Non Discrimination & Elimination of Double Taxation

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Elimination of Double Taxation

Article 23
Why is DTAA required?

- India follows residence based taxation. Indian residents are subjected to tax in India on global income.

- Tax may be levied in India under Sections 4, 5 or 9 by way of residence or source in India.

- In following circumstances, double taxation may occur:
  - A resident in India is also resident of other country which follows resident based taxation.

A US resident has income from India (COR: US, COS: India)

Example:

X Co. has provided some technical services in India. In India it will be taxable u/s 9(1)(vii) whereas in US, X Co (a resident of US) will be liable to pay tax on its global income.
Section 90 / 90A

- Provisions granting foreign tax credit under the domestic law
- Section 90 / 90A: Agreement with foreign countries / specified territories / specified associations
  - Govt may enter into agreement with ‘foreign countries’ or ‘specified territories’
    - for granting relief in respect of income which has been doubly taxed
    - for avoidance of double tax
    - etc…
- The more beneficial provision applicable – DTAA or IT Act 1961
- GAAR overrides !! [GAAR postponed to A.Y. 2016-17]
- Tax Residency certificate (TRC) must for an NR to claim treaty benefits in India [w.e.f. 1.4.2013]
Unilateral Tax Credit..

- Section 91 of the Act grants unilateral Tax Credit in case where no DTAA exists.

- **91. (1)** If any person who is **resident in India** in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any country with which there is no agreement under **section 90**...

- **Conditions:**
  - Applies only to Resident
  - In respect of income accruing outside India
  - Income should not be deemed to accrue or arise in India
  - For taxes paid in any country with which there is no DTAA
Unilateral Tax Credit..

- Amt of deduction of taxes by India =
- Doubly taxed income $ \times \min \text{ (rate of foreign tax OR Indian tax)}$
- Example (‘Individual’ Indian resident):
- Indian income = 11,00,000 out of which 3,00,000 is from Chile (tax paid is 1,00,000)

<table>
<thead>
<tr>
<th>Particulars</th>
<th>India</th>
<th>Chile</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income</td>
<td>11,00,000</td>
<td>3,00,000</td>
<td>11,00,000</td>
</tr>
<tr>
<td>Tax</td>
<td>1,60,000</td>
<td>1,00,000</td>
<td>2,80,000</td>
</tr>
<tr>
<td>Rate</td>
<td>14.55%</td>
<td>33.33%</td>
<td></td>
</tr>
<tr>
<td>Relief</td>
<td>3,00,000</td>
<td>X 14.55%</td>
<td>= 43,636</td>
</tr>
</tbody>
</table>
Unilateral Tax Credit.

- Foreign tax rate

“(iii) the expression "rate of tax of the said country" means income-tax and super-tax actually paid in the said country in accordance with the corresponding laws in force in the said country after deduction of all relief due, but before deduction of any relief due in the said country in respect of double taxation, divided by the whole amount of the income as assessed in the said country;”
Example: An Indian resident has a PE in Chile. This PE earns $100 from Germany and this income is subject to withholding tax in Germany (say $20). Let assume that as per Chile laws, this $100 is taxable in Chile at 25%, i.e. $25 and Chile grants credit of the foreign tax paid ie $20. $100 taxable in India since it is income earned by Indian resident.

- Tax payable in Chile: $25
- Credit of foreign tax paid: $20
- Tax actually paid in Chile: $5 (25-20)
- WHAT WILL BE THE TAX PAID IN CHILE FOR THE RELIEF U/S 91? - $5 or $25?
Unilateral Tax Credit

- **Tata Sons [DCIT v. Tata Sons Limited (ITA No. 4776)]** – Mumbai Tribunal
- USA has a federal system wherein the States have autonomy in levying state income taxes.
- US constitution does not permit the Federal Government to enter into treaty with respect to foreign countries for giving relief.
- Indo – US Treaty – Taxes covered includes only federal tax
  - Federal Tax in US: 35% and state tax can vary from 3 % to 11 %.

Tribunal held that under treaty, only 35% credit will be given whereas under the provisions of the Act U/s. 91, 38.5% credit is available. Since Act is beneficial, provisions of the Act shall apply.

Hence, the credit of State as well as Federal Tax paid in USA is eligible for credit under Section 91.
Introduction

- Article 23 of OECD
- Methods of elimination of Double Taxation
  - Exemption method
  - Tax Credit method
- Under exemption method the Resident State grants **complete exemption** on the income taxed in the Foreign State
- Under Tax Credit method, the Resident State grants credit on the foreign tax paid.
- Hence Article 23 governs the taxation of the Resident State.
Please Note!

- Basic model conventions
  - OECD
  - UN
  - US

- OECD Model convention is followed in this presentation
Exemption method

- Relevant Article: 23A
- India rarely follows the exemption method

In the following treaties with India, exemption method has been followed:

- By both the CS:
  Bulgaria, Poland and Egypt (United Arab Republic)

- By the other CS (i.e. the other CS adopts exemption method and India adopts Tax Credit method):
  Austria, Belgium, Turkey
Para 1 of Art. 23A

- Article 23A: Exemption method
- Para 1 – basic provision
- Where a resident of a Contracting State (say, Indian R.) derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State (say, Egypt), the first-mentioned State (i.e. India) shall, subject to the provisions of paragraphs 2 and 3, exempt such income or capital from tax.

- Exemption granted by the Resident State
- Exemption granted only if income is taxed in other State under the treaty

Resident State completely exempts the income
Para 2 of Art. 23A

- Para 2 – the Exceptions

- Where an Indian resident derives items of income which, in accordance with the provisions of Articles 10 (Dividends) and 11 (interest), may be taxed in Egypt, India shall allow as a deduction from the tax on the income of the Indian Resident an amount equal to the tax paid in Egypt. Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is attributable to such items of income derived from Egypt.

- Dividend and Interest are exceptions to the exemption method and follow Tax Credit (TC) method.

- Such deduction is subject to the Indian Tax attributable on the income so taxed in Egypt

Dividend and Interest always follow TC method
Para 3 of Art. 23A

- Para 3 – Inclusion of Exempt Income

Where in accordance with any provision of the Convention income derived or capital owned by an Indian resident is exempt from tax in India, India may nevertheless, in calculating the amount of tax on the remaining income or capital of such Indian resident, take into account the exempted income or capital.

- This becomes relevant in case of a person who is subjected to progressive taxation, e.g. Individuals

- Could be also relevant when there are additional taxes payable beyond a certain threshold - Surcharge

Exempt income included for rate purpose
Para 4 of Art. 23A.

• The provisions of paragraph 1 shall not apply to income derived or capital owned by a resident of a Contracting State where the other Contracting State applies the provisions of this Convention to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10 or 11 to such income.

• **Example:**
  • Indian resident derived income from *Egypt* (Exemption method followed)
  • India will exempt such income provided it is taxable in *Egypt* under Indo Egypt treaty
  • Egypt tax authorities take a view that such income is **not taxable in Egypt** under the treaty

**NOTE: This provision not there in any Indian treaty**
Tax Credit method

- Under Tax Credit method, the Resident State retains the right to tax a particular income.
- Tax Credit method is adopted in most of the Indian treaties.
- Relevant Article : 23B
Para 1 of Art. 23B

- Where an Indian Resident derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in UK, India shall allow:
  
  a) as a deduction from the tax on the income of that Indian resident, an amount equal to the income tax paid in UK;
  
  b) as a deduction from the tax on the capital of that Indian resident, an amount equal to the capital tax paid in UK.

  Such deduction in either case shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the capital which may be taxed in that other State.

- India to grant deduction of the taxes paid in UK
- Such deduction is subject to the Indian Tax attributable on the income so taxed in UK
Para 2 of Art. 23B

• Where in accordance with any provision of the Convention income derived or capital owned by an Indian resident is exempt from tax in India, such State may nevertheless, in calculating the amount of tax on the remaining income or capital of such Indian resident, take into account the exempted income or capital.
Questions

• What is tax attributable to the Indian income?
  – Relief provided based on incremental tax basis or on the basis of tax paid

• What is Indian tax payable?
  – Does it include DDT?
Mr X an Indian resident has a PE in US

**USA**
- Mr X earns $10,000 (INR 500,000)
- Tax paid is $4,000 (INR 200,000, 40%)

**India**
- Income: INR 15,00,000
- Tax payable: INR 2,80,000

**Global - India**
- Income: INR 20,00,000
- Tax payable: INR 4,30,000 (21.5%)
- Tax paid in US: INR 2,00,000

Credit of tax paid on incremental basis (1) or on the basis of rate of tax (2)?
Computation Issues 2

- **Indian R. Co. has a branch in USA**
- **US profit:** $100
- **Tax Paid:** $20
- **Indian Co taxable profit:** (-INR 50,000)
- **Tax:** 0
- **US Co. tax profit:** $100 * say 50 = INR 5,000
- **Indian Co tax profit:** (-INR 45,000)
- **Indian Co. tax payable:** [Book profit = (-3,000) + 5,000 = 2,000 * 18% = INR 360]
- **Tax Credit:** INR 1,000 (Min of 1,000 or 5,000 * 18%) or INR 360

- **Different Accounting Period – PE Related Issues**
- **Forex conversion issues**
- **Exemptions**
UTC..

- **Underlying Tax Credit (UTC)**

- **USA (UTC only for US residents)**

**ARTICLE 25 - Relief from double taxation - 1.** In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a resident or citizen of the United States as a credit against the United States tax on income—

- (a)… ; and

- (b) in the case of a United States company owning at least 10 per cent of the voting stock of a company which is a resident of India and from which the United States company receives dividends, the income-tax paid to India by or on behalf of the distributing company with respect to the profits out of which the dividends are paid.
• Important treaties having UTC clause
  
• Both CS granting UTC
  – Mauritius, Singapore

• Only other CS granting UTC
  – Canada, China, Germany, Japan, UK, US

• Only India granting UTC
  – None!!
Threshold
- 1. % of holding
- 2. manner of holding: direct, direct or indirect, not specified
- 3. holding of share capital, shares issued, voting power, etc

Japan treaty
Where the income derived from India is a dividend paid by a company which is a resident of India to a company which is a resident of Japan and which owns not less than 25 per cent either of the voting shares of the company paying the dividend, or of the total shares issued by that company, the credit shall take into account the Indian tax payable by the company paying the dividend in respect of its income.

Will ‘Indian Tax Payable’ include DDT ??
## Participation threshold for exemption

<table>
<thead>
<tr>
<th>Country</th>
<th>% holding</th>
<th>% holding of-</th>
<th>Benefit available</th>
</tr>
</thead>
<tbody>
<tr>
<td>China*</td>
<td>10</td>
<td>Shares</td>
<td>UTC</td>
</tr>
<tr>
<td>Germany*</td>
<td>10</td>
<td>Voting</td>
<td>Dividend exemption</td>
</tr>
<tr>
<td>Japan*</td>
<td>25</td>
<td>Total shares issued OR Voting power</td>
<td>UTC</td>
</tr>
<tr>
<td>Mauritius</td>
<td>10</td>
<td>Shares paying dividend</td>
<td>UTC</td>
</tr>
<tr>
<td>Singapore</td>
<td>10</td>
<td>Share Capital</td>
<td>UTC</td>
</tr>
<tr>
<td>UK*</td>
<td>10</td>
<td>Voting power</td>
<td>UTC</td>
</tr>
<tr>
<td>US*</td>
<td>10</td>
<td>Voting power</td>
<td>UTC</td>
</tr>
</tbody>
</table>

**UTC**: Underlying Tax Credit  
•Not for the Indian Resident
Tax Sparing..

• Most of the treaties contain this provision in so far as credit for Indian Taxes granted by the foreign country
  – Developing Countries
  – Tax laws are pre-dominantly used for growth
  – If the Tax sparing provisions are not applied then the benefit given to a person is taken away by other country and not retained by the enterprise

• Here, tax is deemed to be paid in the foreign country
..Tax Sparing

- **France (Tax sparing provision for the French Resident)**

  - *(c)* For the purposes of the tax credit referred to in sub-paragraph *(a) (i)* the term “tax paid in India” shall be deemed to include *any amount which would have been payable as Indian tax under the laws of India*, and within the limits provided for by this Convention, for any year *but for an exemption from, or reduction of, tax granted* for that year under:

  - *(i)* section 10(4), 10(4B), 10(15)(iv) covering interest, section 10(6)(viia) covering salaries and section 80L covering interest and dividends, of the Income-tax Act, 1961 (43 of 1961), so far as they were in force on, and have not been modified since, the date of the signature of this Convention, or have been modified only in minor respects so as not to affect their general character; or

  - *(ii)* any other provisions which may be enacted after this Convention enters into force granting a deduction in computing the taxable income or an exemption or reduction from tax which the competent authorities of the Contracting States agree to be for the purposes of the economic development of India, if it has not been modified thereafter or has been modified only in minor respects so as not to affect its general character.
Tax Credit

- Inter-play of various Factors
  - Underlying Tax Credit
  - Tax Sparing

- Foreign Tax Credit
  - Tax Relief or Mode of Payment of Tax
Mauritius – Interesting Case

UAE – FZE

MauCo – HoldCo
GBC1

InCo – Ultimate HoldCo

Earnings income of US $ 10 Million
Tax Nil – Remittance as Dividend 10 Million

Receives Dividend of US $ 10.00 Million
Tax @ 15 % of US $ 1.50 Million
Tax Credit of 80 % of tax1 i.e. us $ 1.20 Mi.
Tax Paid in Mauritius US $ 0.30 Million [3 %]
Remittance as dividend US $ 9.70 Million

Dividend Received in India US $ 9.70 Mi
Grossed up [UTC] US $ 10.00 Mi
Tax U/s. 115 BBD 15 % US $ 1.50 Mi
Tax Credit [Mauritius] US $ 1.50 Mi [Tax Paid Nil]

Under [Mauritian] Income Tax [Foreign Tax Credit] Rules 1996, Credit for foreign taxes paid is available on “foreign source income”.
If the Assessee is unable to produce evidence of foreign tax paid then deemed credit of 80 % of the tax on foreign source income is given [Refer Regulation 8 (3) read with Section 77 of the Act]
Mauritius – Interesting Case

- With the amendment in Section 115-O
  - UAE income gets distributed to shareholders with 3% ETR
Participation Exemption

- Participation exemption is a term relating to an exemption from taxation for a shareholder in a company on dividends received, and/or potential capital gains arising on the sale of shares.

- GERMANY

  ARTICLE 23 - Relief from Double taxation - 1. Tax shall be determined in the case of a resident of the Federal Republic of Germany as follows:

  (a) …

  In the case of dividends exemption shall apply only to such dividends as are paid to a company (not including partnerships) being a resident of the Federal Republic of Germany by a company being a resident of the Republic of India at least 10 per cent of the capital of which is owned directly by the German company.

  Example: A German company receives dividend from its Indian subsidiary. Such dividend will be completely exempt in Germany.

Exemption for participation in a company
Non-Discrimination

Article 24
Non-Discrimination

- **Article 24** establishes principle of non-discrimination in tax matters in double taxation law.
- The Article specifies 4 criteria which a national tax law of the Contracting States is not permitted to use as a basis for tax discrimination.
  - Nationality
  - Residence
  - Location (Permanent Establishment)
  - Deduction of expense – payments made to Non-Residents.
Para 1 of Art. 24..

Para 1 : Nationality

Nationals of India shall not be subjected in Armenia to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of Armenia in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

Aimed to curb nationality based discrimination

Taxation or any requirement connected therewith (other requirement (returns, payments, prescribed times, etc)

other or more burdensome than...

No ban on favourable treatment of foreigners!
Para 1 of Art. 24

• This provision applicable even if a person is not a resident of either Contracting States.

• in the same circumstances, in particular with respect to residence
  
  – Example:

  In India, an Indian national who is a resident of India may be granted certain benefits not available to an Armenian national who is not a resident of India. This is not discrimination based on nationality but discrimination based on residence.
Para 2 of Art. 24

• Para 2 : Residence
  
  Stateless persons who are Indian residents shall not be subjected in either Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the State concerned in the same circumstances, in particular with respect to residence, are or may be subjected.

• Residence based discrimination
  
  None of the Indian treaties have adopted this provision!
  
  Klaus Vogel: ‘Stateless person’ means a person who is not considered as a national by any State under its law.
  
  – The field of application of Article 24(2) of Model Convention is limited to individuals. The question, whether a stateless company is even able to exist thus does not play a role for Article 24(2) MC.

Not relevant for India
Para 3 of Art. 24..

- Para 3 : Permanent establishment (PE)

  - The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favorably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

- Location based discrimination
  - PE of an Indian enterprise in UK cannot be less favourably taxed compared to a UK enterprise ‘carrying on the same activities’
Para 3 of Art. 24

• Benefits granted by a country to its residents
  - A country may treat its residents favourably based on civil status or family responsibilities. This won’t attract the non-discrimination provisions.
• Para 3 deals only with ‘taxation’, i.e. the rate of tax. It doesn’t deal with the requirements connected to taxation.
• Exceptions: Any benefits granted by a state to its Residents on account of civil status or family responsibilities.
  - Examples: Sec 80U which grants deduction in case of a person with disability and other similar sections like Sec 80DD (medical treatment of a disable dependant), 80DDB (deduction in respect of medical treatment for specified disease), etc.
Para 4 of Art. 24

- Para 4: Deduction of expenses

- Except where the provisions of paragraph 1 of Article 9, paragraph 7 of Article 11, or paragraph 7 of Article 12 (dealing with expenses not incurred at Arm’s length), apply, interest, royalties and other disbursements paid by an Indian enterprise to a UK resident shall, for the purpose of determining the taxable profits of such Indian enterprise, be deductible under the same conditions as if they had been paid to the Indian resident. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.
Para 5 of Art. 24

• Para 5 : Capital

• Indian enterprise, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of UK, shall not be subjected in India to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of India are or may be subjected.
Para 6 of Art. 24..

- Para 6: Taxes included

- The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

- Alternative

- The provisions of this Article shall apply to taxes which are subject to this convention. [UK Treaty]
Para 6 of Art. 24.

Example:

Austria

ARTICLE 2: Taxes Covered -

3. The existing taxes to which the Convention shall apply are in particular:

(a) in Austria:
   (i) the income-tax (die Einkommensteuer);
   (ii) the corporation tax (die Körperschaftsteuer);

(b) in India:
   the income-tax, including any surcharge thereon imposed under the Income-tax Act, 1961 (43 of 1961); (hereinafter referred to as ‘Indian tax’)

(hereinafter referred to as ‘Austrian taxes’)
Para 6 of Art. 24

ARTICLE 24 : Non-Discrimination

Para 5: The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

Hence although only income tax is included in Article 2, Article 24 may be applicable even in case of DDT, FBT, etc.

Most of Indian treaties contain the provision that only those taxes which are a subject matter of the treaty would be included.
A typical tax treaty

• Minor modifications present in all the treaties with India in the non discrimination article

• Lets analyse Article 24 of Indo – Denmark, which is in line with OECD with only minor differences
1. The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.
Para 2 w.r.t stateless persons is absent in this treaty.

2. The taxation of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities in the same circumstances and under the same conditions. Nothing contained in this Article shall be construed as obliging a Contracting State to grant to persons not resident in that State any personal allowances, reliefs, reductions and deductions for taxation purposes which are by law available only to persons who are so resident. (Clause 3 with respect to Model Convention)
• 4. Except where the provisions of paragraph 1 of Article 10, paragraph 7 of Article 12, or paragraph 7 of Article 13, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.
5. Enterprises of a Contracting State the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of that first-mentioned State are or may be subjected in the same circumstances and under the same conditions.
6. In this Article, the term “taxation” means taxes which are the subject of this Convention.

6. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.
Discrimination..

- Exceptions to Non-Discrimination..
..Discrimination..

- Para 3 of Art. 24 (PE)

- Most of the Indian treaties contain additional provision:
  - Example: Indo UK treaty

- 2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favorably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities in the same circumstances or under the same conditions. This provisions shall not be construed as preventing a Contracting State from charging the profits of a permanent establishment which an enterprise of the other Contracting State has in the first-mentioned State at a rate of tax which is higher than that imposed on the profits of a similar enterprise of the first-mentioned Contracting State, nor as being in conflict with the provisions of paragraph 4 of Article 7 of this Convention.

- Higher rate of tax is not to be considered discriminatory

- Not relevant for an Indian resident because of the following amendment

- Explanation 1.—For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favorable charge or levy of tax in respect of such foreign company
nor as being in conflict with the provisions of paragraph 4 of Article 7 of this Convention.

UK treaty - Para 4 to Article 7 (Business profits)

4. Insofar as it has been customary in a Contracting State according to its law to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraphs 1 and 2 of this Article shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be necessary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles laid down in this Article.

Determination of profits of a PE by method of apportionment of the total profits of the enterprise

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Discrimination for convenience!
Rajeev Gajwani (80HHE)..

- Rajeev Sureshbhai Gajwani Vs. ACIT (ITAT Ahd- Special Bench)
  2011-TII-38-ITAT-AHM-SB-IN TL

Assessee is a Citizen of America and a non-resident. Exported software from a PE in India and claimed deduction u/s 80HHE. Article-26(2) of the India-USA DTAA provides that the taxation of an enterprise of USA resident shall not be less favorable than the taxation of a resident enterprise carrying on the same activity. So deductions (in the given case 80HHE) & exemptions available to Indian Enterprises would also be available to the US enterprises if they are carrying on the same activity.

Held that the assessee is entitled to deduction under section 80HHE on the same footing as it is available to a resident person in India.
Deduction in respect of profits from export of computer software,

80HHE. (1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of,—

(i) export out of India of computer software or its transmission from India to a place outside India by any means;
(ii) providing technical services outside India in connection with the development or production of computer software,
Except where the provisions of paragraph 3 of article 7 (Business Profits) apply, the taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.
ABAQUS Engineering [40(a)(i)]..

- the ITAT, Bench 'B', Chennai
- 2011-TII-143-ITAT-MAD-INTL
- AY 2002-03 to 2006-07

- Assessee, an Indian co. had made certain payments to a NR
- Payment held to be royalty in nature
- Since tax deductible u/s 195, which was not deducted, payments were disallowed u/s 40(a)(i)

- In AY 2006-07, there was no provision in Act requiring deduction of tax on payment made to residents [Sec 40(a)(ia) effective AY 2007-08 onwards]. So, the case was of non-discrimination provision as contained in article 26(3) (deductibility of expenses).

- (Herbalife International – 101 ITD 450 – ITAT Delhi - AY 2001-02) and Peoplesoft are on similar lines.
• Post insertion of Sec 40(a)(ia)?

• The provisions for payment to Residents is still favourable compared to payments to Non Residents regarding
  – Time limit for depositing the tax deductible

• Hence, can Non Discrimination provisions be invoked?

• Possible, however a stand may be taken that since PE related provision mentions only ‘taxation’ and not any other connected requirements, depositing TDS may be considered mere procedural requirement.
Metchem Canada (44C)

- Section 44C deals with deduction of head office expenditure in the case of non-residents.

- Sec 44C starts with a non obstante clause:  
  **44C. Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee.**

- There is a ceiling limit in respect of deduction of specified expenses:

- Held that the non discrimination provisions are applicable. **The scope of deduction under section 37(1) will not stand curtailed by the restriction placed under section 44C of the Act.**
Nationality..

- Foreign Company v/s Domestic Company

- Domestic Co. = Indian Co. OR a company which has made arrangements of declaration/payment within India, of Dividends.

- Indian Co = Company incorporated under Companies Act, 1956.

- Foreign Company means a company which is not an Indian Company.

Is this discrimination based on nationality? (Credit Llyonnais – Indo French treaty…)
..Nationality..

• General definitions - Article 3(h) of Indo France treaty

the term “national” means any individual possessing the nationality of a Contracting State and any legal person, partnership or association deriving its status from the laws in force in that Contracting State;
..Nationality

- **Credit Llyonnais** - [2005] 94 ITD 401 (MUM.) - UNFAVOURABLE

- "Non-discrimination clause in the Indian France DTAA cannot be invoked in the cases where provisions of Indian Income-tax Act more favourable to the domestic companies vis-à-vis foreign companies.

- The Non discrimination provisions of Article XXI only deal with the cases of discrimination on the ground of nationality, and non-availability of deduction under section 80M to the foreign companies, i.e., companies which are not domestic companies, has nothing to do with nationality of a company."
Examples??..

• Can you think of any examples in the Indian domestic tax law which contains non discrimination provisions ??
Examples ??

- Discrimination should not be based on
  - Nationality
    - Individual Residency Determination
    - Section 80-IA
  - Permanent Establishment
    - Section 44C
    - Section 80HHE
  - Payment to Non Resident
    - Section 40(a)
  - Ownership
    - TP Adjustment on Income?
Corporate Entities are Nationals

- Corporate Entities – Whether Nationals?
  - US defines it as individuals, UK does not define

- **Standard Chartered Bank – 39 ITD 57 (Mum)**
  - No definition of term ‘national’ in Indo UK DTAA
  - Reliance on SC in State Trading Corp – Corporations have nationality
  - Refers to the Jural relationship of nationals and citizens
  - Held that Companies are nationals and have capacity to invoke non-discrimination clause under the Indo UK DTAA
Entitlement to foreign treaty?

By non discrimination provision, can the benefit of treaty be availed, which otherwise is not available (other than nationality based)?

- InCo
- Singapore Branch of Netherlands Bank
- Netherlands Bank

Payment of Interest Tax With-held by InCo

Whether Tax Credit Available?
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