

Residence Article 4

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Double Tax Avoidance Agreements

Article 4

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Overview

A person qualifies for the benefits under a DTAA if he is resident of either of the two Contracting states.

The concept is important:

- in resolving cases where double taxation arises in consequence of double residence;
- in resolving cases where double taxation arises as a consequence of taxation in the State of residence and also in the State of source

Overview

Broadly, the structure of the Article is as follows:

- Article 4(1) - defines the term ‘resident of a contracting state’
- Article 4(2) - establishes rules for resolving cases of dual residence in case of individuals
- Article 4(3) - sets out rule for ascertaining residential status in case of non –individuals such as companies and other non-corporate bodies

Article 4(1)

For the purposes of this Convention, the term "resident of a Contracting State" 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, and

also includes that State and any political subdivision or local authority thereof.

This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

Liable to tax-

Mohsinally Alimohammed 213 ITR 317(AAR)

Cyril Eugene Pereira 239 ITR 650 (AAR)

ADIT V Green Shipping Travels 100 ITD 203 (Mum)

Definition under domestic law to be seen

Personal attachment to territory to be the determination criteria

Meaning of Domicile

- ▶ Concept under general law – UK especially follows this concept
- ▶ Distinct from nationality or residence
- ▶ Domicile of Origin or dependency v. Domicile of Choice
 - The law attributes to every person a domicile which is determined at the time of the child's birth, of that person upon whom he is legally dependent
 - The domicile of choice is acquired later by the actual removal of an individual to another country accompanied by his intention of continuing to reside there indefinitely.
 - The state of mind, or animus manendi, demands that the person whose domicile is the object of the inquiry should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or in effect, he should have formed a deliberate intention to settle there.
 - Onus lies on person to prove - only intention required for a proof of a change of domicile is an intention of permanent residence

Meaning of Place of management

- ▶ **Control and Management** signifies in the present context, the controlling and directive power, the head and brain as it is sometimes called
- ▶ Situated implies the functioning of such power at a particular place with some degree of permanence.
- ▶ As a general rule the control and management of a business remains in the hands of person or group of persons, and the question to be asked is wherefrom the person or group of persons controls or directs the business.
- ▶ Mere activity by one company in a place does not create residence, with the result that a company may be “residing” in one place and doing a great deal of business in another.
- ▶ In case of dual residence, it is necessary that the company performs some of the vital organic functions incidental to its existence as such in both places so that in fact where there are two centers of management.

Cont.

- ▶ Place of Management is the place where the real business is carried on
- ▶ It is the place where it really keeps house and does business.
- ▶ De-beers case critical case on this point.
- ▶ It is the actual place of management and not that place which it ought to be managed which fixes the residence of the company.
- ▶ It is not the servants and agents that constitute seat of power or the controlling and directing power.
- ▶ It is that authority to which the servants, employees and agents are subject.
- ▶ It is that authority which controls and manages them which is the central authority.
- ▶ It is the place where the central authority functions that the company resides

Meaning of Central control & management

- ▶ Control and Management referred to section 4A (c) of 1922 Act is central control and management and not carrying on the day to day business by servants, employees or agents.
- ▶ In construing the expression “ control and management” it is necessary to bear in mind the distinction between doing of the business and the control and management of the business.
- ▶ Business and whole if it may be done outside India and yet the control and
- ▶ management of that business may be done within India.
- ▶ The real test is:
 - Where the controlling and directing power
 - Where does the controlling and directing power function
 - Where is the seat of power i.e. head and brain

Article 4(2)

Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

- a) He shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
 - b) If the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
 - c) If he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
 - d) If he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.
- ▶ **UN Model** - Same as OECD except the term 'only' has been omitted in points (a) and (c).

Meaning of Permanent Home

- ▶ Home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration Any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room) Available continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration
 1. travel for pleasure,
 2. business travel,
 3. educational travel,
 4. attending a course at a school, etc.

Meaning of center of vital interests

- ▶ State where personal and economic interests are closer
- ▶ Items to be given regard to will be:
 1. his family and social relations,
 2. his occupations,
 3. his political, cultural or other activities,
 4. his place of business,
 5. the place from which he administers his property, etc.
- ▶ The circumstances must be examined as a whole,
- ▶ Considerations based on the personal acts of the individual must receive special attention. For example - If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.

Meaning of Habitual Abode

Addresses two possible situations -

- ▶ The case where the individual has a permanent home available to him in both Contracting States and it is not possible to determine in which one he has his centre of vital interests;
 1. Place where he stays most frequently
 2. Days stay would tip the balance

- ▶ The case where the individual has a permanent home available to him in neither Contracting State
 1. For example all stays in hotels
 2. Not necessary to conclude on reason for stay but simple number of day criteria to be adopted

- ▶ No specification of time period for a habitual abode

Meaning of National

Nationality is determined on the basis of the following :

1. Place of Birth
2. Relationship of right and duties with his State of origin

Article 4(3)

Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

Registration not to be only deciding criterion

Especially common criterion for deciding how income from shipping and air transport is taxed

Concepts commonly used are:

- Place of management
- Place of effective management
- Place of fiscal domicile

Meaning of place of effective management

- ▶ The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business are in substance made.
- ▶ The place of effective management will ordinarily be the place where the most senior person or group of persons (for example a board of directors) makes its decisions, the place where the actions to be taken by the entity as a whole are determined;
- ▶ No definitive rule can be given and all relevant facts and circumstances must be examined
- ▶ An entity may have more than one place of management, but it can have only one place of effective management at any one time.

THANK YOU