



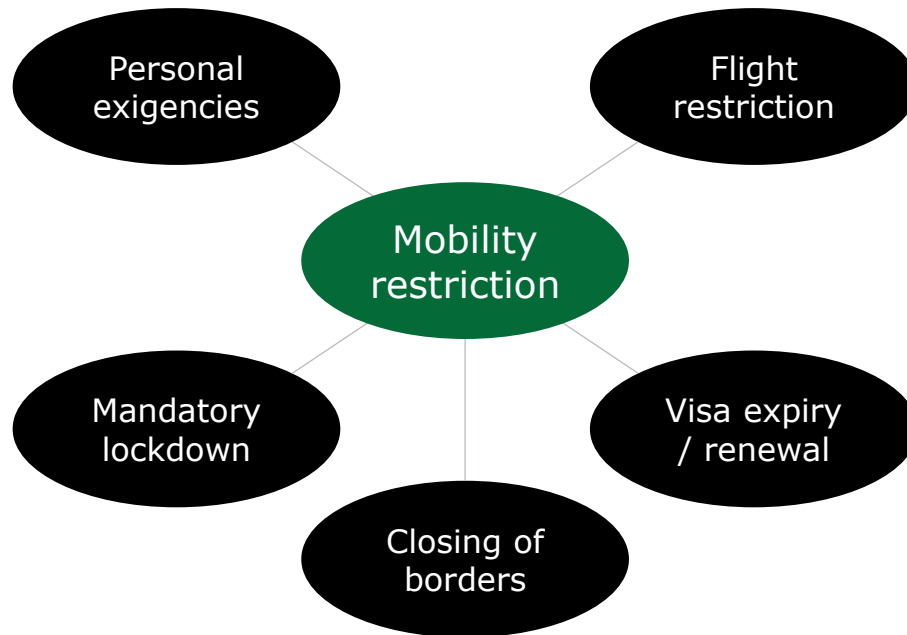
Global mobility in the pandemic - Emerging PE and personal tax issues

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Background

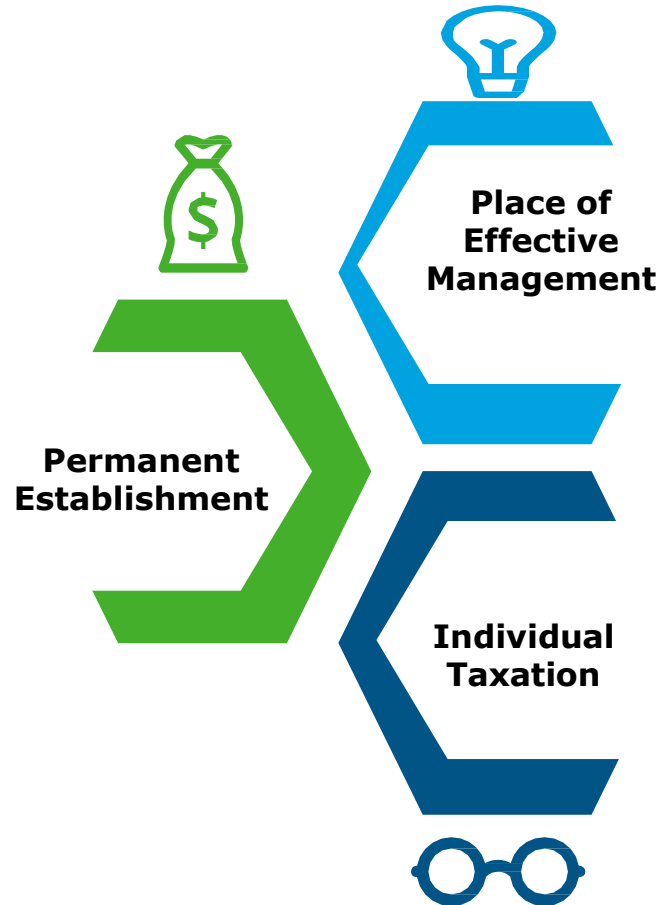
- The COVID-19 pandemic has forced governments to take unprecedented measures such as lockdown, restricting travel, implementing quarantine rules etc.
- As a result, many cross-border personnel were stranded in their home countries.



When cross border workers are stranded in a country, other than their normal country of residence, then said situation can raise many tax issues

Potential tax issues

- Employees of foreign company working from home in India for extended period as they are unable to go back to their usual place of employment



- Directors of foreign companies if present in India and attend board meetings or take strategic decisions from India – Impact on PoEM

- Salary for the period services are rendered in India

Guidelines regarding PE/residency determination since COVID related relief measures were introduced



0. Covid-19 Pandemic

The COVID-19 pandemic had forced governments to take unprecedented measures such as restricting travel and implementing strict quarantine requirements



1. OECD Guidance note dated 3 April 2020

OECD provided guidance on tax issues arising where there were cross-border workers, or individuals who are stranded in a country that is not their country of residence.



2. CBDT Circular No. 11 dated 8 May 2020

- Exclusion of period of stay as specified therein (basically from 22 March to 31 March 2020) for determination of the residential status for FY 2019-20



3. Updated OECD Guidance note dated 21 January 2021

Re-visited the guidance issued in April 2020 and intended to provide more certainty to taxpayers for situations arising due to the pandemic.



5. CBDT Circular No.2 dated 3 March 2021

- Taxpayers affected by COVID-19 and subjected to double taxation to make an application to the PCIT (IT) in Form-NR on or before 31 March 2021

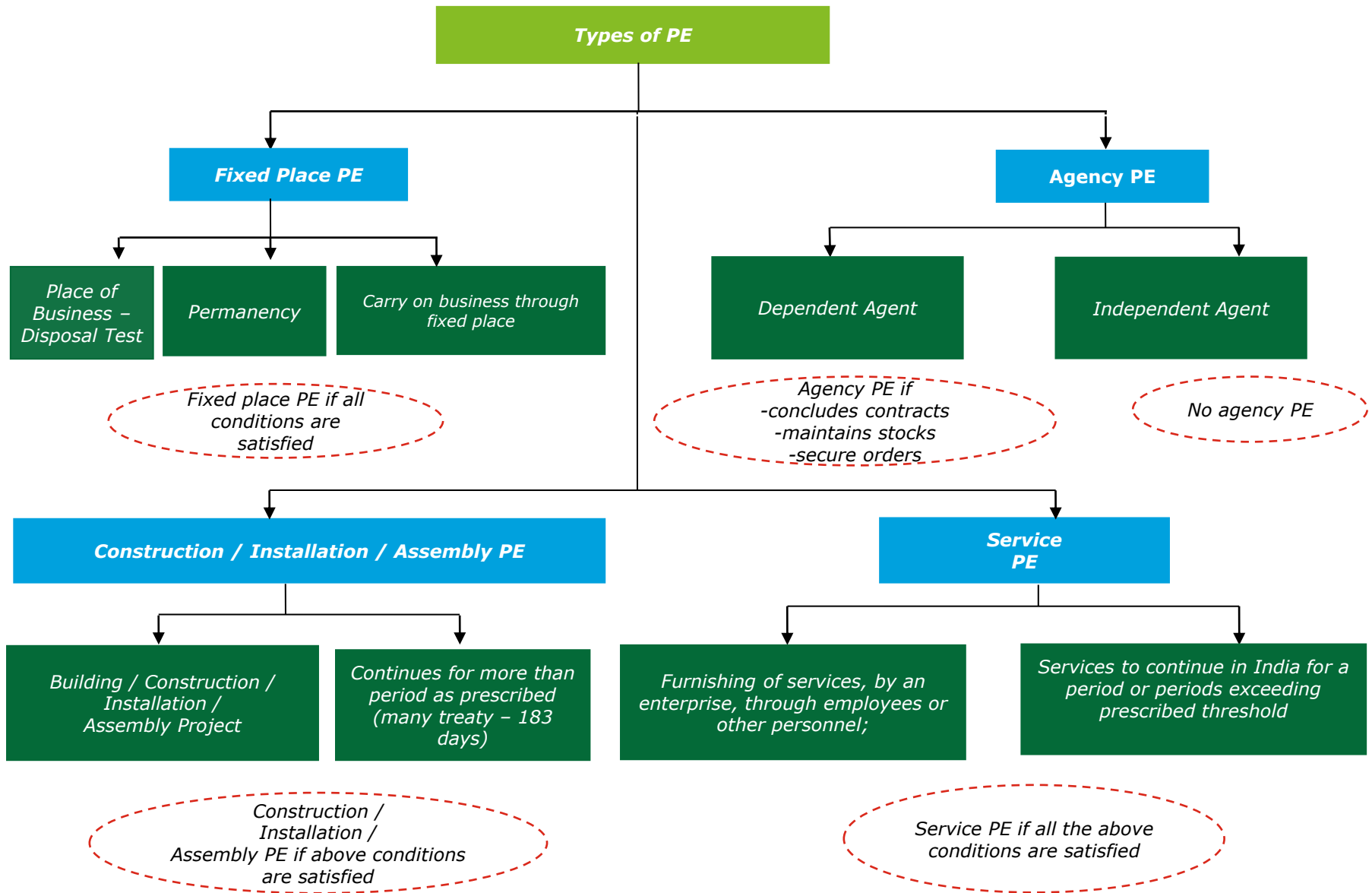


4. Direction by Supreme Court to CBDT to consider representation filed by petitioner (for NR status) within 3 weeks

- A petition was filed by an individual before the Hon'ble Supreme Court seeking clarity on residency norms.
- Supreme Court directed the petitioner to approach CBDT by filing a representation.
- CBDT was directed to consider such representation in 3 weeks of receipt

Permanent Establishment

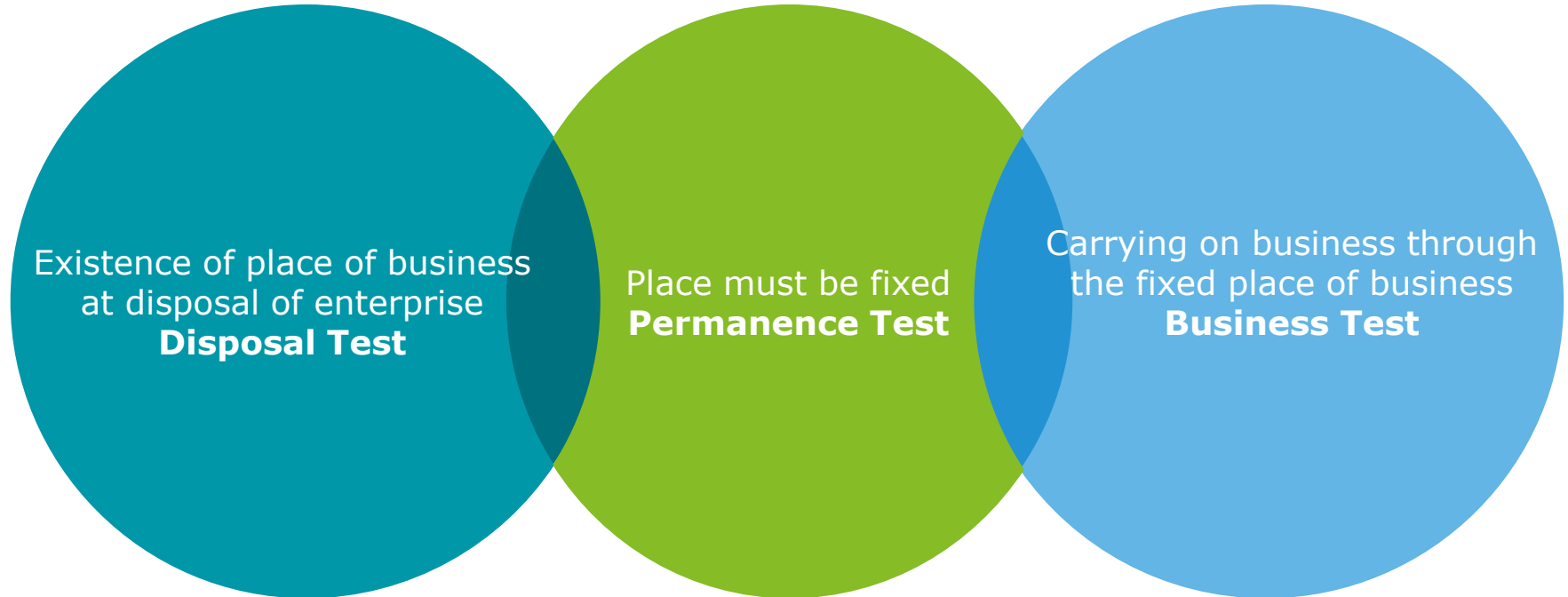
Permanent Establishment – Overview



Fixed Place PE - Overview

As per Article 5(1), the term- permanent establishment ("PE") means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

The requirement to constitute Fixed Place PE are:



Whether Home of employee - Fixed Place PE?

Disposal test

- **OECD Commentary** has illustrated certain guiding factors for determination of Home Office PE:
 - Whether home is used on continuous/ intermittent basis for carrying out business activities
 - Whether employer was required to use home to carry its business activities by not providing office etc.
- Para 18 and 19 of OECD Commentary on Article 5 provides guidance on Home PE (*Refer **Appendix 1***)



Whether Home of employee - Fixed Place PE?

• OECD Secretariat Analysis¹ on home office PE.

9. ... stay at home to work remotely are typically doing so **as a result of government directives: it is force majeure not an enterprise's requirement.** Therefore, considering the extraordinary nature of the COVID-19 crisis, **and to the extent that it does not become the new norm over time**, teleworking from home (i.e. the home office) would not create a PE for the business/employer, either because such activity **lacks a sufficient degree of permanency or continuity or because, except through that one employee, the enterprise has no access or control over the home office. In addition, it provides an office which in normal circumstances is available to its employees.**

- Stay in India as a result of government directives;
- It is force majeure and not an enterprise requirement;
- Unless it become a new norm, it may lack permanency or continuity;
- Provides an office which in normal circumstances is available to its employees

• Updated OECD Guidance² on home office PE.

... stay at home to work remotely are typically doing so as a result **of public health measures: it is an extraordinary event not an enterprise's requirement.** Therefore, considering the extraordinary nature of the COVID-19 pandemic, teleworking from home (i.e. the home office) because **of an extraordinary event or public health measures imposed or recommended by government would not create a PE for the business/employer**, either because such activity lacks a sufficient degree of permanency or continuity or because the home office is not at the disposal of the enterprise. In addition, it still provides an office which in the absence of public health measures is available to the relevant employee. This applies whether the temporary work location is the individual's home or a temporary dwelling in a jurisdiction that is not their primary place of residence.

- Stay in India as a result of public health measures;
- It is an extraordinary requirement and not an enterprise requirement;
- Provides an office which in absence of public health measures is available to its employees

1. OECD Secretariat Analysis of Tax Treaties and the Impact of the COVID-19 Crisis dated 3 April 2020

2. Updated guidance on tax treaties and the impact of the COVID-19 pandemic dated 21 January 2021

Whether Home of employee - Fixed Place PE?

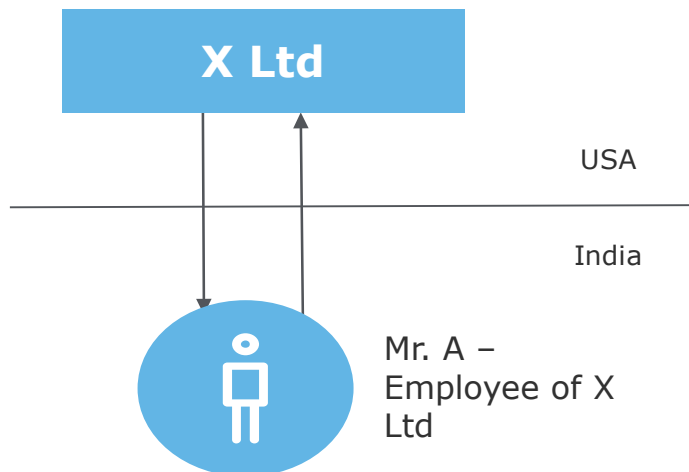
Principle of *lex non cogit ad impossibilia* – Law does not compel a man to do what he cannot possibly be performed

- The fundamental test applied by Courts for application of aforesaid legal maxim is to see whether the event (i.e. non-compliance with the law) was beyond the control of the person, occurred without any fault of the person and it resulted in an impossibility.
- Decision of Delhi High Court in the case of Suresh Nanda [57 Taxmann.com 448]
 - the period of involuntary stay in India caused by unauthorized impounding of passport (i.e. on account of external factors) should be excluded while determining the residential status

Service PE

- To constitute a Service PE in India, following conditions are required to be satisfied:
 - Furnishing of services, by an enterprise, through employees or other personnel;
 - The aforesaid activity to continue in India for a period exceeding days as specified.

Scenario



- Mr. A is an employee of X Ltd.
- Mr. A started rendering services in India from 1 March 2020. He was scheduled to depart from India on 15 April 2020.
- However, due to nationwide lockdown, he was stranded in India.
- Further, from 20 March 2020 to 31 May 2020, no services were rendered to the clients
- The services were resumed from 1 June 2020. Further, he chose to work from India from 1 June 2020 to 31 July 2020 instead of USA as a safety measure
 - Services to employer
 - Services to third party
 - Services to employer and third party
- Service PE threshold is 120 days in any twelve month

Mr. A to constitute a Service PE in India?

Agency PE

- Agent is a person acting for the foreign enterprise in India, even though such foreign enterprise may not have a fixed place of business in India.
- Dependent agent may be regarded as a PE of a foreign enterprise where such 'dependent agent' satisfy any of the following 3 conditions : -
 - has, and habitually exercises, an authority to conclude contracts in India on behalf of a foreign enterprise; or
 - maintains in India a stock of goods from which he regularly delivers goods on behalf of foreign enterprise; or
 - habitually secures orders in India, wholly or almost wholly for the foreign enterprise.
- Agency PE may not get triggered if a foreign enterprise carries on business in India through: -
 - a broker;
 - a general commission agent; or
 - any other agent

of an independent status acting in its ordinary course of business

- Thus, the determination of Agency PE is a two-step process

Step I Whether the person in India is dependent or independent ?

Step II If dependent, whether any of the above mentioned 3 conditions are satisfied ?

Agency PE

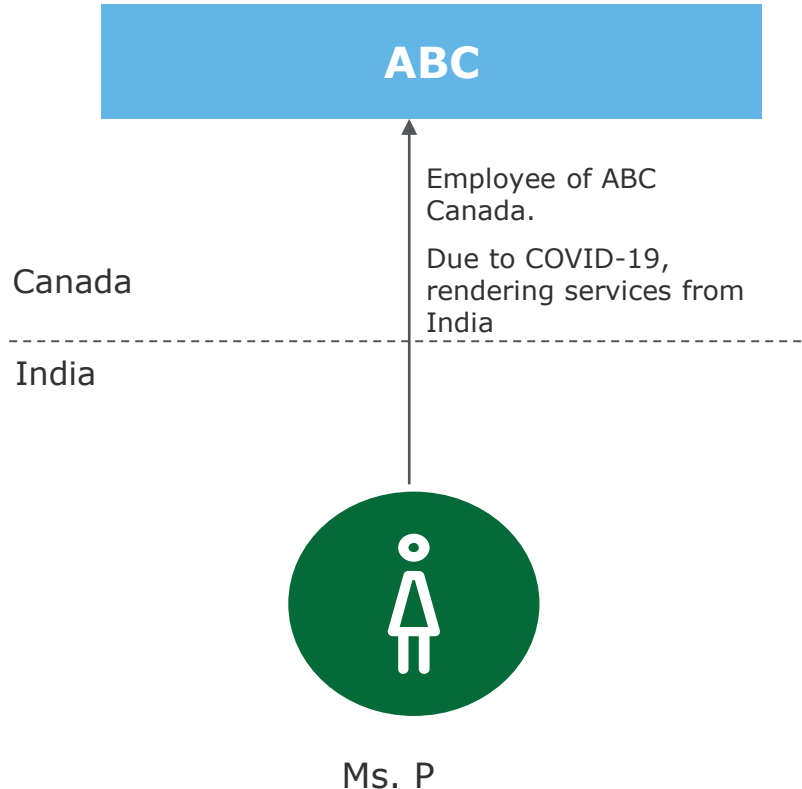
- Can the activities of an individual temporarily working from home for a non-resident employer give rise to a dependent agent PE?

Construction PE

- a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than days as may be specified.
- As per Article 5(3) of the OECD Model a building site or construction or installation project constitutes a permanent establishment only if it lasts more than 12 months.
- As a result of COVID 19 crisis, the work at various project sites could have got suspended. As a result of temporary suspension, the threshold period of site exceeded.
- In general, a construction site continues to exist until the work is completed or permanently abandoned. A site should not be regarded as ceasing to exist when work is temporarily discontinued.

Case Study

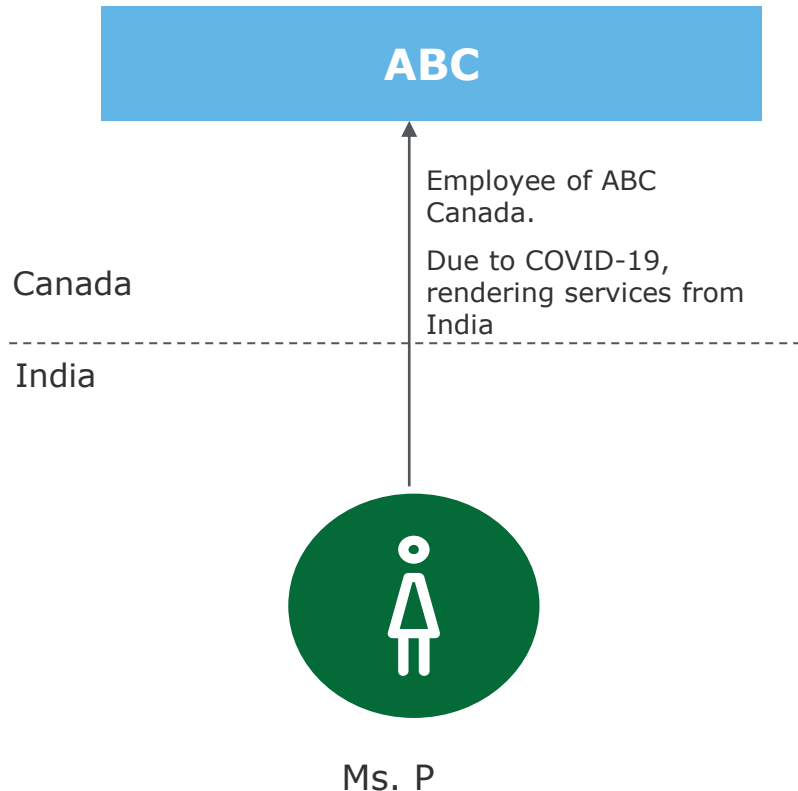
Permanent Establishment



- ABC is a company incorporated in and a tax resident of Canada.
- ABC is a company engaged in the business of providing investment management services
- Ms. P is an Indian citizen and an employee of ABC, working in Canada.
- Her functions/ roles are limited to providing internal services to ABC (e.g. Build and develop financial models on public companies, Apply knowledge of investment policies, fund management guidelines and portfolio risk parameters for determining suitability of investment opportunities, etc.)
- Ms. P arrived in India on 4 November 2020 to spend time with her family for a couple of months. However, due to the COVID-19 pandemic and lockdown in India, Ms. P was in India till 28 May 2021.
- Further, Ms. P has been in India for more than 365 days in the past 4 tax years

Case Study

Permanent Establishment



- Ms. P has been working for ABC, remotely in India from 4 November 2020, from her residential house. This remote working from home is on an intermittent basis, due to COVID-19 pandemic
- ABC does not have any Indian subsidiary/ group company / place of business in India.
- While in India, Ms. P works under the supervision and control of ABC and does not have an employer – employee relationship with any Indian entity.
- Ms. P is the only employee of ABC working from India

Issue for advice:

PE exposure on ABC on account of Ms. P working remotely in India

Place of Effective Management

Place of Effective Management

- The implications of PoEM may need to be analyzed in the following situations:

1

Directors / Key Managerial Persons of foreign companies if present in India due to Covid-19 restrictions and attend board meetings or take strategic decisions from India

2

Entities which are not having adequate substance outside India

- In certain tax treaties, dual residency is addressed through the competent authority mechanism

Employment tax issues

Employment tax issues

Salary deemed to accrue or arise in India - Section 9(1)(ii)

- Income falls under the head "Salaries" if it is earned in India

Explanation : For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for -

- (a) Services rendered in India;
- (b) Income relating to the rest period or leave period which is preceded and succeeded by services rendered in India is salary 'earned' in India.

Salary for services rendered in India is taxable irrespective of the Residential Status and place of receipt of Income

Employment tax issues

Short stay exemption – Section 10(6)(vi)

- 90 Day rule – Section 10(6)(vi)

Conditions

- Employee is a foreign citizen employed by a foreign enterprise
- Foreign entity is not engaged in trade / business in India
- Stay in India \leq 90 days in a tax year
- Remuneration is not liable to be deducted from employer's income chargeable to tax in India

Employment tax issues

Double Tax Avoidance Agreement – Section 90 of the ITA

Residence

- Applicability – Resident of either of the Contracting States. In case of dual residency, tie-breaker rule is applied to determine residency
- Tie breaker Rule:
 - Availability of permanent home
 - Center of vital interests
 - Habitual abode
 - Nationality

Employment tax issues

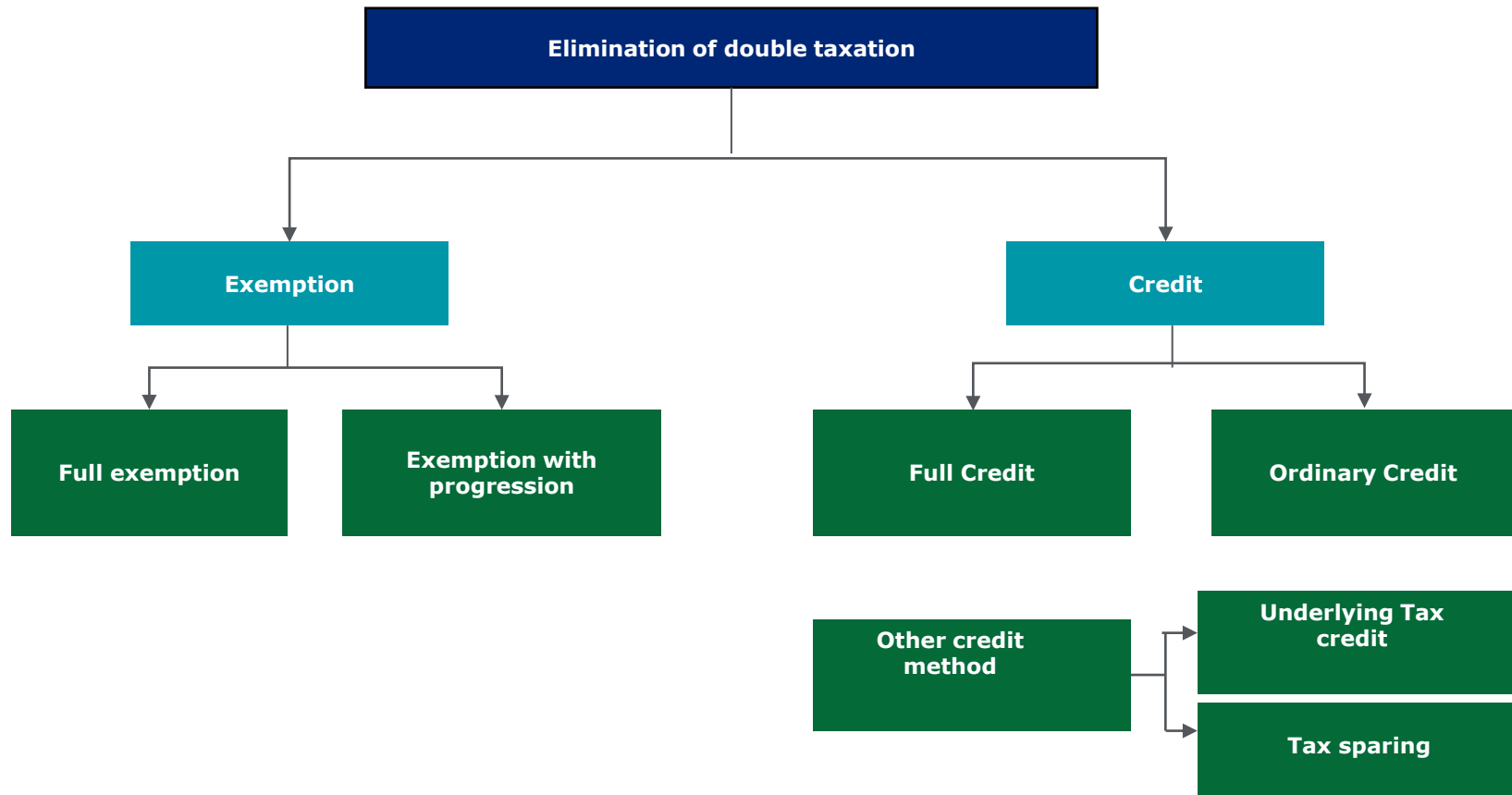
Article 15 - Income from employment (as per OECD Model Convention)

1. *Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.*
2. *Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:*
 - a) *the recipient is present in the other State for a period or periods not exceeding in the **aggregate 183 days** in any twelve month period commencing or ending in the fiscal year concerned, and*
 - b) *the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and*
 - c) *the remuneration is not borne by a permanent establishment which the employer has in the other State.*

Employment tax issues

Elimination of Double Taxation

- Two methods of eliminating double taxation in case of individual:
 - Dependent personal service (Exemption method)
 - Foreign tax credit (Credit method)



Individual taxation

Residential Status – Relief by CBDT

1 >

- CBDT vide Circular No. 11 dated 8 May 2020, excluded the period of stay as specified therein (basically from 22 March to 31 March 2020) for determination of the residential status for FY 2019-20;
- Press release also promised to provide similar relaxation for FY 2020-21. However, no similar relaxation has been provided.

2 >

- CBDT Circular No.2 of 2021 dated 3 March 2021 provided that the taxpayers affected by COVID-19 and subjected to double taxation to make an application to the PCIT(IT) in Form-NR on or before 31 March 2021.
- The CBDT shall then examine whether relaxation is required to be provided in the matter and if required, whether general or specific relaxation can be provided to a class of individuals or specific relaxation to be provided in individual cases

Individual taxation

Circular No. 2 of 2021

Illustrative scenarios not covered by Circular No. 2 of 2021

- No relaxation to NRIs from countries like Oman, Qatar, UAE, etc. who had to reside in India involuntarily due to travel restrictions for more than 182 days
- Individual triggering ROR status due to COVID-19 stay restrictions and thus, global income being subjected to tax in India
- Individual not eligible for short stay exemption under the domestic tax law as well as DTAA on account of stay in India exceeding the maximum threshold due to COVID-19 travel restrictions
- Individuals subjected to tie-breaker test for determining treaty residency due to presence in India – subjective criteria.
- Income subjected to higher tax rate since the presence in India may result in income accruing or arising in India due to activities performed in India due to COVID-19 travel restrictions.

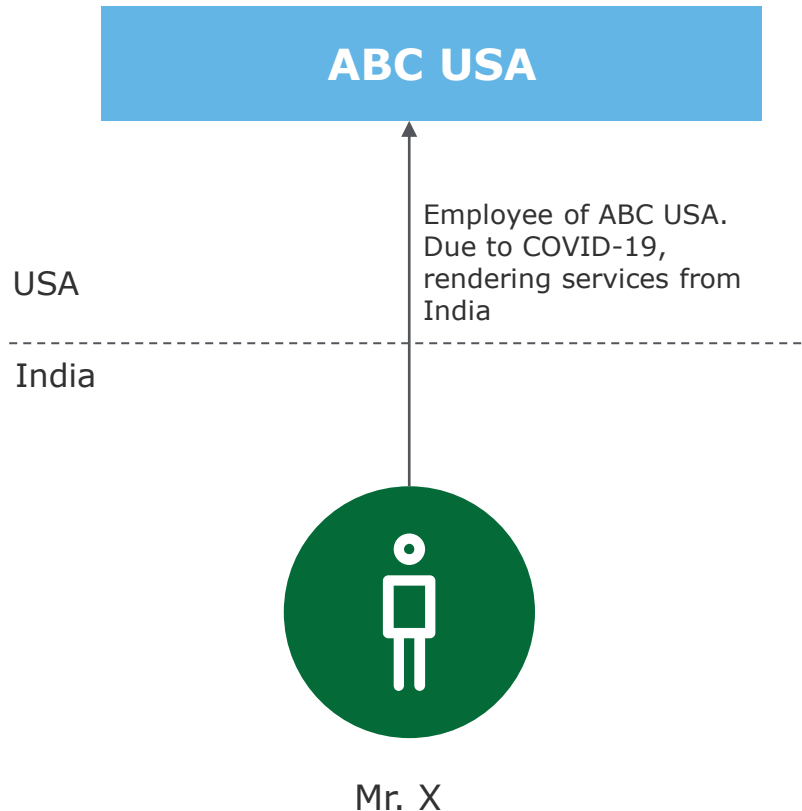
Employment tax issues

Compliances

- Withholding tax and related compliances by employer
- Employees will also be required to obtain PAN and file tax return in India.

Case Study 1

Taxability of salary for services rendered to F. CO from India



- Mr. X is a citizen of India
- He was employed with ABC USA. He had come to India on 8 March 2020 on a vacation and was stranded in India due to the COVID-19 pandemic.
- He was on vacation in India from 8 March 2020 to 7 April 2020. Further, he started working remotely for ABC USA from 8 April 2020 and continued to work till 8 November 2020
- He was present in USA from 9 November 2020,
- His stay in India during the tax year 2020-21 was 226 days as follows:

From	To	No of days	Purpose
1 April 2020	7 April 2020	7	Vacation
8 April 2020	8 November 2020	215	Work from India
28 March 2021	31 March 2021	4	Vacation

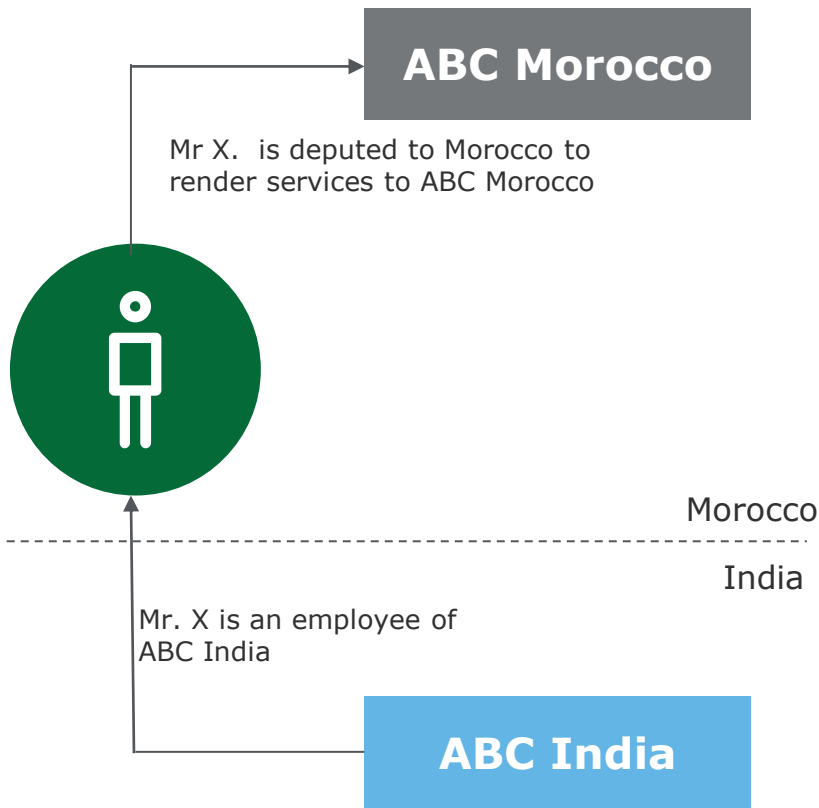
- His stay in preceding 7 years did not exceed 729 days and he was a non-resident in India in the preceding 10 years

Issue for advice:

Determination of residential status of Mr. X in India for tax year 2020-21 in light of income tax provisions and taxability of salary income

Case Study 2

Determination of residential status



- Mr. X is a citizen of India
- He was employed with ABC India.
- He was on a deputation to ABC Morocco during the FY 2019-20
- His total number of days of stay in India during tax year 2019-20 were 202 days including his stay in India during the period 6 March 2020 to 31 March 2020.
- His Morocco assignment started on 31 August 2019 and ended on 20 June 2020.
- He visited India in December 2019 and March 2020
- He had come on a visit to India on 6 March 2020 and after arrival, was quarantined in India.
- His scheduled departure date was 23 March 2020. However, he was unable to leave India on 23 March 2020 due to the COVID-19 pandemic

Issue for advice:

Determination of residential status of Mr. X in India for tax year 2019-20 in light of income tax provisions and circulars issued

Appendix 1 – OECD Commentary on Home PE

"18. Even though part of the business of an enterprise may be carried on at a location such as an individual's home office, **that should not lead to the automatic conclusion that that location is at the disposal of that enterprise simply because that location is used by an individual (e.g. an employee) who works for the enterprise.** Whether or not a home office constitutes a location at the disposal of the enterprise will depend on the facts and circumstances of each case. In many cases, **the carrying on of business activities at the home of an individual (e.g. an employee) will be so intermittent or incidental that the home will not be considered to be a location at the disposal of the enterprise (see paragraph 12 above).** Where, however, a home office is used on a **continuous basis for carrying on business activities for an enterprise** and it is clear from the facts and circumstances that the enterprise has required the individual to use that location to carry on the enterprise's business **(e.g. by not providing an office to an employee in circumstances where the nature of the employment clearly requires an office),** the home office may be considered to be at the disposal of the enterprise.

"19. A clear example is that of a non-resident consultant who is present for an extended period in a given State where she carries on most of the business activities of her own consulting enterprise from an office set up in her home in that State; in that case, that home office constitutes a location at the disposal of the enterprise. **Where, however, a cross-frontier worker performs most of his work from his home situated in one State rather than from the office made available to him in the other State,** one should not consider that the home is at the disposal of the enterprise because **the enterprise did not require that the home be used for its business activities.** It should be noted, however, that since the vast majority of employees reside in a State where their employer has at its disposal one or more places of business to which these employees report, the question of whether or not a home office constitutes a location at the disposal of an enterprise will rarely be a practical issue. Also, the activities carried on at a home office will often be merely auxiliary and will therefore fall within the exception of paragraph 4.





Questions & Answers

Thank you!