Direct Tax Refresher Course
Western India Regional Council – ICAI

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Taxation of Salary Income – Employer's Perspective

P V SRINIVASAN
Corporate Advisor

‘Salary’ –
Master Servant Relationship

“Master – Servant” or “Employer – Employee” relationship

Supreme Court in ITC Ltd. vs. CIT in CA Nos. 4435-37/2016 dated 26.04.2016

Amount paid **dehors the employer – employee relationship** excluded from the ambit of ‘salary’.

Orissa High Court in CIT vs. Ramji Das Naranga in (1993) 202 ITR 48

Income taxable under **“income from other sources” in the absence of an element of relationship of employer and employee.**

“Master – Servant” or “Employer – Employee” relationship

Bombay High Court in CIT vs. Durga Khote in (1952) 52 BOMLR 207

1. Mere establishment of master-servant relationship not sufficient in case of a professional. In the course of the practice of that profession, it may become necessary for the person to get engaged to a particular master temporarily.
2. But even while being so engaged, the profession is being practiced and the **service is merely incidental to that profession.**
3. The **position is different** when a **professional person permanently accepts an employment and exchanges his profession for service** –

Employee vs. Agent

Supreme Court in Lakshminarayan Ram Gopal and Son Ltd. vs. Government of Hyderabad in 1954 AIR 364

1. Servant – Acts under the direct **control and supervision** of his master, and is bound to conform to all reasonable orders given to him in the course of his work

2. Independent contractor – Entirely **independent of any control or interference** and merely undertakes to produce a specified result, employing his own means to produce that result.

3. Agent – Though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is **not subject in its exercise to the direct control or supervision** of the principal.

4. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant.

“Control and supervision” – Whether conclusive?

Supreme Court in Dharangadhara Chemical Works Ltd vs State Of Saurashtra in 1957 AIR 264

1. Whether having regard to the nature of the work there was due control and supervision by the employer?

2. **Though certain features which are usually to be found in a contract of service were absent, that was due to the nature of the industry and that on the whole the status was that of workmen and not independent contractors.**

Definition of ‘Employer’

Section 314(88) of the Direct Taxes Code, 2010

“Employer” means a person who **controls** an individual under **an express or implied contract of employment** and is **obliged to compensate** him by way of **salary.**

‘Source’ of Income from Salary – Domestic Law & DTAA

Income Taxation

Sources of Income

- Within the Country
- Deemed inside the Country
- Outside the Country

Residence Status of the Person

- Resident
- Non Resident

International Taxation

Royalty/ FTS/Interest

Income from House Property

Dependent Personal Services

Capital Gains

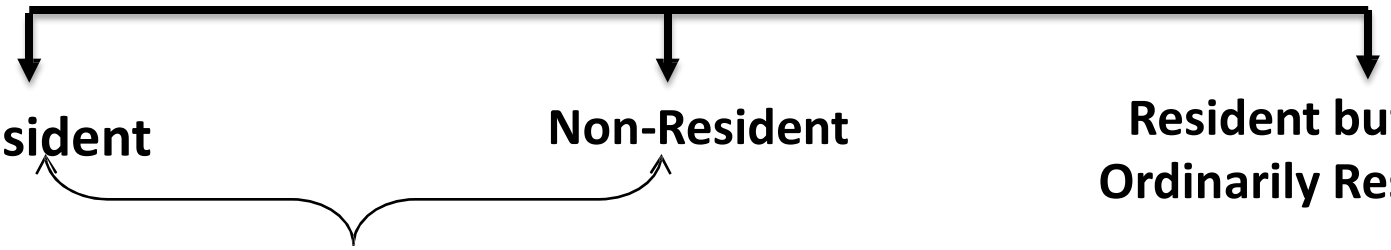
Business Income – BC /PE

Income from other sources

Non-Resident → **Sources within another Country** → **Income chargeable to tax**

Section 5 – Scope of Total Income

Total income# of any previous year of a person who is a –



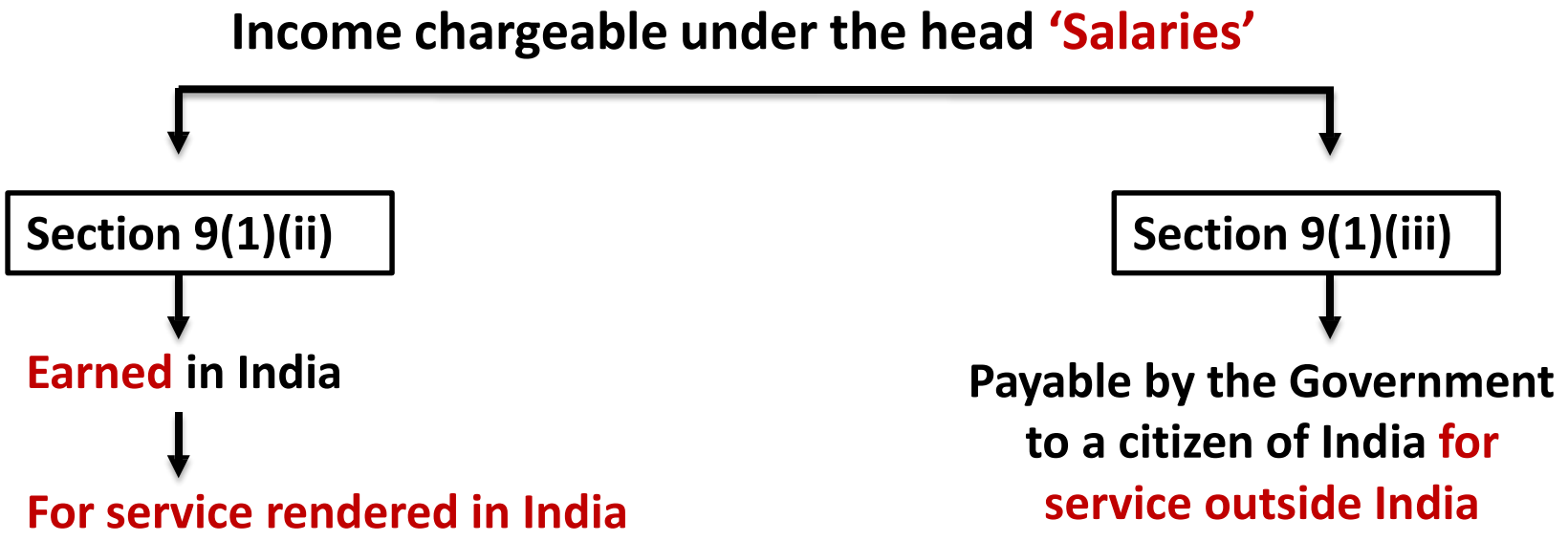
includes **all income from whatever sourced derived** which

Resident	Non-Resident	Resident but not Ordinarily Resident
a) Received or deemed to be received in India; b) Accrues or arises or "is **deemed** to accrue or arise **in In dia"** ; or c) accrues or arises **outside India**.	a) Received or deemed to be received in India; b) Accrues or arises or is **deemed** to accrue or arise **in India**;	Income which accrues or arises outside India shall not be included **unless** derived from a business controlled or a profession set up in India.

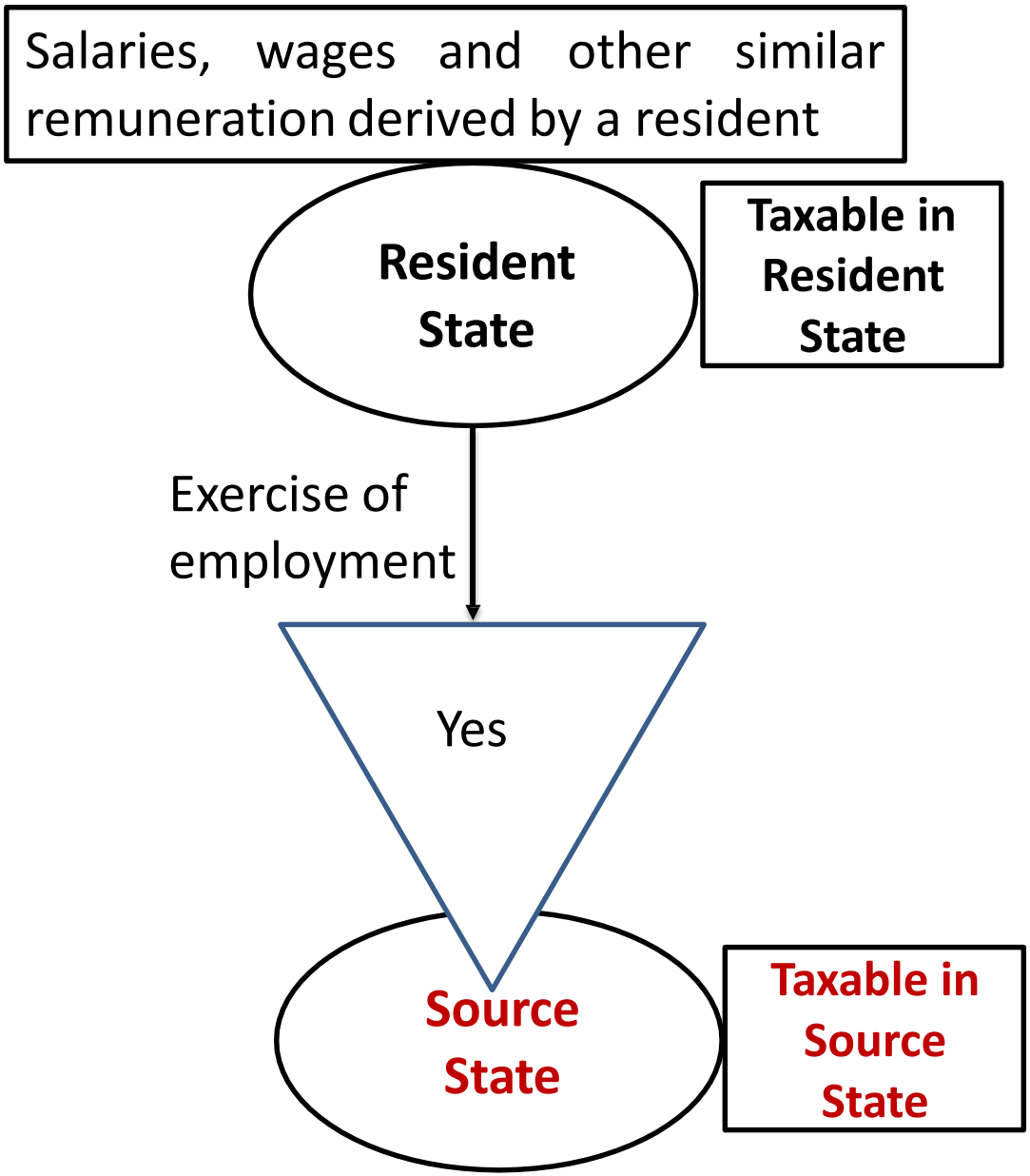
Salary – Section 9(1)(ii) **Salary – Section 9(1)(iii)**

#Subject to the provisions of the Act

Section 9 – Deemed to Accrue or Arise in India



Article 16 – Dependent Personal Services



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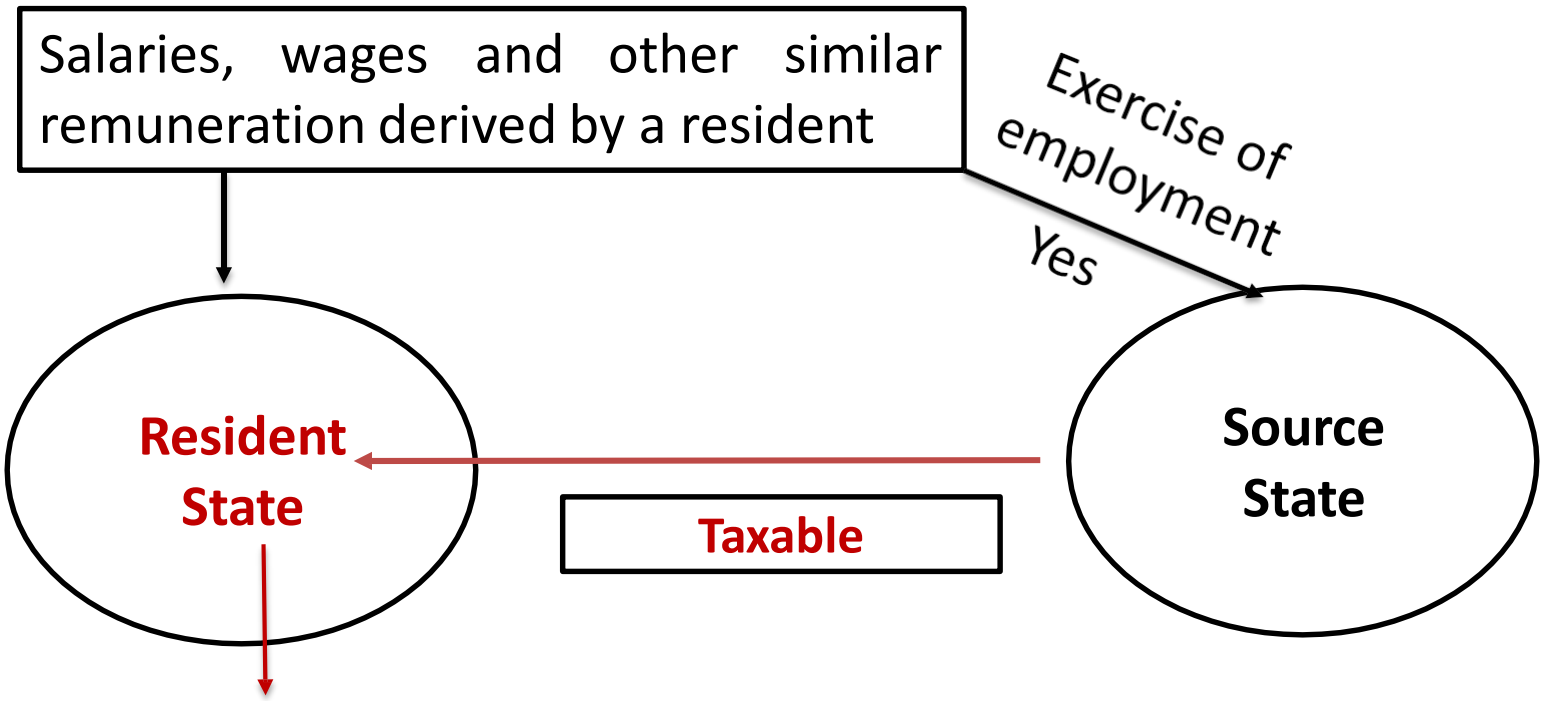


Conditions –

1. **Recipient present in Source State < 183 days in the relevant taxable year ;**
2. **Remuneration is paid by, or on behalf of, an employer who is not a resident of Source State; and**
3. **Remuneration is not borne by a PE or a fixed base or a trade or business of the employer in Source State**

Article 16 – Dependent Personal Services

"Borne by"

AAR in DHV Consultants BV, IN RE in (2005) 277 ITR 97

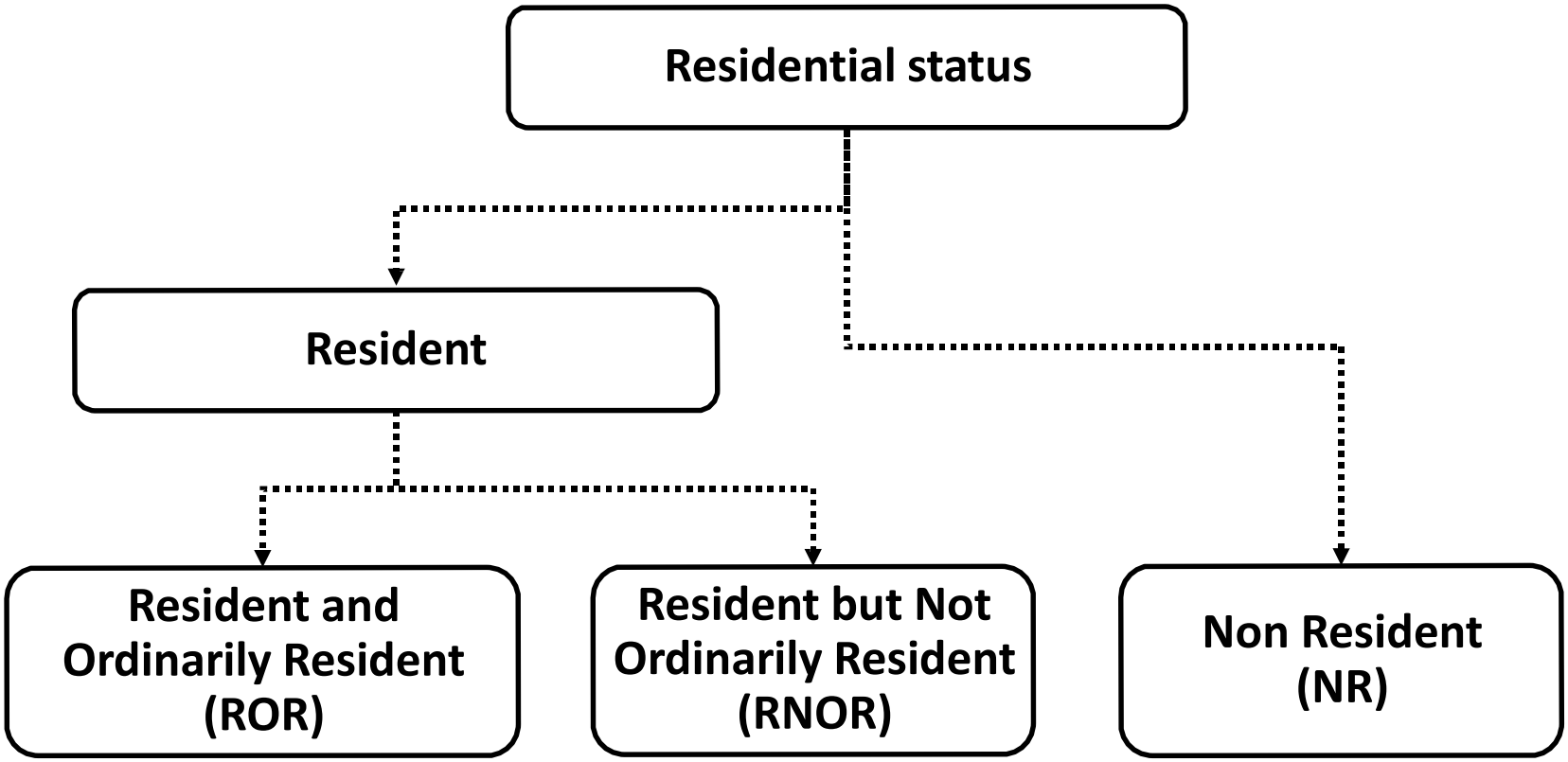
1. The phrase "borne by" must be interpreted such that the fact that the employer **has, or has not, actually claimed a deduction for the remuneration in computing the profits attributable to the PE is not necessarily conclusive** since the proper test is whether any deduction otherwise available for that remuneration would be allocated to the PE.
2. That test would be met, for instance, **even if no amount were actually deducted as a result of the PE being exempt from tax in the source country** or of the employer simply **deciding not to claim a deduction to which he was entitled.**

Delhi Tribunal in Ensco Maritime Limited vs. DCIT in (2004) 91 ITD 459

1. Assessment of the employer company has been made by levy of presumptive rate of tax of 10% as per the provisions of Section 44BB implied that remuneration of the employees is borne by the PE.

Residential Status

Section 6 – Residence

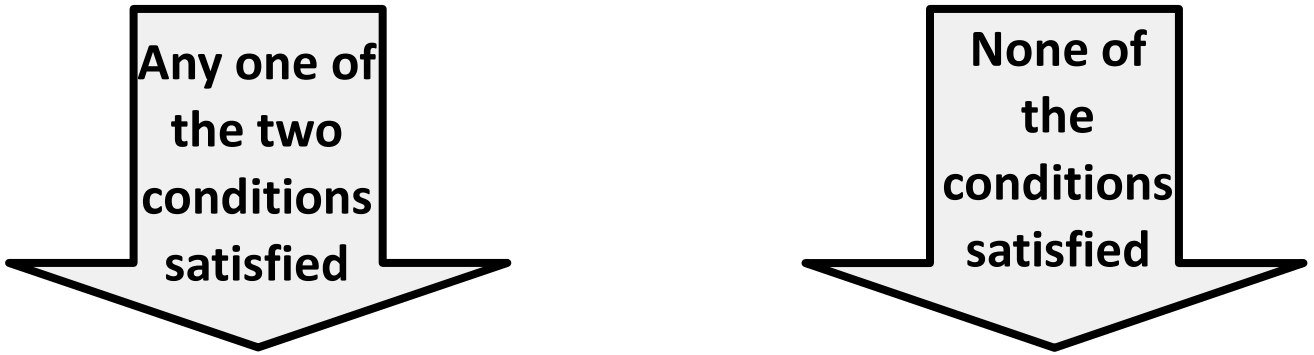


Residency is determined by physical number of days stay in India

Section 6 – Residence

Basic conditions:

1. **Is in India for 182 days or more in a financial year; or**
2. **Is in India for 60 days* or more in the financial year plus 365 days or more in four financial years preceding the relevant financial year**



182 days in the year of departure for an **Indian citizen going abroad for the purposes of employment*

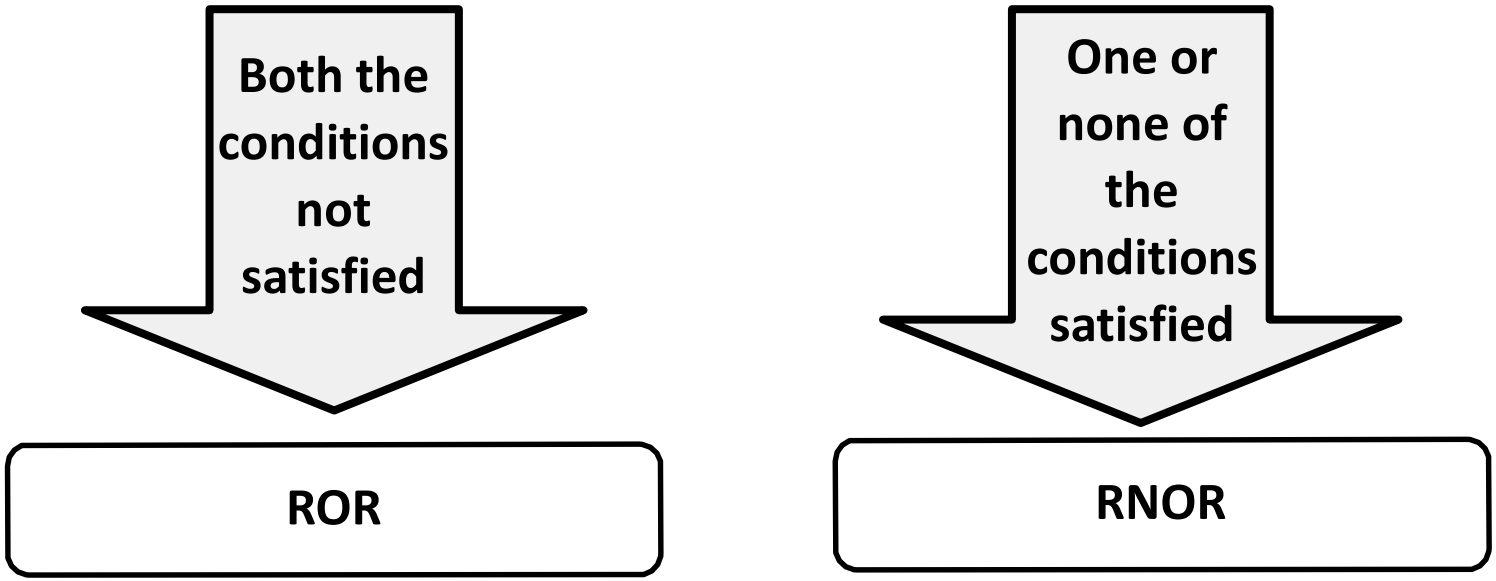
[AAR in British Gas India (P) Ltd. In Re: 285 ITR 218 – An individual need not be an unemployed person who leaves India for employment outside India]

In the year of arrival to India for resuming employment, the threshold limit is 60 days.

Section 6 – Residence

Additional conditions:

1. **"Non-Resident" in India in nine out of ten financial years preceding the relevant financial year; or**
2. **Present in India for 729 days or less during the 7 financial years preceding the relevant financial year.**



Bangalore Tribunal in Manoj Kumar Reddy vs. ITO in (2010) 132 TTJ (Bang) 328

Law disregards fractions. By the calendar the day commenced at midnight and most nations reckon in the same manner.

To compute the period for which an assessee is in India, one has to start the counting from a particular day and to end the same with specific day.

The period is to be counted from the date of arrival of the assessee in India to the date he leaves India.

Thus, the words ‘from’ and ‘to’ are to be inevitably used for ascertaining the period though these words are not mentioned in the statute.

Section 6 - Residence

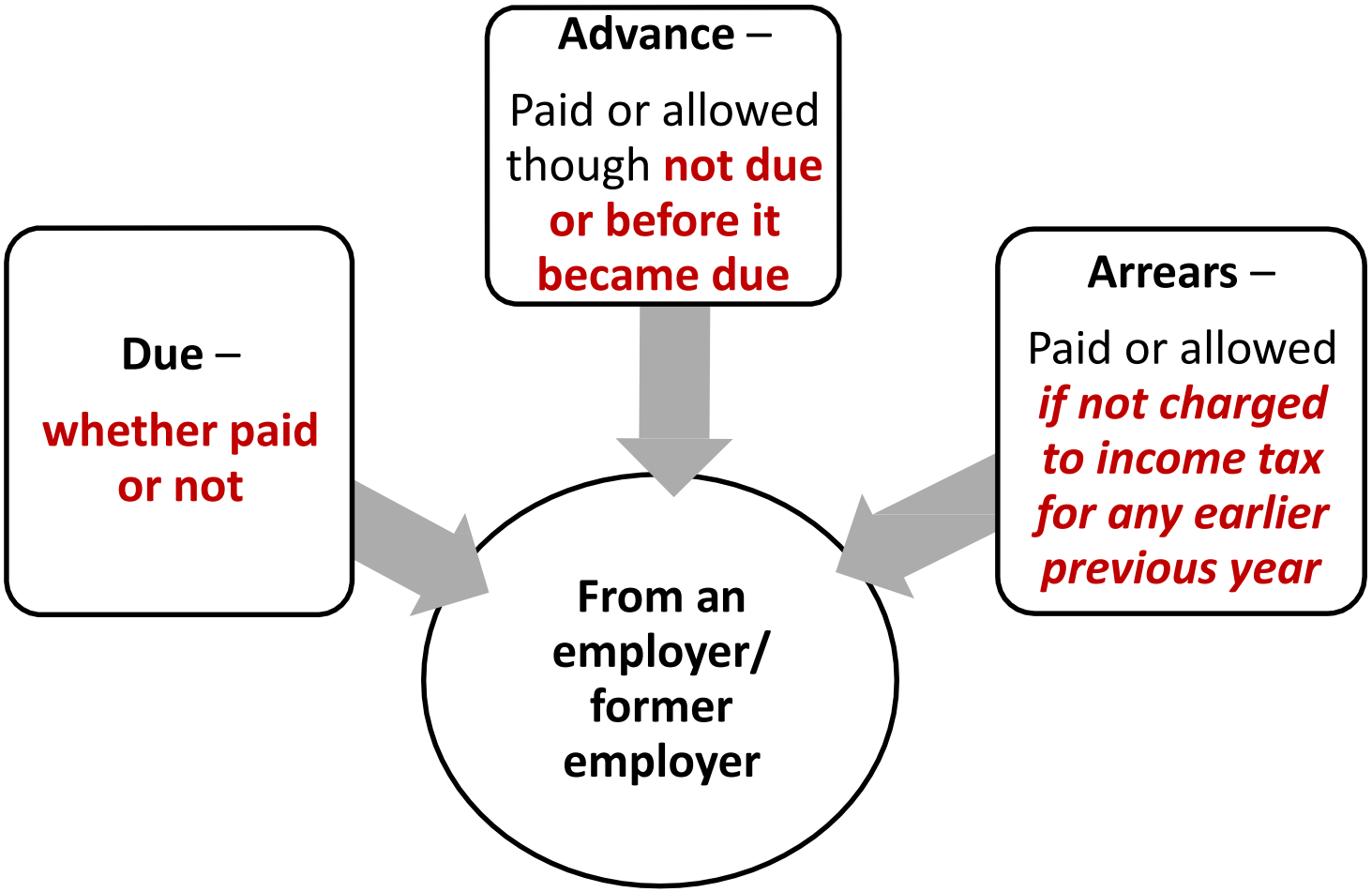
Delhi High Court in CIT vs. Shri Suresh Nanda in ITA 715/2014, 722/2014, 723/2014 dated 27.05.2015

Impounding of passport rendered it impossible for the assessee to leave India. Assessee virtually became an unwilling resident on Indian soil without his consent and against his will.

His **involuntary stay during the period** that followed till the passport was restored under Court's directive, **must be excluded for calculating the period under Section 6(1)(a) of Income Tax Act**.

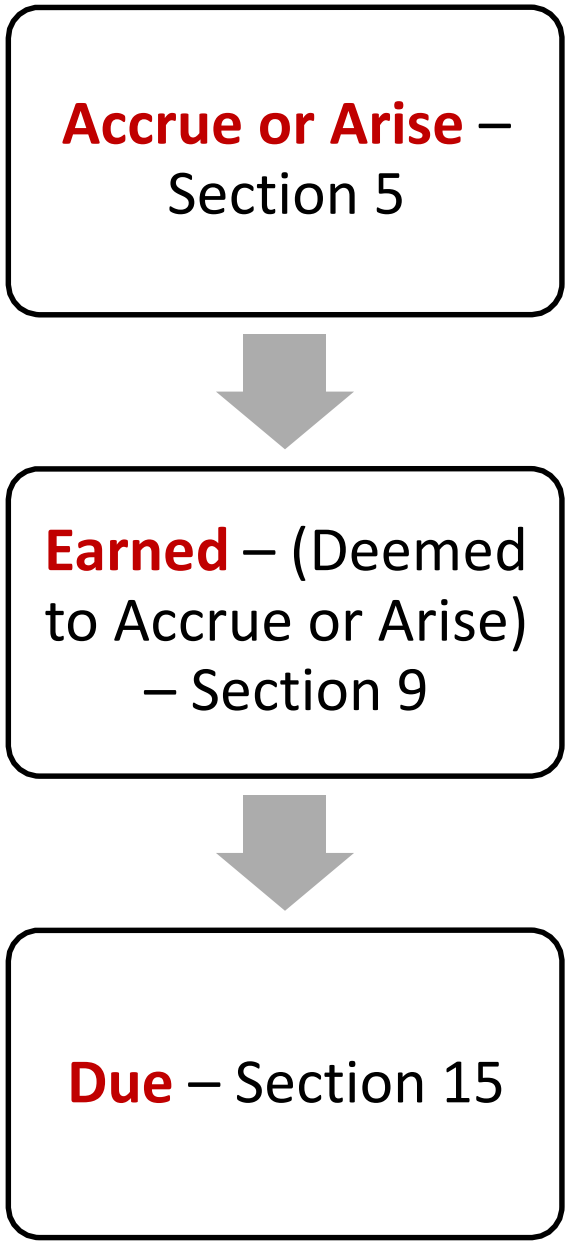
‘Due’ vs. ‘Accrue’

Salary – Chargeable to income tax – Section 15



Salary paid to partner of a firm by the firm not taxable as 'Salary' – (Explanation 2 – Section 15)

Salary – Chargeable to income tax



Salary – Chargeable to income tax

Equating 'earned' with 'accrued' - Supreme Court in E.D. Sassoon [1954] 26 ITR 27

In order that the income can be said to have accrued to or earned by the assessee, it is necessary that –

(i) the assessee must have **contributed to its accruing or arising** by **rendering services** or otherwise

(ii) he must have created a **debt** in his favour.

'Accrue' = 'Due'

Supreme Court in Morvi Industries Ltd. vs. CIT [1971] 82 ITR 835

1. Income can be said to **accrue when it becomes due**.
2. Income accrues when there **"arises a corresponding liability of the other party** from whom the income becomes due **to pay** that amount."

Salary – Chargeable to income tax

Salary earned outside India

Calcutta High Court in Utanka Roy vs. DIT in WP No. 369/2014 dated 15.12.2016

1. **Salary received by a non-resident for services rendered abroad accrues outside India and is not chargeable to tax in India.** The source of the receipt is not relevant.

Salary – Chargeable to income tax

Salary earned outside India

ITAT Calcutta in Ranjit Kumar Bose vs. ITO in 18 ITD 230 & ITAT Delhi in ADIT vs. Nandan Singh Chauhan in 2011-TII-27-ITAT-DEL

1. Salary income accrued outside India, but was received in India in the same accounting year.
2. It is clear that salary income could not have been brought to tax on accrual basis for the simple reason that it accrued outside India
3. The provisions of section 5(2)(a) are subject to section 15 which, inter alia, says that salary is chargeable to income-tax on due basis irrespective of the fact whether it has been received or not.
4. **Salary income is not liable to be taxed in India on receipt basis under section 15.**

Salary – Chargeable to income tax

Agra Tribunal in Arvind Singh Chauhan vs. ITO in ITA No. 319 & 320/Agr/2013

1. A salary is compensation for the services rendered by an employee and, therefore, **situs of its accrual is the situs of services,** for which salary paid, being rendered. An employee **does not get right to receive the salary just by getting the appointment letter.** An employee has to render the services to get a right to receive the salary and unless these services are rendered, no such right accrues to the employee.

2. **'Receipt' of income, for this purpose, refers to the first occasion when assessee gets the money in his own control – real or constructive.** What is material is the receipt of income in its character as income, and not what happens subsequently once the income, in its character as such is received by the assessee or his agent; an income cannot be received twice or on multiple occasions.

3. **Salary amount** is **received in India** in this case but the **salary income is received outside India**.

Salary – Chargeable to income tax

Bombay High Court in Capt. A.L. Fernandes vs ITO in (2002) 75 TTJ Mumbai 714

1. The assessee rendered services on the ships which were floating outside the territorial water of India.
2. **Since the contract of employment has been entered into in India and since all rights flowing therefrom are also enforceable in India, the salary must be held to have accrued or arisen to the assessee in India.**

On-call time of an employee when not at his place of work is “working time”

Court of Justice of the European Union (CJEU) in Ville de Nivelles vs. Rudy Matzak, ECLI:EU:C:2018:82 dated 21.02.2018

The physical presence and availability of the worker at the place of work during the stand-by period with a view to providing his professional services must be regarded as carrying out his duties, even if the activity actually performed varies according to the circumstances.

If the **stand-by period in the form of physical presence at the place of work** were excluded from the concept of ‘working time’, that would seriously undermine the objective of Directive 2003/88, which is to ensure the safety and health of workers by granting them adequate rest periods and breaks.

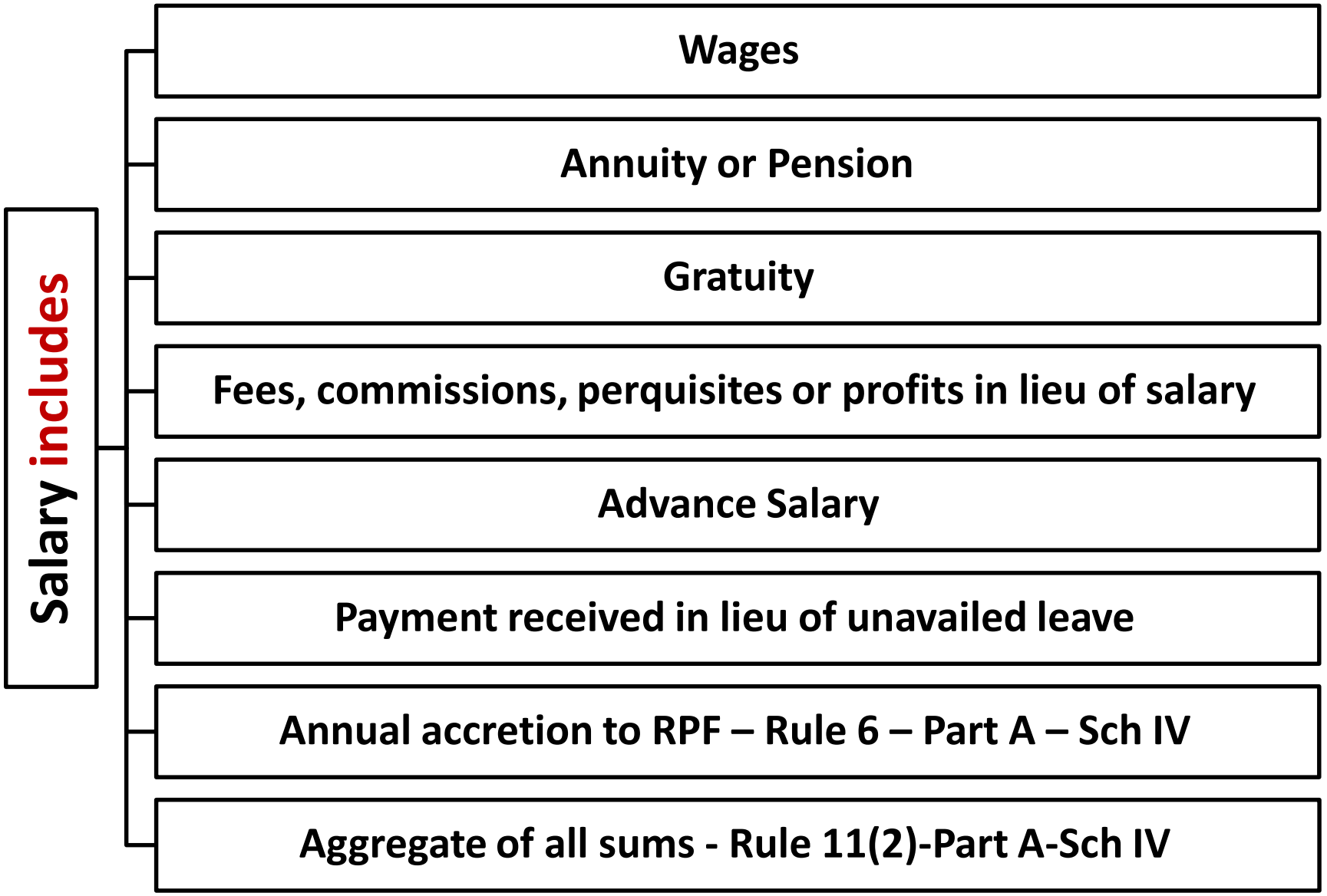
Situation different where the worker performs a stand-by duty according to a stand-by system which requires that the worker be permanently accessible without being required to be present at the place of work. **Even if he is at the disposal of his employer, since it must be possible to contact him, in that situation the worker may manage his time with fewer constraints and pursue his own interests. In those circumstances, only time linked to the actual provision of services must be regarded as ‘working time’.**

Salary – Section(s) 15 - 17

What is ‘Salary’ – Section 17(1)

1. Definition of Salary – Section 17(1) includes ‘perquisites’ & “profits in lieu of salary”
2. Income attribute conferred to ‘perquisites’ & “profits in lieu of salary” – Section 2(24)(iii)
3. ‘Perquisites’ – Section 17(2)
4. “Profits in lieu of salary” – Section 17(3)

What is 'Salary' – Section 17



Managing Director a 'Servant'

Supreme Court in Ram Pershad vs. CIT in 1973 AIR 637

1. MD has the dual capacity of a director as well as an employee, and whether he is the one or the other depends upon the articles of association and, the terms of his employment.

2. Employed by a company as a servant or an agent is not solely dependent on the extent of supervision and control exercised on him. **The control which the company exercises over the assessee need not necessarily be one which tells him what to do from day to day. Nor does supervision imply that it should be a continuous exercise of the power to oversee or superintend the work to be done.**

3. If the company is itself carrying on the business and the assessee is employed to manage its affairs in terms of its articles and the agreement and if he could be dismissed or **his employment can be terminated by the company if his work is not satisfactory, it could not be said that he is not a servant of the company.**

Vested right of an employee essential – Section 17

Salary – Supreme Court in ITC Ltd. vs. CIT in CA No. 4435-37/2016 dated 26.04.2016

1. For Section 15 to apply, there should be a **vested right in an employee to claim any salary from an employer or former employer**, whether due or not if paid; or paid or allowed, though not due.

2. The amount of tip paid by the employer to the employees has no reference to the contract of employment at all. Tips are received by the employer in a fiduciary capacity as trustee for payments that are received from customers which they disburse to their employees for service rendered to the customer.

3. The argument that there is an indirect reference to the contract of employment inasmuch as but for such contract, tips to employees could not possibly have been paid at all, must be rejected for the simple reason that the payments received by the employees have no reference whatsoever to the contract of employment and are received from the customer, the employer only being a conduit in a fiduciary capacity in between the two.

4. Section 192 therefore has no application.

Vested right of an employee essential – Section 17

Perquisite - Delhi High Court in Yoshio Kubo vs. CIT in ITA 441/2003 dated 31.07.2013

Background –

Foreign employer had made contributions in compliance with legal requirements in the country of its incorporation, towards social security benefits of the employee.

These employees were seconded to India to serve in the Indian subsidiary, or assist in the Indian operations of the foreign company.

The revenue sought to bring to tax such social security contributions, contending that they were for the benefit of the employee, and vested in the latter.

Vested right of an employee essential – Section 17

Perquisite - Delhi High Court in Yoshio Kubo vs. CIT in ITA 441/2003 dated 31.07.2013 (contd.)

1. The assessee **does not acquire any vested right over the payment at the time of contribution**. With regard to the insurance plans, the contributions are made to benefit the employer and to protect him from loss of employment, sickness, death, accident, etc. of the employee and that the policies themselves are contingent in nature, the benefit under' which would depend on whether the contingency takes place or not.

2. The assessee does not get a vested right at the time of contribution to the fund by the employer. The amount standing to the credit of the pension fund account, social security or medical or health insurance would continue to remain invested till the assessee becomes entitled to receive it.

Vested right of an employee essential – Section 17

Perquisite - Delhi High Court in Yoshio Kubo vs. CIT in ITA 441/2003 dated 31.07.2013 (contd.)

3. **One cannot be said to allow a perquisite to an employee if the employee has no right to the same. It cannot apply to contingent payments to which the employee has no right till the contingency occurs. The employee must have a vested right in the amount.**

4. Reliance on another decision in CIT vs. Mehar Singh Sampuran Singh Chawla in (1973) 90 ITR 219 (Del) where it was held that the contribution made by the employee towards a fund established for the welfare of the employees would not be deemed to be a perquisite in the hands of the employees concerned as they do not acquire a vested right in the sum contributed by the employer.

Services rendered outside India

Services rendered outside India

Calcutta High Court in Smt. Sumana Bandyopadhyay & Anr vs. DDIT in ITAT 374 of 2016 dated 13.07.2017

Income by way of salary which became due and has accrued to the assessee, a non-resident, for services rendered outside India and which is not chargeable to tax in India on the "due" or "accrual" basis, **cannot be said to be chargeable to tax on the "receipt" basis merely** because the **foreign employers**, on the instructions of the assessee, have **remitted a part of amount of salary to the assessee's NRE bank account in India.**

Section 192

Section 192

Supreme Court in CIT vs. M/s Eli Lilly & Company (India) Pvt. Ltd. in CA No. 5114/2007

1. The word used in Section 192 is not merely 'salaries'. The words used in Section 192(1) are "any income chargeable under the head `Salaries'."

2. Section 9(1)(ii) enacts that income chargeable under the head 'Salaries' u/s 15 shall be deemed to accrue or arise in India if it is earned in India, **i.e., if the services under the agreement of employment are or were rendered in India**, the place of receipt or actual accrual of the salary being immaterial. Thus, Section 192(1) has to be read with Section 9(1)(ii).

3. If Section 192(1) is to be segregated from Section 9(1)(ii) or from Section 40(a)(iii) then the very purpose of shifting the "accrual test" to the "earning test" by reason of insertion of Explanation, would stand defeated.

4. Consequently, **Section 192(1) has to be read with Section 9(1)(ii) read with the Explanation thereto. Therefore, if any payment of income chargeable under the head "Salaries" falls within Section 9(1)(ii) then TDS provisions would stand attracted.**

AAR Ruling in Texas Instruments (India) Pvt. Ltd. in AAR No. 1299/2012 dated 29.01.2018

Employee of the Applicant company, is a non-resident for tax purposes during the FY 2011-12 and is on **deputation with Texas Inc., USA** and is rendering services in the USA.

While on the payroll of the foreign company, continues to receive part of the salary, based on a monthly basis, and certain bonuses in India.

Issue - with reference to the payments received by him in India, as split pay and some perquisites for meeting certain liabilities in India, and whether there would be a liability on the employer, the Applicant, to deduct tax there from.

Split pay and perquisites received in India but accrued outside India, would not be taxable in India, and consequently, the employer, Texas Instruments (India) Pvt. Ltd., would not be obliged to withhold tax on the same at the time of payment u/s 192 of the Act.

Calcutta High Court in British Airways vs CIT in (1992) 193 ITR 439

Whether a legal obligation to deduct income-tax on the amounts payable to the employees, where the amount payable is the amount of tax-free salary. Whether the **element of tax could not be included as a part of the salary paid to the employee?**

1. The obligation of an employer u/s 192 is to deduct income-tax at the average rate of income-tax computed on the basis of the rates in force on the estimated income of the assessee.

2. Thus, an estimate of the income under the head ‘salaries’ for the financial year in which the payment has been made will have to be made and it is on the basis of that estimate that the amount of tax payable will have to be arrived at.

3. **The amount of tax payable on the salary income of the employee which was borne by the company should be treated as part of the "salary" of the employee for the purpose of making an estimate of the income of the employee u/s 192.**

Section 192

Andhra Pradesh High Court in Y.S.C. Babu v. Syndicate Bank (A.P.) 253 ITR 1

Accrual as well as payment of salary should co-exist in order to attract the provisions of section 192.

Delhi High Court in CIT vs. Tej Quebecor Printing Ltd. in 2006 281 ITR 170

Section 192 requires any person responsible for paying any income chargeable under the head "Salaries" to deduct income-tax on the amount payable at the stipulated rate at the time of payment.

The term "payment" has not been defined either in Section 192 or at any other place of the Act. The expression shall, therefore, have to be given its ordinary literal meaning.

It follows that the person making the payment can or is required to make a deduction towards tax at source only at the time of making such payment.

No deduction at source is contemplated under Section 192 in cases where a payment towards salary has accrued but is not made.

Section 201(1A) Interest vs Section 234A, 234B and 234C

BANGALORE TRIBUNAL IN POWER AND CONTROL SYSTEMS. [TS-371-ITAT-2018(BANG)]

1. Assessee (an employee of an MNC) not liable for interest u/s 234B in respect of salary received outside India, since when the employer abroad had paid the interest u/s 201(1A) for not deducting tax at source, then once again interest cannot be recovered from assessee;

2. **Refers Supreme Court judgment in Hindustan Coca Cola Beverage (P) Ltd. wherein it was held that where tax was already paid by the recipient of income, the tax once again could not be recovered from deductor-assessee.**

3. No further interest can be claimed from assessee either u/s 234A or 234B or 234C, where deductor has already discharged the tax liability with interest payable u/s. 201(1A).

Section 201(1A) Interest

BANGALORE TRIBUNAL IN POWER AND CONTROL SYSTEMS. [TS-371-ITAT-2018(BANG)]

1. Difference between :

   a) a case where the amount paid was chargeable to tax but the payee had suffered loss or did not have positive income; and

   b) a case where the payments made were not chargeable to tax at all.

2. In a case where payment in question was chargeable to tax but the payee suffered loss or did not have positive income then the person making the payment was obliged to deduct tax at source.

3. The fact that the payee did not have positive income would absolve the person making payment from being treated as **'an assessee in default'** for not deducting tax at source but could not absolve the person from paying interest u/s 201(1A).

Perquisite Valuation – Rule 3

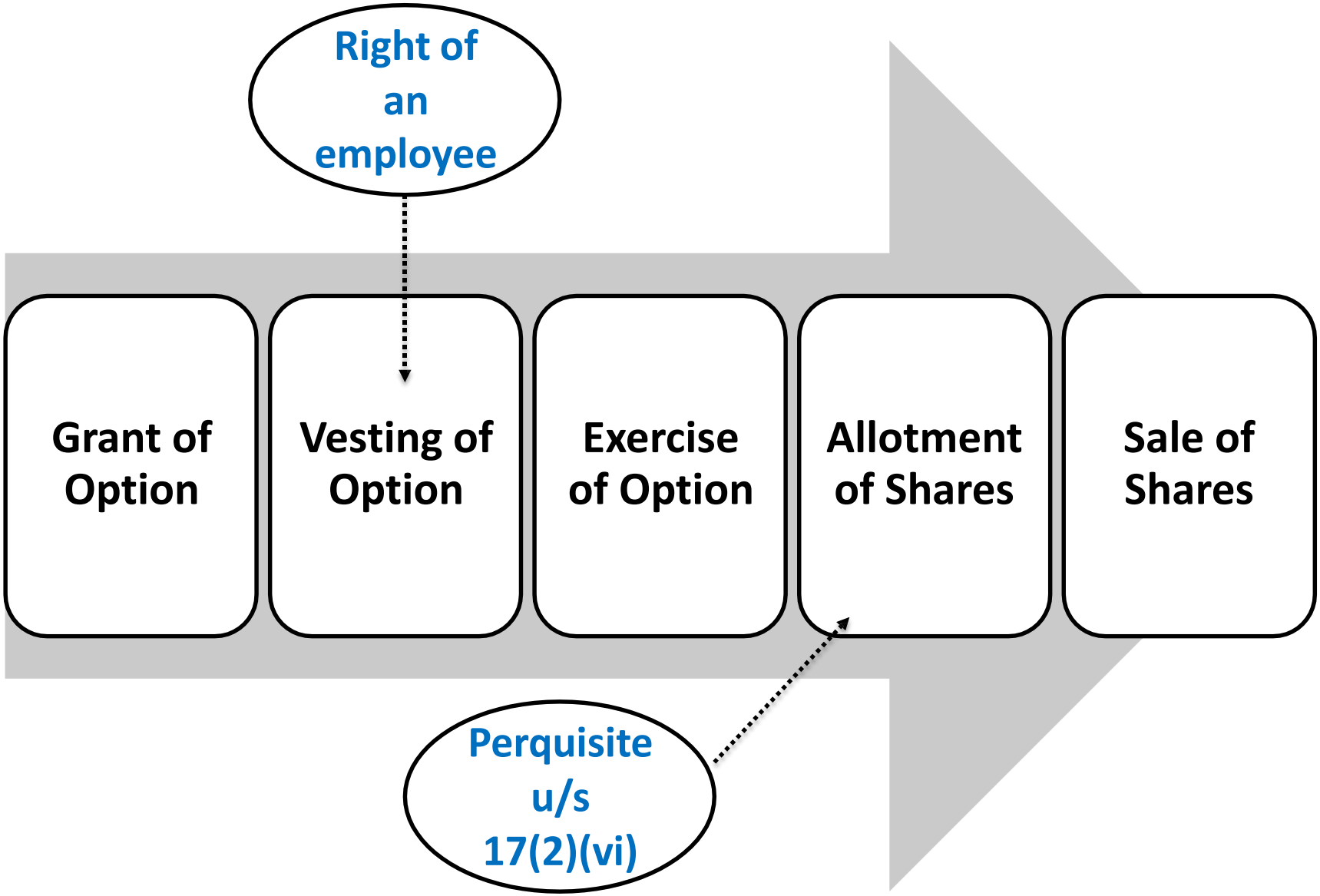
Sub-Rule	Particulars
(1)	Residential accommodation provided by employer
(2)(A) &(B)	Use of motor car to an employee by an employer
(3)	Provision by the employer of services of a sweeper, a gardener, a watchman or a personal attendant
(4)	Value of the benefit to the employee from the supply of gas, electric energy or water for his household consumption
(5)	Provision of free or concessional educational facilities for any member of his household
(6)	Provision by an employer who is engaged in the carriage of passengers or goods, to any employee or to any member of his household for personal or private journey free of cost or at concessional fare, in any conveyance owned, leased or made available by any other arrangement by such employer

Perquisite Valuation – Rule 3

Sub-Rule	Particulars
(7)(i)	Provision of interest-free or concessional loan for any purpose made available to the employee or any member of his household
(7)(ii)	Value of travelling, touring, accommodation and any other expenses paid for or borne or reimbursed by the employer for any holiday availed of by the employee or any member of his household
(7)(iii)	Value of free food and non-alcoholic beverages
(7)(iv)	Value of any gift, or voucher, or token in lieu of
(7)(v)	Amount of expenses including membership fees and annual fees
(7)(vi)	Amount of annual or periodical fee in a club
(7)(vii)	Use by the employee or any member of his household of any movable asset (other than assets already specified and laptops and computers) belonging to the employer or hired by him
(7)(viii)	Benefit arising from the transfer of any movable asset belonging to the employer directly or indirectly to the employee or any member of his household
(7)(ix)	Value of any other benefit or amenity, service, right or privilege

ESOP

Employee Stock Options



Employee Stock Options

Only a part of the ESOP Grant period in India –

CBDT Circular No. 9/2007 dated 20-12-2007

4. How will the value of fringe benefit be determined in case where the employee was based in India only for a part of the grant period?

Answer: In a case where the employee was based in India only for a part of grant period, **a proportionate amount of the value of the fringe benefit will be liable to FBT.** The proportionate amount shall be determined by applying to the value of the fringe benefit, the proportion which the length of the period of stay in India by the employee during the grant period bears to the length of the grant period.

(The value of fringe benefit means the fair market value of the specified security or sweat equity shares, on the date on which the option vests with the employee, as reduced by the amount actually paid by, or recovered from, the employee in respect of such shares.)

Employee Stock Options

Bangalore Tribunal in Shri NR Ravikrishnan vs. ACIT in ITA No. 2348/Bang/2018

Relinquishment of vested options chargeable under Capital Gains as transfer of capital asset

Profits in lieu of Salary

Compensation for termination of employment – Section 17(3)(i) or Section 56(2)(xi)

Supreme Court in CIT vs. E.D. Sheppard in 1963 AIR 1343

1. No distinction between compensation for loss of employment and compensation for loss of prospects rooted in that employment.
2. If the object of the payment was unrelated to the relation between the employer and the employee, it would not fall within the expression "profit received in lieu of salary".
3. Any sum paid by an employer or former employer to an employee at the termination of his services will be a **"payment made solely as compensation for loss of employment" only when it is made in consideration of what the employee can claim is such compensation under law or the terms of the contract of service.**

Compensation for termination of employment – Section 17(3)(i) or Section 56(2)(xi)

Supreme Court in CIT vs. E.D. Sheppard in 1963 AIR 1343

4. If the employee **cannot claim such compensation**, the sum paid will not be by way of **compensation for loss of employment**.

5. No claim for compensation where the employee's services were terminated by giving one month's notice in accordance with the service contract. Payment not made as compensation for loss of employment.

6. The sum was received by the employee from his employer a day before the termination of his services. The payment was made by the firm as employer to the assessee as employee and therefore comes within "profits in lieu of salary".

Compensation for termination of employment – Section 17(3)(i) or Section 56(2)(xi)

Supreme Court in V.D. Talwar vs. CIT in 1963 AIR 1583

1. No notice for the termination of service was given to employee, but he was given twelve months salary.
2. Employee therefore got exactly what he was entitled to under the terms of his employment and he was not deprived of any rights under the contract of service.
3. **There being no deprivation of his rights under the contract, the payment cannot be said to be “compensation for loss of office" within the meaning of that expression.**

Compensation for termination of employment – Section 17(3)(i) or Section 56(2)(xi)

Bombay High Court in H.S. Captain vs. CIT in (1959) 36 ITR 84 Bom

1. There is a loss of employment if the employer terminates the services of the employee. The **mere fact that the employee immediately gets another service with a third party or with a party with which the employer himself is connected makes little difference. The exemption relation to compensation for loss of employment relates to an employment queued the same employer and the same employee**.

2. A loss of employment is a result of the termination of employment. The question for consideration is - **Did the termination of employment result in loss of employment? Fine distinction between the two.**

3. **The fact that another employer, in the management of whose affairs the quondam employer had a large say, had employed the assessee makes no difference. The identity of the quondam employer and the present employer was totally different.**

Payment from a Provident Fund – Section 17(3)(ii)

S No	Particulars	During Employment		On cessation of employment*	
		Up to specified limit	Exceeding specified limit	Up to specified limit	Exceeding specified limit
(A)	(B)	(C)	(D)	(E)	(F)
1.	Contribution made by the employee	Exempt	Exempt since no limit is specified.	The entire balance is 'accumulated balance due to an employee' and withdrawal of the same is exempt under Section 10(12) r.w. Rule 8 of Part A of the Fourth Schedule	
2.	Contribution made by the employer	Exempt	Taxable as per Section 7 r.w. Rule 6(a) of Part A of the Fourth Schedule.		
3.	Interest	Exempt	Taxable as per Section 7 r.w. Rule 6 (b) of Part A of the Fourth Schedule.		
4.	Interest	Not Applicable		Exempt	Taxable as per Section 7 r.w. Rule 6 (b) of Part A of the Fourth Schedule

**There would no contributions on cessation of employment.*

Payment from a Provident Fund – Section 17(3)(ii)

Bangalore ITAT in the case of ACIT vs. Shri Dilip Ranjrekar in ITA No. 858/Bang/2016 dated 10.11.2017.

1. The assessee retired from the company on 01.04.2002. As on the date of retirement, the accumulated provident fund balance of contributions plus interest was Rs.37,93,588/-.

2. The assessee did not withdraw the same immediately, after retirement, but withdrew the accumulated balance of Rs.82,00,783/- from the EPF account on 11.04.2011, which comprised Rs.37,93,588/- the balance on the date of retirement plus interest of Rs.44,07,195/- on the accumulated balance from 01.04.2002 (being the date of assessee's retirement) up to 11.04.2011, being the date of withdrawal.

Payment from a Provident Fund – Section 17(3)(ii)

Bangalore ITAT in the case of ACIT vs. Shri Dilip Ranjrekar in ITA No. 858/Bang/2016 dated 10.11.2017.

3. In respect of the accrued interest of Rs.44,07,195/- from 01.04.2002 to 11.04.2011 on the accumulated balance of Rs.37,93,588/- as on 01.04.2002, the same accrued to the assessee after he retired from Wipro Ltd., and it could not be said that such accrual of the interest was qua an employee.

4. The exemption u/s 10(12) of the Act is limited to the accumulated balance due and payable to an employee up to the date of retirement/end of employment. The accumulated interest of Rs.44,07,195/- post retirement of the assessee on 01.04.2002 is not eligible for exemption u/s 10(12) of the Act.

Payment from a Provident Fund – Section 17(3)(ii)

1. Section(s) 17(1)(vi) and Section 17(3)(ii) of the Act bring the accretion to the amount of contribution and interest in excess of the specified limits, under the ambit of 'salary income'.
2. Rule 6(b) deems that portion of the interest as income, insofar as the same is in excess of the rate fixed by the Central Government by notification in the Official Gazette.
3. Madras High Court in the case of M.C. Muthanna vs. CIT in (1989) 177 ITR 501, held that the interest payment received by the assessee would partake the character of salary having regard to the application of Rule 6(b) of Part A of the Fourth Schedule and Section 17(1)(vi) of the Act. **This was a case of a continuing employment.**

Payment from a Provident Fund – Section 17(3)(ii)

4. While Section 17(1)(vi) would operate when the employment is in subsistence, the provisions of **Section 17(3)(ii) of the Act would cover the period post cessation of employment to the extent there are, if at all, contributions made by the employer and there is interest credited thereon**.

5. **Interest, to the extent not exceeding the rates fixed by the Central Government and accrued and received post retirement, falls outside the purview of Rule 6 of Part A of the Fourth Schedule**

6. It has also been consciously kept outside the charge of tax u/s 7 of the Act.

7. **Whether such interest, in the absence of charge, is taxable under the Act?**

Allowances

Currency and quantum of allowance have no bearing on the eligibility for exemption u/s 10(14)(i)

Bombay High Court in ITO vs. Capt. H.R. Vinayak in (2006) 9 SOT 322

1. The assessee's claim related to the exemption u/s 10(14)(i) read with notification made therein in respect of various allowances received while operating international flights.
2. Allowances received in local currency at the foreign station to meet out other expenditure on meals, refreshments, tea, transportation, telephone and other incidental expenses.
3. **The nature of allowances was admittedly the same for domestic and international visits, only the quantum of allowance and currency of allowance varied.**
4. **The daily allowance at the rates prescribed for the Government employees which ranges between US $ 50 to US $ 75 per day to meet the costs of meals, beverages and other incidental expenses, cannot be said to be excessive or unreasonable allowance.**

Prescription of ‘uniform’ in strict sense of the word required – Section 10(14) r.w. Rule 2BB(1)(f)

ITAT Ahmedabad in ONGC vs. ACIT in ITA Nos. 155, 159, 287 & 332/Ahd/2012

1. ‘Uniform’ is an identifying outfit or style of dress which is identical or consistent without variations in details. Examples are uniform of police personnel, armed forces, canteen staff, etc. Uniform may change as per rank and designation of group of employees concerned.
2. **If appellant's interpretation of 'uniform' were to be accepted, in every office, any dress worn by the employees' would qualify as 'uniform’.**
3. There was **no ‘uniform’ prescribed and question of any allowance to maintain the same did not arise**.

Daily Allowance to Expats - Section 10(14)

Supreme Court in CIT vs Goslino Mario and Others: 241 ITR 312

Daily allowance that was paid by the Indian concern to technicians deputed by Italian concern to work with Indian concern exempt from tax u/s 10(14) of the Act.

Deductibility of Social Security Charges paid outside India

Mumbai Tribunal in Gallotti Raoul vs ACIT: 61 ITD 453

1. The assessees were French nationals who were working in India as employees of a French company.

2. Under the law in France every national is bound to contribute certain percentage of salary as Social Security Charges. This **legal obligation was applicable irrespective of the place where the French national worked**. Such a payment is allowable as a deduction from the taxable income under the Income-tax law of France.

3. **The contribution made was deductible from salary income, being a prior charge by overriding title and it is only the net salary after such deduction that should be treated as gross salary within the meaning of section 16 of the Act.**

Hypothetical Tax of Expatriate Employee

Bombay High Court in CIT vs. Jaydev H. Raja: ITA No. 87/2000 dated 25.09.2012

1. The assessee, a resident but not ordinarily resident individual, was an employee of Coca-Cola Inc USA and had income under the head "Salaries".

2. Under the Tax Equalization Policy framed by the said company, the assessee was guaranteed net of tax salary and the company was to bear all actual taxes imposed on the employee's assignment income.

3. The employee had to reimburse the company that part of his total tax liability which he would have paid had he worked in Atlanta. This was known as the "Theoretical Tax Liability".

4. The assessee claimed that as the company was liable for the amount in excess of the theoretical tax liability, it was proper to net the company's tax reimbursement with the employee's contribution towards that reimbursement.

Hypothetical Tax of Expatriate Employee

Bombay High Court in CIT vs. Jaydev H. Raja: ITA No. 87/2000 dated 25.09.2012 (contd)

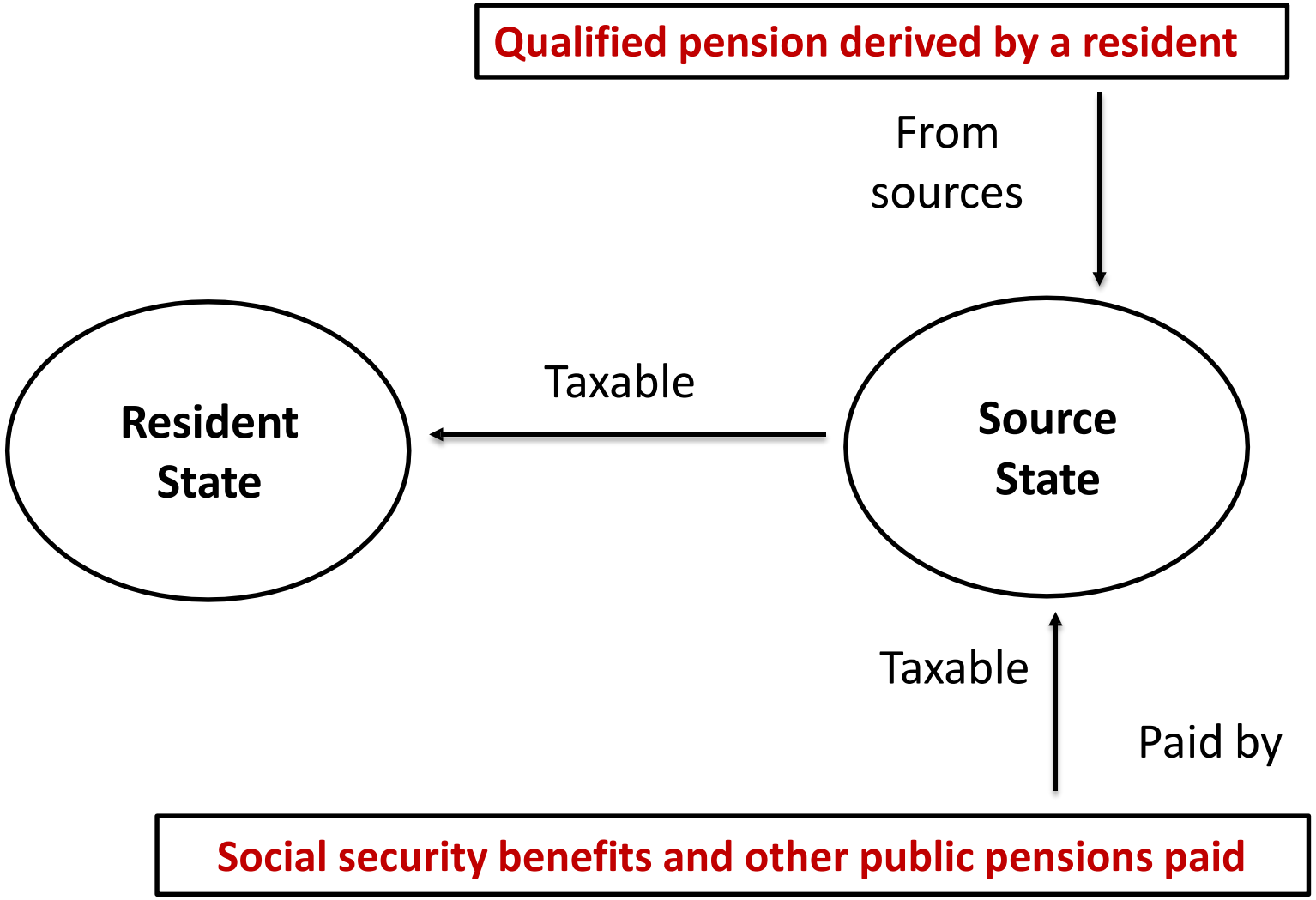
5. The Bombay HC held that the total salary received by the assessee in India was Rs.77.00 lakhs on which the tax payable at the maximum rate of 44.8% comes to Rs.35.00 lakhs. Since the assessee under the Tax Equalization Policy was entitled to get reimbursement of the tax payable on the amount of Rs.77.00 lakhs, his salary income was Rs.113.00 lakhs (Rs.77.00 lacs plus Rs.35.00 lacs).

6. Though the assessee had paid tax of Rs.50.00 lakhs, the assessee was entitled to reimbursement of Rs.35.00 lakhs from the Company, the salary income (Rs.77.00 lakhs) received by the assessee had to be enhanced by Rs.35.00 lakhs only and not by the balance Rs.15.00 lakhs which is paid by the assesses from the salary income.

7. Accordingly, the tax of Rs.15.00 lakhs paid by the assessee from the salary income (not reimbursed by the company) could not be added to the assessee's income.

Pension

Article 20 – Private Pensions, Annuities, Alimony and Child Support



Foreign Tax Credit

Foreign Tax Credit

Section 192(2) of the Act

1. Applicable where, during the financial year, an assessee is employed simultaneously under more than one employer, or where he has held successively employment under more than one employer.

2. The assessee may furnish to the employer such details of the income under the head "Salaries" due or received by him from the other employer, amount of TDS thereon and such other particulars, in such form and verified in such manner as may be prescribed.

3. The employer shall take into account the details so furnished for the purposes of making the deduction under sub-section (1).

Foreign Tax Credit

Foreign Tax Credit under the DTAA –

[Illustrative - Article 25 of the India-US DTAA]

1. Amount of the income-tax paid in India – Credit allowed by the US against the US tax.
2. An amount equal to the income-tax paid in the US, whether directly or by deduction – Credit allowed by India as a deduction from the tax on the income of that resident.
3. Amount of deduction < amount of income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in the US.

Foreign Tax Credit

AAR Ruling in Texas Instruments (India) Pvt. Ltd. in AAR No. 1299/2012 dated 29.01.2018

The case of the assignee is clearly covered by the provisions contained in Article 25 of the India-USA DTAA. As such he is entitled to the credit for the foreign taxes deducted.

When payments are received from more than one source during a particular year, the provisions of section 192(2) will apply, and the present employer can give credit for the taxes deducted during his deputation outside India.

In the absence of any other provision, recourse to the specific provision in section 192(2) alone is possible.

This provision casts an obligation on the employee to furnish to the employer, such details of the salary etc. received by him from the other employer/s, the tax paid or deducted there from, and other particulars, and the employer would examine and take into account such details before computing the tax deductible.

Foreign Tax Credit

Bangalore Tribunal in Shri Sunil Shinde vs. ACIT in ITA No. 2149/Bang/2016 dated 31.08.2017

Tax withheld in USA (Federal and State Tax) should not be added back to quantify the income taxable in India.

The amount of foreign tax credit to be allowed to the assessee should be quantified afresh as per Article 25 of Indo US DTAA because foreign tax credit cannot exceed that part of the income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in the United States.

Foreign Tax Credit – Shifting residential status

1. X an employee seeks voluntary retirement while serving for a company in State A. Compensation upon termination of employment to be paid over a five years period.
2. After retirement, X settles as a tax resident in State B. Ceases to be a tax resident of State A.
3. State A can claim that VRS compensation paid to X is sourced in State A as it related to a former employment in State A.
4. Based on residential status, State B will tax VRS compensation. State B can also deny FTC on the ground that employment was not exercised in State A during the relevant year.
5. State B can also tax the compensation as “other income”.
6. **Article 15 (Dependent Personal Services) gives the Source State a right to tax only when employment is exercised in that State.**

Employee Secondment

Employee Secondment – Service PE

Particulars	SC in DIT vs. Morgan Stanley & Co. in (2007) 292 ITR 416
Service PE (excluding stewardship)	**Yes**
Services to be performed by the deputationists	**Yes**
Lien on his employment with legal employer	**Yes**
MNE renders services through its employees in India for a specified period	**Yes**
Legal employer responsible for the work of deputationists; Employees continue to be on the payroll of the legal employer	**Yes**

Employee Secondment – Service PE

Particulars	SC in ADIT vs. E-Funds IT Solution Inc. in CA No. 6082/2015 dated 24.10.2017
Service PE	**No**
Customers of the assessees located in India or received any services in India	**No**
Enterprise furnished services "within India" through employees or other personnel	**No**
Auxiliary operations that facilitate such services are carried out in India	**Yes**

Employee Secondment – Personnel cost

Particulars	Legal Employer	Economic Employer
Situation 1		
Personnel Cost borne by		Yes
Arrangement Fee		Yes
Payment received from the economic employer to the legal employer taxable in India as FTS – Provision of technical personnel and making available technical expertise – Mumbai Tribunal in Avion System Inc. vs DDIT: 150 TTJ 687		
Situation 2		
Personnel Cost borne by	Yes	
Arrangement Fee	No	
Employee's remuneration to be taxed in India; TDS obligations on the legal employer; Reimbursement not exigible to TDS - Mumbai Tribunal in DCIT vs. Mahanagar Gas Ltd. in ITA No. 1945/Mum/2013 dated 15.04.2016		

GST

1. Services by an employee to the employer **in the course of or in relation to his employment shall be treated neither as a supply of goods nor a supply of services**. – *[Schedule III to CGST Act, 2017]*

2. **Gifts not exceeding Rs.50,000/-** in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both. – *[Schedule I to CGST Act, 2017]*

Questions and Answers

Thank you !