

Individual ITR including Foreign Taxpayers



Bangalore Branch of SIRC of ICAI

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Outline



Taxability of Income



Income Tax return forms - Applicability and What's new?



Taxability of Income of Non Residents



Independent Personal Service



Dependent Personal Service

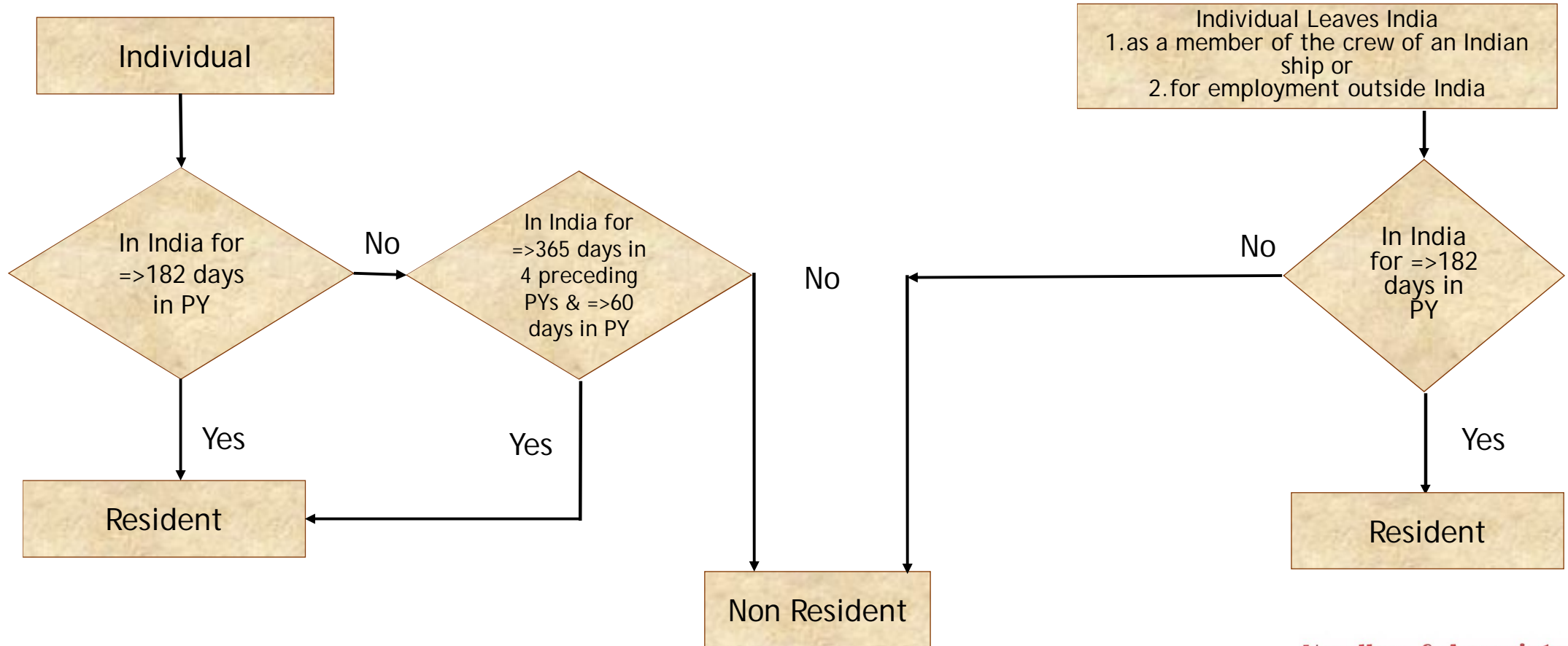


Q and A

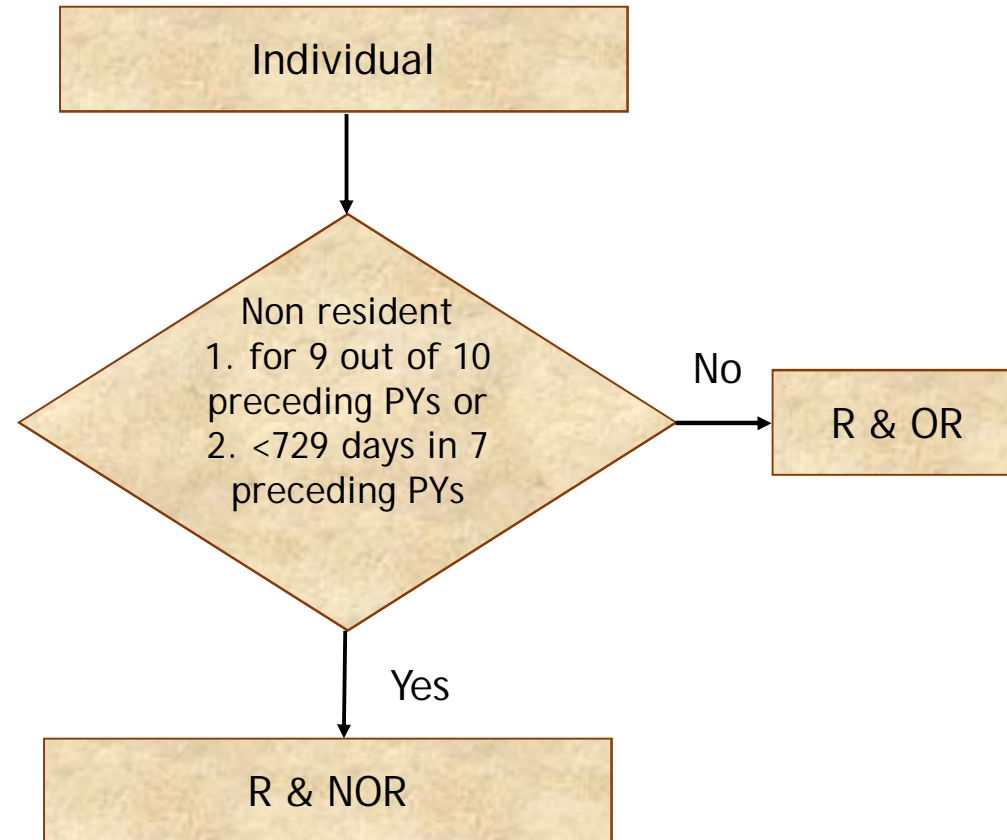
Taxability of Income



Section 6 - Residence in India (Individuals)



Section 6 - Residence in India (Individuals)



Section 5- Scope of Total Income

Particulars	Individuals		
	OR	NOR	NR
Income received or deemed to be received in India	Y	Y	Y
Income arises or deemed to arise in India	Y	Y	Y
Income accrues or deemed to accrue in India	Y	Y	Y
Income accrues or arises outside India	Y	N	N
Income accrues or arises outside India if it is derived from a business controlled in or profession set up in India	Y	Y	N

Section 7 – Income deemed to be received

- i. the annual accretion in the previous year to the balance at the credit of an employee participating in an RPF,
 - contributions made by the employer in excess of 12% of the salary, and
 - interest credited on the balance to the credit of the employee exceeding the rate exceeding as may be fixed by the Central Government in this behalf by notification in the Official Gazette,
- ii. the contribution made by the employer in the previous year, to the account of an employee under a pension scheme referred to in section 80CCD.



Income Tax return forms - Applicability and What's new?

139 - Return of Income

1

Mandates every person to file the ITR on or before the due date

3

Loss Return

4

Belated Return

5

Revised Return

Rule 12 - Return of income

- Rule 12 of IT Rules contains the various forms, its applicability and its manner of filing
- Rule 12 gets amended every year to introduce new forms with new content in line with what tax authorities deem relevant to source data from the tax payers
- It was always seen in the past that CBDT used to take considerable amount of time to notify the forms after the end of the year. Off late, the trend has been better
 - ✓ 2013 - 1st May 2013
 - ✓ 2014 - 1st April 2014
 - ✓ 2015 - 15th April 2015
 - ✓ 2016 - 30th March 2016
 - ✓ 2017 - 30th March 2017
 - ✓ 2018 - 3rd April 2018
 - ✓ 2019 - 1st April 2019



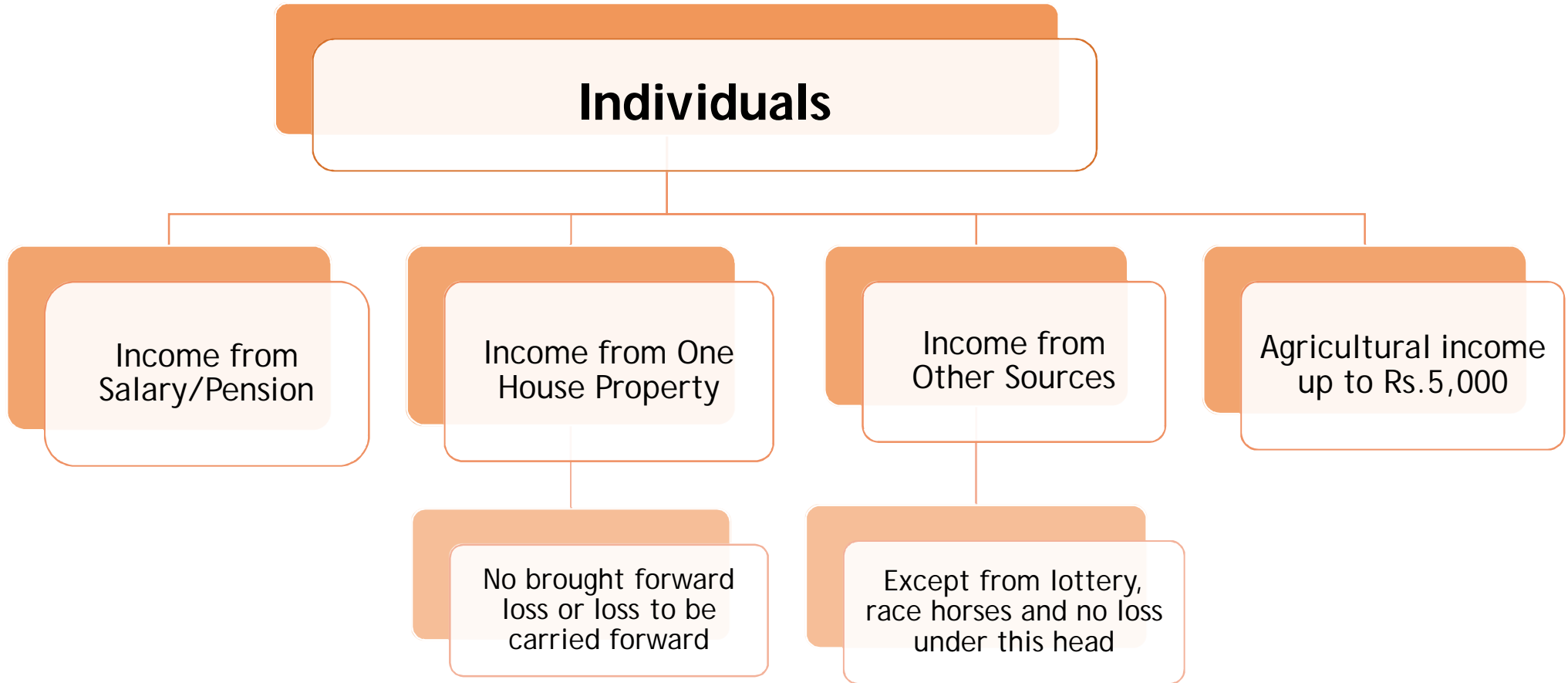
Rule 12 - Return of income

Person	Condition	Manner of furnishing return of income
Individual or Hindu undivided family	(a) Accounts are required to be audited under section 44AB of the Act;	Electronically under digital signature;
	(b) Where total income assessable under the Act during the previous year of a person, being an individual of the age of eighty years or more at any time during the previous year, and who furnishes the return in Form number SAHAJ (ITR-1) or Form number SUGAM (ITR-4)	(A) Electronically under digital signature; or (B) Transmitting the data electronically in the return under electronic verification code; or (C) Transmitting the data in the return electronically and thereafter submitting the verification of the return in Form ITR-V; or <u>(D) Paper form;</u>
	(c) In any other case	(A) Electronically under digital signature; or (B) Transmitting the data electronically in the return under electronic verification code; or (C) Transmitting the data in the return electronically and thereafter submitting the verification of the return in Form ITR-V

ITR Forms

ITR 1 (Sahaj)	Individuals being a resident (other than not ordinarily resident) having total income upto Rs.50 lakh, having Income from salaries, one house property, other sources (Interest etc.), and agricultural income upto Rs.5,000. Not for an individual who is either Director in a company or has invested in unlisted equity shares
ITR 2	Individuals and HUFs not having income from profits and gains of business or profession
ITR 3	Individuals and HUFs having income from profits and gains of business or profession
ITR 4 (Sugam)	Individuals, HUFs and Firms (other than LLP) being a resident having total income upto Rs.50 lakh and having income from business and profession which is computed under sections 44AD, 44ADA or 44AE. Not for an individual who is either Director in a company or has invested in unlisted equity shares
ITR 5	Persons other than,- (i) individual, (ii) HUF, (iii) company and (iv) person filing Form ITR-7
ITR 6	Companies other than companies claiming exemption u/s 11
ITR 7	Persons including companies who are required to furnish return u/s 139(4A) or 139(4B) or 139(4C) or 139(4D) or 139(4E) or 139(4F)

ITR - 1 (Sahaj)



ITR – 1 Not Applicable, if

Individual,

- Is a Not Ordinarily Resident or Non-Resident
- Has claimed relief 90 or 90A or 91
- Has agricultural income > INR 5,000
- Has Total Income > INR 50 lakhs
- Is a Director in a company
- Has invested in unlisted equity shares
- Has dividend from domestic companies in excess of INR 10 Lakhs
- has assets (including financial interest in any entity) located outside India
- Has income u/s 68/69/69A/69B/69C/69D



What's new ??

- Gross salary to be reported in ITR to match with the Gross salary mentioned in Form 16 by the employer.
- Standard deduction from salary u/s 16(ia)

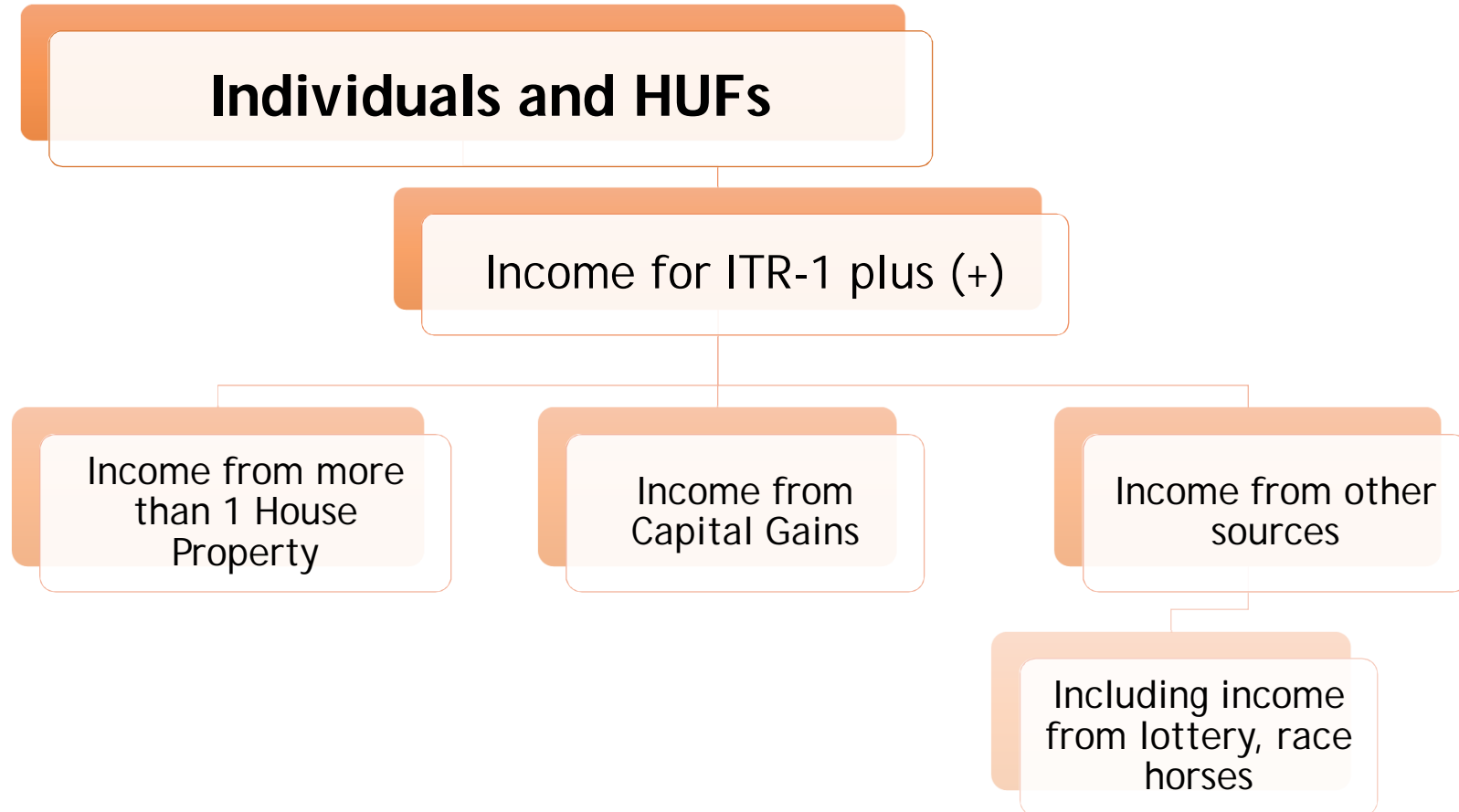
PART B GROSS TOTAL INCOME					Whole- Rupee(₹) only	
B1	i	Gross Salary (ia + ib + ic)			i	
SALARY / PENSION	a	Salary as per section 17(1)	ia			
	b	Value of perquisites as per section 17(2)	ib			
	c	Profit in lieu of salary as per section 17(3)	ic			
	ii	Less allowances to the extent exempt u/s 10 (drop down to be provided in e-filing utility)			ii	
	iii	Net Salary (i – ii)			iii	
	iv	Deductions u/s 16 (iva + ivb + ivc)			iv	
	a	Standard deduction u/s 16(ia)	iva			
	b	Entertainment allowance u/s 16(ii)	ivb			
	c	Professional tax u/s 16(iii)	ivc			
	v	Income chargeable under the head 'Salaries' (iii – iv)			B1	

What's new ??

- Education cess at 2% and Secondary and Higher Education cess at 1% is replaced by Health and Education cess at 4%
- Deduction to be allowed u/s 80TTB upto Rs. 50,000 to senior citizens
- Separate reporting of interest incomes

3	Income from Other Sources			0
	Sl.No.	Nature of Income	Description (If 'Any Other' selected)	Amount
	1	(Select)	Not Applicable	
	(Select)		Not Applicable	
		Interest from Savings Account		
		Interest from Deposit (Bank/Post Office/Cooperative Society)		
		Interest from Income Tax Refund		
		Family pension		
		Any Other		
	Less: Deduction u/s 57(iia) (In case of family pension only)			

ITR - 2



What's new ??

- Gross salary to be reported in ITR to match with the Gross salary mentioned in Form 16 by the employer.
- Standard deduction from salary u/s 16(ia)

Schedule S		Details of Income from Salary			
Name of Employer		Nature of employment (Tick) <input checked="" type="checkbox"/> <input type="checkbox"/> Govt. <input type="checkbox"/> PSU <input type="checkbox"/> Pensioners <input type="checkbox"/> Others		TAN of Employer (mandatory if tax is deducted)	
Address of employer		Town/City	State	Pin code/ Zip code	
SALARIES	1 Gross Salary (1a + 1b + 1c)				1
	a	Salary as per section 17(1) (drop down to be provided)	1a		
	b	Value of perquisites as per section 17(2) (drop down to be provided)	1b		
	c	Profit in lieu of salary as per section 17(3) (drop down to be provided)	1c		
	(Add multiple rows for Gross Salary in case of more than one employer)				
	2 Total Gross Salary (from all employers)				2
	3 Less allowances to the extent exempt u/s 10 (drop down to be provided in e-filing utility) (please refer instructions)				3
	4 Net Salary (2 - 3)				4
	5 Deduction u/s 16 (5a + 5b + 5c)				5
a	Standard deduction u/s 16(ia)	5a			
b	Entertainment allowance u/s 16(ii)	5b			
c	Professional tax u/s 16(iii)	5c			
6 Income chargeable under the Head 'Salaries' (4 - 5)				6	

What's new ??

- Following details of directorship to be furnished if the tax payer was director in a company at any time during the previous year.
 - ✓ Name of the Company
 - ✓ PAN of the Company
 - ✓ Whether shares are listed or unlisted
 - ✓ DIN
- Details to be furnished if the tax payer has held unlisted equity shares at any time during the previous year.

(i)	Whether you have held unlisted equity shares at any time during the previous year? (Tick) <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No												
	If yes, please furnish following information in respect of equity shares												
	Name of company	PAN	Opening balance		Shares acquired during the year					Shares transferred during the year		Closing balance	
			No. of shares	Cost of acquisition	No. of shares	Date of subscription / purchase	Face value per share	Issue price per share (in case of fresh issue)	Purchase price per share (in case of purchase from existing shareholder)	No. of shares	Sale consideration	No. of shares	Cost of acquisition
	1	2	3	4	5	6	7	8	9	10	11	12	13

What's new ??

- About the tenant
 - ✓ Furnishing of PAN of tenant is mandatory, if tax is deducted under section 194-IB.
 - ✓ Furnishing of TAN of tenant is mandatory, if tax is deducted under section 194-I.
- Separate reporting of interest income from saving bank accounts, deposits (i.e., fixed deposit, etc.), income tax refund, in the nature pass through income and others.
- Education cess at 2% and Secondary and Higher Education cess at 1% is replaced by Health and Education cess at 4%.
- Jurisdiction need not be mentioned in the ITR

What's new ??

- Information of buyer is required to be furnished in case of transfer of immovable property.

f	In case of transfer of immovable property, please furnish the following details (see note)						
	SL No.	Name of Buyer	PAN of Buyer	Percentage share	Amount	Address of Property	PIN Code
	1						
	2						
<div>Add Buyer</div>							

- Exemption u/s 54EC is allowed only if LTCG arising from transfer of an immovable property, being land or building or both, is invested in specified bonds. The same changes is updated in the ITR.

What's new ??

- Actual sale consideration shall be deemed to be the full value of consideration if stamp duty value does not exceed 105% of actual sale consideration.

B	Long-term capital gain (LTCG) <i>(Sub-items 4, 5, 6, 7 & 8 are not applicable for residents)</i>							
1	From sale of land or building or both <i>(fill up details separately for each property)</i>							
a	i	Full value of consideration received/receivable				ai		
	ii	Value of property as per stamp valuation authority				aii		
	iii	Full value of consideration adopted as per section 50C for the purpose of Capital Gains [in case (aii) does not exceed 1.05 times (ai), take this figure as (ai), or else take (aii)]				aiii		
b	Deductions under section 48							
	i	Cost of acquisition with indexation				bi		
	ii	Cost of Improvement with indexation				bii		
	iii	Expenditure wholly and exclusively in connection with transfer				biii		
	iv	Total (bi + bii + biii)				biv		
c	Balance (aiii – biv)					1c		
d	Deduction under section 54/54B/54EC/54F/54GB <i>(Specify details in item D below)</i>					1d		
e	Long-term Capital Gains on Immovable property (1c - 1d)							B1e
f	In case of transfer of immovable property, please furnish the following details (see note)							
	S.No.	Name of buyer(s)	PAN of buyer(s)	Percentage share	Amount	Address of property	Pin code	

What's new ??

- Long term capital gain taxable @10%

4	From sale of equity share in a company or unit of equity oriented fund or unit of a business trust on which STT is paid under section 112A			
	a	Full value of consideration	4a	
	b	Deductions under section 48		
	i	Cost of acquisition without indexation (higher of iA and iB)	bi	
		A Cost of acquisition	iA	
		B If the long term capital asset was acquired before 01.02.2018, lower of B1 and B2	iB	
		1 Fair Market Value of capital asset as per section 55(2)(ac)	B1	
		2 Full value of consideration	B2	
	ii	Cost of improvement without indexation	bii	
	iii	Expenditure wholly and exclusively in connection with transfer	biii	
	iv	Total deductions (bi + bii +biii)	biv	
	c	Balance (4a – biv)	4c	
	d	Less- LTCG threshold limit as per section 112A (4c – Rs. 1 lakh)	4d	
	e	Deduction under sections 54F (Specify details in item D below)	4e	
	f	Long-term Capital Gains on sale of capital assets at B4 above (4d – 4e)		B4f

What's new ??

- Additional details are to be filled if the net agricultural income is more than Rs.5Lakh

EXEMPT INCOME	3	i	Gross Agricultural receipts (other than income to be excluded under rule 7A, 7B or 8 of I.T. Rules)					
		ii	Expenditure incurred on agriculture					
		iii	Unabsorbed agricultural loss of previous eight assessment years					
		iv	Net Agricultural income for the year (i – ii – iii) (enter nil if loss)				3	0
		v	In case the net agricultural income for the year exceeds Rs.5 lakh, please furnish the following details					
		SL No.	Name of district along with pin code in which agricultural land is located (a)		Measurement of agricultural land in Acre	Whether the agricultural land is owned or held on lease	Whether the agricultural land is irrigated or rain-fed	
			Name of district	Pin code	(b)	(c)	(d)	
		1				(Select)	(Select)	
		2				(Select)	(Select)	
		<div>Add Rows</div>						

What's new??

For Non residents:

A. In case if a tax payer(individual) is a Non resident, following details to be provided:

- (a) Jurisdiction of residence
- (b) Taxpayer Identification Number

B. In case if a tax payer (individual) is a Citizen of India or a Person of Indian Origin (PIO), following details to be provided:

- (a) Total period of stay in India during the previous year (in days)
- (b) Total period of stay in India during the 4 preceding years (in days)

Foreign Tax Credit

- Governed by Rule 128 of Income Tax Rules, 1962
- Foreign tax means taxes covered in the DTAA of the respective country
- FTC is available for resident only on Foreign taxes paid by them in the source country
- Credits are available in the year in which such incomes are offered to tax in India
- The credit is available against tax, surcharge and cess and not against interest, penalty or fees
- Disputed foreign taxes are not available as a credit
- FTC is restricted to minimum of FT paid or tax on India on such income
- FTC is also available on MAT and AMT
- FTC is available on the basis of:
 - Statement of income and tax from such foreign country and furnishing the details in Form 67
 - Statement of tax deduction, if any issued by the deductor or from tax authority of such country
- Form 67 is to be filed online before the due date of filing of return of income

Some pre-requisites for filing Individual tax returns

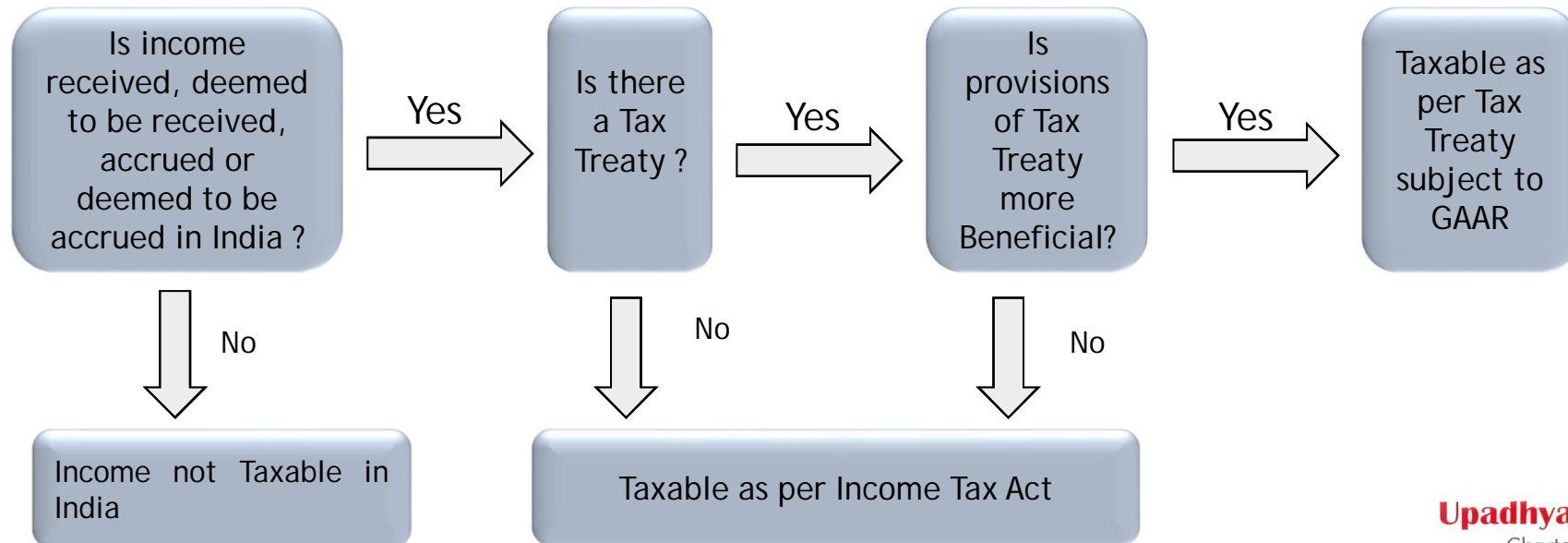
- Determine all the **sources of income** that such individual has
- Compute the **total income** after availing all the **tax benefits, exemptions and deductions**
- Choose the correct **ITR form** and fill the details
- Check **Form 26AS** to confirm that all the tax credits, which ought to have come is appearing
- Register the PAN @ the IT Portal, if not done
- Provide the **email IDs and phone numbers** at IT portal and Income Tax returns of the clients to ensure that the communications go to them directly
- Update the **address details** in the profile section completely
- Link Aadhar and PAN, to e-verify return using Aadhar OTP
- **Pre-validate the bank account**, where you wish to receive the refunds
- File the return after payment of tax
- Ensure to either e-verify the return or send signed ITR-V to complete the process
- Track the processing of returns and preserve the Intimation u/s 143(1)
 - In case of differences in 143(1), ensure to file 154 application
 - In case notice u/s 139(9) is issued, make a suitable response immediately



Taxability of Income of Non Residents

Taxability of Income of Non-Residents

- In relation to the assessee to whom the agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to that assessee
- Any term if not defined in the Act, Agreement shall have the meaning assigned to it in the notification issued by the Central Government.
- To claim the relief, every non resident has to obtain the certificate of residence from the country of residence



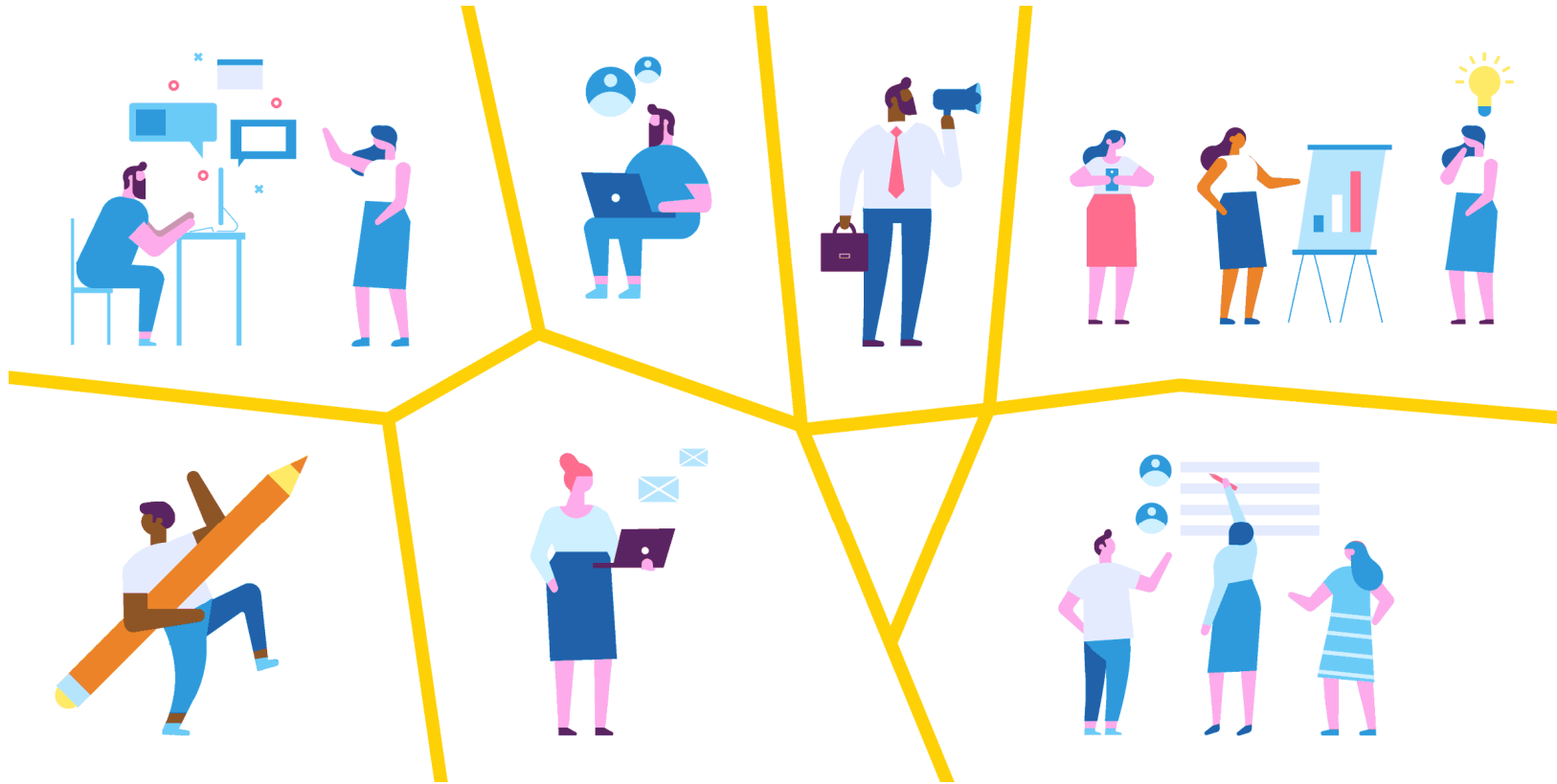
Filing of returns by Non-Residents

Situation	Filing of return in India
If Non resident earns income which are not liable for taxation in India because they are outside of scope of total income	Not required
If the income falls under the purview of section 5 r.w.s. 9 of the Act and is exempt because of tax treaty benefit	Return has to be filed if taxable income exceeds the basic exemption limit
If the income falls under the purview of section 5 r.w.s 9 of the Act and is taxable at gross based taxation	Return has to be filed if taxable income exceeds the basic exemption limit

Taxability of Income of Non-Residents

- The following are the possible incomes that could be taxable to Non-resident Individuals:
 - Interest income
 - Dividend income
 - Income from Capital gains
 - Income from Rentals
 - Dependent Personal Services (DPS)
 - Independent Personal Services (IDPS)
- Rental and other similar income from real estate is taxed in the source country, where the real estate is located
- Capital gains from immovable property is generally taxed in the source state
- Capital gains from other properties could have different rules governing their taxation in the DTAA
- Interest and Dividend Incomes can be taxed both in sources and residence country. However, each tax treaty provides for a reduced rate of taxation in the source state
- Further, the treaty will also have provisions for providing double tax relief, which are subject to provisions in the domestic law of each country
- DPS and IDPS are slightly more peculiar and have detailed articles in the treaty

Independent personal services



IDPS – Model Conventions and Tax treaties

- Typically covered in Article 15 or in some case in Article 14
- It is Article 14 in UN Model Convention
- Deleted from OECD Model convention in the year 2000

India - USA (Article 15)

1. Income derived by a person who is an **individual or firm of individuals (other than a company)** who is a resident of a Contracting State from the performance in the other Contracting State of professional services or other independent activities of a similar character shall be taxable only in the first-mentioned State except in the following circumstances when such income may also be taxed in the other Contracting State :

(a) if such person has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or

(b) if the person's stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 90 days in the relevant taxable year.

2. Professional services defined

India - UK (Article 15)

1. Income derived by **an individual, whether in his own capacity or as a member of a partnership**, who is a resident of a Contracting State in respect of professional services or other independent activities of a similar character may be taxed in that State. Such income may also be taxed in the other Contracting State if such services are performed in that other State and if :

(a) he is present in that other State for a period or periods aggregating to 90 days in the relevant fiscal year ; or

(b) he, **or the partnership**, has a fixed base regularly available to him, or it, in that other State for the purpose of performing his activities ; but in each case only so much of the income as is attributable to those services.

2. For the purposes of paragraph 1 of this Article an individual who is a member of a partnership shall be regarded as being present in the other State during days on which, although he is not present, another individual member of the partnership is so present and performs professional services or other independent activities of a similar character in that State.

3. Professional services defined

Meaning of IDPS

- IDPS include:
 - a. Professional Services or
 - b. Other Independent activities of a similar character
- The term “professional services” is defined in most tax treaties to especially include, ‘independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentist and accountants.
- The activities mentioned in the definition are only illustrative and not exhaustive
- A person providing professional services is generally understood to possess:
 - An advanced level of knowledge acquired through formal training in the chosen practice area
 - Specialised skill sets and experience acquired through dedicated practice in the chosen area and
 - Accreditation to/a certificate of practice issued by a relevant professional body

Taxation of IDPS

IDPS are taxable in the country of residence of the service provider. Such services may also be taxable in the source country in the following situations:

- If services being attributed to **fixed place** available to the taxpayer in the source country; or
- on presence by the taxpayer for a **minimum number of days** in the source country; or
- in some cases, if the fees being borne by a resident of or a permanent establishment (PE) or a fixed place in the source country. (Ex: Zambia, Canada treaty)

Types of person covered

- UN Commentary
 - IDPS is attracted only when an individual renders services and not otherwise.
 - Companies and other body corporates are covered within article 7, subject to existence of a PE.
- Prof. Klaus Vogel's commentary - companies and other bodies of persons may be capable of deriving income from professional services.
- The Hon'ble Mumbai Tribunal in the case of Christiani & Nielsen Copenhagen vs. ITO (1991) 39 ITD 355 (Mum.) with reference to India-Denmark Tax Treaty held that:
 - The words 'he' and 'his presence for 183 days' and the expression 'remuneration for labour or personal services' suggest that, Article 14 of the said Treaty refers only to a living person (that is individual) and not an artificial person such a company.
 - The term 'personal' has been used with reference to individual/ human beings
- Conclusion: whether IDPS would cover services rendered by individuals, partnership firms as well as companies would depend really upon the language in the relevant tax treaty.

Fixed base

OECD while deleting the Article 14 observed that there are only theoretical difference between the term 'fixed place of business' and 'fixed base'. However, a few legal precedents suggests that there are considerable difference between the two.

Particulars	Fixed Base	Permanent Establishment (PE)
General Meaning	Place akin to professional chamber, from where the person can conduct his IDPS	A fixed place from where the business is carried on
Definition	Not defined in the treaty	Defined in Article 5 of most of the treaties
Relevance	In computing the income form IDPS	In computing business profits (Article 7)
Availability/Regularity in usage of place	Should be regularly available to the service provider	Usage on a fairly regular basis
Physical presence of Service provider	Required Need not only be of the service provider. But includes that of his assistants, juniors who are able to accomplish the work either in part/full	Not required. PE can exists in the form of machines/pipelines etc.

Short stay exemption

- If the taxpayer's period of stay in India is in excess of the stipulated period, (90 days or 120 days or 183 days, as the case may be), the income derived from the services would be taxable in host country. However, if the stay for shorter than that IDPS is not liable for taxation in host country
- Some key issues as highlighted by Mumbai ITAT in Clifford Chance vs DCIT 82 ITD 106
 - In computing the period of stay in the context of a partnership firm, besides considering the stay of partners in the source country, **the stay of employees** is also to be considered.
 - Further, in calculating the period of stay by the taxpayer, if there are **multiple periods of stay** in the twelve-month period, these are to be aggregated.
 - However, in case of a partnership firm, where more than one person may be present in the source country on the same day(s) ("common days"). Each **common days** should be counted only once.
 - Where any visit may be for purposes other than for professional purposes, the period of such visits are **to be excluded** in computing the period of stay subject to the evidence for such fact.



Dependent Personal Services



DPS (Article 16) in India UK DTAA

1. Subject to the provisions of Article 17 (Directors' fees), 18 (Artistes and athletes), 19 (Governmental remuneration and pensions), 20 (Pensions and annuities), 21 (Students and trainees) and 22 (Teachers) of this Convention, 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 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 :

(a) **he is present in the other State** for a period or periods not exceeding in the aggregate 183 days during the relevant fiscal year;

(b) **the remuneration is paid** by, or on behalf of, an employer who is not resident of that other State; and

(c) the **remuneration is not deductible** in computing the profits of an enterprise chargeable to tax in that other State.

3. Notwithstanding the preceding provisions of this Article, remuneration in respect of an employment exercised aboard a ship or aircraft in international traffic may be taxed in the Contracting State of which the person deriving the profits from the operation of the ship or aircraft is a resident.

Comparison of treaties

India - Singapore (Article 15)

1. Subject to the provisions of Articles 16, 18, 19, 20 and 21, 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 the relevant fiscal year** ; 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 or a fixed base which the employer has in the other State.

3. In the case of a recipient who satisfies all the conditions under subparagraphs (a), (b) and (c) of paragraph 2, if his remuneration is deductible as an expense against fees for technical services (dealt with under Article 12) derived by his employer and the employer has no permanent establishment in the other Contracting State, the remuneration may, notwithstanding the provisions of paragraph 2, be taxed in that State. In such case, the tax so charged shall not exceed 15 per cent of the gross amount of the remuneration.

4. Taxation of remuneration in respect of an employment exercised aboard a ship or aircraft operated in international traffic

India - Australia (Article 15)

1. Subject to the provisions of Articles 16, 17, 18, 19 and 20, salaries, wages and other similar remuneration derived by an individual who is a resident of one of the Contracting States 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 from that exercise may be taxed in that other State.

2. 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 :

- (a) the recipient is present in that other State for a period or periods not exceeding in the aggregate 183 days in a **year of income** of that other State;
- (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and
- (c) the remuneration is not deductible in determining taxable profits of a permanent establishment or a fixed base which the employer has in that other State.

3. Taxation of remuneration in respect of an employment exercised aboard a ship or aircraft operated in international traffic

Scope and Applicability of DPS

- Typically Article 15 or 16
- OECD Model Convention calls it as 'Income from Employment'
- Any remuneration or emolument earned while exercising the employment by the employee.
- The word 'other similar remuneration' is not defined in the treaty. It needs to be understood as per the Domestic tax laws.
- All emoluments received by reason of employment are covered with the following exceptions carved out in the OECD model treaty:
 - Director's fees (Article 16)
 - Pension (Article 18)
 - Government Service (Article 19)
- Some treaties provide for exception in respect of payments to artists, sportsmen, professors, teachers and research scholars even if they are in employment of the payer, as they are covered by other Articles

Employer-Employee Relationship

- As per Prof Vogel's commentary - "An employer is someone to whom an employee is committed to supply his capacity to work and under whose direction the latter engages in his activities and whose instructions he is bound to obey."
- Clarification of the scope of para 2 of Article 15 of Model tax Convention 2010 issued by the OECD recommends that the following factors are to be considered for determining who the real employer is.
 - (A) One of the factors of relevance highlighted is to examine:
 - (a) Whether the service rendered by the employee constitute an **integral part of the business of the enterprise** to which he provides the services;
(or)
 - (b) Whether he performs the service which is the **core function** of the organization by whom the person is deputed.

Employer-Employee Relationship

(B) The following factors are also to be considered for determining who the **real employer** is

- Who has the **authority to instruct** the individual regarding the manner in which the work has to be performed;
- Who **controls and has responsibility for the place** at which the work is performed;
- The **remuneration** of the individual is **directly charged by the formal employer** to the enterprise to which the services are provided;
- Who **puts the tools and materials necessary for the work** at the individual's disposal;
- Who **determines the number and qualifications** of the individuals performing the work;
- Who **has right to select** the individual who will perform the work and **terminate** the contractual arrangement entered into with that individual for that purpose;
- Who has **right to impose disciplinary sanctions** related to the work of that individuals;
- Who **determines the holidays and work schedule** of that individual.

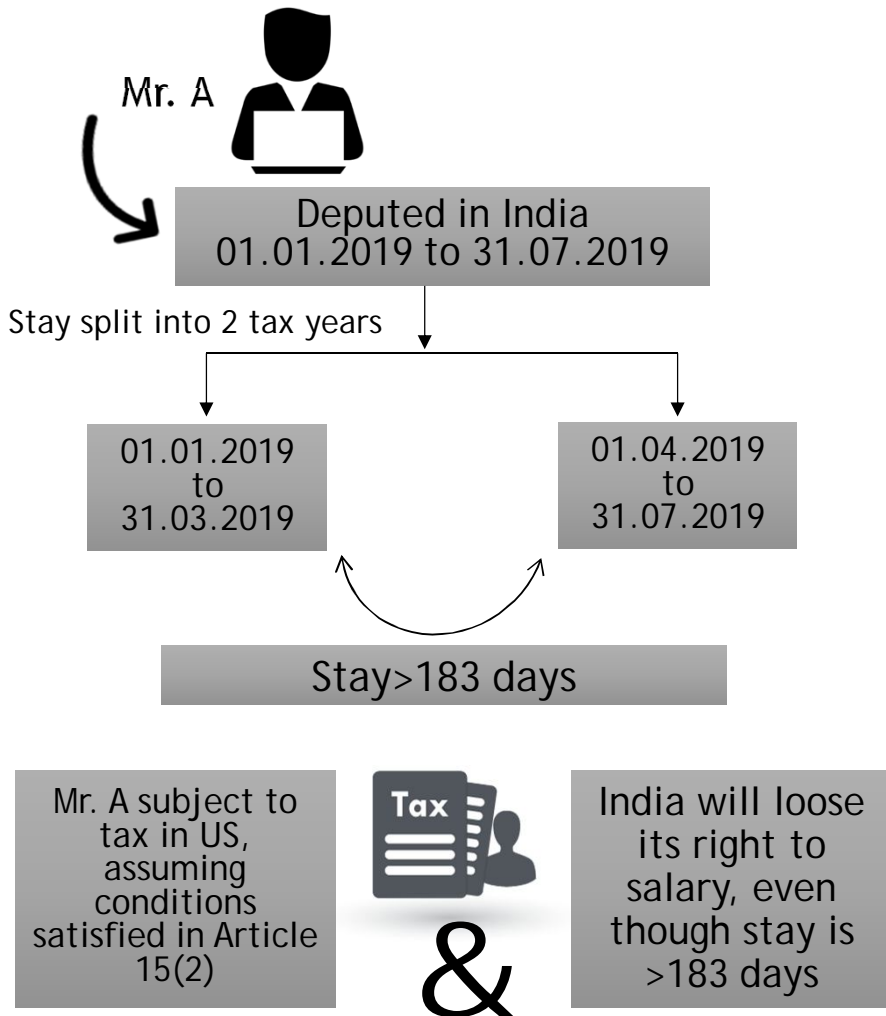
Taxation of DPS

- Treaty allocates right to tax the salary only to the country of residence of the employee.
- Treaty also allocates the right to tax salary income to the source country to the extent, it relates to services rendered in source country subject to conditions of short stay and source of payment

Key issues: Short Stay Exemption

- As recommended in UN Model Convention, following are the inclusions for calculating the no. of days of stay:
 - Physical presence of the person in the source country irrespective of the purpose
 - Period of holidays/relaxation
 - Voluntary or non voluntary interruptions
 - Days lost due to factors beyond/within the control of the employee
 - Part of a day
 - Day of arrival and departure
- Exclusions:
 - Time spent in source country to prepare up for the employment should not be considered.
 - Days spent in the source country in transit in the course of trip between two points outside the source country
- Generally most of the treaties contain short stay exemption for “in aggregate of 183 days in relevant taxyear/fiscal year” with the exception to India Sweden treaty where it is said that “any twelve-month period commencing or ending in the fiscal year concerned”

Short Stay Exemption – Possible scenario



- Mr. A is deputed to India for the period from 1 January 2019 to 31 July 2019.
- Mr. A's stay will get split in two tax year; i.e.;
 - a) period from 01.01.2019 to 31.03.2019 will be in the tax year 2018-19 and
 - b) period from 01.04.2019 to 31.07.2019 will be in the tax year 2019-20
- In both the tax years, his stay doesn't exceed more than 183 days.
- Mr. A would be subject to tax only in US [assuming that all the other conditions are satisfied, as per article 15(2)] and
- India will lose it's right to tax such salary even though Mr. A has stayed in India for more than 183 days.

Short Stay Exemption - Possible scenario

As a preventive measure



The model convention was modified to Rolling Period Concept

Present in the country for >183 days

During any 12 month period commencing or ending in the relevant fiscal year

A's stay in India < 183 for tax year **2018-19**

A's stay in India < 183 days for tax year **2019-20**

During these 24 months, if his stay > 183 days



Liable to pay tax in respective Assessment Years

- To prevent such non-taxation, the UN model convention was modified to rolling period concept i.e. a person is present in the source country for more than 183 days during any twelve month period commencing or ending in the relevant fiscal year
- Accordingly, if during these 24 months his stay exceeds 183 days, he would be liable to pay tax in the respective assessment year on his salary income.
- Threshold to be counted with respect to each visit in the relevant previous year and the charge is attracted if threshold of 183 days is crossed in respect of any given date.
- Some of the treaties signed by India off late, has such clause

"Borne by PE"

Based on the various Indian judicial pronouncements, the term 'borne by' PE has different meanings

- Allocable - functionally remuneration is attributed to PE irrespective of the tax deductibility due to the nature of the remuneration.
- Economically incurred - all expenses economically incurred rather than being merely tax deductible
- Commercially liable/ actually paid - either person liable to pay but paid by other person or actual sum paid by him in discharge of the liability
- Deductible - has a direct and proximate connection with the business receipts of the PE and is a deductible business expenditure or is liable to be deducted by the PE whether actually paid or not by the PE. If it is paid by other person but reimbursed by a PE, it will also be considered as borne by PE.
- Deducted - remuneration to employees is deducted in computing the profit of a PE even if taxable profits are determined on a deemed basis on gross income
- Actually paid - remuneration is actually paid by the PE.



Questions, if any



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