

# Dependent Personal Services Directors' Fees

## ICAI – Recent updates in International Tax

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Yield (%)	Yield (%)	Yield (%)	Yield (%)	Yield (%)	Yield (%)
-13.8%	36.1%	6.700	Jan. 30, '18	1461	-286
16.9%	-17.4%	5.875	May 10, '12	3820	-270
2.7%	17.9%	6.750	March 15, '12	786	-180
8%	1.9%	7.625	Nov. 30, '12	949	-131
	10.2%	5.750	Sept. 8, '11	953	-118
		7.995	June 1, '36	787	-101
		6.875	Feb. 1, '14		
		5.500	Nov. 15, '12		

Share price	One-day change	Last week
Oct.		1702
Nov.		
Dec.		
Jan.		

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**Article 15 – Dependent  
Personnel Services  
(DPS)**

# DPS- Taxability under the Act

- **Section 5 – Scope of Total Income**
  - Income received / accrues / arises, deemed to be received / accrue / arise
- **Section 9(1)(ii) – Salary deemed to accrue or arise in India:**
  - Salary for service rendered in India; and
  - Rest / leave period preceding and succeeding services rendered in India
- **Section 10(6)(vi) – Exemptions from Total Income**
  - The remuneration received by a foreign citizen employed by a foreign enterprise for services in India exempt if:
    - Foreign enterprise not engaged in any trade or business in India;
    - Foreign citizen’s stay < 90 days
    - Remuneration not liable to be deducted from the income of employer
- **Section 15 – Salaries**
  - Taxable on due / payment basis

R-Ordinarily Resident; NOR – Not Ordinarily Resident; NR – Non Resident

Income	R	NOR	NR
Global Income	✓	✗	✗
Income accrued/ arising/ received/ deemed to accrue/ arise in India	✓	✓	✓
Salary for employment exercised/ services rendered in India	✓	✓	✓

## DPS – Taxability under the Treaty

- **Different Models**
  - **United Nations Model refers to as DPS**
  - **Organization for Economic Co-operation and Development (OECD) Model and United States Model refers to as “Income from Employment”**
- **Deals with remuneration derived by a Resident of a Contracting State (State R) in respect of an employment**
  - **Apportions taxing rights between State R and the State of exercise of employment (State S)**
- **Article 15(1) Exclusion – Only State R to tax income from employment unless employment exercised in State S**
- **Article 15(2) Short Stay – If employment exercised in State S for specified time, State S to exempt subject to conditions**

## Article 15(1) - Interpretation of Key Terms

### Salaries, wages and other similar remuneration

- Includes rewards flowing from Employment e.g. Salaries, Wages, Perquisites, Benefits, Severance Pay, etc.
- Includes benefits in kind or perquisites received from employment viz.
  - Stock Options
  - Use of a residence or automobile
  - Health or Life Insurance Coverage
  - Club Memberships
- Such income may include:
  - Bonus for past years' services [US Model Commentary 2006]
  - Amount received from Superannuation Fund [Yogesh Prabhakar Modak {2004} 138 Taxman 121 (AAR- New Delhi)]
  - Income derived from exercise of Stock Options granted with respect to services performed in State S, and exercised after employee has left State S [OECD Commentary (2005)]

### Employment is exercised

- Employment Exercised “ means “Services Performed” [US Model Commentary (2006)]
- Employment is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid [OECD Model Commentary (2008)]
- Time or place of payment of Salary, wages or other similar remuneration is irrelevant as long as the remuneration pertains to employment exercised in the Other State
- The place where the results of the work are exploited is irrelevant

## Article 15(1) - Important Decisions

### Sreenivas Kumar Sistla Vs CIT (AAR No. 514 of 2000)

#### Facts:

- Assessee was employed with Wipro Limited, India from 21 November 1994
- Assessee was transferred to US on 8th January 1995
- Salary was continued to be paid in India by Wipro India

#### Issues:

- Whether salary received in India for services rendered outside India is taxable in India
- Whether Wipro Limited India is required to deduct tax at source on salary payments made to the assessee

#### AAR Ruling:

- As the assessee is a tax resident of USA during the FY 1999-2000 as per the Treaty between India and USA.
- Hence, eligible for the benefits under the Treaty



## Article 15(1) - Important Decisions

### British Gas (BG) - AAR No 725 of 2006 [287 ITR 462]

#### Ruling

- Salary paid by BG India to employee deputed to UK not to be taxed in India, if it has been offered to tax in UK as per tax treaty between India and UK
- BG India not to deduct tax at source from salary paid to its employees in India, if the taxes have been paid on such payments in UK
- Deputation to be considered as leaving India for the 'purpose of employment'

#### Basis of Ruling

- As per Act, if an Indian citizen, leaves India for purposes of employment outside India, then period of 60 days stands increased to 182 days
- Individual to qualify as a 'resident' in India, if he is present in India for a period of 182 days or more during a tax year

#### Comments

- Act provides that income of a "Non Resident (NR)" shall be taxed in India, if it is received / accrues / arises or deemed to accrue / arise in India
- However, Article 16 (1) of India - UK Double Tax Avoidance Agreement (DTAA) grants the right only to UK to tax salary of a tax resident of UK under India – UK treaty in respect of employment exercised in UK (outside India), even if salary is received in India
- Hence, the salary received in India need not be taxed in India if the aforementioned benefit is availed for



## Article 15(1) - Important Decisions (.....Cont'd)

### S Mohan - AAR No 741 of 2007 [294 ITR 177]

#### Facts

- Individual, filed a return of income for AY 2006-07
- Income from salaries from previous and current employer (Infosys Technologies Limited) reported
- Individual deputed on official duty to Norway
- Rendered services for more than 182 days
- Individual continued to remain on the payrolls of the Indian entity
- Residential status in India – ‘Non Resident’
- No proof in respect of any taxes paid in Norway

#### Observations of AAR

- Since income not taxed in Norway, taxable in India
- Distinguished between “shall be taxable” and “may be taxed”;
- Distinguished BG AAR- Tax was actually paid in the Country where employment was exercised;

#### AAR Ruling

- The salary earned by a non-resident on employment exercised outside India is taxable in India and no relief can be claimed under the DTAA unless tax has been paid in the other country.
- The British Gas case cannot be relied on as the facts of this case are distinguishable from the former.
- The purpose of bilateral treaties is to avoid double taxation and not to exempt income from tax altogether; since the taxes have not been paid in Norway, the article relating to double taxation cannot be relied upon.

## Article 15(1) - Important Decisions (.....Cont'd)

### ITO vs Mr. Arjun Bhowmik (ITA No.3484 / Del / 2012)

#### Facts

- Individual was employed with M/s KJS India Pvt. Ltd.
- He was on long term assignment to Kraft Food, Philippines from 01 December 2006
- Qualified as NR of India for AY 2007-08 and tax resident of Philippines
- Paid taxes in Philippines on salary received in India
- Individual filed return of income For AY 2008-09 claiming salary received in India as exempt as the services were rendered in Philippines

- ITO disallowed the exemption on the ground that salary is accrued / received and paid in India.

#### Delhi ITAT's observations:

- Salary income derived by individual, who is a tax resident of Philippines for exercising employment in Philippines shall only be taxable in Philippines as per Article 16 (1) of the Treaty

## Article 15(1) - Case Study No. 1

### Facts

- Mr. A, a French citizen had come from France to India with family on 1 September 2008
- Mr. A completed his India assignment on 31 August 2012 and left for Brazil with family
- He started Brazil assignment w.e.f. 1 September 2012
- Salary received in India upto 31 August 2012; salary received in Brazil from 1 September 2012
- 1 April 2012 to 31 August 2012 - ROR in India – Article 4(1) of India-Brazil Treaty
- 1 September 2012 to 31 March 2013 – ROR in India but ultimate Resident of Brazil under Article 4(2) of India-Brazil Treaty
- Qualifies as a resident in Brazil from 1 September 2012 under domestic tax law of Brazil

### Issues

- Whether Salary in India for 1 April 2012 to 31 August 2012 taxable in India?
- Whether Salary in Brazil for 1 September 2012 to 31 March 2013 taxable in India?

### Comments

- 1 April 2012 to 31 August 2012
  - Salary income pertaining to Indian assignment taxable in India
- 1 September 2012 to 31 March 2013
  - Should qualify as ultimate tax resident of Brazil
  - Salary income for employment exercised in Brazil should not be taxed in India

# Article 15(1) - Case Study No.2

## Facts

- Rakesh, an Indian citizen, went on a 3 year assignment to Singapore on 1 June 2012
- Although his assignment started on 1 June 2012 the payroll set-up in Singapore was delayed
- Hence he was paid in India for June 2012 and salary re-charged to Singapore
- Rakesh qualifies as a Singapore tax resident for year 2012 as he would spend > 182 days there
- Rakesh was granted deferred cash bonus as under:

Year of Grant	Amount (INR)	Place of Pay	Vesting and Release End of Year 1	Vesting and Release End of Year 2
Jan 2011	INR 90,000	India	50%	50%
Jan 2012	INR 1,50,000	India	40%	60%

## Issues

- What will be the taxable bonus in India during FY 2012-13?
- Will Salary for June 2012 be taxable in India?

## Article 15(1) - Case Study No.2 (.....Cont'd)

### Comments

- As Rakesh's stay in India < 182 days in India –NR (going abroad for employment)
- As NR-Taxable on income sourced or received in India

Year of Grant	Amount vesting in FY 12-13	Place of Pay	Taxable in India (As per Act)
Jan 2011 (2 <sup>nd</sup> Tranche)	INR 45,000	India	INR 45,000
Jan 2012 (1 <sup>st</sup> Tranche)	INR 60,000	India	INR 60,000

- Resident of Singapore as per Article 4 of Indo-Singapore Treaty
- Exclusion of bonus income pertaining to Singapore Services as per Article 15 (1) of Treaty

Year of Grant	Taxable in India (As per Act)	India Services (Grant to Vesting)	Total Vesting Period	Proportionate bonus taxable in India (As per Treaty)
Jan 2011	INR 45,000	17 months	24 months	INR 31,875
Jan 2012	INR 60,000	5 months	12 months	INR 25,000

- Salary for June 2011 – can be excluded under Art. 15(1) as services rendered outside India

## Article 15(1) - Case Study No.3

### Facts

- M, an Indian citizen, went on a 3 year assignment to Philippines on 1 August 2012
- Payroll transferred to Philippines from 1 August 2012
- M's airfare (Rs. 55,000) and cost of shipment of personal goods (Rs. 93,000) paid by I Co
- M entitled to additional relocation allowance of USD 10,000
- Payment of relocation - In or outside India as per M's choice
- M qualifies as a Philippines tax non resident for year 2012 as he would spend <182 days there

### Issues:

- Will airfare and shipment cost borne by I Co taxable?
- What choice should M make for place of payment of relocation allowance?

## Article 15(1) - Case Study No.3....Cont'd

### Comments

- As M's stay in India < 182 days in India –NR (going abroad for employment)
- As NR -Taxable on income sourced or received in India
- Airfare and transport of personal goods - not taxable as assignment regarded as - Transfer
- M qualifies as a Philippines tax non resident for year 2012
- Relocation Allowance

Place and time of Receipt	Taxable in India as per Domestic tax law	Residency as per Treaty	Benefit under Treaty Available in India
India before 31 Dec 2012	Yes	NR – India NR – Philippines	No
India after 31 Dec 2012	Yes	NR – India R – Philippines	Yes
Philippines before 31 Dec 2012	No	NR – India NR – Philippines	Not Required
Philippines after 31 Dec 2012	No	NR – India R – Philippines	Not Required



## Article 15(2) – Exception to Basic Rule

### Article 15(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) recipient is present in other State for a period or periods not exceeding in the aggregate 183 days in any 12 month period commencing or ending in the fiscal year concerned;
- (b) the remuneration is paid by, or on behalf of, an employer who is not resident of the other State; and
- (c) the remuneration is not borne by permanent establishment / fixed base which the employer has in other State

### Scope of Taxation

- Article 15(2) provides exception to Article 15(1) that remuneration to be taxed in State R even if derived from employment exercised in State S
- Exception does not cover individuals whose remuneration falls under other Articles and specifically excluded under Article 15(1)
- Only if all three conditions specified in Article 15(2) are satisfied, remuneration shall be taxable only in State R


# Article 15(2)(a) - Key Elements of the Basic Rule

## 183 days Rule

Recipient is present in other state for a period or periods not exceeding in aggregate 183 days in any twelve month period commencing or ending in fiscal year concerned

DTAAs with Austria, Hungary, Iceland, Ireland, New Zealand, Sweden, etc. have similar wordings

### Alternate Wordings:

- "... in aggregate 183 days ..."
- Australia: "in a year of income of other state"
- Canada, France, Japan: "... days in the relevant fiscal year"
- Germany: "... in the fiscal year concerned"
- UK: "... during the relevant fiscal year"
- US: "... in the relevant taxable year"
- Norway: "any two consecutive years of income" 

## Calculation of 183 days

### OECD Model – “days of physical presence” method

- Following days are included:
  - part of a day; day of arrival / departure;
  - all other days spent inside the State of activity such as Saturdays and Sundays, national holidays, holidays before, during and after the activity, short breaks (training, strikes, lock-out, delays in supplies), days of sickness and death or sickness in the family
- Exclusions:
  - days in transit
  - entire day spent outside the State S, whether for holidays, business trips, or any other reason, should not be taken into account

## Article 15(2)(b) - Key Elements of the Basic Rule

### “Employer” – Broad Guidelines as per OECD / UN commentary and judicial precedents

- “Master – Servant” relationship
- Test of substance over form, employer is a person who
  - has rights over work produced; and
  - bears relative responsibility and risks
- Some other facts and circumstances to establish real employer:
  - Authority to instruct employees?
  - Control and responsibility over work place where employment is exercised?
  - Whether remuneration to the hirer of the personnel is calculated on the basis of the time utilised, or is there a link between hirer’s remuneration and salaries received by employee?
  - Who provides tools and other resources at the disposal of employee?
  - Who determines number of employees required?
  - Who determines qualifications of the employees?

### “Remuneration is paid by, or on behalf of”

- Remuneration regarded as paid by a non-resident employer (NR) when:
  - It is initially paid by an Indian contractor on behalf of NR employer and
  - Subsequently recovered from NR employer

[Nakazono vs. ACIT (2003) 1 SOT 31(Del)]
- Remuneration not regarded as so paid if:
  - NR initially pays salary of employee; but
  - A host country corporation reimburses it

[US Model Commentary – Technical Explanation to India-US Tax Treaty]

## Article 15(2)(b) - Who is the Employer?

Factors	Judgments
Right to terminate employment	AT& S India (287 ITR 421), Tekmark Global Solutions (3 taxmann.com 38), IDS Software Solutions (2009-TIOL-82 Bang)
Responsibility for work performance, no warranty from foreign entity	CIT v Morgan Stanley (292 ITR 416), Dolphin Drilling Ltd (121 TTJ 433), IDS Software Solutions (2009-TIOL-82 Bang)
Compliance with regulations and management systems, work schedules	Dolphin Drilling Ltd (121 TTJ 433), AT& S India (287 ITR 421),
Issue of appointment letters with terms and conditions of appointment	Dolphin Drilling Ltd (121 TTJ 433),
Powers/duties of secondees regulated by AOA	IDS Software Solutions (2009-TIOL-82 Bang)
Impact of a service agreement/foreign collaboration agreement –Foreign entity under obligation to provide services?	AT& S India (287 ITR 421), Cholamandalam MS General Insurance (2009-TIOL-02-ARA)
Lien on employment retained	CIT v Morgan Stanley (292 ITR 416),
Reimbursement without mark-up	Tekmark Global Solutions (3 taxmann.com 38), Cholamandalam MS General Insurance (2009-TIOL-02-ARA)

## Article 15(2)(c) - Key Elements of the Basic Rule

The remuneration is not borne by a permanent establishment which the employer has in the other State.”

### Alternate wording in DTAA

- **Australia:** “....is not deductible in determining taxable profits of a permanent establishment or a fixed base”
- **UK:** “....is not deductible in computing the profits of an enterprise chargeable to tax in that other State”
- **USA:** “ ...is not borne by a Permanent Establishment or a fixed base or a trade or business which the employer has in the other state”
- **Canada, Netherlands, New Zealand, Singapore:** “ ...is not borne by a Permanent Establishment or a fixed base which the employer has in the other state”



## Article 15(2)(c) - Key Elements of the Basic Rule

### “Borne by”

- OECD Commentary, US Model Commentary and the Indian judicial rulings have interpreted ‘borne by’ as having different meanings as follows
  - allocable;
  - economically incurred;
  - commercially liable / actually paid;
  - deductible;
  - deducted;
  - actually paid
- Relevant Decisions
  - Scan Drilling Company
  - AAR in case of Stanley Keith Kinnet (154 CTR 193)

### “Allocable”

- Remuneration is allocable to Permanent Establishment (PE) and borne by it even when:
  - Remuneration (eg stock options) may not be deductible as a tax expense
  - Remuneration is not actually deducted since PE is exempt from tax in State S
  - Employer decides not to claim a deduction to which he is otherwise legitimately entitled

## Article 15(2)(c) - Key Elements of the Basic Rule.....Cont'd

### “Deductible”

Test of “deductibility” is met and remuneration is regarded as “borne” by a PE in following situations:

Foreign employer initially pays salary of employee, but its PE reimburses foreign employer in a deductible payment which can be identified as reimbursement. [Technical Explanation to India-US Tax Treaty]

Employer has been assessed on a presumptive basis (i.e., where taxable profits are determined at a fixed percentage of gross receipts) [Lloyd Helicopters International P Ltd (2001) 249 ITR 162 (AAR)]

Employer is assessed on a gross basis at concessional tax rate for fees for technical services/ royalties [DHV Consultants BV (2005) 277 ITR 97 (AAR)]

Salaries relatable to activities of PE are paid by head office outside State S and not debited in books of PE [Ensco Maritime Ltd vs DCIT (2004) 91 ITD 459]

Proper test is whether remuneration would be allowed as deduction for tax purpose; that test would be met, for instance, even if no amount were actually deducted as a result of the permanent establishment being exempt from tax in source country or of employer simply deciding not to claim deduction to which he was entitled [Sedco Forex International Inc v. CIT (147 Taxman 389)]

Assessment under section 44BB not conclusive to indicate that remuneration was deducted in computation of income of PE. Tribunal has made a distinction between the phrase ‘deducted’ and ‘deductible’ [Pride Foramer S.A. vs. ACIT (15 SOT 562)]



## Article 15(2) - Important Decisions

### DHV Consultants BV, In re [2005] 277 ITR 97 (AAR)

#### Facts

- The Applicant, a Netherlands company, had several project offices ('PO') in India
- The PO's derived income which was taxable on gross basis under Section 44D of the Act
- The Applicant sent its employees to India to work on the projects executed by it in India
- The employees during their stay in India continued to receive salary and allowances in Netherlands

#### Issues

- Whether it could be considered that the remuneration paid to the employees is borne by the PE in India under Article 15(2)(c) of the India-Netherlands tax treaty, when the applicant is taxed in India on gross basis under Section 44D of the Act

#### AAR Ruling

- The expression 'borne by' means 'deductible' or 'liable to be deducted'
- The beneficial rate is provided for allowing margin for the deduction of expenses which includes remuneration paid to employees working in India
- The salary paid to employees would be deemed to have been treated as deductible even though such PE is being taxed on a gross basis
- Hence, short-stay exemption cannot be claimed by the employees

## Article 15(2) - Important Decisions....Cont'd

### CIT v R. Rajagopal, 11 taxmann.com 222 (Mad.) 2011

#### Facts

- Mr. A, worked in India for 20 days with Indian subsidiary of a UK entity
- Indian subsidiary making payment for portion of salary had deducted tax and issued Form 16 to Mr. A
- Salary paid by Indian subsidiary recovered from UK parent company
- Mr. A claimed exemption under Article 16(2) of India-UK Treaty for salary paid in India

#### Issues

- Indian subsidiary should be regarded as employer
- Salary paid in India was claimed as exempt in Mr. A UK tax return
- Not taxed in India and UK

#### As per Tribunal

- Indian Company acting as postman
- Salary recovered from UK parent Company and not claimed as expenditure by Indian subsidiary

#### High Court Ruling

- No dispute on income not taxed in both India and UK
- Indian subsidiary deducted tax from Mr. A salary and issued salary certificate thereby treating him employee
- Condition stipulated in Article 16(2)(b) not fulfilled i.e. Indian company regarded as employer

## Article 15(2) - Case Study

### Facts

- P Co is an Indian company engaged in providing offshore drilling and allied services
- P Co has been awarded a contract with ONGC for providing drilling operations in the offshore waters of India
- For performing these drilling operations, P Co has taken certain rigs on lease
- P Co is in need of expat crew to work on these rigs
- P Co enters into an agreement with a manpower supply company - E Co incorporated in the US
- As per this agreement, E Co will send its expatriate crew to work on the rigs
- The crew is present in India for less than 183 days
- Features of the Agreement
  - E Co supplies the required manpower on a fixed day rate to P Co
  - The manpower supplied remains under the control and supervision of E Co

- The salary is paid outside India by E Co to the expatriate crew
- P Co can disqualify and demobilise any of the crew in the event their performance or behavior is not satisfactory
- E Co's responsibility is to provide the crew and they are not responsible for detailing of the work assigned by P Co

### Issues

- Whether salary paid by E Co to expatriate crew is eligible for short-stay exemption in India?

### Comments

- Economic Employer is P Co
- E Co is making the payments on behalf of P Co
- Even if E Co does not constitute a PE in India, the employer in this case becomes P Co and not E Co
- Short-stay exemption may not be allowed as second condition itself fails

## Article 15(3) - Special Rule for employment aboard a ship/ aircraft

### OECD/UN Model

Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated”

### Scope of Taxation

- Exception to Article 15(1) and 15(2)
- Rule applied to taxability of income from business of shipping, inland waterways and air transport as provided in Article 8
- Employment income may be taxable in State where effective management of employer is situated



## **Key Recent Amendments**

## Recent amendments- Disclosure of Overseas assets

- **Disclosure of overseas assets (including financial interest in any entity) or signing authority in any account located outside India, for ROR of India from FY 2011-12**
  - Foreign Bank Accounts - including peak balance
  - Financial interest in any Entity
  - Amount invested in Immovable Property
  - Amount invested in any other Asset
  - Details of Account(s) in which signing authority exists and not included above.
- **Mandatory irrespective of whether individual has taxable income or not**
- **Tax return forms contain schedule for disclosing details such as peak balance in bank account during FY, peak investment during FY, required to be declared in INR**
- **Revenue can reopen cases for past 16 years if they have reason to believe that income relating to such assets has escaped assessment**
- **Impacts family members of expatriates who become OR by virtue of stay pattern but otherwise may not have taxable income**
- **Several practical issues on definition of asset etc. still remain e.g. balance in 401K plan?**

# Recent amendments- Tax Residency Certificate

- **With effect from FY 2012-13, non-resident taxpayers claiming Treaty benefits in India required to obtain a Tax Residency Certificate (TRC) from the Government of foreign country**
- **TRC would be regarded as necessary but not sufficient condition to avail Treaty benefits in India**
- **Details required to be included in the TRC from foreign country have been notified as**
  - Name, status, nationality of taxpayer
  - Country of incorporation
  - Tax identification/unique identification number in other country
  - Tax residential status
  - Period for which TRC applicable
  - Address of taxpayer for specified period
- **Also, format specified for TRC for Indian residents in Form 10FA and Form 10FB**
- **Open issues-**
  - Applicability to Residents under Act (however Treaty residents of foreign country)
  - Timing of obtaining TRC
  - Where foreign country does not have a provision to issue TRC/ to issue TRC in specified format
  - Documentation to be submitted to Indian authorities for obtaining TRC, time limit for issue



# Recent amendments- Non Tax Aspects

- **Change in Social Security Regime**

- Concept of International Worker (IW)
- IW's to contribute to Indian Provident Fund if Indian entity a covered establishment
- Exemption for individual's coming from countries with which India has entered into a Social Security Agreement (SSA) or a Bilateral - Comprehensive Economic Partnership / Co-operation Agreement (CEPA-CECA)
- Currently 8 SSA's signed and notified
- Only Singapore CEPA eligible

- **Stringent Visa Regulations**

- Tax compliance certificate requested at the time of Foreign Regional Registrations Office (FRRO) or visa extension

- **Interplay of Tax, PF and Visa regulations**



## **Article 16**

### **Directors Fees**

# Director's Fee- Taxability under the Treaty

- **General Rule (UN and OECD model)**
    - Directors fees and other similar payments received by a resident of State R, as member of board of directors of a company resident of State S;
    - May be taxed in State S (i.e. state of residence of company and not state where services rendered)
  - **Additional Rule (UN model)**
    - Salaries, wages, and other similar remuneration derived by a resident of State R, as official in a top level management position of company resident in State S;
    - May be taxed in State S (i.e. where the company is resident has primary right to tax)
  - **US Model**
    - No express arrangement for director's fee- taxed under rules covering independent personal services
  - **Persons covered- Even non individuals**
- **Board of Directors – not defined**
    - Includes a body in-charge of supervision of company's management
  - **Types of Income**
    - Director's fees – for supervision of company management (OECD model)
    - Payments in cash or kind ((e.g. use of residence, car, club. Insurance coverage, stock options etc.) received in a capacity as Director
    - Severance pay, annuity etc. in connection with directorship
    - Remuneration paid to a director on account of other functions e.g. as ordinary employee, adviser, consultant etc. not included



Dieter Ederhard Gustav AAR 235 ITR 698



**Questions**

**&**

**Answers**





## Annexures

## DPS- Article 15(2)(a)- 183 days rule- Comparison

Australia	Germany	UK	US	Norway
<p>' Notwithstanding the provisions of paragraph (1), remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if :</p> <p>(a) the recipient is present in that other State <b>for a period or periods not exceeding in the aggregate 183 days in a year of income of that other State</b></p>	<p>'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 :</p> <p>(a) the recipient is present in the other State <b>for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned</b></p>	<p>'Notwithstanding the provisions of paragraph 1 of this Article, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall not be taxed in that other State if :</p> <p>(a) he is present in the other State for a period or periods not exceeding <b>in the aggregate 183 days during the relevant fiscal year</b></p>	<p>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 :</p> <p>(a) the recipient is present in the other State for a period or periods <b>not exceeding in the aggregate 183 days in the relevant taxable year ;</b></p>	<p>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—</p> <p>(a) the recipient is present in that other State for a period or periods not exceeding <b>in the aggregate 183 days in any two consecutive years of income</b></p>



## DPS- Article 15(2) (b) & (C)- Comparison

Australia	Germany	UK	US	Norway
<p>(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and</p> <p><b>(c) the remuneration is not deductible in determining taxable profits of a permanent establishment or a fixed base</b> which the employer has in that other State.</p>	<p>(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and</p> <p><b>(c) the remuneration is not borne by a permanent establishment or a fixed base</b> which the employer has in the other State.</p>	<p>(b) the remuneration is paid by, or on behalf of, an employer who is not resident of that other State; and</p> <p><b>(c) the remuneration is not deductible in computing the profits of an enterprise chargeable to tax</b> in that other State.</p>	<p>(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State ; and</p> <p><b>(c) the remuneration is not borne by a permanent establishment or a fixed base or a trade or business</b> which the employer has in the other State.</p>	<p>(b) the remuneration is paid by, or on behalf of, an employer who is a resident of the State of which the recipient is a resident; and</p> <p><b>(c) the remuneration is not reasonably connected with the activities of a permanent establishment or a fixed base</b> which the employer has in the other State.</p>





# Director Fee- Comparison

Australia	Germany	UK	US	Norway
<p>Directors' fees and similar payments derived by a resident of one of the Contracting States as a member of the Board of Directors of a company which is a resident of the other Contracting State may be taxed in that other State.</p>	<p>Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.</p>	<p>Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.</p>	<p>Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.</p>	<ol style="list-style-type: none"> <li>1. Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors or of a similar organ of a company which is a resident of the other Contracting State may be taxed in that other State.</li> <li>2. Salaries, wages and other similar remuneration derived by a resident of a Contracting State in his capacity as an official in a top-level managerial position of a company which is a resident of the other Contracting State may be taxed in that other State.</li> </ol>

