REVISED 2025

TECHNICAL GUIDE ON EXPATRIATES TAXATION

Committee on International Taxation
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

TECHNICAL GUIDE ON EXPATRIATES TAXATION

Committee on International Taxation
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

First Edition	:	July, 2011
Second Edition	:	February, 2014
Third Edition	:	June, 2017
Fourth Edition	:	October, 2019
Fifth Edition	:	February, 2023
Sixth Edition	:	December, 2025
Committee/Department	:	Committee on International Taxation
Email	:	citax@icai.in
Website	:	www.icai.org
Price	:	₹ 215/-
ISBN	:	978-81-8441-470-7
Published by	:	The Publication Department on behalf of the Institute of Chartered Accountants of India, ICAI Bhawan, Post Box No. 7100, Indraprastha Marg, New Delhi - 110 002.Printed by

Foreword

In today's globalised business environment, the cross-border mobility of talent has become a strategic imperative for organisations worldwide. Both multinational corporations and Indian enterprises are increasingly mobilising their workforce across jurisdictions to align with evolving strategic and operational objectives. The dynamic mobility of expatriate employees both inbound and outbound continues to raise intricate tax issues under Indian law and international tax treaties. For tax professionals, staying abreast of these developments is essential to ensure compliance and deliver informed advisory in an increasingly borderless world.

Recognising the increasing complexity and critical importance of expatriate taxation in today's dynamic tax landscape, the **Committee on International Taxation** of the **Institute of Chartered Accountants of India (ICAI)** has undertaken the initiative to revise and release the **sixth edition** of its publication, ***"Technical Guide on Expatriates Taxation."***

This updated edition comprehensively incorporates recent legislative amendments, including changes in the taxability of capital gains, revised tax slab rates as per concessional tax regime which has now become the default and other significant provisions of the Income-tax Act. These updates aim to ensure that members remain well-informed and professionally equipped to address the evolving tax implications arising from cross-border employee mobility.

I commend the Committee on International Taxation for this timely initiative. My special appreciation goes to CA. Sanjay Kumar Agarwal, Chairman, CA. Chandrashekhar Vasant Chitale, Vice-Chairman, for leading the revision. I also acknowledge the contributions of all other Committee members for their dedication and support.

I am confident that this publication will serve as a valuable and practical reference for professionals in navigating this important aspect of international taxation.

CA. Charanjot Singh Nanda
President
The Institute of Chartered Accountants of India

Place: New Delhi
Date: 10.12.2025

Preface

The taxation of expatriates has emerged as a significant aspect of international tax law. With increasing global mobility of skilled professionals, the cross-border deployment of human resources whether Indian residents taking up overseas assignments or foreign nationals working in India has given rise to complex tax considerations that span multiple legal and regulatory domains. These include not only domestic income-tax law but also social security obligations, exchange control provisions, and bilateral tax treaties. The convergence of these regimes has made expatriate taxation a subject of increasing professional and policy relevance.

Recognising the need for a comprehensive reference on the subject, the Committee on International Taxation of the Institute of Chartered Accountants of India (ICAI) has, since 2011, taken the initiative to issue and periodically revise the **"Technical Guide on Expatriates Taxation."** Over the years, this publication has served as a reliable and practical resource for chartered accountants, tax practitioners, and corporate professionals dealing with the legal and compliance dimensions of cross-border employment. In continuation of this endeavour, the **Sixth Edition** has been thoroughly revised to reflect significant developments impacting expatriate taxation.

This edition of the Guide elaborates on determination of residential status under the Income-tax Act, 1961, including the provisions relating to deemed residency and the expanded thresholds for physical presence, which have substantial implications on the taxability of global income, particularly in respect of Indian citizens and Persons of Indian Origin maintaining economic nexus with India. The publication further examines the practical ramifications of the default tax regime under section 115BAC, especially in relation to expatriate salary structures involving tax-exempt allowances, reimbursements, and perquisites. Detailed guidance is also provided on the withholding obligations under section 195 and the taxability of salary paid outside India for services rendered in India.

Discussion with respect to social security contributions and entitlements under Indian law and bilateral Social Security Agreements (SSAs) is also given. The discussion addresses coverage rules, contribution requirements, and withdrawal conditions for international workers in India, along with treaty-based exemptions available in specific jurisdictions. Exchange control provisions under the FEMA regime and recent changes in procedural requirements, including electronic filing of Form 10F and documentary compliance for claiming DTAA relief, are also comprehensively covered. This

revised edition also integrates compliance obligations required **under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.** It serves not only as a tax guide but also as a broader regulatory reference for structuring, documenting, and implementing compliant expatriate arrangements.

The Committee believes that this Sixth Edition will assist members and other stakeholders in navigating the legal and practical challenges associated with the taxation of expatriates. It is our expectation that this edition will continue to promote informed decision-making, robust compliance, and jurisprudential clarity in a domain that is integral to today's globalised employment landscape. We express our deep gratitude to **CA. Charanjot Singh Nanda, President, ICAI** and **CA. Prasanna Kumar D, Vice-President, ICAI**, for their strategic guidance and continued encouragement for the Committee's work.

We sincerely acknowledge the dedicated contributions of CA. Parul Jolly, CA. Sachin Sinha and CA. Akshat Maheshwari for undertaking the meticulous revision of this edition. We also place on record our appreciation for the critical insights and review by **Mr. S.P. Singh (Ex-IRS)**, who has played a foundational role in significantly enhancing the analytical depth and policy orientation of the publication.

Our special thanks go to Vice-Chairman **CA. Chandrashekhar Vasant Chitale** and Committee members: **CA. Vishnu Kumar Agarwal, CA. Jai Ajit Chhaira, CA. Piyush Sohanrajji Chhajed, CA. Arpit Jagdish Kabra, CA. Umesh Ramnarayan Sharma, CA. Babu Abraham Kallivayalil, CA. Sridhar Muppala, CA. Ravi Kumar Patwa, CA. Rajendra Kumar P, CA. Gyan Chand Mishra, CA. Pankaj Shah, CA. (Dr.) Anuj Goyal, CA. Satish Kumar Gupta, CA. Hans Raj Chugh, CA. Pramod Jain, CA. Rajesh Sharma**, and **Shri Vinod Kumar Jindal, Government Nominee** for their valuable involvement and support.

We also acknowledge the outstanding efforts of **CA. Aparna Chauhan, Secretary, Committee on International Taxation**, **CA. Prachi Jain, Project Associate** and her team for ensuring the timely completion and coordination of this initiative.

We hope this revised and enhanced edition will deepen your understanding of expatriates' taxation, serving as a valuable guide for professionals navigating an increasingly globalized economy.

Place: New Delhi
Date: 10.12.2025

CA. Sanjay Kumar Agarwal
Chairman
Committee on International Taxation, ICAI

Index

Chapter 1
Introduction

The term 'Expatriate' is derived from Latin word ex-patria, which means "out of the country". The Oxford Dictionary defines an expatriate as 'a person who lives outside their native country'. Similarly, the Webster Dictionary defines the term as 'a person residing in a foreign country'. Technically an expatriate is a person who temporarily or permanently residing in a country and culture other than that of his/her upbringing or legal residence. The term 'expatriate' in some countries also has a legal context used for tax purposes.

The Income-tax Act, 1961 ('ITA') does not define the term 'Expatriate'. But as pointed out above it essentially refers to an employee who is working abroad on deputation or secondment[1]. In terms of the Oxford Dictionary, deputation means 'to appoint someone to perform a task for which one is responsible'. Secondment is defined in the Oxford Dictionary as 'to temporarily transfer a worker to another position'.

The concept of 'deputation' is well understood in service law and has a recognized meaning, as observed by the *Apex Court in State of Punjab and others vs. Inder Singh and Others,* ((1997) 8 SCC 372). The Apex Court pointed out that :

"'Deputation' has a different connotation in service law and the dictionary meaning of the word deputation is of no help. In simple words "deputation" means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, to another department on a temporary basis. After the expiry of period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the recruitment rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post."

For the purpose of easy understanding, it can be said that an expatriate (or expat) is a person who lives and works outside their country of citizenship or

country of residence, either temporarily or permanently. In the context of taxation and employment, an expatriate typically refers to an individual who is sent by their employer to work in a foreign country, often under a formal secondment, assignment, or employment contract.

Thus, in the Indian context expatriate means a person (citizen/resident) of a foreign country working in India (inbound) or a person (citizen/resident) of India working abroad (outbound).

Depending upon the work requirements, an inbound expatriate may work in India under any of the below structures:

- Business visit
- Short term assignment
- Medium to Long term assignment
- Permanent relocation
- Consultant

The broad issues involved in a typical assignment structure which an employer and an expatriate need to be aware of are discussed below:

(a) **Immigration:** The expatriate should travel on correct visa category (business visa /employment visa/student visa- depending upon the purpose of visit) and should get himself/herself registered with Foreign Regional Registration Office ('FRRO') in India within 14 days of arrival in India, if required as per his/her visa endorsement.

(b) **Taxability of the employee:** Salary received by an employee for rendering services in India would be liable to tax in India as employment income irrespective of its place of receipt; as the source of the same lies in India. Hence, any salary/ allowance/ benefit paid/provided to an employee outside India which is related to assignment period in India will be subject to tax in India. Employer is required to comply with withholding tax obligation on such payments.

A short stay exemption may be claimed subject to satisfaction of conditions, as per the applicable clause of tax treaty / ITA, as may be beneficial to the expatriate.

(c) **Social security:** Social security in India is governed by Provident Fund Regulations under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('the EPF Act'). A foreign passport holder, working for a covered establishment in India under the EPF

Act, is mandatorily required to contribute under the EPF Act. A covered establishment is one which is registered under the EPF Act. Registration is mandatory the moment employee strength (including persons employed through contractors) becomes 20 or more. The employer is mandatorily required to contribute 12% of "salary" prescribed for provident fund contribution and the employee is required to make a matching contribution. The employer has a right to recover 12% of such contribution from the employee's salary. The employer also has to make 0.5% contribution capped at a monthly salary of ` ₹ 15,000, towards an insurance scheme under the EPF Act.

In relation to the withdrawal of social security contributions, the same cannot be applied for till the expatriate attains 58 years of age (in case the expatriate is from a country with which India does not have an effective SSA) or till a Social Security Arrangement is signed with the respective country from which the expatriate has come to India. For expatriates coming from a country with which India has an effective SSA, provident and pension fund may be withdrawn, subject to certain restrictions/ provisions of the applicable SSA.

(d) **Payment of salary outside India:** Under the exchange control regulations of India, it is permissible for the employees of a foreign entity seconded to branch, office, joint venture, subsidiary or group company of such foreign entity in India, to receive their entire salary in a bank outside India provided the income tax as per the domestic tax laws of India has been duly paid on the entire salary as accrued in India.

(e) **Other issues:** The presence of employees of a foreign entity in India may create a Permanent Establishment (PE) exposure for the foreign entity. The arrangement between the foreign entity and the Indian entity to second the employees of the foreign entity to work for the Indian entity needs to be evaluated from Goods and Services Tax (GST) perspective, also. The secondment/deputation transaction between related parties would be subject to transfer pricing regulation and hence any cost sharing arrangement should satisfy arm's length principle. Any taxable payment from Indian entity to a Non Resident ('NR') would be subject to withholding tax provisions.

The typical characteristics of various deployment structures and tax implications for inbound expatriates are indicated below.

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
(a)	**Business visits – Short Term Business Travelers (STBTs) / Frequent Business Travelers (FBTs)**	• Employee visiting India for short business visits • Purely for the limited purpose of attending meetings/ conferences in the capacity of employee of foreign entity	• Traditionally, the expatriates come to India for business visits / secondment / deputation. However, off late the concept of STBTs / FBTs is catching up globally and its necessary for home and host country entity to examine in detail the purpose of visit to examine if such visits trigger any compliance obligation in the host country i.e. India. • A short business visit may create tax implications for foreign entity. It is advisable to evaluate PE risk for foreign entity. • Employee may be eligible to claim short stay exemption under the ITA or applicable tax treaty subject to

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
			satisfaction of given conditions and in such circumstances, salary may not be taxable in India.
(b)	**Short-term Assignments**	• Employee would be sent to India for short period generally less than a year. • He/ she would be working in India but as an employee of the foreign entity and would continue to be on its payroll. Normally, Indian entity would compensate the foreign counterpart for the services rendered by the expatriate. • Generally, such arrangement is made for performing training or supervisory functions or executing short term projects.	• Employee would be taxable on the salary income earned for services rendered in India. • There could be PE exposure for the foreign entity because of the presence of the expatriate employees of foreign entity in India on behalf of foreign entity. • Foreign entity would have to comply with the withholding tax obligation in relation to salary paid to its employees for services rendered in India or alternatively have

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
			the Indian entity to discharge the obligation as an Agent of the foreign entity • However, where the India entity is compensating the foreign counterpart for the salary paid to the expatriates, then the India entity may comply with the withholding obligations instead of foreign entity. • Short stay exemption provided under the tax treaty may be claimed subject to satisfaction of given conditions.
(c)	**Medium-term & Long-term assignments — Secondment / deputation**	• Employee would be deputed to India for rendering services to the Indian entity for a period generally longer than a year. • He/ she would be working in India in the capacity of Employee of Indian entity which is the	• Employee would be taxable on the salary income earned for services rendered in India. • Indian entity will have to comply with the withholding tax obligations and the related

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
		economic employer. • Expatriate may be on the payroll of Indian entity or the remuneration is solely borne by the Indian entity.	compliances under ITA in respect of the employee. • The foreign entity may not have any PE exposure in India subject to appropriate documentary evidence to substantiate factual conduct that expatriate employees are working under the direction, control and supervision of the Indian entity and the expatriate does not have any lien of his employment with the foreign entity. However, it is advisable to analyze the PE exposure on a case to case basis.
(d)	**Permanent Relocation**	• Employee will resign from home country entity and join the Indian entity as a local hire (working exclusively for and on the payroll of Indian	• Employee would be taxable on the salary income earned for services rendered in India. • Indian entity will

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
		entity).	have to comply with tax obligations and the related compliances under ITA, similar to local Indian employee. • There is no PE exposure for home country entity due to presence of the expatriate under this arrangement.

Sometimes, a company may choose to hire independent foreign consultants. The taxability of independent expatriate consultants differs from that of expatriate employees.

Similarly, in case of outbound expatriates the assignment could be in the nature of business visits, short-term, medium-term or long-term assignments.

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
(a)	**Short Term Business Travelers (STBTs) /Frequent Business Travelers (FBTs)**	• Employee visiting foreign country for short business visits during the year. • Purely for the limited purpose of attending meetings/conferences in the capacity of employee of the Indian entity.	• Employee would remain a resident in India (subject to his physical presence in India) and hence salary in respect of period of foreign visits would continue to be taxable in/ India. • However, such arrangement may trigger a PE risk which needs to be analyzed on case to

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
			case basis.
(b)	**Short-term assignments**	• Employee would be sent out of India for short period generally less than a year. • He/ she would be working outside India but as an employee of the Indian entity & would continue to be on its payroll. • Foreign entity may compensate the Indian entity for the services rendered by the expatriate • Generally, such arrangement is made for performing training or supervisory functions or executing short term projects	• There could be PE exposure for the Indian entity in the foreign country. Further, if, salary is received in India, the same may be taxable on receipt basis under ITA. • In case the outbound expatriate qualifies as a NR in India, possibility of claiming income exemption under applicable tax treaty may be explored. • In case the employee continues to be resident in India, short stay exemption may be claimed in the host country subject to fulfilment of conditions specified under the domestic tax law of host country or the tax treaty • In case the employee is not eligible for short stay exemption in host country, the double taxation can

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
			be eliminated by claiming credit of taxes paid in the host country in India, provided such an expatriate is considered as an ultimate treaty resident of India.
(c)	**Medium-term & Long-term assignments- Secondment / deputation**	• Employee would be deputed to the foreign entity for rendering services for a period generally longer than a year. • He/ she would be working abroad in the capacity of employee of the foreign entity. • He/ she would be on the payroll of foreign entity and the remuneration would be solely borne by such foreign entity.	• In case the outbound expatriate qualifies as a NR in India, he/she would not be liable to pay tax on salary income received outside India for the period of service rendered outside India. • In case the employee is on split payroll meaning receives part of the salary in home country, it would be advisable to evaluate whether such receipt in India can be claimed as non-tax in India subject to conditions provided in the tax treaty. • In case the employee continues to be resident in India, he/ she would

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
			be liable to pay tax on his/her global income in India. However, at the same time, he/she would be eligible to claim credit of taxes paid in the host country on the doubly taxed income related to period of services rendered outside India.
(d)	**Permanent Relocation**	• Employee would be sent to overseas entity on a permanent basis. • He/she would no longer be a part of Indian entity. • Legal and social ties with India would be detached.	• In case the outbound expatriate qualifies as a NR in India, he/she would not be liable to pay tax on salary income received outside India for the period of service rendered outside India. • In case the employee continues to be resident in India, he/she would be liable to pay tax on his/her global income in India. However, at the same time, he/she would be eligible to claim credit of taxes paid in the host country on the

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
			doubly taxed income related to period of service rendered outside India.

Chapter 2
Taxation

2.1 Basic concepts — Domestic Law

Under the ITA, incidence of tax depends on the residential status of the taxpayer as well as on the place and time of accrual or receipt of any income. Each of these components is discussed in the following paragraphs.

2.1.1 Residential status

In India charge of income-tax is not based on domicile or citizenship. The extent of Indian tax liability depends on the residential status of an individual based on the individual's physical stay in India, the purpose of stay, the amount of taxable income in India and overseas residency/taxation.

Residential status is determined on the basis of the above-mentioned aspects during each previous year i.e. the Financial Year commencing from 1st April.

For tax purposes, an individual may be Resident and Ordinarily Resident ('ROR'), Resident but Not Ordinarily Resident ('RNOR') or Non-Resident ('NR'). The conditions to be satisfied to qualify in any of these categories are discussed below:

(a) Basic residency test

An individual is regarded as a resident in India in any previous year, if he/ she is present in India for:

— 182 days or more during that year; or

— 60 days* or more during that year and 365 days or more during the preceding 4 years.

**To be replaced by 182 days in following two cases:*

— an Indian citizen who leaves India for the purpose of employment abroad or as a crew member of an Indian ship; or

— an Indian citizen or Person of Indian Origin[1] who comes to India on a visit during that year and total income other than the income from foreign sources not exceeding fifteen lakh rupees during the previous year

Further, in the case of an individual, being an Indian citizen and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of an eligible voyage[2], would not include the period beginning on the date entered into the Continuous Discharge Certificate[3] in respect of joining the ship by the said individual for the eligible voyage and ending on the date entered into the Continuous Discharge Certificate in respect of signing off by that individual from the ship in respect of such voyage[4]

**To be replaced by 120 days in following case:*

— an Indian citizen or Person of Indian Origin who being outside India, comes to India on a visit during that year having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year.

What constitutes '**leaves India for the purpose of employment outside India**' has not been defined/explained in the Income-tax Act. Therefore, this phrase can be said to be wide enough to cover the following situations:

- an Indian employee leaving India for taking up a new employment with an overseas employer while continuing his legal employment with his existing employer (e.g. on deputation), or

[1] As per Explanation to Section 115C(e) of the ITA, a person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India.

[2] Voyage undertaken by a ship engaged in the carriage of passengers or freight in international traffic where for the voyage having originated from any port:

(i) in India, has as its destination any port outside India and

(ii) outside India, has as its destination any port in India.

[3] Meaning Continuous Discharge Certificate-cum-Seafarer's Identity Document

[4] Explanation 2 to Section 6(1) of the IT Act read with Rule 126

- an Indian employee leaving India for taking up a new employment, with a new employer.

A case-to-case evaluation is required in order to determine whether an individual can be said to have left for the purpose of employment or not.

For example:

- A person leaves India for searching job is also covered within the meaning of “leaves India for the purpose of employment outside India.”
- This employment also includes self-employment.
- It is not necessary that when the person leaves India, he must have the appointment letter in his hand.
- This test of “leaves India for the purpose of employment” is only in the first year and not every year.

Also, the word “visit” is not defined under the ITA. However, basis the general interpretation of the term and judicial pronouncements, visit includes coming to India for both social and employment purposes. It is important that when he is in India as a visitor means he visited India for a time being with an intention to go back outside India. It means, the intention of the person is very important that he visited to India for permanent stay or to go back after certain period.

The term “total income” as per section 6(1) Explanation (b), is the determining factor. The term total income is defined u/s 2(45) which says, "total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act. This section refers to Section 5 which is regarding scope of total income. If any income which is exempt by the meaning of Chapter III of this Act, that shall not for part of the total income. For example, agriculture Income, share of partnership profit, Interest from NRE account etc.

The term “other than the income from foreign sources” is also important to test ₹ 15 lakh threshold criteria. For the purposes of this section, the expression "income from foreign sources" means income which accrues or arises outside India (except income derived from a

business controlled in or a profession set up in India) and which is not deemed to accrue or arise in India.

(b) Deemed Resident

An individual being Indian citizen

— having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, and

— if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature, and

— who is not a resident in India in the previous year as per the basic residency test.

“Income from foreign sources" means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).

Making a person deemed resident, the number of days stayed in India is not relevant. It means, even though such person was not in India for a single day, he can be deemed resident if he satisfies the conditions mentioned above.

Liable to tax is important and it is defined u/s 2(29A) of the Act. "liable to tax", in relation to a person and with reference to a country, means that there is an income-tax liability on such person under the law of that country for the time being in force and shall include a person who has subsequently been exempted from such liability under the law of that country.

(c) Non-Resident (NR)

An individual fulfilling neither of the above basic residency test is regarded as a NR in India.

(d) Resident but Not Ordinarily Resident (RNOR) and / or Resident and Ordinarily Resident (ROR)

A person resident in India may be further classified as ROR or RNOR based on the below mentioned criteria.

A resident individual (i.e. satisfying the basic residency test specified in clause (a)) would be regarded as a ROR in India in any FY if both the following conditions are satisfied:

— He/ she has been resident in India for at least 2 out of 10 preceding FYs; and

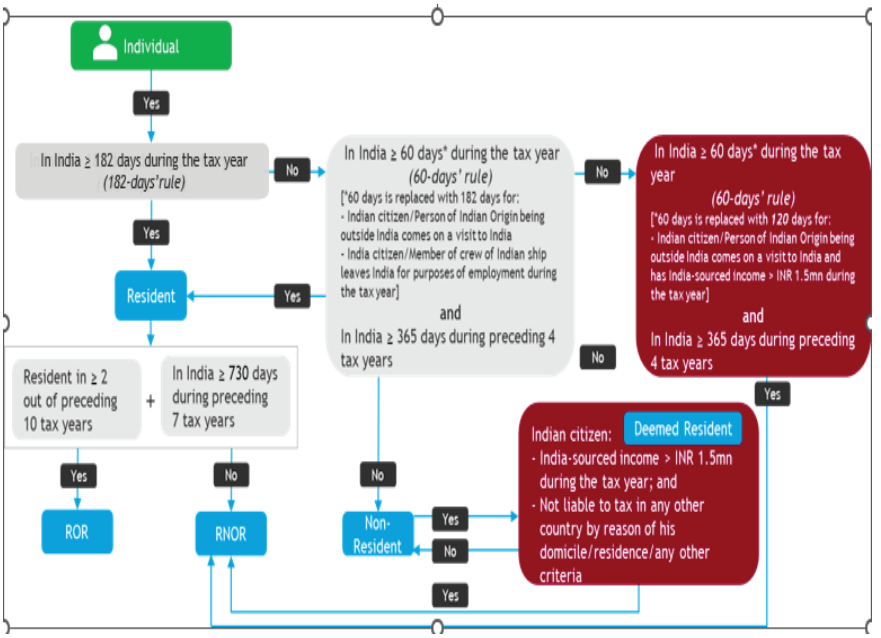
— He/ she has been present in India for a period or periods aggregating to 730 days or more, during the 7 preceding FYs.

A resident individual who does not satisfy any one or both of these additional conditions would be regarded as RNOR.

— He/ she is an Indian citizen or PIO who, being outside India, comes on a visit to India in any previous year having total income, other than the income from foreign sources exceeding fifteen lakh rupees during the previous year, who has been in India for 120 days or more but less than 182 days during that previous year, OR

— He/ she is an Indian citizen who is a deemed resident in India.

The above residency rules are summarized in the below matrix:



The actual number of days an individual is present in India is generally determined on the basis of entries in the passport, taking into account the

day of entry as well as the day of exit. Further, stay in the territorial waters of India would also constitute presence in India for the purpose of determining the residential status.

Illustration 1

Mr. ABC, a Canadian citizen, arrives in India for the first time on October 02, 2022. Assuming he continues to stay in India, his residential status would be as follows:

Year Number	Previous Year	Days present in India	Cumulative Stay in preceding previous year	Residential status
1	2022-23	181	0	NR
2	2023-24	365	181	NOR
3	2024-25	366	546	NOR
4	2025-26	365	912	ROR

Normally, an inbound expatriate coming to India for the first time will become ROR only in the third/ fourth year from the year of arrival.

Illustration 2

Mr. X, an Indian citizen, who is appointed as a Senior Manager by an Australian company, leaves India for the first time on September 10, 2022. His income in India for FY 2023-24 is Rs. 900,000 and for FY 2024-25, the total income is Rs.17,00,000. Details of his India visits in the subsequent years and his residential status would be as follows:

Year Number	Previous Year	Days present in India	Cumulative stay in preceding previous year	Residential status
1	2022-23	163	>365	NR*
2	2023-24	75	>365	NR**
3	2024-25	135	>365	NOR**
4	2025-26	185	>365	ROR

* Indian citizen going outside for the purpose of employment, the 60 days condition shall be replaced by 182 days.

** Indian citizen or PIO who being outside India, comes to India on a visit and having total income, other than the income from foreign sources exceeding fifteen lakh rupees, the 60 days condition shall be replaced by 120 days. While in the year number 2, the total income was less than fifteen lakh rupees, hence the residential status would be NR. In the year number 3, the total income was more than fifteen lakh rupees, hence the residential status would be NOR.

Illustration 3

Mr. XYZ, an Indian citizen, was employed outside India in the past 10 years and did not have any visits to India in the previous tax years. He moved to India on 1st December 2025 and his total income in India for FY 2025-26 is Rs. 25,00,000. He is not liable to tax in the overseas country. The residential status in India for FY 2025-26 is as below:

Mr. XYZ is an Indian citizen and income is exceeding fifteen lakh rupees during the FY 2025-26 and not liable to tax in any other country. XYZ will be considered as a deemed resident and hence will qualify as a NOR for FY 2025-26.

2.1.2 Scope of income

While taxpayers whose residential status is "resident" (also, referred as "Resident and Ordinary Resident" or ROR) are taxed on their worldwide income, non-residents (NRs) are taxed only on income that is received or deemed to be received in India or income that accrues/ arises or is deemed to accrue/ arise in India. There is a third category of residential status, known as "Not Ordinary Resident" (NOR) is taxed like a NR with the only difference that he/ she is also liable to tax on income accruing abroad if it is from a business controlled from or a profession set up in India.

The above rules can be broadly depicted as follows:

Nature of income	Taxability in case of		
	ROR	RNOR	NR
Income received or deemed to be received in India by or on behalf of the individual	√	√	√
Income accruing / arising or deemed to be accrued /arising in India	√	√	√

Nature of income	Taxability in case of		
	ROR	RNOR	NR
Income from a business controlled from India or from a profession set up in India but not received or accrued in India	√	√	X
Income not received or not deemed to be received in India	√	X	X
Income not accruing / arising or not deemed to be accrued / arising in India	√	X	X

Thus, depending upon its nature, income is taxed in India either on receipt or on accrual basis. Income is said to be received when it actually reaches the taxpayer; however, it is said to accrue or arise when the right to receive such income becomes vested to the taxpayer.

It may be noted that any income which is taxed on accrual basis cannot again be taxed on receipt of the same. Further, once an amount is received as income, any remittance of such amount to another place does not result in receipt at another place – for instance if a ROR taxpayer is receiving income abroad in financial year 2021-22, he cannot be said to have received the same when he brings or remits such income to India subsequently.

2.1.3 General scheme of taxation

Under the ITA, income is classified and accordingly taxable under any of the following heads:

(a) **Income from Salaries:** The income arising on account of employee-employer relationship is taxable under this head and inter alia includes salary, allowances, perquisites, provident fund contributions, income received from previous employers, retirement benefits, salary arrears, profits in lieu of salary, income on termination of employment etc.

(b) **Income from House Property:** Under this head of income, income is computed on the basis of the potential of property (i.e., land and/ or building, commercial as well as residential) to generate income not merely on the actual rent received there from. Specific rules are laid

down for computing the taxable value of a property for taxation purpose.

(c) **Profits and Gains from Business or Profession:** Income earned by a taxpayer on exercise of a business or profession is taxable under this head. Generally, business/ profession income is arrived at after deducting from the gross sale/ revenue all the expenses incidental to such business/ profession, including depreciation. Weighted deduction is available in case of certain specified expenses such as research & development whereas certain expenses are deductible on fulfilment of prescribed conditions (for instance only on actual payment or on compliance with withholding tax procedures). In case of resident individuals engaged in profession referred to in Section 44AA of ITA may adopt the presumptive taxation u/s 44ADA and declare the profession income at the prescribed rate.

(d) **Capital Gains:** Capital Gains represent the profit or gain arising to a taxpayer on transfer of a capital asset during the FY. Generally, capital gains are calculated by deducting from the net sale consideration the cost of acquisition and cost of improvement incurred by the transferor on the capital asset. In case of long-term capital assets i.e. those held for a period of more than 24 months [12 months in case of listed securities (other than a unit) listed in recognized stock exchanges in India or a unit of Unit Trust of India or a unit of an equity oriented fund or a zero coupon bond]. In order to give effect to inflation the cost of acquisition and improvement are indexed using the cost inflation index numbers notified by the Government. However, the benefit of indexation has been done away with w.e.f. 23.7.2024 except in case of sale of immovable property by resident individual or a HUF which were acquired before 23.07.24.

W.e.f. 23.7.2024 Short term capital gain, arising from the sale of equity shares or units of an equity oriented fund or unit of a business trust on which Securities Transaction Tax (STT) is paid, is taxable at 20%. Other short term capital gain is taxable at normal income-tax rates.

For an individual, long term capital gain is taxable at 12.5% w.e.f. 23.7.2024. However, in case long term capital gain from sale of immovable property, a resident individual or HUF can take the benefit of indexation and in that case the capital gains are taxed at 20%.

As per Section 112A of ITA, capital gains arising from transfer of a long-term capital asset (being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust) shall be taxed at the rate of 12.5% for capital gains exceeding Rs. 125,000 :

-in a case of an equity share in a company, Securities Transaction Tax (STT) has been paid on both acquisition and transfer of such capital asset; and

-in a case a unit of an equity oriented fund or a unit of a business trust, STT has been paid on transfer of such capital asset.

Grandfathering provisions – The Finance Act, 2018 introduced the grandfather clause in respect of investment made on or before 31 January 2018 in equity shares or units of an equity-oriented mutual fund. This has been provided for the capital gains accrued till 31st January 2018.

The Finance Act 2018 introduced Section 112A by withdrawing Section 10(38) to tax long-term capital gains from the sale of listed equity shares, units of equity-oriented mutual funds and units of business trust.

With the insertion of Section 112A, a corresponding clause was also inserted in Section 55. Section 55(2) (ac) provides for the determination of Cost of Acquisition of an asset referred to in Section 112A. Accordingly, where a Capital asset referred in Section 112A is acquired before 1st February, 2018, the Cost of Acquisition of such asset shall be the higher of:-

(i) Cost of Acquisition of the asset and

(ii) Lower of–

A. Fair market value of the asset as on 31st January 2018 and

B. Full value of consideration received or receivable as a result of the transfer of the capital assets.

Long term capital gains are exempt from tax in certain cases if the gains are reinvested within the specified period. For example, capital gains on transfer of residential house held for more than 24 months are exempt if they are reinvested in acquiring or constructing another

residential house within a specified period. Similarly, capital gains from the sale of any long-term capital asset are exempt if the amount of capital gains is reinvested in certain specified assets, being redeemable bonds issued by the National Highways Authority of India/ Rural Electrification Corporation/ any other specified bonds or units of a specified fund, within six months and for a lock-in period of 3 years.

Illustration 4

Mr.XYZ sold 50 shares exercised in the ABC company on 20th September 2021. The shares of ABC company are not listed in India. The shares were exercised on 15th March 2021. The capital gains will be as follows

The sale of shares will be considered as short-term capital gains since it was sold within 24 months from the date of exercise. The capital gains will be taxable at the applicable slab rates.

(e) Income from other sources: This is the residual head of income and any income which is not covered under the earlier heads is covered in 'income from other sources' for instance interest, gifts, dividends, lottery winnings, etc.

2.1.4 Computation Mechanism

The computation mechanism for income under each of the above-mentioned head is distinct and the total income under all the heads, after setting off brought forward losses, if any, constitutes the **Gross Total Income ('GTI')** for a particular FY. From the GTI a tax-payer/ assessee is entitled to claim certain deductions in respect of specific investments and/ or expenses (for instance provident fund investments, life insurance premiums, housing loan repayments, etc.) up to the prescribed limits so as to arrive at the **Net Taxable Income** for the year.

As discussed earlier, expatriate employees are in essence employees working in a country away from their country of legal residence. Thus, for the purpose of easy understanding, normally the income earned by an expatriate working in India would be arising from the employee-employer relationship, irrespective whether he/she is on the payroll of the foreign entity or the Indian entity, and therefore the same would be taxed as their 'Salary income'. The taxability of such salary income and related issues are discussed in the forthcoming topics.

2.1.5 Tax Rates

Income tax is payable on the Net Taxable Income at the rates specified for the relevant year. The tax rates for every FY are proposed by the Finance Bill.

The Budget 2020 introduced a new regime/concessional tax regime under section 115BAC giving individuals and HUF taxpayers an option to pay income tax at lower rates. The new tax regime is available with lower tax rates and must forgo the deductions/exemptions as listed in the said section.

However, with effect from A.Y. 2024-25, the new/concessional tax regime became the default tax regime. It implies that unless an assessee opts out of such regime, he will pay tax as per section 115BAC. Further, the Default /Concessional tax regime is extended to an assessee, being an AOP (other than co-operative society), BOI and AJP.

2.1.6 Under Default Tax Regime

The tax rates applicable for individuals as per the Default tax regime for the financial year 2025-26 are as follows:

Income slabs	Tax rates
Taxable income upto ₹ 4,00,000	NIL
Taxable income between 4,00,001 & 800,000	5%
Taxable income between 800,001 & 12,00,000	10% plus ₹20,000
Taxable income between 12,00,001 & 16,00,000	15% plus ₹60,000
Taxable income between 16,00,001 & 20,00,000	20% plus ₹ 1,20,000
Taxable income between 20,00,001 & 24,00,000	25% plus ₹2,00,000
Taxable income above 24,00,000	30% plus ₹3,00,000

Some common deductions/ exemptions not available under the default tax regime are listed here:

— Leave Travel Allowance/ House Rent Allowance

— Section 10(14) read with Rule 2BB:

- Helper/ Uniform/ Academic allowance
- Children education – ₹ 100/ month/ child
- Hostel expenditure– ₹ 300/ month/ child

— Professional tax deduction

— Free food (₹ 50/ meal)

— Interest and principal repayment in respect of self-occupied property

— Set off of loss under the head 'House Property'

— Chapter VIA deductions e.g. deduction u/s

- 80C - PPF, life insurance, employee's contribution to PF, tuition fees etc.
- 80CCD(1)/ 80CCD(1B) – Employee's contribution to NPS
- 80D - Medical insurance
- 80E – Loan taken for higher education
- 80G – Donations
- 80TTA – Interest on saving deposit

2.1.7 Under Optional Tax Regime

The tax rates applicable for individuals as per the optional tax regime for the financial year 2025-26 are as follows:

Income slabs	Tax rates
Taxable income up to ₹ 2,50,000	Nil
Taxable income between ₹ 2,50,001 & 5,00,000	5%
Taxable income between ₹5,00,001 & 10,00,000	20% plus ₹12,500
Taxable income above ₹10,00,000	30% plus ₹ 1,12,500

The basic exemption limit in case of resident taxpayers who are 60 years of age or more but less than 80 years of age (at any time during the FY) is Rs. 3,00,000 and the same is ₹ 500,000 in case of resident taxpayers who are of the age of 80 years or more (at any time during the FY).

Rebate under section 87A

A rebate of lower of tax payable or ₹ 12,500 is available to resident individuals whose total income does not exceed to ₹ 500,000 under the old

regime. Rabate is not available on the tax payable on long-term capital gains under section 112A.

The said rebate in case of assessee falling under default regime is lower of tax payable or ₹ 60,000 where the total income does not exceed ₹ 12,00,0009. However, rebate under default tax regime is available only against income tax payable under section 115BAC.

Surcharge

Surcharge is applicable on the amount of income tax at the below rates if the taxable income exceeds specified limits.

Taxable Income	Applicable Surcharge Rate
Exceeding ₹ 50,00,000 but not exceeding ₹ 1,00,00,000	10%
Exceeding ₹ 1,00,00,000 but not exceeding ₹ 2,00,00,000	15%
Exceeding ₹ 2,00,00,000 but not exceeding ₹ 5,00,00,000	25%
Exceeding ₹ 5,00,00,000	37%

Further, marginal relief is allowed to ensure that the additional amount of income-tax payable including surcharge, on the excess of income over ₹ 50,00,000 / ₹1,00,00,000/ ₹ 2,00,00,000/ ₹ 5,00,00,000 is limited to the amount by which the income is more than ₹ 50,00,000 / ₹ 10,000,000/ ₹ 2,00,00,000/ ₹ 5,00,00,000.

The enhanced surcharge of 25% and 37% is not applicable on dividend income and capital gains. Further, in case of default tax regime, the surcharge rate is capped at 25%.

Note - The above tax rates under both regimes are required to be increased by Health and Education Cess of 4% in all cases.

Illustration 5

Mr. A earns ₹18 lakh salary income for FY 2025-26. His contribution to PF and other investment u/s 80C is ₹ 1.5 lakh. He has paid premium towards health insurance of ₹ 25,000. The other additional investments are ₹ 30,000 in NPS. He also claimed an exemption for house rent of ₹ 50,000 and leave travel amount of ₹ 25,000. The tax payable under both the tax regimes are

Particulars	Old tax regime	Default tax regime
A. Annual salary	18,00,000	18,00,000
B. HRA exemption	50,000	-
C. LTA	25,000	-
D. Standard deduction	50,000	*75,000
E. Section 80C	150,000	
F. Section 80D	25,000	
G. Section 80CCD(1B)	30,000	
H. Total deduction and exemption	330,000	
I. Net taxable income	14,70,000	17,25,000
J. Tax payable (including education cess)	2,63,640	1,50,800

*Standard deduction in case of default regime is Rs. 75,000 as against Rs. 50,000 in case of optional regime.

2.2 Basic concepts — Tax Treaties

In case resident of one country (Country of residence) derives income from another country (Country of source) there arises a possibility of 'double taxation' of the same income in the source country and subsequently in the residence country. Such double taxation can also arise due to difference in the definition of tax residency and in the scope of taxation of various countries.

Thus, with respect to an expatriate, double taxation may arise on account of the following reasons:

— He/she is a resident of two countries and each country seeks to tax the individual on worldwide income;

— He/she is a resident of one country deriving income from another country.

In order to prevent such double taxation, provisions are included in the domestic laws to unilaterally reduce double taxation. However, as it may not address all situations of double taxation, governments enter into Double Taxation Avoidance Agreements/ Tax Treaty ('DTAA'). The adoption of a

DTAA requires modification to the internal tax laws of the respective state and as such, an enabling provision in an Act passed by the Parliament.

Under Section 90 of the ITA, the Central Government of India is empowered to enter into an agreement with any country for granting relief from double taxation, exchange of information, recovery of tax and to make such provisions as may be necessary for implementing the agreement. In India, a DTAA becomes a law without any further legislation having to be enacted.

DTAA divide the taxing rights between the countries that are party to the agreement. India has entered into two types of DTAA with other countries:

— Comprehensive DTAA, which covers all income flows; and

— Limited DTAA that covers only shipping and/ or air transport income.

India has concluded comprehensive DTAA with almost 96[5] countries including major countries like Australia, Belgium, Brazil, Canada, China, Germany, Hong Kong, Italy, Japan, Mauritius, New Zealand, Singapore, United Kingdom, United States, etc.

India has also entered into 'Tax Information Exchange Agreements' with 23 countries[6] i.e. Argentine, Bahamas, Bahrain, Belize, Bermuda, British Virgin Islands, Brunei Darussalam, Cayman Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Liberia, Marshall Islands Macao, Maldives, Principality of Liechtenstein, Principality of Monaco, Saint Kitts and Nevis, San Marino and Seychelles. Further, India has Limited DTAAs (for air traffic/ shipping) with 8 countries.[7]

Section 90 further provides that where the provisions of the DTAA entered into by India with another country are more beneficial to any assessee, the assessee would be governed by such beneficial provisions of the DTAA. This position has been upheld by the Apex Court in the case of *UOI vs. Azadi Bachao Andolan (263 ITR 706)*. Hence, in the case of an expatriate, the provisions of the treaty need to be examined for the purpose of ascertaining the tax liability.

---

[5] https://incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx (accessed on 15 June 2025)

[6] Source: ibid

[7] Source: ibid

A person, who is not a resident of a treaty partner country, India avoids/reduces double taxation unilaterally through section 91 of the ITA. It may also be noted that the treaties has to be read with Multilateral Instruments (MLI) in case the respective treaty is covered tax agreement (CTA).

2.2.1 Residential status under DTAA

Generally, Article 4(1) of a DTAA, defines the term 'resident' of a country to mean any person who, under the laws of that country, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political sub-division or local authority thereof. Thus, in order to qualify as a resident under a DTAA entered into by India, an expatriate should be a resident either in the overseas country or in India under the domestic laws. It may be noted that the residential status of the employer is not relevant in determining the status of the expatriate.

However, if by virtue of the above provision, an individual is a resident of both the contracting countries, the distributive rules cannot apply. Therefore, for such cases, clause 2 of the residency article provides the tie breaker test for determining in which country from the two countries the person would be deemed to be a resident as per the DTAA. The relevant factors to be considered in the tie-breaker test are as follows:

(a) **Permanent home:** The country in which he/she has a permanent home available to him/her;

(b) **Centre of vital interest:** The country with which his/her personal and economic relations are closer;

(c) **Habitual abode:** The country in which he/she has habitual abode;

(d) **Nationality:** Country of which he/ she is a national;

(e) **Competent authorities:** As determined by mutual agreement between both the countries competent authorities.

The tie-breaker rules are required to be followed sequentially as may be provided in the DTAA.

2.2.2 Relief under the DTAA

Depending on the residential status of an individual as per the treaty, the income may be taxable, or an exemption can be claimed. The most common methodology for avoidance of double taxation used in Indian DTAAs are as below:

— **Exemption method:** Income or capital that is taxable in the country of source may be fully exempted in the country of residence or vice versa. Alternatively, the country of source limits its right to tax income from sources in its country. Tax Residency Certificate is required from the revenue authorities of foreign country to substantiate the claim of considering tax resident of foreign country as per the relevant DTAA.

— **Credit method:** Income or capital that is taxable in the country of source may be subject to tax in the country of residence. However, the tax levied in the country of source may be available as a credit to the extent of tax levied by the country of residence on such income or capital to avoid the double taxation.

— **Special tax rate:** Income or capital that is taxable in the country of source may be taxable at the specified tax rate as per the DTAA. Tax Residency Certificate is required from the revenue authorities of foreign country to substantiate the claim of considering tax resident of foreign country as per the relevant DTAA.

— **Tax Sparing**: Tax sparing allows a resident country to grant tax credit for taxes that were "spared" or foregone by the source country under tax incentive schemes, treating them as if they had actually been paid. This ensures that tax exemptions or holidays offered by the source country are not offset by tax liabilities in the investor's home country. It is aimed at promoting foreign investment in developing countries.

  For instance, if India offers a tax holiday to a company from Country X, and no Indian tax is paid, a tax sparing clause in the DTAA may still allow Country X to provide a tax credit as if the Indian tax had been paid. India has included such provisions in older treaties with countries like Singapore, Mauritius, and Spain, but has limited their inclusion in newer DTAAs due to concerns over treaty abuse and erosion of its tax base.

On 16 July, 2022, the Indian Tax Administration issued a notification mandating non-resident (NR) taxpayer to electronically furnish specific information in specified form (Form 10F) to avail Double Taxation Avoidance Agreements (DTAA) benefits.

Prior to the notification dated 16th July 2022, Taxpayers were not required to file the Tax Residency Certificate (TRC) and Form 10F along with the tax returns. These documents were to be retained by the taxpayers and furnished to the Indian Tax Administration upon request or during a tax assessment.

Said notification now requires NR taxpayers to electronically file Form 10F on the Portal. The TRC is also required to be attached when e-filing Form 10F. Many practical challenges were faced by the non-resident taxpayer without a PAN. The Central Board of Direct Taxes (CBDT) vide notification dated 12th December 2022 provides that Non-Resident taxpayers who are not having PAN and not required to have PAN as per relevant provisions of the ITA and Income-tax Rules, 1962 (IT Rules) are exempted from mandatory electronic filing of Form 10F till 31st March 2023.

2.3 Inbound and outbound Expatriates

As discussed earlier, salary income of expatriates would be taxable in India under the provisions of ITA in case the same is received or deemed to be received in India or in case it accrues or is deemed to be accrued in India.

Any salary due or received from the employer or the former employer is charged to tax in India as '*Income from Salary*'. Further, it is taxed on due or receipt basis, whichever is earlier.

Further, Section 7 of ITA provides that the following incomes are deemed to be received in India:

(i) Annual increase in the recognized provident fund balance of an employee, in excess of the prescribed percentage

(ii) Transferred balance in the recognized provident fund to the extent specified

(iii) Contribution made by the employer to the specified employee pension scheme.

Section 9 *inter alia* provides that income from salary shall be deemed to be accrued in India in case the same is in respect of:

— services rendered in India; and

— Leave period which is preceded and succeeded by services rendered in India and forms part of contract of employment.

Thus, salary income of an expatriate would be deemed to arise in India and hence taxable, if the services are rendered in India, irrespective of the place of entering into the contract of employment or receipt of the income.

2.3.1 Inbound Expatriate Employees

An inbound expatriate employee working in India would be liable to tax in India on the salary earned during the period of services rendered in India, whether he/ she is on the payroll of the Indian entity or of the foreign entity, subject to certain exemptions provided in the domestic law as well as the respective DTAA.

(a) Salary components

ITA provides an inclusive definition of the term salary and perquisites. The term 'salary' includes wages, any annuity or pension, gratuity, any fees, commission, perquisites or profits in lieu of or in addition to any salary or wages, advance salary, leave salary, etc. Thus, essentially salary includes all consideration in money or money's worth (cash or kind) for services rendered arising out of an employer-employee relationship. The definition is wide enough to cover all types of payments whether in cash or in kind; whether immediate or lump sum and whether from or on behalf of current or past employer.

In addition to the normal components included in salary structure of any employee, some typical components of the remuneration package of an expatriate employee and the tax treatment of the same are discussed below:

1. Daily allowance/ Per Diem

Daily allowance/ per diem is generally paid to employees in addition to their regular salary in order to meet their daily living expenses.

Such daily allowance/ per diem is includible in the taxable salary income of employees. However, exemption from tax in some cases, particularly in case of short-term business travelers who are on tour, may be claimed in respect

of the actual expenses incurred by the expatriate towards ordinary daily charges on account of absence from the normal place of duty.

2. Relocation allowance

The employees may be paid an allowance to meet relocation/ transfer expenses, shipment cost, excess baggage cost, etc. In case such allowance is actually used by the employees at the time of transfer for travel and shipment purposes and the same can be substantiated by adequate documentation, the amount of allowance which is actually used to meet such expenses can arguably be claimed as exempt. Any cash relocation allowance which cannot be substantiated with actual proof of expenditure (limited to travel and shipment of goods) is fully taxable.

3. House Rent Allowance ('HRA')

In case the employee has taken accommodation on rent in India, the employee shall be eligible for exemption on account of the rent paid by the him to the extent of lower of the following:

- Actual HRA received for the period during which the rented accommodation was occupied; or
- Excess of rent paid over 10% of salary for the period; or
- 50% of the salary, in case accommodation is situated in Mumbai, Delhi, Kolkata or Chennai, or 40% in all other cases

Salary for the purpose of computing the aforesaid exemption means basic salary, dearness allowance if terms of employment so provide and commission earned by the employee based on a fixed percentage of turnover achieved.

An employee is required to submit Form No. 12BB providing relevant details viz. name, address and PAN of landlord (where rental payments exceed Rs. 100,000 per annum) along with proof of making rental payments for claiming exemption of HRA.

4. Provident Fund

Any contribution made by the employer to Provident Fund up to 12% of 'salary' (as defined for the purpose of Provident Fund contribution is exempt from tax). However, any contribution in excess of 12% of the employee's contribution paid by the employer (on employees' behalf) is taxable in the

hands of the employee. Further, Finance Act 2020 introduced a new provision which states the amount or aggregate of amounts of any contribution made in a recognized provident fund and NPS referred to in Section 80CCD(1) and in an approved superannuation fund by the employer to the account of the employee, to the extent it exceeds ₹ 7,50,000 would be considered as taxable in the hands of the employee.

5. Perquisites

The term perquisite is defined widely to include all the benefits/ concessions received by an employee from an employer. It includes both, monetary as well as non-monetary perquisites. Rules have been prescribed for valuing the perquisites and the same are discussed below:

(i) Accommodation

Free or concessional accommodation provided by the employer constitutes a taxable perquisite under ITA. In terms of the valuation rules such accommodation perquisite is valued as follows:

S. No.	Accommodation perquisite	Valuation Rules prescribed	
		Where accommodation is unfurnished	**Where accommodation is furnished**
A.	Provided by Central/ State Government	License fee determined by Central/State Government reduced by rent recovered from employee.	Value of unfurnished accommodation to be increased by 10% of the cost of furniture, in case owned, or actual hire charges where it is hired as reduced by any charges paid for the same by the employee.
B.	Provided by any other employer who	— 15% of salary in cities	Value of unfurnished

S. No.	Accommodation perquisite	Valuation Rules prescribed	
		Where accommodation is unfurnished	**Where accommodation is furnished**
	owns the accommodation	having population above 2.5 million as per 2001 census. — 10% of salary in cities having population exceeding 1 million but not exceeding 2.5 million as per 2001 census. — 7.5% of salary in other case **Less**: Rent recovered from employee.	accommodation to be increased by 10% of the cost of furniture, in case owned, or actual hire charges where it is hired as reduced by any charges paid for the same by the employee.
C.	Provided by any other employer who has taken the accommodation on lease or rent.	Actual amount of lease rental paid or payable by the employer or 15% of salary whichever is lower **Less:** Rent recovered from employee	Value of unfurnished accommodation to be increased by 10% of the cost of furniture, in case owned, or actual hire charges where it is hired as reduced by any charges paid for the same by the

S. No.	Accommodation perquisite	Valuation Rules prescribed	
		Where accommodation is unfurnished	Where accommodation is furnished
			employee
D.	Provided in a hotel — Up to 15 days on transfer of the employee — For more than 15 days	Nil **Lower of** actual hotel charges **or** 24% of salary for the period of stay as reduced by the rent, if any, actually paid by the employee.	

(ii) Vehicle

	Nature of perquisite	Valuation Rules prescribed	
		Small car (engine cc up to1.6 litres)	Big car (engine cc above 1.6 litres)
A	In case car is provided by employer		
A.1	Used exclusively for official purposes	Nil, subject to prescribed conditions **(see note) ***	Nil, subject to prescribed conditions **(see note) ***
A.2	Used exclusively for private purposes of employee and expense reimbursed by employer	Actual expenditure incurred (including amount representing wear and tear of the car) as reduced by	Actual expenditure incurred (including amount representing wear and tear of the car) as reduced by

	Nature of perquisite	Valuation Rules prescribed	
		Small car (engine cc up to1.6 litres)	**Big car (engine cc above 1.6 litres)**
		amount charged from the employee for such use	amount charged from the employee for such use
A.3	Used partly for official purpose and partly for private purpose and the running and maintenance expenses are reimbursed by the employer	₹ 1,800 p.m. (plus ₹ 900 if driver is provided)	₹ 2,400 p.m. (plus ₹ 900 if driver is provided)
A.4	Used partly for official purpose and partly for private purpose and the running and maintenance expenses for private use are fully met by the employee	₹ 600 p.m. (plus ₹ 900 if driver is provided)	₹ 900 p.m. (plus ₹ 900 if driver is provided)
B	In case car is owned by employee and employer reimburses running and maintenance expenses		
B.1	Used exclusively for official purposes	Nil, subject to prescribed conditions **(see note)***	Nil, subject to prescribed conditions **(see note)***
B.2	Used partly for official purpose and partly for private purposes	Actual expenses reimbursed reduced by ₹ 1,800 p.m. (plus ₹ 900 if driver is provided)	Actual expenses Reimbursed reduced by ₹ 2,400 p.m. (plus ₹ 900 if driver is provided)

Note:

* A log book containing details of journey undertaken, viz. date of journey, destination, mileage and the amount of expenditure incurred, for official purpose needs to be maintained.
* A certificate from the employer to the effect that expenses were incurred wholly and exclusively for the performance of official duties should be obtained.

(iii) Employee Stock based incentives

A company may reward its employees through any of the following forms of stock-based incentives:

— Employee Stock Option Plans (ESOPs)

— Stock Appreciation Rights ('SAR')/ Phantom Equity Plan ('PEP')

— Restricted Stock Plans

— Employee Stock Purchase Plans

Securities allotted to employees under ESOP or similar share settled programs constitute benefit derived by the employee and is taxed as salary income in the year of allotment of shares to the employees.

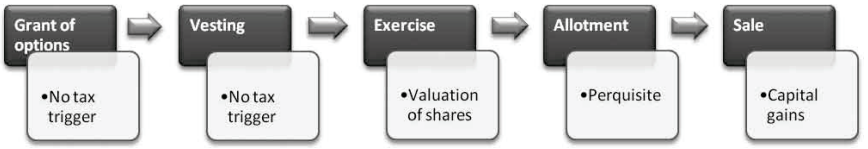
The taxable value is the Fair Market Value ('FMV') of the specified securities on the date on which the option is exercised by the employee as reduced by the exercise price recovered from the employee.

The FMV of the securities is determined as follows:

S. No		Type of securities (equity shares)	FMV on date of exercise
A.	**Listed securities (equity shares)**	Traded on one Indian stock exchange	Average of the opening and closing price
		Traded on more than one Indian stock exchange	Average of the opening and closing price on the stock exchange that recorded highest trading

S. No		Type of securities (equity shares)	FMV on date of exercise
		Not traded on date of exercise	Closing price of the share on a closest date preceding the date of exercise
B.	**Unlisted securities** (equity shares)	This includes the securities which are listed outside India.	As determined by a Category I Merchant banker : — on date of exercise or — any date not more than 180 days preceding the date of exercise

The flow of events and the relevance of the same in determining the levy of taxation on ESOP can be depicted as follows:



In case of cash settled stock-based incentive plan (SAR/ PEP), the cash payout is taxable as salary income.

The employer is required to withhold tax at the time of allotment of securities (in case of stock settled incentive plan) and at the time of cash payout (in case of cash settled incentive plan) to the employees. In case of global stock option plans, it is the responsibility of the Indian entity to withhold tax on the perquisite value of such stock options under Section 192 of the ITA.

Further, individuals qualifying as NR or RNOR in India are liable to tax only on their India sourced income. ITA does not specifically provide for apportionment of stock-based income in relation to mobile employees. However, guidance may be drawn from the Delhi Income Tax Appellate Tribunal (ITAT)[8] in the case of Robert Arthur Keltz (represented by United

[8] 59 SOT 203 (Delhi Tribunal) 24.05.2013

Technologies International Operation), according to which if an employee is based in India only for a part of vesting period (i.e. period beginning with the date of grant of the stock options and ending with the date of vesting of the stock options), then proportionate amount of the value of benefit will be liable to tax in India. The proportionate value shall be determined by applying to the value of benefit, the proportion which the length of the period of stay in India by the expatriate during the vesting period bears to the length of the total vesting period. This proposition is supported by CBDT circulars in the erstwhile Fringe Benefits Regime.

Hence, in case of NRs and RNORs, only that benefit which is attributable to the period of services rendered in India during the vesting period shall be taxable in the financial year in which taxable event occurs.

In case of Bharat Financial Inclusion Ltd[9], the Hyderabad Tribunal held that allotment of shares by the employer is relevant for taxation of ESOP perquisite and not on exercise of option by employee. Accordingly, tax withholding obligation arises on allotment of shares.

(iv) Other perquisites

S.No.	Perquisite	Valuation
A	**Sweeper, gardener, watchman, personal attendant**	Actual cost to the employer **Less:** Amount recovered from the employee for services
B	**Supply of gas, electric energy, water**	Actual amount of expenditure incurred or reimbursed by employer on that account **Less:** Amount, if any recovered from the employee for such benefit or amenity **Note:** Where supply of gas, electric energy, and water is made from resources owned by the employer, without purchasing them from any outside agency then the value of perquisite would be manufacturing cost

[9] 172 ITD 198 (Hyd. Tribunal) 03.08.2018

S.No.	Perquisite	Valuation
		per unit incurred by the employer.
C	**Free or concessional educational facilities for any member of employee's household**	Actual amount of expenditure incurred or reimbursed by employer or cost of such education in similar school **Less:** Amount, if any recovered from the employee for such benefit or amenity.
D	**Interest free concessional loan**	Interest calculated using State Bank of India rates as on 1 April of the relevant FY on maximum outstanding monthly balance **Less:** Interest paid by employee The provision is not applicable on petty loan up to ` 20,000 or loan for medical treatment in respect of specified diseases. However, exemption is not applicable to so much of the loan as has been reimbursed to the employee under any medical insurance scheme.
E	**Free food and non-alcoholic beverages**	Amount of expenditure incurred by the employer **Less:** Amount recovered from the employee Except if employer provides free food and Non-alcoholic beverages during the office working hour at office premises or through paid **meal voucher** and amount of expenditure not exceeding ` 50 per meal.
F	**Gifts, Vouchers or token to employees**	Actual amount of expenditure incurred However, such value to be considered Nil, if the value of gift per employee during the FY in aggregate is below ` 5,000

S.No.	Perquisite	Valuation
G	**Memberships and annual fees charged on credit card**	Actual amount of expenditure, which is personal in nature, incurred or reimbursed by such employer on that account **Less:** Amount, if any recovered from the employee for such benefit or amenity. **Note:** However, there will be no perquisite in the hands of employees where expenses incurred wholly and exclusively for official purposes and if complete detail in respect of such expenditure are maintained by the employer & the employer gives the certificate to the effect that the expenditure was incurred wholly and exclusively for the performance of official duties
H	**Use of movable assets (other than Laptops)**	10% of actual cost of the asset or the amount of rent paid or payable Less: Amount, if any recovered from the employee for such benefit or amenity
I	**Home Leave**	Any expense incurred by the employer on the home leave travel for journey outside India for employee and his/her family is fully taxable
J	**Telephone facility**	Any expense reimbursed by Employer to the employee on account of telephone expenses incurred by an employee is exempt under Section 17(2) read with Rule 3 (7)(ix) of the IT Rules
K	**Transfer of movable asset to the employee directly or indirectly**	Actual cost of movable asset **Less:** 10% of depreciation for each completed year which such assets were put to use by the employer (the

S.No.	Perquisite	Valuation
		depreciation rate to be used in case of computer and electronic items is 50% and in case of motor car is 20% by reducing balance method Less: Amount, if any recovered from the employee for such benefit or amenity
L	**Any other benefits or amenities, services, rights or privilege**	Cost to employer **Less:** Amount, if any recovered from the employee

6. Standard deduction

Standard deduction from gross salary has been introduced from FY 2018-19. The deduction is the least amount from the below under the old tax regime is:

- Amount of ₹ 50,000; or
- Amount of gross salary

For the default tax regime, the standard deduction would be Rs. 75,000.

7. Tax equalization and Hypothetical tax

Most of the companies follow a principle wherein an expatriate should be neither better off nor worse off by taking up an international assignment and therefore he/ she should pay no more or no less tax on the salary income than what would have been payable had the employee continued in the home country.

This principle is known as 'tax equalization' which means that a hypothetical tax is deducted from the salary in the home country and actual taxes in respect of income from employment in the home and host country would be borne by the employer and not by the employee.

Hypothetical tax is a part of the tax equalization policy under which the expatriate employee is responsible during the assignment for "hypothetical" or "stay-at-home" tax, which would be calculated on the remuneration the expatriate employee would have earned if he/she continued to live and work in the home location.

Hypothetical tax is withheld from the expatriate's normal pay and is retained by the employer as a "tax reserve". The company would then pay all

applicable home and host country taxes on employment income (including taxes on expatriate benefits) during the assignment.

There are judicial precedents to support the position that the hypothetical tax reduced from the salary does not constitute income in the hands of the expatriate and therefore cannot be treated as part of the employee's taxable salary. This has also been re-affirmed by the Bombay High Court in the case of Jaydev H. Raja (ITA No 87/2000).

The tax so borne by the employer, would form part of the expatriate's salary and therefore in computation of the 'income from salaries' the taxes so borne by the employer have to be grossed up and included therein.

As per provisions of ITA, the employer could, at its option pay taxes on the non-monetary perquisites provided to employees, and such taxes need not be grossed up as per Section 10(10CC) of the Act. Considering that normally expatriate employees are tax equalized, the benefit of this could be availed. However, there would be a disallowance of expense under Section 40(a)(v) of the ITA, in the corporate tax return of the employer to this extent.

The Uttarakhand High Court in case of *Sedco Forex International Drilling Inc. (TS-603-HC-2012)* and the Delhi High Court in case of *Yoshio Kubo & Ors. (ITA No 441/2003/Del)* have held that amounts paid by the employer, directly to the Indian income tax authorities, in discharge of an employee's income tax liability do not fall into the category of monetary benefits and hence eligible for exemption under Section 10(10CC) of ITA. The impact of the exemption is that, instead of applying for multiple gross-up, the employer can pay tax on employee's behalf on the value of non-monetary benefits with a single stage gross up.

It may, however, be noted that the above said position will receive finality only after an affirmative decision by Supreme Court.

The table below shows the total cost for an employer where the tax liability borne by it is calculated with multiple stage gross up and with single stage gross up relying on the High Court judgment.

	Particulars	**Tax liability (single stage grossing up)** `	**Tax liability (multiple stage gross up)**

			`
(a)	Total Income	100	100
(b)	Tax Perquisite (tax liability borne by the employer)#	31	45[100*31/ (100-31)]
(c)	Total Income including perquisite	131	145
(d)	Tax payable (@ 31%)	41	45
(e)	Total cost for the employer (a) + (d)	141	145

#Assuming tax rate @ 31% for simplicity

Please note that the exemption under Section 10(10CC) of ITA is a trade off with the corporate tax deductibility of such amount which is claimed as exempt (refer Section 40(a)(v) of ITA).

8. Overseas social security

a) Taxability of employer's contribution

There is no specific provision under ITA that governs the tax treatment for social security contributions made by an employer to the overseas social security scheme on behalf of its employees or by the inbound expatriate employees who continue to contribute to their home social security scheme.

Guidance can be drawn from past judicial rulings where it has been held that employer contribution may not be considered as a taxable perquisite provided the following conditions are satisfied-

(i) The contribution made is an obligation of employer and is mandatory in nature;

(ii) The contribution made is not an obligation of the employee being met by employer.

(iii) The contribution is not actually paid to the employee or allowed to the employee or due/accrued to the employee from the employer.

(iv) The employee does not have vested right at the time when contribution is made.

(v) The receipt of the contribution made to the fund is contingent in nature.

(vi) The employees do not have any right to claim the amount payable under the policy on the date on which the contribution is being made.

The Delhi HC in case of Yoshio Kubo & Ors. vs CIT (ITA No 441/2003/Del) has held that the amounts paid by employers to pensions or social security funds are not perquisite since no immediate vesting is derived to employee at the time of contribution to such funds. Hence, the same were held as non-taxable in the hands of employees.

b) Employee's contribution

Likewise, based on judicial precedents, in respect of inbound employee's contribution to home social security, a deduction may be available from the salary income if the contributions made by employee meet the following conditions:

(i) The employer is authorized to deduct the social security contribution from the remuneration payable to the employee.

(ii) The provisions of the home country income tax laws allow full deduction of the social security contributions from the income and it is only on the net income that the tax is levied.

(iii) The scheme to which the contributions are made is not a 'company framed scheme' and are statutorily required by law.

(iv) The contributions are required to be made by employees compulsorily.

(v) The contributions are deducted from the employee's salary as a prior charge by overriding title.

A case specific evaluation shall need to be done on the basis of the above, to determine income-tax implications.

9. Relief from Taxation on Income from Retirement Benefit Account (RBA)

Section 89A deals with providing relief from taxation on income from retirement benefit account maintained in a notified country wherein, individual shall be provided relief in the form deferment of income from retirement benefit account till the date of actual receipt of amount instead of

charging tax on such account on accrual basis. Below conditions need to be adhered with in order to claim the said relief:

(1) Relief is applicable to 'specified person', which shall mean a person resident in India who opened a specified account in a notified country while being non-resident in India and resident in that country.

(2) 'Specified account' means an account maintained in a notified country by the specified person in respect of his retirement benefits and the income from such account is not taxable on accrual basis but is taxed by such country at the time of withdrawal or redemption.

(3) Currently the following countries are notified for the purposes of Section 89A: United States of America, United Kingdom, Canada, and Northern Ireland.

Critical aspects of Section 89A

(1) The residency of the person should be checked in the year when the specified account was opened in the notified country.

(2) In case the person was resident of both India and the notified country in the year in which the specified account is opened, the relief u/s 89A may not be available.

IT Rule 21AAA-Rules for Taxation of Retirement Benefit Account maintained in a Specified Country

(1) The rule provides that if a specified person has accrued any income in the retirement benefits account, then the same shall be included in his total income of the FY, in which such income is taxed in the country wherein such account is maintained.

(2) To exercise this option the specified person is required to file Form No. 10EE on or before furnishing the return of income. Further, once this option is exercised, it will apply to all subsequent FYs and cannot be withdrawn.

(3) However, if the specified person has become non-resident after exercising the option, then it shall be deemed that he has never exercised the option and income accrued in the specified account from the FY in which such option was exercised shall be taxable in his hand.

Illustration 6

Facts: Mr. A worked with a company in the UK for 15 years and contributed to a retirement benefits account in the UK. He qualified as a resident of the UK and non-resident of India in the year of opening of social security account in the UK. Income from such retirement benefit account is taxable in the year of withdrawal in the UK. During the FY 2024-25, he qualified as ROR of India.

For FY 2024-25, being an ROR, Mr. A is taxable on his global income accrued /received by him during such year.

However, the provision of Section 89A may be invoked and income from the retirement benefit account held may be considered as taxable in the year of receipt than accrual as such income is taxable in the UK in the year of receipt.

10. Storage Expenses

At the time of secondment / deputation from home country to an overseas location, the employer may permit the expatriate to leave his personal belongings/ goods in his home country for the period of the international assignment depending upon the secondment/deputation/relocation policy of the company. In such case, the employer would incur storage expenses on behalf of the expatriate to enable him to retain his personal belongings in his home country until his repatriation upon completion of the technical assignment. On the other hand, some belongings/ goods, up to a specific weight, could be allowed to be transferred to the host location depending upon expatriate's requirements. The storage expenses incurred by the employer may be taxable in the hands of the employee,

However, any expenses incurred by the employer in relation to shipment and storage of goods on transfer of the expatriate to India can be argued to be wholly and necessarily incurred in performance of his official duties, and hence, are exempt under Section 10(14)(i) of ITA read with Rule 2BB(1)(a) of the IT Rules, meeting the cost of traveling on transfer to India and spent in packaging and transportation of the personal effects of the assessee.

Further, if the employer has incurred the expenditure (either direct payment to the third party or reimbursement to the expatriate) on storage of household goods in the home country, after moving of the expatriate to India or during the Indian assignment, then it may be said that employer has reimbursed the

expenditure due to the expatriate rendering services in India. Hence, it may be considered as a monetary obligation of the employee met by the employer on behalf of the employee, and hence, a taxable perquisite in view of Section 17(2)(iv) of ITA.

(b) Exemptions

1. Short-stay exemption

ITA provides for a short stay exemption in case of an individual who is not a citizen of India. The remuneration received by an individual as an employee of a foreign entity for services rendered during his/her stay in India is exempt from tax subject to fulfilment of all the following conditions:

— The foreign enterprise is not engaged in any trade or business in India;

— His/ her stay in India does not exceed in the aggregate a period of 90 days in such previous year; and

— Such remuneration is not deductible from the income of the employer chargeable under ITA.

Similarly, India's DTAAs with different countries also provide for a short stay exemption for DTAA residents of other countries in respect of employment exercised in India. Generally, Article 15 or 16 (Dependent Personal Services) of the DTAAs, deal with taxation of employment income.

The said Article provides that salaries, wages and other similar remuneration derived by a resident in respect of employment exercised in the host country would be taxable in the host country; however, such income would be taxed exclusively in the home country/ country of residence provided the satisfaction of the following conditions:

— The employee is present in the host country 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 as defined in the relevant Article of the respective DTAA (usually Article 3 which defines the terms used in DTAA);

— The remuneration is paid by, or on behalf of, an employer who is not a resident of the host country; and

— The remuneration is not deductible in computing the profits of an enterprise chargeable to tax in the host country. In other words, such

remuneration is neither deductible nor borne by the PE of the foreign employer in the host country or any other entity which has taxable presence in India.

The aforesaid conditions may differ from country to country and the relevant DTAA should be referred to before application. A claim for the beneficial provisions under this Article should also be substantiated with evidence.

Thus, it could be concluded that inbound expatriates whose presence in India is for a short-term duration could be exempt from tax in India under the relevant DTAA subject to fulfilment of all the conditions mentioned in the relevant clause of the respective DTAA.

Further, in order to claim any benefit under the applicable DTAA by a resident of other country, the person is required to obtain a Tax Residency Certificate from the revenue authorities of the other country apart from other documents and information as may be prescribed by the Indian tax authorities.

2. Tax credits

An inbound expatriate earning income in India may be liable to tax in India under the 'source' rule and may also be taxable in respect of the same income in his/ her home country as per the 'residence' rule. This scenario can lead to double taxation of the said income and in order to avoid the same DTAAs provide for specific provisions for elimination of such double taxation. The most common methodology for avoidance of double taxation used in Indian DTAAs are mentioned under para 2.2.2 Relief under the DTAA.

Generally, in terms of the DTAAs income arising to an expatriate is taxed with or without limitation in the source country and therefore the country of residence has the obligation to eliminate double taxation through credit method.

An individual (qualifying as tax resident of India) must furnish a statement of income and certificate in Form No. 67 before filing return of income under Section 139(1) of ITA in order to claim Foreign Tax Credit in his/her return of income.

The CBDT vide notification dated 18th August 2022 provides that Form 67 can be furnished on or before the end of assessment year where return of income for such assessment year has been furnished within the time

specified under Section 139(1) or Section 139(4) of ITA. This is effective from 01-04-2022.

Where an updated return has been furnished by the individual under Section 139(8A), Form 67 (relating to income included in updated return) shall be furnished on or before the date of filing of such updated return.

In case there is no DTAA, signed between India and the other country, the taxpayer can take benefit under Section 91 of ITA. This relief is available to the individuals who qualify as resident of India in any tax year. The individual will be entitled to the deduction from the Indian income-tax payable of a sum calculated on the doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal.

3. Conversion of home country salary in Indian rupees in order to calculate Indian taxes

Generally, expatriates receive whole/part of their salaries in foreign currency especially when they continue to remain on the payroll of the foreign employer. In such cases, the salary denominated in foreign currency is to be converted to Indian rupees using the Telegraphic Transfer Buying Rate of such foreign currency as on the following dates:

— In case where tax is deducted at source by the employer: the date on which tax is required to be deducted at source i.e. at the time of payment of such salary

— In other cases: the last day of the month immediately preceding the month in which the salary is due or is paid in advance or in arrears.

Telegraphic Transfer Buying Rate in relation to a foreign currency means the rate of exchange adopted by the State Bank of India for buying such currency having regard to the guidelines specified from time to time by the Reserve Bank of India.

4. Withholding tax implications on the employer

Section 192 of ITA governs withholding tax provisions for payments in the nature of “Salaries”. It casts an obligation on the ‘person responsible for paying’ salary to deduct and deposit withholding taxes at the appropriate rates of tax, as prescribed by ITA.

Based on Section 192(1) of the ITA, the employer, being a person responsible to pay salary is under an obligation under Section 192(1) of ITA to deposit withholding taxes (on an average basis) at the applicable rates, on the salary payments to the expatriates. Failure to withhold appropriate taxes would expose the employer to interest and penalties under ITA.

In this regard, it is pertinent to note that the Supreme Court of India[10] has ruled that in case salary paid to the expatriate is for rendition of services in India, with no part of such services being performed for the foreign entity, tax has to be deducted at source from salaries of expatriate employees working in India even in cases where such salaries were paid abroad. In other words, salary payable for services rendered in India should be subject to tax deducted at source/ withholding tax provisions, even on that part of the salary which is paid in the home country to the expatriate employee.

The sum of all the salary components, after considering the exemptions and including the value of monetary as well as non- monetary perquisites, would constitute the total salary income chargeable to tax in India.

Further, there may be situations where salary is paid in India (though taxable on receipt basis as per ITA) is not taxable under the applicable DTAA (due to the employee qualifying as tax treaty resident of the overseas country and also rendering services overseas).

Conversely, where an employee qualifies as tax treaty resident of India and liable to tax in India may also be taxable in the overseas country (say due to part of services being rendered overseas and not eligible to short stay exemption) and eligible to foreign tax credit in India in respect of such foreign taxes.

As regards tax withholding in India by the employer, though there is no explicit provision in section 192, the employer can arguably consider the above mentioned tax treaty benefits (i.e. non-taxability of salary / foreign tax credit) at the stage of Indian tax withholding. This approach has been upheld in recent AAR rulings in the case of Texas Instruments as well as Hewlett Packard.

Sub section (2B) of this section amended w.e.f 01.10.2024, where the employee who receives any income chargeable under the head "Salaries" has, in addition-

[10] **Eli Lilly & Company (India) Pvt. Ltd. (SC) (178 Taxmann 505)**

(i) any income chargeable under any other head of income (not being a loss under any such head other than the loss under the head "Income from house property"); or

(ii) any tax deducted or collected under the provisions of Part B or Part BB of this Chapter, as the case may be,

for the same financial year, he may send to the person responsible for making the payment referred to in sub-section (1), the particulars of—

(a) such other income;

(b) any tax deducted or collected under any other provision of Part B or Part BB of this Chapter, as the case may be; and

(c) the loss, if any, under the head "Income from house property",

in such form and verified in such manner as may be prescribed, and thereupon the person responsible as aforesaid shall take into account the particulars referred to in clauses (a), (b) and (c) for the purposes of making the deduction under sub-section (1)

Further, sub-section (1C) for the purpose of withholding tax responsibility for the start-ups referred to in Section 80IAC. The person responsible for responsible for paying any income to the assessee being perquisite of the nature specified in sub-clause (vi) of clause (2) of section 17 in any previous year relevant to the assessment year, beginning on or after the 1st day of April, 2021, shall deduct or pay, as the case may be, tax on such income within fourteen days—

(i) after the expiry of forty-eight months from the end of the relevant assessment year; or

(ii) from the date of the sale of such specified security or sweat equity share by the assessee; or

(iii) from the date of the assessee ceasing to be the employee of the person,

whichever is the earliest, on the basis of rates in force for the financial year in which the said specified security or sweat equity share is allotted or transferred.

5. Goods and Services Tax (GST) Implications

GST is an indirect tax applicable on supply of goods and services. The Central Goods and Services Act (CGST Act) came into effect from 1st July 2017.

Services by an employee to the employer in the course of or in relation to employment is excluded as per Schedule III of the CGST Act 2017.

In case of reimbursement of secondment / deputation costs by Indian entity to a foreign entity, the secondment / deputation arrangement and relationship between the foreign entity, Indian entity and the expatriate needs to be evaluated to ascertain any GST obligation.

Here, in case of reimbursement of salary cost, the Hon'ble Supreme Court[11] has held that disbursement of salary through group company cannot qualify as a service. The Supreme Court decision was based on the following key observations:

a. The deputed person works under the control, direction and supervision of the assessee, and the compliance to withhold tax was also undertaken as an employer by the assessee.

b. The assessee did not pay any direct or indirect compensation to its parent company for the deployment of employees, apart from the reimbursement of salary at cost.

c. The terms of the agreement make it clear that the relationship between the assessee and the deputed employee is that of employer-employee.

Accordingly, the essential principles laid down by the Supreme Court need to be considered while determining an employer-employee relationship and consequent GST implications. It would be pertinent to note that in case the transaction qualifies as a service, the Indian entity will be required to pay GST under reverse charge mechanism on the said import of services.

Recent Supreme Court ruling on Secondment of Employees

In a recent Supreme Court ruling[12], it was held that decision of whether an arrangement between group entities is in nature of supply of services or not

[11] *Nissin Brake India Pvt. Ltd (TS-230-SC-2019-ST)*

[12] *[CC, CE & ST – Bangalore (Adjudication) etc. Vs Northern Operating Systems Pvt. Ltd. order dated 19 May 2022]*

requires evaluation of who is the "employer" of the seconded employee. If the overseas entity treated as employer, the arrangement would be treated as of supply of service by overseas entity to Indian entity and will be subject to service tax. On the other hand, if it is concluded that the Indian entity is the employer, the arrangement would be outside the purview of service tax. It was held that there is no single factor of determination of this issue and the overall effect of all the related documents is required to be seen. Further, though this judgment pertains to the Service tax regime, the observations made by the Supreme Court are relevant for determination of applicability of GST on such secondment arrangements.

Secondment of Employees by an Indian entity to a foreign entity

In case of reimbursement of secondment / deputation costs by foreign entity to Indian entity, the secondment / deputation arrangement and relationship between the foreign entity, Indian entity and the expatriate needs to be evaluated to ascertain any GST obligation.

The transaction may have following GST implications, considering the nature of transaction-

a. Indian employee deputed to foreign entity and consideration is collected by Indian entity – The transaction may qualify as export of services subjection to fulfilment of conditions specified in Section 2(6) of IGST Act, 2017

b. Indian employee deputed to foreign entity (related party) and no consideration is collected by Indian entity – even though the nature of services qualify as export of services, the condition pertaining to receipt of foreign exchange as specified in Section 2(6) of IGST act, 2017 is not satisfied. Hence, the tax authorities may demand GST on the deemed value of such services.

6. Transfer Pricing

Under the Indian transfer pricing regulations (provided under Sections 92, 92A to 92F of the ITA and the Rules 10, 10A to 10E of the IT Rules thereunder), any "international transaction" between two or more Associate Enterprises (AEs) would need to satisfy the arm's length principle. The term "international transaction" is defined as a transaction between two or more associated enterprises, either or both of whom are NRs, in the nature of purchase, sale or lease of tangible or intangible property, or provision of

services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

The transfer pricing regulations requires all the relevant taxpayers to maintain specified contemporaneous transfer pricing documentation to establish the arm's length nature of its international transaction with the AEs, and also to report all such transactions to the Indian tax authorities in the specified form (i.e. Form No 3CEB i.e. Accountant's Report) to be filed along with corporate income-tax return.

The secondment / deputation arrangements (inbound as well as outbound assignments) between related parties are subject to such Indian Transfer Pricing Regulations. Thus, any cross charge between related parties qualifies as an international transaction and requires an appropriate arm's length justification. The functional matrix of the particular arrangement/ engagement between related parties play a determinative role for the purposes arm's length analysis.

2.3.2 Outbound Expatriate Employees

An overview of the significant issues arising in case of an outbound assignment and the general taxability in such cases are discussed below:

(a) Residential Status and taxability of income under ITA

(i) NR/ RNOR in India

An outbound expatriate employee who is a citizen of India going for employment outside India shall qualify for the NR status if the total stay in India is less than 182 days during the year of departure and any subsequent year of assignment outside India (when he/she is on a visit to India) and in such a case, he/ she would be liable to tax in India only in respect of the following:

— Salary actually received in India;

— Salary deemed to be received in India i.e. annual accretion to the recognized provident fund in excess of the prescribed percentage and employer's contribution to notified pension scheme;

— Salary in respect of services rendered in India;

— Salary in respect of rest or leave period which is preceded or succeeded by service in India.

(ii) ROR of India

Outbound expatriate employees qualifying as resident (ROR) in India would be subject to tax on their worldwide income under the ITA and eligible for foreign tax credit on foreign sourced income.

(b) Taxability of income under applicable DTAA

(i) DTAA resident of India

Further, in terms of DTAA, an outbound expatriate employee would be deemed to be a resident in India, if he/she is resident under the ITA and accordingly may be entitled to claim the short stay exemption in the host/source country subject to fulfilment of all the conditions prescribed in the Dependent Personal Service Article of respective DTAA.

(ii) DTAA resident of host country

An outbound expatriate employee who qualifies as a NR in the relevant FY under ITA and a resident of host country under its domestic tax laws, may claim the income received in India for services rendered in the host country as exempt in India under Article 15 /16 (the Dependent Personal Services) of the applicable DTAA. In order to claim any such exemption, Tax Residency Certificate issued by the Revenue Authorities of host country is required. Further, the employee may be required to furnish prescribed information in prescribed Form 10F of the IT Rules which is to be self-certified if Tax Residency Certificate does not capture the information prescribed under the Rules of the ITA.

(iii) Split Residency

There is no specific provision provided under the ITA specifying the split residency. However, in case of Raman Chopra[13], Delhi Tribunal discussed

[13]*Raman Chopra vs. DCIT (ITAT Delhi) [(2016) 69 taxmann 452]*

the matter relating to split residency. It was discussed that in case of an individual who qualifies as a ROR in India during the relevant FY and also a tax resident of overseas country, his residential status is required to be determined under the relevant DTAA between India and overseas country where the individual is considered as a resident. Based on the tie-breaker analysis, in case the individual qualifies as a resident of overseas country as per the DTAA for the said period of services rendered in the overseas country, the individual may claim exemption from tax in India in respect of the salary earned in the overseas country for such period as per the 'Dependent Personal Services' Article of the relevant DTAA, based on a split residency position. The split residency position was also upheld by Bangalore Tribunal in case of Sanjeev Kumar Ranjan[14].

(c) Taxability of Salary Income

The tax treatment of the various salary components and computation of the taxable salary in case of outbound expatriate employees would be similar as in the case of inbound expatriate employees, discussed above. However, there are few typical issues in case of outbound expatriate employees which have been discussed below:

— Generally, an outbound expatriate employee who is a citizen of India who goes for employment outside India or an employee who is a citizen of India / person of Indian origin who comes to India for visit while employed overseas would qualify for the beneficial provisions for determination of residential status and therefore can continue to enjoy NR status as long as total stay in India does not exceed 181 days.

— Even though the services are rendered outside India, in case the outbound expatriate employee continues to receive salaries in India under a short-term assignment, such salary would be taxable in India. However, if the outbound expatriate employee satisfies the conditions as provided in the sub article 1 of Article 15/16 of the DTAA, the same may not be taxed in India. Accordingly, the Indian employer may not deduct tax in respect of such salary payments upon a satisfaction that the resulting tax liability has been discharged in the host country. However, conservatively, exemption at withholding stage may only be

[14] *DCIT vs. Sanjeev Kumar Ranjan (Bangalore ITAT) (ITA No. 1655/Bang/2017)*

allowed on receipt of a valid Tax Residency Certificate from the overseas tax authorities.

— Outbound expatriate employees contributing to foreign social security scheme pursuant to their posting to a foreign country can still contribute to Provident Fund in India if they continue to be employees of Indian employer during the period of their assignment and continues to receive salary in India. However, it is worthwhile to note that as per an EPFO circular of January 2016, contribution to PF is required only if wages are paid or payable by the Indian establishment.

2.4 Issues

2.4.1 Taxation of employees working abroad on ship or aircraft

Domestic law provisions:

The taxation issues of the employees working abroad on ship or aircraft are always important and matter of discussion. Section 6(1), Explanation 1 (a) says, being a citizen of India, who leaves India in any previous year as a member of crew of an Indian ship as defined in clause (18) of Section 3 of Merchant Shipping Act, 1958. Explanation 2 to this section clarifies that for the purposes of this clause, in the case of an Individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage be determined in the manner and subject to such conditions as prescribed in Rule 126 of the Rule. This rule reads as follows:

> *"126. (1) For the purposes of clause (1) of section 6, in case of an individual, being a citizen of India and a member of the crew of a ship, the period or periods of stay in India shall, in respect of an eligible voyage, not include the period computed in accordance with sub-rule (2).*
>
> *(2) The period referred to in sub-rule (1) shall be the period beginning on the date entered into the Continuous Discharge Certificate in respect of joining the ship by the said individual for the eligible voyage and ending on the date entered into the Continuous Discharge Certificate in respect of signing off by that individual from the ship in respect of such voyage.*

Explanation.—For the purposes of this rule,—

(a) "Continuous Discharge Certificate" shall have the meaning assigned to it in the Merchant Shipping (Continuous Discharge Certificate-cum-Seafarer's Identity Document) Rules, 2001 made under the Merchant Shipping Act, 1958 (44 of 1958);

(b) "eligible voyage" shall mean a voyage undertaken by a ship engaged in the carriage of passengers or freight in international traffic where—

(i) for the voyage having originated from any port in India, has as its destination any port outside India; and

(ii) for the voyage having originated from any port outside India, has as its destination any port in India.]"

Treaty provisions:

Article 15 of OECD MC, clause (3) says: *"Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment, as a member of the regular complement of a ship or aircraft, that is exercised aboard a ship or aircraft operated in international traffic, other than aboard a ship or aircraft operated solely within the other Contracting State, shall be taxable only in the first-mentioned State."*

Paragraph 3 of Article 15 of the OECD Model Tax Convention provides that remuneration derived by crew members of ships or aircraft operated in international traffic shall be taxable exclusively in the State of residence of the employee. This principle of exclusive residence-based taxation was introduced through a 2017 amendment to simplify administration and provide greater clarity. Simultaneously, the definition of "international traffic" was broadened to include ships or aircraft operated by enterprises of third States, thereby allowing the rule to apply even when the employer is not a resident of either Contracting State. However, where the employment is exercised aboard a ship or aircraft operated solely within the other Contracting State, the exclusive taxing right does not apply. In such cases, the remuneration is taxable under paragraphs 1 and 2 of Article 15, ensuring that source-based taxation is preserved where the activity lacks an international character.[15]

[15] Paragraphs 9 – 9.2 on Page 321 of the Model Tax Convention, OECD, 2017

The CBDT has clarified vide Circular No. 586 dated 28 November 1990 as below:

1. A person resident in India in any year is liable to pay tax in India on his global income. A non-resident, on the other hand, is charged to tax in India only on income which is received or is deemed to be received in India or which accrues or arises or is deemed to accrue or arise to him in India. Thus, in the case of a non-resident, income which accrues or arises outside India and is also received outside India is not subjected to tax in India.

2. After the amendment made in section 6 of the Income-tax Act, 1961 by the Finance Act, 1990, w.e.f. 1-4-1990, an Indian citizen who is a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 is regarded as a resident in India only if he is in India for 182 days or more during the relevant year irrespective of the extent of his stay in India in earlier years. For this purpose, it is necessary to note that the term "India" as defined in section 2(25A) of the Income-tax Act, 1961 does not extend to Indian ships operating beyond Indian territorial waters. However, if he is outside India and comes on a visit to India in any year, and leaves India otherwise than as a member of the crew of an Indian ship he will be regarded as a resident in India if his stay in India during that year is for 150 days or more if during the 4 years preceding that year he has been in India for 365 days or more.

3. Thus, generally, Indian members of the crew of a foreign-going Indian ship would be non-resident in India if they are on board such ship outside the territorial waters of India for 182 days or more during any year. Accordingly, such seamen will be charged to tax in India only in respect of earnings received in India or the earnings for the period when they are working within the Indian waters on coastal ships, etc.

4. Under section 192 of the Income-tax Act, persons responsible for paying salary and other incomes chargeable under Income-tax Act under the head "Salaries" are required to deduct income-tax from such income at the time of payment. For this purpose, the amount of tax to be deducted is computed at the average rate of income-tax arrived at by applying the rates in force for the financial year in which the payment is made on the estimated income of the person to whom salary is paid. Since, as explained above, in the case of members of crew of foreign-going Indian ships, who are not likely to be in India for a period or periods exceeding 182 days in a year, income

which accrues or arises outside India and is also received outside India is not liable to tax in India, the shipping companies and other persons responsible for paying salary to such members of crew may take these factors into account while computing the amount to be deducted as tax and deduct only so much of tax as would be chargeable on the estimated income liable to tax in India. If the shipping company or other person responsible for paying to such members of crew subsequently finds that any person who was earlier considered as not likely to be resident in India and deduction of tax at source was made on that basis is now likely to be resident in India, the shipping company or the other person responsible for making the payment, may increase the deduction so as to adjust any deficiency arising out of an earlier short deduction or non-deduction during the same financial year.

The relaxation in the period i.e. 182 days instead of 60 days is available only in the year an Indian citizen leaves India as a member of the crew of an Indian ship.

2.4.2 Taxation of director's fees

Director's fee is the remuneration received by an individual, in the capacity of a member of a Board of Directors of a company. In terms of the applicable Articles of the DTAA dealing with director fees, services are deemed to have been rendered and may be taxed in the country where the company is a resident. Remuneration would cover all payments in cash and kind. It is pertinent to mention here that the OECD definition restricts itself to only directorial remuneration in the capacity as a member of the board of directors of a company and excludes all payments made to a director in any other capacity.

Since it might sometimes be difficult to ascertain where the services are performed, the provision treats the services as performed in the State of residence of the company.

The stock-options granted to employees will also arise in the case of stock-options granted to members of the board of directors of companies. To the extent that stock-options are granted to a resident of a Contracting State in that person's capacity as a member of the board of directors of a company which is a resident of the other State, that other State will have the right to tax the part of the stock-option benefit that constitutes director's fees or a similar payment even if the tax is levied at a later time when the person is no longer a member of that board. While the Article applies to the benefit

derived from a stock-option granted to a member of the board of directors regardless of when that benefit is taxed, there is a need to distinguish that benefit from the capital gain that may be derived from the alienation of shares acquired upon the exercise of the option. Article 16 of the OECD MC, and not Article 13, will apply to any benefit derived from the option itself until it has been exercised, sold or otherwise alienated (e.g. upon cancellation or acquisition by the company or issuer). Once the option is exercised or alienated, however, the benefit taxable under this Article has been realised and any subsequent gain on the acquired shares (i.e. the value of the shares that accrues after exercise) will be derived by the member of the board of directors in his capacity of investor-shareholder and will be covered by Article 13.

2.4.3 Taxation of teachers/diplomats

Taxation of Teachers - Several DTAAs of India have articles dealing with teachers, for example the DTAA with Australia has a separate article.[16] However, such article has been dropped in the OECD Model and even in the UN Model. Both have separate article on taxation of Student (Article 20 in both models).In fact, the Group of Experts decided to drop special article on teachers after deliberations. In its Commentary the UN Model in paragraph 7 on page 527 (UN Model 2021) clarifies:

"As regards paragraph/11 of the Commentary on Article/15 of the 2017 OECD Model Tax Convention quoted immediately above, it should be noted that, though Articles/14, 15, 19 and 23 may generally be adequate to prevent double taxation of visiting teachers, some countries may wish to include a visiting teachers Article/in their treaties. Reference is made to paragraphs/11

[16] **ARTICLE 20 : PROFESSORS AND TEACHERS**

1. Where a professor or teacher who is a resident of one of the Contracting States visits the other Contracting State for a period not exceeding two years for the purpose of teaching or carrying out advanced study or research at a University, college, school or other educational institution, any remuneration that person receives for such teaching, advanced study or research shall be exempt from tax in that other State to the extent to which such remuneration is, or upon the application of this Article will be, subject to tax in the first-mentioned State.

2. This Article shall not apply to remuneration which a professor or teacher receives for conducting research if the research is undertaken primarily for the private benefit of a specific person or persons.

to 13 of the Commentary on Article/20 for a comprehensive treatment of this subject."

Articles 14 of UN MC which deals with independent personal services may include teaching activities. If the person is earning income from teaching activities of an independent character he shall be taxable only in the resident state, except in the following circumstances, when such income may also be taxed in the other Contracting State:

(a) If he 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 Contracting State; or

(b) If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

Taxation of diplomats – As per section 10(6)(ii) of the Income Tax Act 1961, an exemption is available in case of an individual who is not a citizen of India, on the remuneration received by him as an official, by whatever name called, of an embassy, high commission, legation, commission, consulate or the trade representation of a foreign State, or as a member of the staff of any of these officials, for service in such capacity.

The remuneration is exempt from tax provided:

- The remuneration of the corresponding officials or, as the case may be, members of the staff, if any, of the Government resident for similar purposes in the country concerned enjoys a similar exemption in that country.
- The members of the staff are subjects of the country represented and are not engaged in any business or profession or employment in India otherwise than as members of such staff.

Article 27 of the UN MC and Article 28 of OECD MC clarifies that nothing in the Convention shall affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special agreements.

2.4.4 Taxation of business visits

An individual who is on a business visit to India may be taxable in India on any remuneration received during the period of stay in India. However, the taxability would be dependent on various factors such as the purpose of stay, nature of activities carried out while in India, tax residential status, remuneration/benefits for such period, etc. Short stay exemption may be available under the ITA or under the relevant DTAA subject to satisfaction of prescribed conditions.

2.4.5 Tax Residency Certificate

In order to claim relief under DTAA, Section 90 of the ITA has been amended to provide for an additional requirement. Sections 90(4) and 90A(4) of the ITA provide a condition for submission of tax residency certificate to avail the benefits under a DTAA. The certificate would have to be obtained from the Revenue Authorities of the host country. Please note that where the entire prescribed information is not captured in the TRC, electronic filing of Form 10F would be required separately as per the provisions of section 90(5) and 90(5A) of ITA read with Rule 21AB

Further, a standard format has also been issued for making an application for requesting tax residency certificate from the Indian tax office if the individual qualifies as a resident of India, where the certificate is required by the authorities of another country. Refer to para 2.2.2 for notification on filing of form 10F.

2.4.6 Reporting requirements for payments made to NRs

Any payment made to a NR which is “chargeable to tax in India” is required to be reported electronically in Form 15CA and/or Form 15CB. Thus, salary payments made to NR expatriates are required to be reported by the employer in case they are chargeable to tax in India.

2.4.7 Obligation to pay Gratuity

As per Section 4 of the Payment of Gratuity Act, 1972, gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years;

— on his superannuation, or

— on his retirement or resignation, or

— on his death or disablement due to accident or disease.

An expatriate who have already rendered five years of service reserve the right to claim gratuity from the Indian employer at the time of termination.

2.5 Other heads of income and deductions

As discussed earlier, apart from salary, income arising to a taxpayer in India can be classified into four heads. Each of these heads of income and the distributive rights for taxation of the same are discussed below:

2.5.1 Income from house property

An expatriate who is NR/RNOR in India, shall be taxable in India in respect of income from immovable property provided that such property is situated in India. However, in case the expatriate is ROR in India, his/her global income would be liable to tax in India and accordingly, income arising from immovable property situated outside India would also be taxable in India. The assessee can take the benefit of DTAA in such case. As per Article 6 of the OECD MC, Income derived by a resident of a Contracting State from immovable property situated in the other Contracting State may be taxed in that other State. Article 6 of India's DTAAs, dealing with income from immovable property generally provide that such income 'may be taxed in the country where the property is situated' (i.e., the source country).

Hence in case of double taxation, country of residence may provide the credit of taxes paid in the country of source i.e. in the country where the property is situated.

The interest paid on the housing loan against the property situated outside India may be claimed as deduction only if the conditions prescribed u/s 25 of the ITA are satisfied. Section 25 of the ITA says, notwithstanding anything contained in section 24, any interest chargeable under this Act which is payable outside India, on which tax has not been paid or deducted under Chapter XVII-B and in respect of which there is no person in India who may be treated as an agent u/s 163 shall not be deducted in computing the income chargeable under the head "Income from house property".

2.5.2 Income from Business or Profession

In terms of India's DTAAs, business income derived by a NR shall be taxable in India provided such business is carried on in India through a Permanent Establishment (PE) or a Fixed Base situated in India. A PE primarily means

an industrial or commercial establishment that is equipped with sufficient resources to operate as an independent business unit ('fixed base PE') and includes within its ambit a PE arising on account rendition of services by a NR ('service PE') as well as an agency Permanent Establishment ('agency PE'). It would basically mean a 'virtual projection' of the resident of a foreign country into India.

Thus, in case a person resident abroad is carrying on a business in India through a PE, income attributable to such PE shall be taxable in India.

The proviso clause of Section 5(1) says, in case of an individual, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or profession set up in India.

2.5.3 Income from profession

In terms of India's DTAAs, income derived by a NR in India in respect of professional services shall be taxable in India provided the NR professional has a fixed base available to him/her in India or his/her stay in India is equal to around 90 days or more (threshold varies depending on the DTAA) or more in the relevant financial year. In case of resident individuals engaged in profession referred to in Section 44AA of ITA may adopt the presumptive taxation u/s 44ADA and declare the profession income at the prescribed rate subject to satisfaction of given conditions.

For the purpose of this Article 'professional services' includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

2.5.4 Capital gains

Under the ITA, NR expatriates are subject to tax only on gains from the transfer of capital assets situated in India or on the sales proceeds received directly in India on account of transfer of foreign assets made outside India.

Generally, the Article dealing with capital gains in India's DTAAs also provide for the source-based taxation in case of immovable properties, movable properties forming part of the business assets of a permanent establishment as well as for shares. For all other assets, usually taxation would be in the country of residence of the taxpayer.

2.5.5 Income from other sources

Any residual income not covered in the earlier heads of income is taxable as "Income from other sources". It includes interest, dividend, royalties, fees for technical services, etc. Generally, in terms of tax treaties, NR expatriates would be taxable in India in respect of such income provided the same is arising in India. The tax rates for the same are specified in the respective Article of the DTAAs.

Under the domestic tax law, the following interest incomes are exempt from tax:

— Interest on Non-resident (external) account in the hands of individual who is a Non-resident under the Foreign Exchange Management Act or is permitted by RBI to maintain such account

— Interest on **Foreign Currency (Non-Resident) Account** (FCNR) deposits exempt in the hands of individual who are NR or RNOR and where acceptance of deposit by bank is permitted by RBI.

— A deduction of up to ₹ 10,000 under the old tax regime(under Section 80TTA of ITA) may be claimed by individuals with respect to interest on deposits in a savings account with a banking company, specified co-operative society or post office in India. The deduction limit in case of senior citizens (resident individual of the age of 60 years or more at any time during the year) is ₹ 50,000 (under Section 80TTB of ITA) under the old tax regime.

Refer to para 4.1 for the individuals who qualify as a Non-resident as per Foreign Exchange Management Act.

The total of income under each of the heads discussed above would constitute the gross total income from which the expatriate can claim certain deductions on account of investments in eligible securities, payment of life insurance premium, contribution to provident fund, contribution to certain pension funds, payment towards children tuition fee and other specified payments up to a maximum amount of ₹ 150,000 per annum under Section 80C of the ITA.

2.6 Procedural Compliances

Expatriates coming to India have to comply with the following procedural formalities in India:

2.6.1 Entry procedures – inbound employees

(a) Before arrival

Foreign nationals arriving in India must hold valid visa or travel authorization. The Indian Embassy/High Commission located in various countries issues the correct type of visa to foreign nationals based on the proposed activities of foreign nationals in India. Foreign nationals can secure below illustrative list of visas to enter India depending upon their purpose to visit India:

S. No.	Nature of visa	Purpose of Visit to India
(i)	Employment visa	Foreign travellers intending to visit India for the purpose of employment. The employment visa is generally granted to a highly skilled or professionally-qualified foreigner subject to the fulfillment of other pre-requisites conditions.
(ii)	Business visa	Foreign travellers visiting India for limited purpose including business meeting, non-paid activities for professional and amateur sports people, judges and adjudicators who want to come to India to participate in their field of sport.
(iii)	Entry visa	Other purposes not covered elsewhere (including accompanying dependent family members of foreign nationals)
(iv)	Tourist visa	Visiting India for tourism. e-Visa facility is also available.
(v)	Student visa	1) Pursuing studies/academic courses 2) For Internship purposes with Indian companies, NGOs and educational institutes including French VIE Programme, AIESEC, etc. 3) Pursuing research in any field
(vi)	Transit visa	Travellers passing through the country
(vii)	Missionary visa	Missionaries of registered charitable trusts

S. No.	Nature of visa	Purpose of Visit to India
(viii)	Journalist visa	Media representatives
(ix)	Conference visa	Event organizers and visitors. E-visa facility is available.
(x)	Medical visa / Medical attendant visa	For seeking medical treatment in India at recognized and specialized hospitals and treatment centres. e-Visa facility is also available for both visas
(xi)	Mountaineering Visa	For expeditions and climbing activities. Requires clearance from Indian Mountaineering Foundation and Home Ministry
(xii)	Intern Visa	For foreign nationals interning at Indian companies or NGOs after graduation. Validity: Max 1 year Requirement: Internship letter, must be within one year of graduation
(xiii)	Film Visa	For shooting films, TV commercials, or reality shows in India. Requires Script approval from Ministry of Information & Broadcasting
(xiv)	Research Visa	For academic research scholars, professors, and university fellows having validity of upto 5 years. Requires detailed research proposal, institutional approval

The Government of India has issued guidelines on the grant of visa to foreign nationals visiting India. The guidelines specify the conditions for issuing the visa to foreign nationals upon submission of prescribed documents and payment of prescribed fee. The process, documentation, fee etc. depends upon place of visa application. It is noteworthy that the place of visa application depends upon country of origin/country of domicile of foreign nationals.

Electronic visa (e-visa) is for foreigners visiting India for short-term for business, medical, and tourist purpose. At present, India allows e-Visas for around 175 countries around the globe.

A brief of various categories of Visa have been mentioned hereunder:

(i) Employment Visa

Employment visa are generally granted to a highly skilled and/or a qualified foreign national who desire to come to India for employment purposes. Employment visas are not granted for jobs for which large numbers of qualified Indians are available and for those jobs which are routine/ordinary/ secretarial in nature.

Employment visa may be granted to foreign nationals only if the salary is in excess of ₹ 16,25,000 per annum (at present). However, the said limit is not applicable for a few specified cases like ethnic cooks, language (other than English) teachers/translators and staff working for a high commission/ consulate in India etc.

The employment visa can also be issued to foreign nationals engaged in execution of project in power sector and steel sector. The number of project visas that may be granted per power and steel project is subject to a ceiling.

The Employment Visa must be issued from the country of origin or from the country of domicile of the foreigner provided the period of permanent residence of the applicant in that particular country is more than 2 years.

(ii) Business Visa

Business visas may be granted to foreign nationals who desire to visit India to establish industrial/business venture or to explore possibilities to set up an industrial/business venture in India.

The guidelines issued by the Ministry of Home Affairs ('MHA'), apex immigration body in India, provide various illustrative scenarios under which business visas may be granted to foreign nationals, e.g. those who intend to visit India for participation in trade fairs, meetings, purchase/ sale of goods, etc.

Multiple entry business visas may be granted for a maximum period of five/ten years subject to bilateral agreement between the two governments.

Recently, Government of India introduced e-business visa facility as well wherein foreign nationals intend from specified countries may obtain business visas electronically to visit India.

(iii) Entry (X) Visa

Entry (X) visas are granted to the spouse and dependents of foreign nationals who desire to visit India or are already in India on any other type of visas, i.e. business, employment, etc. An entry (X) visa may also be granted to foreign nationals of Indian origin and spouse/dependents of such foreign nationals who desire to visit India for meeting relatives, holidays, sightseeing, etc.

The Indian immigration laws do not permit grant of entry (X) visa to unmarried partners.

The validity of the entry (X) visa is co-terminus with the visa of the principal visa holder or a shorter duration but limited to five years from the date of initial issue.

Foreign nationals holding entry (X) visas cannot accept any employment in India or undertake/engage in any business/economic activity in India.

(iv) Tourist Visa

Tourist visas are generally granted to foreign nationals who are desirous of visiting India for recreational purposes, meet family members or friends etc. and do not have any permanent residence or occupation in India. In order to boost tourism in India, government of India has introduced e-tourist visa facility for 166 countries and visa-on-arrival facility for Japanese nationals and Korean nationals.

Tourist visa is non-extendable and non-convertible in India.

A Tourist Visa-on-Arrival (TVOA) can be granted to citizens of Finland, Japan, Luxembourg, New Zealand, Singapore, Cambodia, Vietnam, Philippines, Laos, Indonesia or Myanmar, who fulfil the specified conditions.

(b) After arrival

(i) Foreigners' Registration

Foreign nationals visiting India are generally required to get themselves registered with concerned Foreigner's Registration Office ('FRRO/FRO') where the validity of visa exceeds 180 days or within the stipulated time period as endorsed on visa if any. Generally foreign nationals are required to

obtain registration within 14 days of arrival in India. Penalty applicable if there is a delay in registration.

The process, documentation, fee etc. depends on many aspects like nationality, place of residence in India, etc. The registration process is generally the same, but some requirements may be different at various jurisdictional FRRO/FRO.

(ii) Provisions related to Visa extension

Generally, long term visas such as Employment, Business, Entry(X), etc., are extendable on year-to-year basis. The process, documentation, fee etc. depends on many aspects like nationality, place of residence in India, etc. The registration and extension process is generally the same, but some requirements may be different at various jurisdictional FRRO/FRO.

(iii) Overseas Citizenship of India ('OCI') / Person of India Origin ('PIO') Card Schemes

Both OCI and PIO cards are multi-purpose, multi-entry life-long visa facility which allow specified foreign nationals to enter into India without need of any separate activity-based visas specified by MHA. Typically, these cards are issued to foreign nationals of Indian origin or their spouse/dependents.

Foreigners holding OCI or PIO cards are exempted from FRRO registration. Effective 9 January 2015, both OCI card and PIO card schemes have been merged and under the new scheme no further PIO cards shall be issued. Existing PIO cardholders shall enjoy the same benefits as that of OCI cardholders.

If a foreign national on e-visa/ Visa-on-Arrival/ Tourist Visa/ Employment Visa/ Business Visa/ Student Visa/ Research Visa marries an Indian national/ Person of Indian Origin/ OCI cardholder during the validity of his/her Visa, his/ her visa may be converted to Entry ['X-2'] Visa by FRRO/ FRO concerned.

(iv) Other Matters

Foreigners need to inform the FRO in case change in accommodation and obtain certificate of change of address.

Generally, employment/business visa cannot be converted into any other kind of visa during a foreign national's stay in India. However, such visas may be converted into "X" visa (dependent visa)/ "Medical" visa, subject to the prescribed conditions and the prior approval of MHA in India.

Conversion of the Entry (X) visa of the spouse of the employee on an intra-company transfer to employment visa may be permitted in India with the prior approval of the MHA and subject to fulfillment of prescribed conditions.

Change of employer is generally not permitted on an employment visa. However, MHA has clarified that the change of employer by foreign nationals in India may be permitted in cases where the transfer is between a parent company and its subsidiary or vice versa, and between subsidiaries of a parent company.

Considering the numerous security concerns, the Government of India has declared a few areas ('Specified Areas') to be known as 'Protected / Restricted Areas' governed by the rules framed under Foreigners (Protected Area) Order, 1958 and Foreigners (Restricted Area) Order, 1963. As per the orders, foreign nationals are not allowed to visit specified areas without prior approval from the immigration authorities.

2.7 Permanent Account Number (PAN)

PAN is akin to an Income-tax registration number and any person earning taxable income in India has to obtain the PAN. The application for a foreign citizen is to be made in Form 49AA to the National Securities Depository Ltd. Facilitation centers together with a copy of prescribed documents.

The documents accepted as proof of identity, proof of residence and proof of date of birth is stipulated under Rule 114 of the IT Rules.

PAN application can also be made online on the website of National Securities Depository Ltd.

The PAN is to be quoted on all tax returns, correspondence with the tax authorities and on all documents relating to prescribed categories of transactions.

2.8 Advance Tax

Where the total tax liability after TDS (subject to actual deduction by the deductor) exceeds ₹ 10,000, advance tax is payable within the same FY on the principle of pay-as-you-earn. The due dates for payment of advance tax and the amount payable are:

Due Date	Amount Payable
On or before 15th June of the year	15% of estimated tax
On or before 15th September of the year	45% of estimated tax less earlier installment
On or before 15th December of the year	75% of the estimated tax less earlier installment
On or before 15th March of the year	Whole of the estimated tax less earlier installments

Failure to pay advance tax invites interest liability under Sections 234B and 234C of ITA. Interest is payable at 1% per month for three months in case of deferral of tax payment which is due on 15th June (except if 12% of estimated tax is paid), 15th September (except if 36% of estimated tax is paid) and 15th December and for one month in case of deferral of payment of the last instalment i.e. tax which is due on 15th March. No interest is charged in respect of advance tax on dividend income, capital gains and windfall gains if the tax on such income is paid in subsequent installments due when the gain arises before 15th March. If such gain arises after 15th March, no interest will be charged if the tax is paid on or before 31st March.

If the total amount of advance tax is less than 90% of the taxpayer's actual liability after Tax Deducted at Source (including foreign tax credit), interest is payable at the rate of 1% per month from 1st April following the year in which the tax is due until full payment of the tax occurs.

The amount paid after 15th March but on or before 31st March is also treated as advance tax paid. Thus, if estimated income is likely to exceed the amount estimated on or before 15th March, then additional advance tax can be paid and penal interest can be saved.

Advance tax provisions are not applicable to resident individual who is of the age of 60 years or more and does not have any income from 'Profits and gains of business or profession'.

2.9 Self-assessment Tax

Any remaining tax due after claiming credit for Tax Deducted at Source/Tax Collected at Source, advance tax payments and foreign tax credits is to be paid by way of Self-assessment tax. Self-assessment tax is a tax paid after the end of the tax year by an individual and generally at the time of filing the tax return.

2.10 Tax return

Every expatriate earning taxable income in India is required to furnish a return of income, in the prescribed form, giving details of his/her income under different heads, tax liability thereon, deductions claimed, etc. The due date for filing such tax return is 31st July of the assessment year i.e. the following financial year. For instance, the tax return for the FY ended 31st March, 2022 is required to be filed by 31st July, 2022. A belated tax return can be filed before 31st December, 2022.

The return of income for FY 2021-22 (filed within the due date or a belated return) can be revised at any time before 31st December, 2022.

Fee chargeable for default in furnishing return of income under Section 234F of the ITA is as follows:

Late fees shall be ₹ 5,000 if return of income is filed after the specified due date but on or before 31st December of the relevant A.Y. (i.e. 31st December 2026 for A.Y. 2026-27).

However, if the total income of the taxpayer is less than ₹ 5,00,000 then such fee shall not exceed ₹ 1,000.

RORs in India who have assets (including financial interest in any entity) located outside India or a signing authority on any account located outside India or is a beneficiary of an asset outside India are mandatorily required to file a tax return electronically in India (irrespective of their level of income). This provision will apply even to individuals accompanying expatriates to India qualifying as ROR as it is unrelated to whether the individual has taxable income in India.

It is to be noted that a tax return shall need to be filed where an individual's total income before giving effect to tax exemptions under section 10(38),

deductions under Chapter VI-A, certain capital gains exemptions e.g. under section 54F, exceeds the maximum amount not chargeable to income-tax.

Additionally, The Finance (No. 2) Act, 2019 requires the following individuals to mandatorily file their tax return (w.e.f. from FY 2019-20) who during the FY:

(a) Deposit an amount / aggregate of amounts exceeding ₹ 1 crore in one or more current accounts maintained with banking company or a co-operative bank; or

(b) Incur expenditure of an amount / aggregate of amounts exceeding ₹ 2 lakhs for himself or any other person for foreign travel; or

(c) Incur expenditure of an amount / aggregate of amounts exceeding ₹ 1 lakh towards consumption of electricity.

As per notification dated 21st April, 2022, CBDT has notified the below additional conditions for furnishing a return of income for FY 2021-22:

(a) if his total sales, turnover or gross receipts, as the case may be, in the business exceeds ₹ 60 Lakh during the previous year; or

(b) if his total gross receipts in profession exceed ₹ 10 Lakh during the previous year; or

(c) if the aggregate amount of TDS and TCS during the previous year is ₹ 25,000 or more (for a senior citizen, the limit is ₹ 50,000); or

(d) if the aggregate amount of deposit in one or more savings bank accounts of the person is ₹ 50 Lakh or more during the previous year.

The income tax return forms also require information relating to such assets including foreign assets and foreign income (along with other disclosures) to be set out in the forms. It may be noted that non-disclosure of such foreign assets and foreign income in the tax return triggers onerous consequences under the Black Money law.

As per Notification no. 37/2017, dated 11 May 2017, issued by Government of India, in case of a foreign national or individual qualifying as NR who has not be allotted Aadhar, quoting of Aadhar in application for PAN and in the Income-tax return is not mandatory.

Updated tax return

The Finance Act, 2022 has inserted section 139(8A) in ITA. This section provides for filing of 'Updated Return' by the individuals. Any individual whether or not has filed the original or belated or revised return for an assessment year may furnish an updated return of income in the prescribed form within forty-eight months from the end of the relevant assessment year. However, there are certain exceptions for filing an updated return. The below are the exception if the updated return

(a) is a return of a loss; or

(b) has the effect of decreasing the total tax liability determined on the basis of original or belated or revised return filed or

(c) results in refund or increases the refund due on the basis of original or belated or revised return filed

Further conditions are that the tax payer cannot file updated return if

— a search has been initiated under Section 132 or books of account or other documents or any assets are requisitioned under Section 132A in the case of such person.

— a survey has been conducted under Section 133A, other than sub-Section (2A) of that Section, in the case of such person; or

— A notice has been issued to the effect that any money, bullion, jewelry or valuable article or thing, seized or requisitioned under Section 132 or Section 132A in the case of any other person belongs to such person; or

— an updated return has already been furnished by him under this sub-section for the relevant assessment year; or

— any proceeding for assessment or reassessment or re-computation or revision of income under this Act is pending or has been completed for the relevant assessment year in his case; or

— the Assessing Officer has information in respect of such person for the relevant assessment year in his possession under Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 or Prohibition of Benami Property Transactions Act, 1988 or Prevention of Money-laundering Act, 2002 or Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

— or information for the relevant assessment year has been received under an agreement referred to in Section 90 or Section 90A in respect of such person and the same has been communicated to him, prior to the date of furnishing of return under this sub-section; or

— any prosecution proceedings under the Chapter XXII have been initiated for the relevant assessment year in respect of such person, prior to the date of furnishing of return under this sub-section; or

— Such person/ class of person as notified by the CBDT.

Tax on updated return

Section 140B provides for payment and computation of tax, interest, fee, and additional income-tax on updated return. It contains the following provisions:

(a) Computation of tax on the updated return where no original or belated return was filed.

(b) Computation of tax on the updated return where original, revised or belated earlier ('earlier return') was filed.

(c) Computation of additional tax payable at the time of furnishing of updated return.

The updated return furnished shall be accompanied by proof of payment of such tax, additional tax, interest and fee.

(a) The additional tax, payable at the time of furnishing the return under sub-section (8A) of Section 139, shall be equal to twenty-five per cent of aggregate of tax and interest payable, as determined, if such return is furnished after expiry of the time available under sub-section (4) or sub-section (5) of Section 139 and before completion of period of twelve months from the end of the relevant assessment year.

(b) However, if such return is furnished after the expiry of twelve months from the end of the relevant assessment year but before completion of the period of twenty-four months from the end of the relevant assessment year, the additional tax payable shall be fifty per cent of aggregate of tax and interest payable, as determined.

(c) Sixty per cent of aggregate of tax and interest payable, as determined, if such return is furnished after the expiry of twenty-four months from the end of the relevant assessment year but before completion of the

period of thirty-six months from the end of the relevant assessment year.

(d) Seventy per cent of aggregate of tax and interest payable, as determined, if such return is furnished after the expiry of thirty-six months from the end of the relevant assessment year but before completion of the period of forty-eight months from the end of the relevant assessment year

It is also clarified that for the purposes of computation of "additional income-tax", tax shall include surcharge and cess, by whatever name called, on such tax.

This provision also contains an explanation that provides for computation of interest under Section 234A, Section 234B and Section 234C of ITA and interest on additional tax payable at the time of furnishing of updated return.

2.11 Tax clearance certificates

The ITA provides for procedures to be followed by any person leaving India to obtain a no-objection certificate and the same are summarized below:

2.11.1 Foreign Nationals

In terms of Section 230(1) of the ITA a foreign national who has come to India in connection with business, profession or employment and has derived income from any source in India has to furnish an undertaking in the prescribed Form 30A to the tax authorities. The said form is basically an undertaking to be given by the employer of the expatriate to the effect that any future tax liability arising in case of the expatriate would be paid by the employer. The purpose of the undertaking is that the Indian Government should not be at loss in terms of collection of taxes in case any tax liability arises in India after repatriation of the expatriate. The tax authorities upon receipt of the undertaking and verification of the documents filed shall issue a no objection certificate in Form No. 30B to the expatriate. Such certificate issued by the tax authorities is valid for the period specified in the certificate from the date of issue. Due to any reason, if the expatriate has to defer his departure date beyond the period stated in the certificate, he is required to obtain a fresh certificate from the tax authorities.

The above compliance procedure is not applicable to a foreign national who visits India as a foreign tourist or for any other purpose not connected with business, profession or employment.

2.11.2 Individuals domiciled in India – outbound employees

In case of a person domiciled in India, leaving India the relevant information needs to be furnished to the tax authorities in Form No. 30C which is a self-declaration by the outbound expatriate that includes his/her details such as PAN, passport details, purpose of visit outside India and estimated period of stay outside India, etc.

Thus, it may be seen that an inbound expatriate shall file Form No. 30A and obtain No Objection Certificate in Form 30B from the tax authorities in India while an outbound expatriate shall furnish his/her information in Form No. 30C to the tax authorities.

Chapter 3
Social Security in India

3.1 Provident Fund Obligation in India

Social Security in India is predominantly governed by the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (the EPF Act) which is operated through the following schemes:

— Employees Provident Funds Scheme, 1952 (EPF Scheme)

— Employees' Pension Scheme, 1995 (Pension Scheme)

— Employees Deposit Linked Insurance Scheme, 1976 (EDLI scheme)

The EPF Act applies to:

— an establishment employing 20 or more persons engaged in a specified industries notified by the Central Government from time to time.

— any establishment employing even less than 20 persons that has opted to be covered voluntarily under the EPF Act.

3.1.1 Taxability of Employer's contribution

As per the provisions of the ITA, employer's contribution to recognized EPF is exempt from taxation provided such contribution does not exceed 12% of salary of the employee. Employer's contribution made in excess of 12% of salary is taxable in the hands of the employee.

Apart from EPF employers may contribute to superannuation funds and the National Pension Scheme ('NPS') for the benefit of employees in India

As per section 80CCD(2), employer's contribution to NPS to the extent of 10% of salary[1] can be claimed as deduction against the income of the employee.

With regard to superannuation funds, prior to its amendment vide the Finance Act 2020, employer's contribution to an approved superannuation

[1] 14% of salary where employee opts for taxation regime as per section 115BAC(1A) of ITA

fund in excess of Rs. 1,50,000 was chargeable to tax as perquisite in the hands of the employee.

The Finance Act 2020 however introduced a new provision under the ITA by virtue of which employer contribution exceeding seven lakh and fifty thousand rupees in a previous year (i.e. excess contribution) in aggregate to the following funds is now taxable in the hands of the employee as perquisite:

— Employer contribution in a recognized provident fund;

— Employer contribution in National Pension Scheme ('NPS');

— Employer contribution in an approved superannuation fund.

Further, the annual accretion by way of interest, dividend or any other amount of similar nature during the previous year to the balance at the credit of such fund or scheme referred above to the extent attributable to employer contribution is also a taxable perquisite. While the excess employer contribution above seven lakh and fifty thousand rupees in a previous year is taxable u/s 17(2)(vii) of ITA, the annual accretion attributable to such excess contribution is taxable u/s 17(2)(viia). These provisions are applicable from FY 2020-21.

The CBDT has inserted a new rule 3B. This rule provides detailed computation mechanism to calculate the annual accretion to the specified funds taxable u/s 17(2)(viia) of ITA. Post the amendment in the ITA, the Income Tax Form 2 was modified for disclosure of such taxable interest separately.

3.1.2 Taxability of Employee's contribution

As per the provisions of ITA, employee's contribution to recognized provident fund and statutory provident fund are allowed as deduction to the extent of Rs. 1,50,000 per section 80C of ITA.

In this regard, the Finance Act, 2021 has amended Section 10(11) and Section 10(12) of ITA to provide that exemption shall not be available for the interest income accrued during the previous year on the recognized and statutory provident fund in the account of the person to the extent it relates to the contribution made by the employees exceeding two lakh and fifty thousand rupees in any previous year in that fund, on or after the 1st April 2021.

The CBDT has notified Rule 9D to calculate the taxable portion of interest pertaining to the contribution made to a statutory or a recognized provident fund exceeding two lakh and fifty thousand rupees in any previous year in that fund. It provides that separate accounts within the provident fund account shall be maintained during the previous year 2021-22 and onwards for the taxable and non-taxable the contribution made by an employee. The non-taxable contribution and taxable contribution are computed as below:

Non-taxable contribution account shall be the aggregate of the following:

(i) closing balance in the account as on 31st March 2021;

(ii) any contribution made by the employee in the account during the FY 2021-2022 and subsequent FYs, which is not included in the taxable contribution account; and

(iii) interest accrued on sub-clause (i) and sub-clause (ii) above,

as reduced by the withdrawal, if any, from such account.

Taxable contribution account shall be the aggregate of the following:

(i) contribution made by the employee in a FY in the account during the FY 2021-2022 and subsequent FYs, which is in excess of the threshold limit; and

(ii) interest accrued on sub- clause (i),

as reduced by the withdrawal, if any, from such account

Employee Provident Fund Organisation (EPFO) issued a circular dated 06th April, 2022 which clarifies about the calculation and deduction of tax on taxable interest which is relating to contribution in provident fund.

Illustration

Mr. A is a salaried employee who makes an monthly contribution of ₹ 30,000 to EPF. The closing Balance on 31st March 2024 is ₹ 50,00,000. He makes a withdrawal of ₹ 2,75,000 from his account (employee share) as advance during January, 2025. The calculation of taxable and not taxable portion of contribution and interest earned on his EPF contribution (employee share) under both the accounts would be as under.

Period	Monthly Contribution	Cumulative balance at the end of the month in		Interest accrued @ 8.1% in	
		Non-Taxable Account	Taxable Account	Non-Taxable Account	Taxable Account
Apr-24	30,000	30,000		203	
May-24	30,000	60,000		405	
Jun-24	30,000	90,000		608	
Jul-24	30,000	1,20,000		810	
Aug-24	30,000	1,50,000		1013	
Sep-24	30,000	1,80,000		1215	
Oct-24	30,000	2,10,000		1418	
Nov-24	30,000	2,40,000		1620	
Dec-24	30,000	2,50,000	20000	1688	135
Jan-25	30,000	2,50,000	50,000	1688	338
Withdrawal	2,75,000	-2,25,000	-50,000		
Feb-25	30,000	55,000	0	371	0
Mar-25	30,000	85,000	0	574	0
Total	**3,60,000**	**85,000**	**0**	**11,613**	**473**

The amount available under Taxable & Non-taxable account at the end of the year would be as under:

Particulars	Non-taxable account	Taxable account
C/b as on 31.03.2024	50,00,000	-
Contribution during the year	310,000	50,000
Withdrawals during the year	2,25,000	50,000
Interest accrued during the year	11,613	473
Total amount available in each account at the end of the year	50,96,613	473

TDS on interest to be deducted by EPFO @ 10%	0	47
Opening balance as on 01.04.2025	50,96,613	426

3.2 Applicability of Indian Social Security Schemes to International Workers

In October 2008, the Government of India issued notifications extending the applicability of EPF Act to a new category of workers called 'International Workers' requiring them to mandatorily contribute into its schemes with effect from 1 November 2008. Prior to this, international workers were given exemption from contribution to EPF because they were considered excluded employees as their monthly pay exceeds Rs. 15,000.

As per the amendment, 'International Worker' has been defined to mean:

— Indian employee having worked or going to work in a foreign country with which India has a Social Security Agreement (SSA);and being eligible to avail the benefits under the social security programme of that country, by virtue of eligibility gained or going to gain, under the said SSA

— An employee other than an Indian employee, holding other than an Indian passport, working for an establishment in India to which the EPF Act applies.

— However, a Nepalese national and a Bhutanese national shall be deemed to be an Indian worker and not an International Worker under the EPF Act

The Employees' Provident Fund Organisation (EPFO) vide its Circular[2] dated 23rd June 2017 has clarified that Indian expatriates who qualify as International Worker while on employment abroad would become domestic employees once they come back to India.

Thus, all international workers are now subjected to contribution under EPF Act unless they are considered as excluded employee.

Excluded Employee (also known as detached workers)

[2] HO No. IWU/7/(25)/2017/Clarification reg. Para83/5041 dated 23/06/2017

Under the special provisions of the EPF Act only a non-Indian worker can become eligible to be an 'excluded employee'. An International Worker, who is an excluded employee, shall not be required to contribute to the scheme.

As per the provisions an excluded employee is:

(i) A detached International Worder contributing to the social security programme of the home country and certified as such by a Detachment Certificate for a specified period in terms of the bilateral SSA signed between that country and India; or

(ii) An IW, who is contributing to a social security programme of his country of origin, either as a citizen or resident, with whom India has entered in to a bilateral comprehensive economic agreement containing a clause on social security prior to 1st October, 2008, which specifically exempts natural persons of either country to contribute to the social security fund of the host country.

3.2.1 Contribution for International Workers

Both the employer and international worker are required to contribute 12% of "salary" under the EPF regulations. The employer also has to make 0.5% contribution (capped at a monthly salary of ₹ 15,000) towards EDLI scheme which is an insurance scheme under the EPF Act.

For International Workers, the wage ceiling of ₹ 15,000 is not applicable and contributions are required to be made on full monthly pay, irrespective of whether it is paid in home country or host country. An analysis of salary components is required to be determined if it constitutes a part of 'monthly pay' having regard to the test of universality and contingency as laid down by the past judicial rulings.

The 24% contribution in case of international workers will be split as follows:

— For an International Worker who has joined before 1st September 2014 or who is an existing member of the Provident Fund: 12% of 'Monthly Pay' as employee's contribution to EPF Scheme

— 8.33% of 'Monthly Pay' as employer's contribution to Pension Scheme

— 3.67% of 'Monthly Pay' as employer's contribution to EPF Scheme.

For an International Worker who has joined and become the member of the Fund for the first time on or after 1st September 2014 and having monthly pay which exceeds the statutory limit of ₹15000:

— 12% of 'Monthly Pay' as employee's contribution to EPF Scheme

— 12% of 'Monthly Pay' as employer's contribution to EPF Scheme

Apart from the above-mentioned contributions, the employer is also required to contribute towards administrative charges of accounts under EPF and EDLI Scheme.

The taxability of employer and employee contribution to EPF as discussed above in Paras 3.1.1 and 3.1.2 shall remain same in case of an International Worker as well.

The SC in its recent decision[3] has clarified the term 'basic wages' for EPF contributions to include allowances paid by employer to employees. It held that emoluments provided "universally, necessarily and ordinarily" to all employees should be considered as wages for the EPF purposes. Further, the Supreme Court has held that allowances which are variable in nature, linked to any incentive for production resulting in greater output by an employee or paid especially to those who avail opportunity are excluded from 'basic wages' for calculation of Provident Fund contributions.

In this regard it may also be noted that while the Bombay High Court (HC) in the case of Sachin Vijay Desia v UOI (WP No. 1846/2018 dated 7th August 2018) had dismissed the petition filed by an employee on the grievance that in relation to the employees other than international workers, the Scheme prescribes a ceiling of the contribution which the employee can make to the fund and corresponding ceiling of the contribution that the employer would therefore make in the account of such employee, whereas there is no such ceiling in case of International Workers and hence the said provisions are discriminatory and unconstitutional. The Bombay HC held that the petitioner had failed to make out any case for declaring the said provisions unconstitutional.

[3] Civil appeal nos. 6221 of 2011, 3965-3966/3967-3968/3969-3970 of 2013, Transfer Case (C) No(s).19 OF 2019 (arising out of T.P.(C)No. 1273 OF 2013)

However recently the Karnataka High Court (HC)[4] struck down the special provision for 'international workers' notified on 1st October 2008, under Para 83 of the Employees' Provident Funds Scheme, 1952 (Provident Fund Scheme) and Para 43A of the Employees' Pension Scheme, 1995 (Pension Scheme) as being unconstitutional and arbitrary, which required international workers to contribute in to the Provident Fund. The issue was on account of the said provisions as per which international workers are covered under the Provident Fund Scheme irrespective of salary drawn whereas domestic workers drawing monthly pay exceeding the prescribed statutory ceiling (i.e. INR15,000 per month) are outside the purview of the Provident Fund Scheme.

The Karnataka High Court noted that the EPF Scheme is a subordinate legislation which cannot run beyond the scope and object of the mother Act. Therefore, Paragraph 83 of the EPF Scheme cannot transcend the parameters of the principal legislation, that is, EPF Act which sets forth the wage limit for the Indian employees to be INR 15,000 per month. Therefore, Paragraph 83 of the EPF Scheme ought not to have an unlimited threshold for international workers while denying the same benefit to Indian workers. On contributions for international workers vs domestic workers, the HC noted that the distinction in the amount of contribution between an Indian employee going to a country with which India has not entered into a Social Security Agreement (non-SSA country) and a foreign passport holder employee from non-SSA country working in India is discriminatory and violative of Article 14 of the Constitution. Hence the demand for contribution on global salary i.e. salary earned by an international worker from some other country or in home country is arbitrary and hit by Article 14 of the Constitution.

In this regard The Ministry of Labour & Employment in its statement on May 7, 2024 vide a Press Release has stated that Employees' Provident Fund Organisation ("EPFO") (which is the statutory body constituted by the Central Government under the provisions the EPF Act) is actively evaluating the future course of action in response to this judgement.

International Workers must be digitally registered on the EPFO portal, ensuring accurate classification and compliance with applicable social security agreements (SSAs), where relevant. The Universal Account Number (UAN) is mandatory for all International Workers, and KYC documentation,

[4] (W.P. No.18486/2012 and others) dated 25th April 2024

including passport and visa details, must be uploaded and verified online. Contributions must be made via the Electronic Challan cum Return (ECR) system, correctly flagged as "International Worker" in the wage file. In cases involving countries with SSA treaties, Certificate of Coverage (CoC) must be maintained and submitted electronically when required.

3.2.2 Withdrawal of social security contribution

(a) Provident Fund accumulations

International Workers will be entitled to withdraw accumulated balance in the Provident Fund Scheme in the following circumstances:

1. International Workers covered under an SSA

— On ceasing to be an employee in an establishment covered under the EPF Act; or

— On retirement from service in the company at any time after 58 years of age; or

— Faced with certain contingencies mentioned in the EPF Act.

2. International Workers not covered under an SSA

In case a person is not covered under SSA, he may withdraw the EPF balance on retirement from service in the company at any time after 58 years of age or is faced with certain contingencies mentioned in the EPF Act.

(b) Pension accumulations

In relation to pension withdrawal, the lump sum refund will be available only to those employees who are covered under an SSA in force and who have not completed the eligible service of 10 years even after including the totalization of service under the respective SSAs. Employees not covered under an SSA will not get the lump sum refund.

In case of employees (both from SSA as well as non-SSA countries) having 10 years or more contributory service, they would be qualified to receive a monthly pension.

An IW having service more than 10 years can avail reduced/early pension as per benefit provided under the scheme.

Further, PF accumulations can be withdrawn by International Workers by way of credit to their Indian or overseas bank accounts. Alternatively, withdrawal is also possible by way of credit to the Indian employer's bank account.

EPFO[5] has relaxed the requirement of Adhaar for withdrawal of accumulated funds. The EPFO circular exempts International Workers who left India after completing their assignments without obtaining an Aadhaar and allows for physical settlement of claims.

3.3 Social Security Agreements ('SSA')[6]

India has currently signed SSAs with 20 countries and out of which, agreements with Belgium, Germany, Switzerland, Denmark, Luxembourg, France, Republic of Korea, Netherlands, Hungary, Finland, Sweden, Czech Republic, Norway, Austria, Canada, Australia, Japan Portugal, Brazil and Quebec have entered into force.

3.3.1 Advantages of Signing SSA

The various advantages of signing an SSA are:

(a) Exemption from Contribution-COC

A Certificate of Coverage (COC) is a confirmation from home country social security authorities that the individual is covered under the respective home country social security and continues to be covered during the period of assignment. Foreign passport holders can obtain COC in home country and claim exemption in India. Similarly, Indian passport holders can obtain COC in India and claim exemption in the host country with which India has a SSA. In many SSAs, one of the eligibility conditions for obtaining a COC is the requirement for the employee to work in the host country on behalf of the home country entity. This could lead to a potential Permanent Establishment exposure.

(b) Equality of treatment

An SSA ensures that persons who ordinarily reside in either country receive equal treatment with the nationals of the other country in the application of the social security legislation.

[5] EPFO circular dated 29.11.2024

[6] https://www.epfindia.gov.in/site_en/International_workers.php

(c) Export of benefits

SSAs contain provision for payment of benefits to the International Workers irrespective of the location (India, home country or a third country).

(d) Totalization of service periods

Totalization of periods means aggregation of duration of employment in home country and host country to determine eligibility to social security benefit. Aggregation of periods is permissible only for determining eligibility and not for the purpose of determining actual level of benefit payable.

The process of application for COC has been made online by the EPFO[7]. An Indian worker having Indian passport going to work in a country with which India has an effective SSA needs to file an online application for COC. In view of the online application, manual COC application forms have been discontinued.

3.4 Labour Codes

a) The Government of India has enacted four Labour Codes[8] to ensure social equity, social security and ease of doing business for all. These have not come into force in entirety. Once notified, these new labour codes will replace 29 central government labour laws currently in force.

b) New labour codes will impact all the organizations irrespective of sector of operations and require change management for the employers. Employers will need to analyse the impact and upgrade their internal policies, processes and compliance management structures to align it with the various requirements as prescribed under the labour codes.

c) Central Government and most of the States have rolled out draft rules for industry comments. The date of entry into force is expected to be notified soon.

[7] File No.IWU/7(31)/Application for COC/1708 dated 31st July 2017

[8] Codes on Wages, 2019; Industrial Relations Code, 2020; Occupational Safety, Health and Working Conditions Code, 2020 ; and Code on Social Security, 2020

Chapter 4
Exchange Control and Other Law

For an expatriate[1] who is a foreign national but residing in India or a person of Indian origin who works in a foreign country, it is essential to have an understanding of, and ensure compliance with, other applicable laws like exchange control regulations or Black Money (Undisclosed foreign Income and Asset) Act 2015. Exchange control regulations are primarily governed by The Foreign Exchange Management Act, 1999 (FEMA)

4.1 Residential status

The Foreign Exchange Management Act, 1999 (FEMA) along with its various regulations defines a Person Resident in India (PRI) and Non- Resident Indian ('NRI') / Person Resident outside India ('PROI') as a person who is not resident in India for the purposes of applicability of various regulations under the law.

A Person Resident in India (PRI), under FEMA[2], means:

— a person residing in India for more than 182 days during the course of the preceding financial year,

— a person who has come to or stays in India, in either case, (a) for or on taking up employment in India, or (b) for carrying on in India a business or vocation in India, or (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.

Thus, a foreign national who has come to India for employment purposes, on satisfaction of above provisions, would be considered a person resident in India for applicability of FEMA provisions.

An individual shall be, inter alia, considered a Person Resident outside India (PROI) where the person:

— has gone out of India or who stays outside India either for employment outside India, or for carrying business outside India, or for any other

[1] For the definition of the term "Expatriate" refer to Chapter 1.

[2] Section 2 (v) of The Foreign Exchange Management Act, 1999

purpose as would indicate his/ her intention to stay outside India for an uncertain period; and

— has come to or stays in India for purposes other than for taking up employment in India, or for carrying on business in India, or for any other purpose as would indicate his/her intention to stay in India for an uncertain period.

On the basis of the nationality and residential status of the individual under the foreign exchange laws, an individual may be categorized as a PRI/PROI, Non-resident Indian (NRI), PIO(Person of Indian Origin) or a Foreign National.

NRI has not been defined in FEMA. However, the term NRI has been used and defined in many regulations issued by Reserve Bank of India (RBI). Basis the various regulations issued by RBI, an NRI[3] is defined as a person resident outside India who is a citizen of India.

A PIO has also not been defined in FEMA. However, the term PIO has been used and defined in various regulation issued by RBI. Basis the various regulations issued by RBI, PIO[4] means a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or any other specified country satisfying the following conditions :

(a) who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 or

(b) who belonged to a territory that became part of India after independence or

(c) who is a child or grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b) or

(d) who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c).

A PIO will include an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955. Such an OCI Card holder should also be a PROI.

[3] Regulation 2(vi) of The Foreign Exchange Management (Deposit) Regulations, 2016

[4] Regulation 2(x) of The Foreign Exchange Management (Deposit) Regulations, 2016

Thus a person of Indian origin or an Indian citizen who goes outside India for employment purposes, on satisfaction of above provisions, would be considered a PROI/NRI/PIO for applicability of FEMA provisions.

4.2 Bank accounts

4.2.1 Bank Accounts for persons residing in India for employment purposes

An individual who is residing/deployed in India for the purposes of employment will be considered as an PRI under the provisions of FEMA.

a) A PRI may open and maintain a normal savings or current bank account in India for receiving the salary payable to him/her in India.

b) Also, following persons can open a foreign currency account outside India for remitting/ receiving their entire salary payable to him/her in India[5].

- A foreign citizen resident in India, being an employee of a foreign company, on deputation to the office/ branch/ subsidiary/ joint venture/ group company in India
- An Indian citizen, being an employee of a foreign company, on deputation to the office/ branch/ subsidiary/ joint venture/ group company in India
- A foreign citizen resident in India employed with an Indian company.

It may be noted that foreign nationals are permitted to re-designate their resident account maintained in India as Non resident Ordinary (NRO) account[6] on leaving the country after their employment in order to enable them to receive their pending bonafide dues such as income tax refunds, Provident Fund withdrawals, etc. subject to certain conditions.

[5] Para 4.5 of Part I of The Master Direction - Deposits and Accounts

[6] Para 9(a) of Schedule 3 of The Foreign Exchange Management (Deposit) Regulations, 2016

4.2.2 Bank Accounts for persons residing abroad

Banks offer different types of accounts to PROI / NRIs, based on whether funds available in the account are freely repatriable i.e. whether such funds can be freely transferred or repatriated abroad.

(a) Non-Resident (External) Rupee Account Scheme ('NRE' Account)

— NRE accounts are rupee denominated accounts.

— Can be opened by NRIs and PIOs as savings, current, recurring or fixed deposit account.

— Both principal and interest can be repatriated / transferred out of India.

— Generally, term deposits can be made for 1 to 3 years.

— The interest rates on Non-Resident (External) Rupee (NRE) Deposits are deregulated. Accordingly, banks are free to determine their interest rates on both term deposits of maturity of one year and above under NRE Deposit accounts in accordance with the directions/ instructions issued by Reserve Bank from time to time..

(b) Foreign Currency (Non-Resident) Account (Banks) Scheme ('FCNR (B)' Account)

— Deposits in FCNR (B) accounts can be made in any permissible currency.

— Can be opened by NRIs and PIOs as term deposit account only.

— Term deposits can be made for 1 to 5 years.

— Similar to NRE accounts, in FCNR (B) Accounts both principal and interest are repatriable.

Interest rates are fixed on the basis of directions from the RBI regulations

(c) Non-Resident Ordinary Account Scheme ('NRO' Account)

— NRO accounts are rupee denominated accounts.

— Can be opened by a PROI (individually or jointly with NRIs/ PIOs) or the purpose of putting through bona fide transactions denominated in Indian Rupees.

— Can be opened as savings, current, recurring or fixed deposit account.

— In NRO Account, only current incomes are repatriable. Savings NRO accounts are normally operated to credit rupee income from shares, interest, rent from property in India, etc.

— The banks are allowed to determine their own interest rates on both savings and term deposit accounts in accordance with the regulations stipulated by Reserve Bank from time to time.

— Banks can allow remittance up to USD 1 million per financial year for bona fide purposes from balances in the NRO accounts once taxes are paid out without any prior approval from Reserve Bank of India.

— This limit includes the sale proceeds of immovable properties held by NRIs and PIOs.

(d) Resident Foreign Currency Account ('RFC' Account)

— Can be opened by a PRII (Person Resident in India) as savings, current or term deposit account

— NRIs and PIOs returning to India can maintain an RFC account with an authorized bank in India to transfer funds from their NRE/ FCNR (B) accounts.

— Proceeds of assets held outside India at the time of their return to India can be credited to the RFC account.

— These funds are free from all restrictions as to their utilization or in investment in any form outside India.

Generally, when a resident becomes an NRI, his existing savings account is designated as an NRO account. The NRO accounts could be maintained in the nature of current, saving, recurring or fixed deposits. NRIs can also open NRO accounts for depositing their funds from local transactions. The interest earned from NRO accounts is fully taxable in India. NRO accounts can be opened in the name of NRIs who have left India to take up employment or business temporarily or permanently in a foreign country.

NRIs, PIOs, foreign nationals of non-Indian origin, retired employees or non-resident widows of Indian citizens can remit, through the Authorized Dealer, up to USD one million per calendar year from the NRO account or from income from sale of assets in India.

4.3 Remittance of salary by persons residing in India for employment purposes

A citizen of a foreign state resident in India, being an employee of a foreign entity and on deputation to India with the office/ branch/ subsidiary / joint venture/ group company in India of such foreign entity or being an employee of an Indian entity, may open, hold and maintain a foreign currency account with a bank outside India and receive/remit the whole salary payable to him/her for the services rendered, by credit to such account, provided that income tax chargeable under the ITA is paid on the entire salary as accrued in India.

Similarly a citizen of India, employed by a foreign entity outside India and on deputation to India, may open, hold and maintain a foreign currency account with a bank outside India and receive the whole salary payable to him/her for the services rendered in India, by credit to such account, provided that income tax chargeable under the ITA is paid on the entire salary as accrued in India.

Also, under the Liberalised Remittance Scheme, a FEMA resident individual (including a foreign national residing in India for employment) is permitted to freely remit up to USD 250,000 per annum for specified purposes such as maintenance of close relatives, gifts etc.

For a very limited purpose, there is a concept of 'Not Permanently Resident' (NPR) under FEMA. NPR means a person, being foreign national, resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years. The NPRs who have remitted their entire earnings and salary and have exhausted the limit of USD 250,000, and who wish to further remit 'other income', may approach RBI with documents through their Authorised Dealer (AD) bank for consideration.

4.4 Permissible investments

The permissible investments for different categories of individuals under the foreign exchange laws in India are tabulated as under:

Status of individual	Investments	General / Special permission
NRI	Shares, convertible debentures*, real estate (other than an agricultural land, plantation property or farm house etc.)	General Permission granted
PIO/OCI	Shares, convertible debentures*, real estate (other than an agricultural land, plantation property or farm house etc.)	General Permission granted
Foreign national	Shares, convertible debentures*, real estate (including an agricultural land, plantation property or farm house)	General Permission granted Not permitted**

* The foreign exchange regulations provide that an Indian entity shall issue any security (e.g., shares, convertible debentures etc.,) to a non- resident subject to conditions prescribed under the FDI policy and prior permission of Reserve Bank of India (RBI), if required. A foreign national, being a person resident outside India, may acquire shares listed on an Indian stock exchange only through a registered foreign institutional investor route under the portfolio investment scheme. Similarly, an NRI/OCI, being a person resident outside India, may acquire shares listed on an Indian stock exchange under the portfolio investment scheme. It may be noted here that once the individual gains the status of being a resident as per the exchange control regulations, the individual may acquire securities through a recognized stock exchange in India.

** A foreign national is generally not permitted to acquire any property or invest in real estate in India when he/she qualifies as PROI. However, he may acquire an immovable property in India by obtaining a prior permission from the RBI. The RBI may grant permission to the foreign national after satisfying certain conditions, on a case to case basis.

Hence, it may be observed that an NRI/OCI may be privileged to make investments into most forms of investments, whereas certain restrictions are applicable in case of investments made by foreign nationals.

4.5 Compliance to Black Money Act

4.5.1 Disclosure of Foreign Assets / Income as per Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

- The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (BMA), was introduced in 2015 and was made applicable from Financial Year 2015-16 i.e., Assessment Year 2016-17 onwards.
- BMA was introduced with an intent to enable the Government of India to tax undisclosed foreign income and assets acquired from such undisclosed foreign income and penalize the persons indulging in illegitimate means of generating money, causing loss to the revenue and also to prevent such illegitimate income and assets kept outside India from being utilised in ways which are detrimental to India's social economic and strategic interest etc.
- Foreign assets and foreign income, as the name suggests, are assets / income acquired / earned outside India and includes foreign depository accounts, custodial accounts, equity & debt interest, insurance contract, financial interest in any entity outside India, immovable property, accounts in which a person has signing authority, trust created outside India in which person is a trustee, beneficiary or settlor, any other foreign asset. Non-disclosure of foreign assets / income in India entails stringent consequences as per the provisions of BMA.
- Disclosure of foreign assets and income under BMA is applicable for Residents and Ordinary Residents (ROR) in India only [residential status to be determined as per section 6 of the Income tax Act] and the same is not applicable to a Non-resident (NR) or Resident but Not Ordinarily Resident (RNOR) in India. This implies that an expatriate employee who becomes an ROR in India is required to disclose all incomes and assets held outside India in the return of income filed for each Financial Year. Further, as a ROR, in addition to the disclosures mentioned aforesaid, such individual is required to pay taxes on all incomes outside India. This law is of extreme relevance when it comes to expatriates as well, because they move to India and would have

foreign assets which they would have acquired in their home country, which are required to be reported in India in the year they become a ROR as per section 6 of the Income tax Act.

- Further, for the purpose of BMA, foreign assets and foreign income are considered undisclosed even for an individual who is NR/RNOR in India, where such foreign assets were acquired and/ or foreign income was earned while the individual was a resident in India and such income were not offered to tax in India (as were liable to be) and the assets were purchased from sources for which there is no explanation and not disclosed in the return of income in India. This may, however, not be relevant for an expatriate who is coming to India for the first time and whose residential status in India has always been NR. But, for the expatriate who keep coming to India or the Indian citizens who work in a foreign jurisdiction on short term assignment/deputation/ secondment, the assets acquired outside India while they were resident in India, requisite disclosure under BMA becomes relevant.
- As stated above, disclosure under BMA applies to ROR only. Expatriates working in India are required to furnish tax returns in India. Hence, in case of expatriates who have come to India and the year in which their residential status changes to that of ROR (from NR), then he / she is required to report all the foreign assets (even though acquired when he / she was a non-resident) and foreign income in India while filing the return of income in India.

4.5.2 Keys implications under the BMA

- BMA covers taxation of undisclosed income and undisclosed assets of an individual outside India. Taxation of Indian income and assets is covered by the Income tax Act and not BMA.
- Undisclosed income outside India refers to the income earned outside India, which has not been disclosed/ offered to tax in India. Undisclosed foreign asset means assets (including financial interest in any entity) of individual held outside India, for which there is no explanation regarding the source of such investments, or the explanation is not satisfactory for the tax authorities in India.

  Thus, **BMA requires disclosure of all foreign assets and incomes of an individual (held in own name or as beneficial owner) including**

financial interests, signing authorities etc. outside India (as stated above), in the return of income to be filed in India.

- It may be noted that compliance under the BMA was introduced in 2015 and was effective from 1st July 2015 and hence applicable for Financial Year 2015-16 onwards. It may however be noted that foreign assets and incomes purchased/ earned prior to introduction of BMA, may also come under the purview of BMA and the source of such income and assets may be required to be explained. Therefore, an expatriate, upon becoming ROR, would be required to disclose all foreign assets and incomes in the return of income for the relevant year and the explanation for source of such incomes and assets must be established along with appropriate documents in support.
- **BMA entails stringent implications for violation of the above-mentioned provisions which include**:
  - Undisclosed foreign income and assets are taxable at the rate of 30% plus interest.
  - Penalty of 300% (three times) in addition to the tax above is applicable on such undisclosed foreign income and assets.
  - Further, a penalty of Rs. 10 lakhs is applicable for failure to disclose such foreign income and assets in the return of income in India. However, as amended vide Finance (No. 2) Act 2024, such penalty shall not apply in respect of undisclosed foreign assets (other than immovable property), where the aggregate value of such assets does not exceed Rs. 20 lakhs at any time during a Financial Year.
  - Apart from the above financial implications, BMA also provides for prosecution for non-compliance of the provisions of BMA.

Gist of Important Judicial Decisions

1. ACIT vs. Robert Arthur Keltz (represented by United Technologies International Operation) (3452/DEL/2011) (Delhi ITAT)

Mr. Robert Arthur Keltz, an employee of UTIO, USA, received ESOPs with a three-year vesting period. He was deputed to UTIO's Indian liaison office in 2006. The ESOPs vested and were exercised while he was in India. Mr. Keltz, as a Resident and Not Ordinarily Resident (RNOR), reported a portion of the ESOP perquisite as taxable in India, based on his service period in India during the vesting period. The Assessing Officer (AO) initially taxed the entire ESOP perquisite.

The Delhi Tribunal held that as the employee has not rendered service in India for the whole grant period of stock option, only such proportion of the stock options as is relatable to the service rendered in India during the grant period is taxable in India.

2. CIT vs. Jaydev H. Raja (Mumbai High Court) (Income tax appeal No. 87 OF 2000)

Mr. Jaydev H. Raja, a resident but not ordinarily resident, was employed by USA based company. Under its Tax Equalization Policy, the company reimbursed his tax liability arising from foreign assignments, including his Indian posting during AY 1994-95. He received Rs.77 lakhs as salary in India and paid Rs.50 lakhs as tax. Of this, Rs.35 lakhs was reimbursed by the employer, which he included in his taxable salary income, totalling around Rs.113 lakhs. He claimed that the remaining Rs.15 lakhs tax paid by him out of his own salary should not be treated as additional income or perquisite.

The Mumbai High Court held that only actual reimbursement of tax by his overseas employer can be treated as his perquisite and taxed accordingly. Any tax which is borne by the assessee cannot be treated as his income. The High Court reaffirms the Delhi High Court ruling on hypothetical taxes not forming part of the taxable salary of an employee.

3. DIT vs. Sedco Forex International Drilling Inc (Uttarakhand High Court). (TS-603-HC-2012)

The employer entered into an agreement with its employees pursuant to which the employer agreed to bear the income tax payable by the employees

on their salary. The question was whether such tax payment was "income" in the nature of a perquisite, not provided for by way of monetary payment, within the meaning of clause (2) of Section 17 of the ITA and hence eligible for exemption under Section 10(10CC) of the ITA. In this case High Court held that the tax on the salary paid by the employer was a "perquisite" under Section 17(2)(iv) because it was paid in respect of the employees' obligation and it was not by way of monetary payment to the employees concerned but for or on their account to the Income-tax department. Consequently, it is a "non-monetary" payment of a perquisite to the employee which is eligible for exemption under Section 10(10CC).

4. Yoshio Kubo & Ors. vs Commissioner of Income Tax (Delhi High Court) (ITA No 441/2003/Del)

This common judgment disposes a bunch of appeals in which the High Court ruled on a number of issues related to expatriate employees. The ruling includes:

— Amounts paid by the employer, directly to the Indian income tax authorities, in discharge of an employee's income tax liability do not fall into the category of monetary benefits. Hence, the same is eligible for exemption under Section 10(10CC) of the ITA.

— Employer contributions to overseas social security, pension and medical insurance plans are not taxable if such contribution does not result in any direct present benefit to the employee but assures him/her of a future benefit subject to certain contingencies.

— Tax paid the by employer is excluded from the definition of salary for the purpose of valuing accommodation benefits provided by the employer.

— A deduction on account of hypothetical taxes is allowed from the salary income of employees covered under the employer's tax equalization policy.

— A refund of excess tax ultimately due to the employer is not treated as a taxable benefit for the employee since the employee is obliged to repay the refund back to the employer and does not derive any benefit from it.

— Fees paid by an employer to a tax consultant for tax compliance for expatriates are not considered to be a taxable benefit.

5. Eli Lilly & Company (India) Pvt. Ltd. (SC) (Civil Appeal No. 5114/2007)

In *Eli Lilly & Company (India) Pvt. Ltd.*, the Indian subsidiary engaged expatriate employees who performed services in India. Their salaries were structured such that a portion was paid in India by the subsidiary and another portion was paid abroad directly by the foreign parent company. However, tax was deducted at source only on the Indian salary component. The tax authorities held that since the employees were rendering services in India, the Indian subsidiary had an obligation under Section 192 to deduct tax at source on the entire salary, including amounts paid overseas by the foreign parent.

It was observed by the Supreme Court of India that the withholding tax provisions relating to salary payments are distinct from with the withholding tax provisions on other income. If the salary paid by the foreign entity abroad was for rendition of services in India and if no work was found to have been performed for the foreign entity, such payments would be subject to withholding tax provisions in India. The Indian entity was required to comply with the withholding tax provisions even in case of salary paid overseas by the foreign entity.

Interest will be charged only in cases where no taxes have been paid on foreign salary or where there is a gap between the date on which tax was deductible and the date of actual tax remittance of salary.

6. British Gas India Ltd. (AAR) (285 ITR 218)

The Authorities for Advance Ruling (AAR) was of the view that the requirement under Explanation (a) to Section 6(1) of the ITA was not leaving India for employment but it was leaving India for the purposes of employment outside India and a person who was leaving India for employment outside India need not be an unemployed person in order to be entitled to claim the beneficial provisions of the said Explanation. Accordingly, the salary paid by the Indian entity to such non- resident employee shall not be taxable in India, if the same has been offered for tax in the foreign country.

7. Gallotti Raoul vs. ACIT (Mumbai ITAT) (61 ITD 453)

Mandatory contribution by the employer towards the social security in the home country of the employee (foreign national), wherein no benefit/ right gets vested in the year of contribution should not be considered as a taxable

perquisite in hands of such employee. Also see *ACIT vs. Harashima Naoki Tashio,* ITA No. 4634/Del)

8. Bholanath Pal vs. ITO (Bangalore ITAT) (ITA No. 10) 2011

Salary is taxable on accrual basis and not on receipt (unless received in advance or arrears). Normal place of employment relevant in determining place of accrual.

9. ITO vs. Saptarshi Ghosh and Others I.T.A No. 915/Kol/2010 and Others (Kolkata ITAT)

In this case, the assessee was an employee deputed to the USA for training and work assignment. He received a living allowance in addition to his salary to cover higher costs of living abroad. The Assessing Officer treated this living allowance as taxable perquisite forming part of salary income. The assessee contended that the living allowance was specifically meant to meet extra living expenses overseas and was not in the nature of income. The dispute before the Tribunal was whether such living allowance paid to an employee deputed abroad constituted taxable salary under Indian tax law.

Living allowance exempt from tax, if paid to employees of Indian company who are temporarily deployed in US to work for Indian Company and employee continued to receive salary and benefits in India. This judgment highlights the principle that duration of posting is a relevant consideration in deciding whether the person has been sent on tour or transfer, but it cannot be considered as a conclusive factor. Further, the factors such as transfer of payroll, nature of service provided, relation with the entity transferred to, visa travelled on, location of family, etc. also needs to be analysed in detail.

10. Raman Chopra vs. DCIT (ITAT Delhi) [(2016) 69 taxmann 452]

The individual qualified as a ROR in India during tax year 2010-11 and also a tax resident of USA during the period 1 April to 30 June 2010. As he qualified as a resident of both the countries, his residential status was determined under Article 4(2) of DTAA between India and USA. Based on the tie-breaker analysis, the individual qualified as a resident of USA as per the DTAA for the said period of 1 April to 30 June 2010. As a resident of USA, the individual/ assessee/ taxpayer was entitled to claim exemption from tax in India in respect of the salary earned in USA for such period as per Article 16(1) of DTAA, based on a split residency position.

11. DCIT vs. Sanjeev Kumar Ranjan (Bangalore ITAT) (ITA No. 1655/Bang/2017)

The assessee was a resident of India and US as per domestic tax laws of both countries. By applying the tie-breaker tests contained in Article 4 of India-US Tax Treaty, the assessee had permanent home in both India and US. However, the assessee's economic and social interests (centre of vital interest) were closer to US. The Tribunal held that he was a resident of US for the split period and therefore, the salary received in US for the period post assessee's Indian assignment was not taxable in India.

12. Deepak Kumar Todi vs. DDIT (Kolkata ITAT) (ITA No. 1918/Kol/2017)

Assessee rendered services in Nigeria and received salary in Indian NRE account. The employer/payer deducted tax at source in India on salary and bonus earned in Nigeria. The Kolkata Tribunal held that salary for services rendered outside India has to be considered as income accrued and received outside India and, therefore, not taxable in India.

13. Texas Instruments (India) Pvt. Ltd. (A.A.R. No 1299 of 2012)

Employees of Indian company (Applicant) were deputed to overseas group companies. Such employees rendered services in USA and qualified as NR in India.

Since service rendition is outside India, the salary income has accrued outside India. Only because salary is received in India, it cannot be treated as earned in India. AAR held that the Applicant was not liable to deduct TDS on salary paid in India to employees.

AAR further held that when employees become resident of India, the Applicant employer can consider foreign tax credit (FTC) for taxes paid in the USA on salary while determining TDS liability under Section 192(2) of the ITA. Employee has to provide details of salary income received from other employer during the year to the current employer. The employer i.e. the Applicant should carry out necessary verification before granting FTC at withholding stage.

AAR has pronounced similar ruling in case of Hewlett Packard India Software

Operation Private Limited (A.A.R. No 1217 of 2011)

14. Smt. Sumana Bandyopadhyay & Anr. Vs. DDIT (Calcutta High Court) (GA 3745 of 2016 With ITAT 374 of 2016)

Calcutta HC held that salary is not taxable in India on 'receipt basis'. It further held that remuneration received by NR assessee working as marine engineer in foreign waters in his NRE account in India, is not taxable in India. Also relies on CBDT circular 13/2017 wherein it was clarified that salary accrued to NR seafarers for services rendered outside India on foreign ships shall not be included in the total income merely because such salary was credited to NRE account in India.

15. Utanka Roy vs. DIT (Calcutta High Court) W.P. No. 369 of 2014)

The petitioner (a marine engineer) rendered services outside India for a period of 286 days and received his remuneration from a foreign company for work performed outside India. The Calcutta HC held such income as accrued and received outside India and treated as non-taxable in India.

16. Dr. Rajiv I. Modi vs. DCIT (Ahmedabad ITAT) (IT Appeal No. 1285 (Ahd.) Of 2014)

The Ahmedabad Tribunal held that the taxpayer is entitled to credit of State taxes paid in the USA as per Section 91 of the ITA. Such credit was subject to the rider that credit for all taxes paid in USA cannot exceed the Indian income-tax liability in respect of the same income.

17. Bharat Financial Inclusion Ltd. vs. DCIT (Hyderabad ITAT) (ITA No. 237/Hyd/2017, dated 03. August 2018)

The Hyderabad Tribunal held that allotment of shares by the employer is relevant for taxation of ESOP perquisite and not on exercise of option by employee. Accordingly, tax withholding obligation arises on allotment of shares.

18. Centrica India Offshore Pvt. Ltd. – Service PE and FTS Implications Delhi High Court | W.P. (C) No. 6807 of 2012 | [TS-237-HC-2014(DEL)]

The Delhi High Court held that the secondment of employees of Canadian & UK Group companies to assessee, an Indian company Centrica India Offshore (P) Ltd, creates Permanent Establishment (PE) basis the following observations:

- The Delhi High Court upheld the ruling of the Authority for Advance Rulings (AAR) on employee secondment giving rise to Permanent Establishment (PE) holding that services rendered by deputed employees "makes available" technical knowledge to the Indian entity and hence payment for those services was taxable as fees for technical services as per the Double Taxation Avoidance Agreement (DTAA).
- The reimbursement of salary and other associated costs by the Indian Company without an element of income could not be construed as diversion of income by overriding title.
- The activities cannot be termed as mere stewardship activities, Delhi High Court distinguished the E-funds rulings on facts and concluded that in the present case, the real employer of the seconded employees continues to be the overseas entity concerned. The Delhi High Court thus held that the secondment arrangement constitutes a service PE of the overseas entities in India.

The ruling of the Delhi High Court will apply if the facts are similar. If the facts are different, one needs to examine whether the ruling may be applicable or not.

[TS-237-HC-2014(DEL)]

Centrica India Offshore Pvt. Ltd. (CIOP) engaged expatriate employees seconded from its overseas group companies (Centrica Plc and its affiliates) to provide managerial and technical services in India. The Indian entity reimbursed the overseas entities for the salaries paid to these secondees. The Assessing Officer treated such reimbursements as Fees for Technical Services (FTS) under Section 9(1)(vii) read with Section 195, contending that secondment created a service PE in India, and tax had to be withheld accordingly. The assessee argued that secondees became its employees and salary reimbursements were not FTS.

The AAR ruled against CIOP, holding that salary reimbursements to overseas entities under the Secondment Agreement were income accruing to them. Though the seconded employees rendered managerial services, these did not qualify as FTS under Article 13.4 of the India–UK DTAA or Article 12.4 of the India–Canada DTAA. However, the overseas entities constituted a service PE in India due to the deputed employees, and tax was deductible under Section 195 on such payments.

The Delhi High Court held that the secondees continued to be employees of the overseas entity and the overseas companies provided managerial services through them to the Indian entity. Therefore, such payments were in the nature of FTS under Section 9(1)(vii) and taxable in India. The Indian entity was required to withhold tax under Section 195 on such reimbursements.

19. GE Energy Parts Inc v/s ADIT, International Taxation, New Delhi (Delhi ITAT) (ITA No, 671/Delhi/27 January 2017)

The Delhi ITAT upheld Revenue Authorities' claim for constitution of fixed place Permanent Establishment (PE) as well as dependent agent PE for 24 GE group entities in batch of 139 appeal taking GE Energy Parts Inc. ('assessee', a US based group co.) as the lead case, upholds reassessment.

Pursuant to survey conducted at Liaison Office ('LO') premises in India of General Electric International Operations Company Inc (one of the overseas group entity), it was observed that expatriates were deputed in India for undertaking the marketing activities/sale functions of the overall GE group, accordingly, Revenue had held that LO constituted assessee's fixed place PE and that 'GE India' comprising of expatriates / employees of overseas GE entities constituted dependent agency PE.

20. GE Energy Management Services Inc. v. *Assistant Director of Income Tax (International Taxation) New Delhi*

The Delhi ITAT held that offshore maintenance and support services provided by assessee do not make available to the recipient any technical knowledge, experience, skills, know how or processes as the nature of services are repetitive and ongoing and thus, consideration for such services do not qualify as fees for included services under Article 12(4) of India-US DTAA

21. Brinda RamaKrishna vs. ITO (Bangalore ITAT) (ITA No. 454/Bang/2021 dated 17 August 2021)

The Bangalore Tribunal held that Rule 128(9) does not provide for disallowance of foreign tax credit in case of delay in filing Form No. 67. Filing of Form No. 67 is not mandatory but a directory requirement and DTAA overrides the provisions of the ITA and the Rules cannot be contrary to the ITA. Accordingly, the foreign tax credit claimed by the assessee was allowed. Also see Sonakshi Sinha vs CIT (Mumbai ITAT) (ITA No 1704)

22. **HIGH COURT OF KARNATAKA- Flipkart Internet (P.) Ltd.** WA No. 992 of 2023 (Karnataka)

Flipkart Internet Pvt. Ltd., an Indian subsidiary of a Singapore-based entity, engaged Walmart Inc., its ultimate US holding company, under an Inter-Company Master Service Agreement. Pursuant to this agreement, Walmart Inc. seconded employees to Flipkart in India and received reimbursements for their salaries. The Assessing Officer concluded that these payments were not mere reimbursements but consideration for technical services rendered by Walmart Inc. Consequently, the payments fell within the ambit of Section 9(1)(vii) of the Income-tax Act, 1961, attracting withholding tax obligations on Flipkart for fees for technical services rather than being treated as exempt salary reimbursements. The Hon'ble Karnataka High Court (HC) held that the services rendered by the employees seconded by the US entity to the India Company (I. Co.) did not qualify as technical services rendered by the US entity to the I.Co as per section 9(1)(vii) of the Income Tax Act 1961 (the Act) and that the I.co was not required to withhold taxes under section 195 of the Act on payment made to US entity towards cost-to-cost reimbursement of salaries of seconded employees in India. The Hon'ble HC noted that the secondment was in accordance with the Master Service Agreement (MSA) and I. Co had issued employment letters to such employees, with material particulars of Job Chart & other details such as, contribution to Provident Fund, procurement of Employment Visa etc. This indicated employer-employee relationship between the I.co and such employees. By relying on the Coordinate Bench decision in the case of DIT, (International Taxation) v. Abbey Business Services India (P.) Ltd. [2020] 122 taxmann.com 174/[2021] 279 Taxman 284 (Karnataka), the Hon'ble HC held that if the 'Triple Test' of (i) Direct Control, (ii) Supervision & (iii) Direction, as laid down in the said judgement, is satisfied, a strong case is made out for existence of an employer-employee relationship and the absence of a few criteria cannot be held to be against the same given the realities of the business world.

23. ITAT DELHI- ERNST & Young U.S. LLP [ITA No. 2332/DEL/2022 (AY 2019-20)] The Delhi ITAT held that based on the deputation agreement between EY India and EY US, cost to cost reimbursement to EY US on account of secondment of employees cannot be treated as FTS as defined under Article 12 of India USA-DTAA and that the seconded personnel are employees of EY India, whose income has been taxed as salary in their respective hands in India. Therefore, the very same amount could not, in law,

be subjected twice - firstly in the hands of the seconded employees working in India and second again the hands of the assessee/EY US. In the instant case as per the deputation agreement it was clear that the employee would work exclusively for EY India and EY India shall be responsible for the work of such employees. EY US would not be responsible for the work of the employees and shall not bear any risk for the results produced from such work. Such personnel shall not be regarded as employees of EY US and shall not be subject to any instructions or control by EY US. EY US shall not have any obligation towards EY India regarding the performance of such personnel. The privity and lien of EY US would cease during the period of employment with EY India on entering of employment contract by international assignee with EY LLP India.

24. Google LLC [ITA No. 167/Bang/2021 (AY 2010-11 and ITA No. 688/Bang/2022 (AY 2012-13)]

The facts of the case is that Google LLC, a US-based foreign company, received notices under Section 148 of the Income-tax Act for Assessment Years 2010-11 and 2012-13, as it had not filed returns despite receiving payments from Google India Pvt. Ltd. (GIPL). The Assessing Officer observed that these payments were for seconding employees from Google LLC to GIPL. The AO concluded that GIPL required technical and managerial services from Google LLC, which were provided through its seconded employees who were experts at senior levels. The AO viewed the arrangement as effectively a service or contractual agreement, whereby Google LLC rendered professional services to GIPL. Since the services imparted technical and managerial skills to GIPL's workforce, the payments were characterised as Fees for Included Services under the Indo-USA DTAA. Consequently, the AO treated the payments as taxable in India, rejecting the assessee's position that these were non-taxable reimbursements for employee secondment. Hon'ble Bengaluru ITAT held that amount paid by Google India to Google US with reference to seconded employees did not come within the purview of FTS or FIS under the Act or the DTAA. ITAT observed that Google India had deducted tax at source u/ 192 of the Act from the salaries and allowances payable to the seconded employees and deposited the same with the Government. Further requisite social security compliances were duly undertaken in India for such employees.

In most of the cases the families of the seconded employees were in USA and due to convenience, salary of such employees was deposited in bank

account of the employees in USA. When the salaries of such seconded employees are deposited in their bank accounts in USA, Google India reimbursed the same to the Google US on cost-to-cost basis. The ITAT held that in the real sense the payment made by Google US was nothing but reimbursement of cost relating to remuneration on certain employees who were seconded in India. Further based on the factual information it was clear that the seconded employees were working solely under control and supervision of Google India and not on behalf of Google UA during the period of secondment. Google US's was merely to facilitate payment of salary on behalf of Google India and accordingly the same was not taxable in India.

ISBN : 978-81-8441-470-7

www.icai.org