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms

This material and the information contained herein prepared by Deloitte Touche Tohmatsu India Private Limited (DTTIPL) is intended to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). None of DTTIPL, Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this material, rendering professional advice or services. The information is not intended to be relied upon as the sole basis for any decision which may affect you or your business. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this material.

©2014 Deloitte Touche Tohmatsu India Private Limited

Member of Deloitte Touche Tohmatsu Limited