

# Special Provisions for Taxation of Non-residents

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Presentation at the Direct Taxes Refresher  
Course of the WIRC of the ICAI

# Flow of discussion

- General introduction
- Treaty application
- Income determination
- Transfer pricing
- Special types of non residents
- Tax compliance for non residents
- What is on the horizon

# General introduction

# Non resident

- Who is Non resident
- Why special provisions
- Approach in analyzing non resident taxation
  - Precedence between domestic law and Treaty
  - Application of Treaty
  - Is Treaty interpretation static
  - Can Treaty bring about levy of tax?

# Non resident (*contd*)

- Individual
- HUF/ Firm/ AOP
- Company
  - Is a foreign company always a non-resident?
- Other ‘persons’
- Can residential status differ for different sources of income?

# Treaty application

# Treaty

- Residence, persons & taxes covered
- Income characterization
- PE & business income, Associated enterprises
- Shipping/ aircraft
- Dividend/ interest/ royalty
  - Beneficial ownership
- Independent v. Dependent personal services
- Other income
- Limitation of benefits

# Income determination



# Scope of total income

- Accruing/ Arising/ Receipt in India
- Deemed receipt in India
- Deemed accrual/ arising in India
  - Directly or indirectly
  - Business connection *in* India
  - Property in India
  - Source of income in India
  - Capital asset in India

# Scope of total income (*contd*)

- Business
  - Partly in India
  - Purchase only
  - LO/ PO/ BO
  - Agency
    - Dependent v. Independent
  - ‘Vodafone’ amendments

# Exemptions

- Under tax statute
  - Diplomats
  - Dividend
  - Interest
  - Capital gains

# Exemptions (*contd*)

- Under international obligation recognized by India
  - Incomes of multilateral institutions
  - Incomes of employees of multilateral institutions
  - Retirement funds for employees of such employees
- Is income of foreign sovereign exempt?

# Salaries

- Employment in India – is it always taxable
- Short stay exemption
  - Under domestic law
  - Under Tax Treaty
- Contribution to a foreign retirement fund
- Tax equalization

# House Property

- Can income from property outside India be taxed in India?

# Capital gains

- Exemptions
  - Overseas amalgamation/ demerger resulting in transfer of Indian shares
  - Transfer of GDRs/ FCCBs
  - Conversion of FCCBs
  - Transfer under SLB

# Business Income

- LO
  - Purchase
  - Other activity
- BO
  - What is attributable
  - Deductible expenses
  - Non deductible expenses
  - Are HO expenses deductible?



# Business Income (*contd*)

- PO
  - Meaning of 'India'
- Special types of businesses/ earnings
  - Interest
  - Royalty
  - Fees for technical services
  - Shipping/ Aircraft operation, Oil exploration, Turnkey Power projects

# Business Income (*contd*)

- Interest
  - Characterisation
  - Is coupon accrual always interest?
  - Special rates
- Royalty
  - Meaning
  - Connected to PE
  - Deduction of expenses
  - Special rates

# Transfer Pricing

# Transfer Pricing

- International transaction
- Related parties
- Arm's length
- Mandatory certification
- Documentation
- Comparables, Averages, Tolerance band

# Special types of non residents

# Special types on non residents

- NRIs
- FIIs
- QFIs

# NRIs

- Foreign Exchange asset
  - Impact of recent amendment from FERA to FEMA
- Specified asset
  - Does **not** include immovable property
- Investment income
  - Interest on NRE/ FCNR/ NRO
  - Other interest
- Long term capital gains
- Applicability after return to India

# FII's/ QFIs

- Special regimes
- Characterization of income
  - Investment v. business
  - Interest
  - Foreign exchange cover
- Mode of tax payment



# MAT

- Are non residents subject to MAT?

# Tax Compliance for non residents

# Tax compliance for non residents

- By non residents
- By residents in respect of non residents
  - As agent of non resident
  - As payer of income to non resident

# Tax Compliance by non resident

- Whether PAN required
  - NRI/ FII/ QFI/ LO/ PO/ BO
- Filing of return
  - Whether optional for NRI
  - When optional for others
  - Whether mandatory for FIIs/ QFIs from tax exempt jurisdictions

# Tax Compliance by non resident (*contd*)

- Payment of taxes
  - Whether required to pay advance tax/ self assessment tax
  - Whether liable to pay interest for shortfall in tax payment
  - Non tax regulation governing tax payment
- Is non resident required to do TDS for payments made by the non resident?
  - To residents
  - To other non residents

# Resident as 'Agent'

- Notice required
- Can the same person be an agent and also be treated as person responsible for tax deduction at source?

# Tax deduction at source by resident

- Advance electronic reporting
- Salaries
- Interest on securities/ other interest
  - NRO
  - ECBs/ Long term infrastructure bonds
  - G-sec/ Rupee bonds for FII/ QFI
  - Other interest

# Tax deduction at source by resident *(contd)*

- Capital gains
  - FII's
  - Others
- Royalties/ fees for technical services
- Proceeds of life insurance policies
- Horse racing/ lotteries
- Sports persons
- Other income



# Rates of tax deduction

- Rates of tax deduction
  - Domestic law
  - Treaty
  - If Treaty is silent
  - If Treaty definition is different
  - PAN
  - Without PAN – long term infra bonds
- Exemption granted to banks
- Reduced rate certificates

# Treaty & tax deduction at source

- Which Treaty to apply
- Should funds necessarily go to the country of residence
- Tax residency certificate
  - Do all items appear?
  - Does tax residency remain static?
- Double non taxation

# What is on the horizon

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- GAAR
- Direct Tax Code
- Profit attribution
- Base Erosion & Profit Shifting (BEPS)
- G-8 statement

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