Income from Personal, Individual Services

ARTICLE 14
INDEPENDENT PERSONAL SERVICES

- This article is concerned with professional services and other services of an independent character. Article 14 applies to a service provider who bears the risk or rewards of his services.
- In principle, only the state of residence has right to levy tax on such income, even if the underlying activity is performed in the state of source of income.
- However, if the activity in the state of source of income is supported by a fixed base regularly available to him for the purpose of performing his activities than it will also be taxable in the state of source of income but only so much of it as is attributable to that fixed base.
- The term "fixed base" as used in Article 14 is similar or analogous to that PE even though the term "fixed base" is not defined. There are no intended differences between the concepts of PE and "fixed base" . Generally all the tests relevant for determining the existence of a PE would be relevant for ascertaining the existence of "fixed base".
- On a plain reading, the term "fixed base" denotes a centre of activity having a fixed or permanent character and in broad terms, it implies a place from where a person can conduct his independent professional activities.
- The protocol to India-Belarus Tax treaty provides that the term "fixed base" includes a fixed place such as an office, a room or any other place regularly available to him through which the activity of a person performing independent personal services is wholly or partly carried on.

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- While the meaning of term "fixed base" is analogous to PE but it is not identical. A PE is constituted only if a business is actually carried on in a fixed place of business. However there is no such stipulation in relation to a "fixed base" .
- A "fixed base" includes a doctor's clinic, a lawyer's chamber or an architect's office.
- A fixed base should be regularly available. Even though it is not defined but it encompasses a place which is at the disposal of a person to perform service in the state of source. While it should be regularly available but it need not be regularly used.
- Hon'ble Bombay High Court in the case of Clifford Chance *v.* Deputy Commissioner of Income-tax, Circle 2(6), Mumbai - [2009] 176 Taxman 458 (Bombay) had held that for a non-resident to be taxed in India on income for services, two conditions must be fulfilled simultaneously, i.e., services, which are source of income sought to be taxed in India, must be (i) utilized in India; and (ii) rendered in India.
- It will be deemed that there is a fixed base in the state of source if an individual is present in the State of source for a period or periods aggregating to 90 days or 183 days in the relevant fiscal or taxable year.
- Taxability of income as is attributable to activity in the state of source will only be taxable

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- Independent Personal Services excludes:
  - Industrial or commercial activities;
  - Services performed by an employee who is covered by Article 15 (Dependent Personal Service)
  - Independent activities which are covered by more specific provisions of Article 16 and 17.
  - Payment to an enterprise in respect of furnishing of the services of employees or other personnel which are subject to article 5.
- Hon'ble Bombay High Court in the case of Clifford Chance *v.* Deputy Commissioner of Income-tax, Circle 2(6), Mumbai - [2009] 176 Taxman 458 (Bombay) had held that for a non-resident to be taxed in India on income for services, two conditions must be fulfilled simultaneously, i.e., services, which are source of income sought to be taxed in India, must be (i) utilized in India; and (ii) rendered in India.
- If the main services were rendered in India and some minor work was done outside India, which was only of allied and incidental nature than the entire income is exigible to tax in India.
- It was held by Hon'ble Mumbai Tribunal in the case of **Clifford Chance, United Kingdom *v.* Deputy Commissioner of Income-tax -** [2002] 82 ITD 106 (MUM.) that if the services were rendered outside India, it was incumbent on the part of the assessee to establish beyond the shadow of doubt that how and where such services were rendered. If assessee proves that it rendered services outside India, its income to that extent can be excluded while computing its total income for determining tax payable in India.
- The amount of reimbursement of expenditure could not be treated as the income of the assessee.

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- Article 14 applies to an individual whether in his own capacity or as a member of a partnership or firm of individuals (other than a company) depending upon the clause of DTAA.
- It was held in the case of Linklaters LLP *v.* Deputy Commissioner of Income-tax (IT), Circle-3(1)(2), Mumbai by Hon'ble Mumbai Tribunal reported in [2018] 97 taxmann.com 464 (Mumbai - Trib.) that since article 15 of India-UK DTAA applies to determine taxable income in hands of individual and not other persons, assessee being a partnership firm, impugned amount of fee received by assessee for rendering legal advisory services was not taxable in India. Article 15 of India-UK DTAA states that it applied an individual, whether in his own capacity or as a member of a partnership.
- It was held by Hon'ble Mumbai Tribunal in the case of Deputy Director of Income-tax (International Taxation)-4(1), Mumbai *v.* Zee Telefilms Ltd - [2017] 83 taxmann.com 14 (Mumbai - Trib.) that benefit of Indo-UK treaty is available to partnership firm of solicitors registered in UK even though firm is not recognized as taxable entity under taxation provisions of UK.
- It was held by Hon'ble Mumbai Tribunal in the case of Clifford Chance, United Kingdom *v.* Deputy Commissioner of Income-tax - [2002] 82 ITD 106 (MUM.) that a partnership firm can very well execute the contractual duty by sending solicitors who are employed in the firm. The presence of the partner solicitor can just be avoided to hoodwink the cause of revenue. In our opinion the term 'member' as is used in Article 15 of the DTA is NOMEN GENERALISSIMUM (term of most general meaning). Taking into consideration the entire conspectus of facts we hold that lawyers representing the firm as employee also comes within the ambit of the term 'member'.

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- It was held by Hon'ble Hyderabad Tribunal in the case of Spectrum Power Generation Ltd. *v.* Assistant Commissioner of Income-tax, Circle- 3 (2), Hyderabad - [2017] 77 taxmann.com 118 (Hyderabad - Trib.) that Commissioner (Appeals) made a mistake in calculating days by including day of arrival and day of departure also for to ascertain period of stay of foreign consultant in India and one day was to be excluded for each seven trips and, thus, period of stay would come to eighty six days i.e., less than ninety days.
- It was held by Hon'ble Mumbai Tribunal in the case of Clifford Chance, United Kingdom *v.* Deputy Commissioner of Income-tax - [2002] 82 ITD 106 (MUM.) that multiple counting of the common days is to be avoided so that the days when two or more partners were present in India, together, are to be counted only once. Multiple counting would lead to absurd results. For example, if 20 partners were present in India together for 20 days in one fiscal year, multiple counting would result in 400 days. There cannot be more than 365 days in a year. Therefore this system of multiple counting leads to absurdity. Therefore it should be avoided.
- Business promotional visits should be considered for computing number of days within the meaning of article 15 of the DTA.

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- It was held by Hon'ble Mumbai Tribunal in the case of Outotec India (P.) Ltd. *v.* Assistant Commissioner of Income-tax, Circle 13(1), New Delhi - 2015] 59 taxmann.com 108 (Delhi - Trib.) that Supervisory services rendered by Finnish engineers independently in connection with erection and commissioning of plant in India would fall within domain of 'Professional services' and engineers whose presence in India was less than 90 days would not be changeable under article 15 notwithstanding its taxability under section 9(1)(vii) i.e. 'fees for technical services'.
- It was held by Hon'ble Mumbai Tribunal in the case of Deputy Commissioner of Income-tax, Cir. 6 (1), Mumbai *v.* ABC Bearing Ltd.- [2017] 78 taxmann.com 62 (Mumbai - Trib.) that when in terms of relevant clauses of DTAA between India-Italy and India-Japan, where payments fall within purview of Independent Personal services then, even if, they are treated as Fees for technical fee or Fees for included services, such income of non-resident shall be liable to be taxed under Article governing Independent Personal services and not as Fee for technical services.
- It was held by Hon'ble Ahmedabad Tribunal in the case of Income-tax Officer (International Taxation)-I, Ahmedabad *v.* Susanto Purnamo - [2016] 73 taxmann.com 108 (Ahmedabad - Trib.) that Software development services rendered by assessee, resident of US, to design, build and maintain a complete video streaming website and all of its administrative applications to Indian company are in nature of professional services specifically covered by article 15 of DTAA between India and USA.

ARTICLE 15
DEPENDENT PERSONAL SERVICES

- Salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in the country of residence.
- However such income is taxable in the State where the employment is actually exercised subject to satisfaction of following three conditions:-
  - The period of stay in country of employment exceeds in the aggregate 183 days or more during the relevant fiscal year; and
  - The remuneration is paid by, or on behalf of, an employer who is resident of the state of source or the remuneration is borne by a permanent establishment or a fixed base or a trade or business which the employer has in the the state of source and
  - The remuneration is deductible in computing the profits of an enterprise chargeable to tax in the state of source. (UK Treaty)
- The expression "exercise" means "perform, carry out". Thus employment exercised means services performed and employment is exercised at a place where the employee performs services, that is, the place where he is physically present. The place where the result of his work is exploited is immaterial.
- The term "salaries, wages and other similar remuneration" to include benefits in kind received in respect of an employment (e.g. stock-options, the use of a residence or automobile, health or life insurance coverage and club memberships).

ARTICLE 15
DEPENDENT PERSONAL SERVICES

- Although various formulas have been used by member countries to calculate the 183 day period, there is only one way which is consistent with the wording of this paragraph: the "days of physical presence" method. The application of this method is straightforward as the individual is either present in a country or he is not.
- Under this method the following days are included in the calculation: part of a day, day of arrival, day of departure and 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 (unless they prevent the individual from leaving and he would have otherwise qualified for the exemption) and death or sickness in the family.
- However, days spent in the State of activity in transit in the course of a trip between two points outside the State of activity should be excluded from the computation.
- It follows from these principles that any entire day spent outside the State of activity, whether for holidays, business trips, or any other reason, should not be taken into account.
- A day during any part of which, however brief, the taxpayer is present in a State counts as a day of presence in that State for purposes of computing the 183 day period.

ARTICLE 16
DIRECTORS' FEES

- 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 the state of residence of the company.
- It is immaterial where the services are performed.
- The term "fees and other similar payments" to include benefits in kind received by a person in that person's capacity as a member of the board of directors of a company (e.g. stock-options, the use of a residence or automobile, health or life insurance coverage and club memberships). It will include sitting fees for attending the meeting of Board of Directors or a committee of the directors.
- A member of the board of directors of a company often also has other functions with the company, e.g. as ordinary employee, adviser, consultant, etc. It is clear that the Article does not apply to remuneration paid to such a person on account of such other functions. It covers remuneration in the capacity as a director.
- Article 16 does not cover remuneration paid to Managing Director which will be covered in Article 15. it encompasses non-employment remuneration of a director.
- In some countries organs of companies exist which are similar in function to the board of directors. If DTAA includes such organs of companies under a provision corresponding to Article 16 than it will be taxable as Director's fees.

ARTICLE 18
INCOME EARNED BY ENTERTAINERS AND ATHLETES

- Paragraph 1 provides that artistes and sportsmen who are residents of a Contracting State may be taxed in the other Contracting State in which their personal activities as such are performed, whether these are of a business or employment nature.
- It is not possible to give a precise definition of "artiste", but paragraph 1 includes examples of persons who would be regarded as such. These examples should not be considered as exhaustive. It includes entertainer such as a theatre, motion picture, radio or television artiste, or a musician.
- However, it does not extend to a visiting conference speaker or to administrative or support staff (e.g. cameramen for a film, producers, film directors, choreographers, technical staff, road crew for a pop group etc.).
- An individual may both direct a show and act in it, or may direct and produce a television programme or film and take a role in it. In such cases it is necessary to look at what the individual actually does in the State where the performance takes place. If his activities in that State are predominantly of a performing nature, the Article will apply to all the resulting income he derives in that State. If, however, the performing element is a negligible part of what he does in that State, the whole of the income will fall outside the Article. In other cases an apportionment should be necessary.

ARTICLE 18
INCOME EARNED BY ENTERTAINERS AND ATHLETES

- Whilst no precise definition is given of the term "sportsmen" it is not restricted to participants in traditional athletic events (e.g. runners, jumpers, swimmers). It also covers, for example, golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers.
- The Article also applies to income from other activities which are usually regarded as of an entertainment character, such as those deriving from billiards and snooker, chess and bridge tournaments.
- Paragraph 2 states that where income arising from personal by an entertainer or athlete does not accrue to that entertainer or athlete himself but to another person, that income may, notwithstanding the provisions of Articles 7 (Business profits), 15 (Independent personal services) and 16 (Dependent personal services) of the DTAA will be taxed in the state of performance in the hands of person receiving the remuneration. It enables the state of performance to tax income derived from appearances in its territory and accruing in the entity for the individual's benefit, even if the income is not actually paid as remuneration to the individual.
- The Article says nothing about how the income in question is to be computed. It is for a Contracting State's domestic law to determine the extent of any deductions for expenses. Domestic laws differ in this area, and some provide for taxation at source, at a low rate based on the gross amount paid to artistes and sportsmen.

ARTICLE 18
INCOME EARNED BY ENTERTAINERS AND ATHLETES

- Besides fees for their actual appearances, artistes and sportsmen often receive income in the form of royalties or of sponsorship or advertising fees. In general, other Articles would apply whenever there was no direct link between the income and a public exhibition by the performer in the country concerned. Royalties for intellectual property rights will normally be covered by Article 12 rather than Article 17 (see paragraph 18 of the Commentary on Article 12), but in general advertising and sponsorship fees will fall outside the scope of Article 12. Article 17 will apply to advertising or sponsorship income, etc. which is related directly or indirectly to performances or appearances in a given State. Similar income which could not be attributed to such performances or appearances would fall under the standard rules of Article 7 or Article 15, as appropriate. Payments received in the event of the cancellation of a performance are also outside the scope of Article 17, and fall under Articles 7 or 15, as the case may be.
- Certain conventions contain provisions excluding artistes and sportsmen directly or indirectly supported, wholly or substantially by organisations which are subsidised out of public funds from the application of Article 17. For e.g. US & UK treaty. While SA trearty exempts from tax in the Contracting State in which these activities are exercised if publicly funded.

ARTICLE 18
INCOME EARNED BY ENTERTAINERS AND ATHLETES

- Article 17 applies irrespective of duration of visit or smallness of the amount. However, in terms of India- US treaty the net income derived by such entertainer or athlete from such activities (after deduction of all expenses incurred by him in connection with his visit and performance) does not exceed one thousand five hundred United States dollars ($ 1,500) or its equivalent in Indian rupees for the taxable year concerned.
- If an artiste performs gratuitously without any consideration, no income arises and consequently there cannot be any tax in the state of source. When a pop star performs in state of source to promote the sale of his music album and no consideration is paid for this performance by the record company, there will be no taxation in state of source.
- The income under Article 17 is taxable irrespective of the timing of payment for services. Thus a bonus paid after the end of a fiscal year will be taxable in the year of receipt of bonus.
- Article 17 applies irrespective of whether such artiste performs individually or as a member of a troupe.