International Taxation Session

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Framework and Key Articles

DTAA vs. Domestic Law: Which Prevails?

Q&A

Framework and Key Articles

Tax Treaties – Broad Framework

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3. General definition
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22. Elimination of Double Taxation - Exemption method or Credit method

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Often followed by:

Protocol

Tax Residence

Section 5 - Scope of total income

- Income shall be taxable based on the residential status as determined in Section 6
  - **Residents** are taxed on their global income
  - **Not Ordinarily Residents** are taxed on Indian income and only certain foreign income
  - **Non-residents** are taxed only on income received or deemed to be received or accrue or arise or deemed to accrue or arise in India
- Mere accounting entries or income considered for preparing Balance Sheet in India, do not constitute received in India
- Income of the person shall not be taxed again on receipt basis, when it has already been included in the income on deemed basis

Section 6 - Residence in India

- Provides the criteria to determine who is a resident or non-resident for Indian tax purposes
  - **Individuals** - 182 days or more in the tax year **or** 60 days or more in the tax year **and** 365 days or more in preceding 4 tax years
  - **Deemed Resident** – A citizen of India having Total income > INR 15 lakh in tax year other than income from foreign sources, and he is not liable to tax in any other country / territory
  - **Company** - It is an Indian company or, its place of effective management (PoEM) is in India
  - **Every Other Person** – Resident in India, except where control and management of the affairs of such person is situated wholly outside India

Tie-breaker rules for Residence (Article 4)

These rules are used when a person/entity is resident in both countries under their domestic laws

Individuals

Residence is resolved in this order:

- Permanent home available;
- Centre of vital interests (personal & economic ties);
- Habitual abode (where they live more regularly);
- Nationality;
- Mutual agreement between the two tax authorities, if still unresolved.

Entities

- Treaties generally use Place of Effective Management (POEM) as the tie-breaker (Singapore, Germany, Netherlands, Australia etc.)
- Article 4(1) of the MLI requires the competent authorities of both contracting states to engage in a Mutual Agreement Procedure (MAP) where an entity is dual resident (*e.g., Canada and Colombia*).

Interpretation of Tax Treaties

Overview

- Interpretation of Tax Treaties is **an art not an exact science**
- No single approach from global perspective for interpreting Tax Treaties

Basic approaches for Interpretation

Article 31(1) of Vienna Convention in summary provides that: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

- **Textual approach** – Interpretation focuses primarily on the text (**presumed to be most reliable expression of intention of negotiators**) – opted by **International Law Commission**
- **Subjective approach** – Emphasizes the **intention of negotiators** so that preparatory documents as the *travaux preparatoires** can always be used for the assessment
- **Purposive approach** – Endorses the **interpretation that best gives effect to the object and purpose of the tax treaty**, even if that reading is not the most literal one.

** official record of a negotiation*

Static vs Ambulatory approach of interpretation

Static approach

- Consider meaning at the time was signed
- Example - OECD commentaries in force **at the time of conclusion**
- Many scholars advocates this approach

  If for example, OECD commentaries are regarded as providing 'ordinary meaning' or 'special meaning', these meanings could be inferred from version in force at the time of conclusion of
- *Case laws: Telstra Singapore Pte Ltd (Delhi High Court, 2024), Sanofi Pasteur Holding SA (Andhra Pradesh High Court, 2013), New Skies Satellite BV (Delhi High Court, 2016)*

Ambulatory approach

- **Interpret a treaty provision using the meaning of terms and context at the time the provision is applied**, including later-developed commentaries and practice, rather than freezing the meaning at the conclusion date
- For tax treaties based on the OECD Model, this usually means looking at the **latest OECD Commentary when the dispute arises**, even if that Commentary post-dates the treaty's conclusion
- This is **contrasted with a static approach**, which looks primarily at the text, context and materials (including the then-current Commentary) as of the date the treaty was signed.
- *Case laws: Nestle SA (Supreme Court, 2023), Formula One World Championship Ltd (Supreme Court, 2017)*

'May Be Taxed' vs 'Shall Be Taxed'

Scope in DTAA Articles

Used across Articles 6, 7, 10–13, 15 etc. to confer a conditional taxing right on the **source state**, often with rate caps and PE/threshold conditions

OECD/UN view

"**may be** taxed" gives a **non-exclusive** source right; the residence state must then provide relief (exemption or credit) under the treaty's article

It is different from "**shall be taxable** only in" which grants exclusive taxing right to one State

Indian statutory clarification

CBDT Notification 91/2008 clarifies that if foreign income of an Indian Resident may be taxed abroad, such income is included in Indian total income and double tax is addressed via DTAA-prescribed relief (typically foreign tax credit)

Current position in practice

Such income is taxable in India with foreign tax credit, unless the treaty uses stronger wording like "may be taxed **only** in that State" or an express exemption rule

Essar Oil Ltd. v. ACIT (ITAT Mumbai 2013), Daler Singh Mehndi v. DCIT (ITAT Delhi, 2018), State Bank of India v. ACIT (Mumbai ITAT, 2026)

Concept of Permanent Establishment (PE)

Importance of PE

The existence of a PE is necessary for a source country to tax business profits of a resident of another country

Is there a PE?

This is the most contentious and frequently confronted issue for multinational enterprises doing businesses in other countries which is being analysed more from substance perspective basis the business model

Implications of PE

- Results in taxability of resident of contracting state (foreign company) in the source state (in India) to the extent income attributable to the latter state (in India)
- Exposes the multinational companies to the compliance obligations in the source country

Types of PE - Overview of Article 5

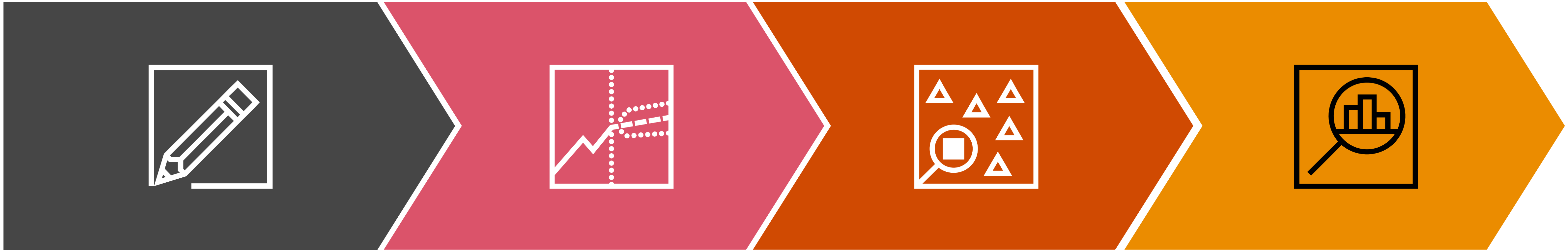
Service PE – 5(2)(l)

Employees visiting India to render services

Installation/Supervisory PE

Building site, Construction, Assembly, Installation, Project

(UN MC- 6 months; OECD MC- 12 months)



Fixed Place PE - 5(1) & 5(2)

Office, warehouse, place of management, equipment etc.

Tests - Disposal, ~~*Permanence*~~, Business Activity

Agency PE – 5(4)

Dependent agent carrying on specified activities

Virtual PE

In the era of digital revolution for e.g., India introduced SEP

Virtual PE in Digital Economy

The Challenge of the Digital Economy

- Tax rights require a physical office, warehouse, or factory
- Source Countries finding difficult taxing digital businesses in the absence of enabling provisions
- Digital tax introduction and withdrawal!

Concept

- Tax nexus based on **digital or virtual presence** in a country, even without physical offices or staff
- Focus shifts from "fixed place of business" to significant and sustained online interaction with users/customers in a jurisdiction

Virtual PE due to Automatic Equipments

- Where the **non-resident retains effective control over networked devices** in India and those devices perform essential, non-auxiliary functions (validation, encryption, routing, transaction execution), authorities and rulings (e.g., MasterCard, Amadeus/Galileo) have held that such automatic equipment can create a PE
- What matters is whether the non-resident has the equipment "at its disposal": control over configuration, software, remote operation, upgrades and critical decisions; title or legal ownership can sit with an Indian affiliate or a customer and still result in PE

Virtual PE in India via Significant Economic Presence (SEP)

- India's domestic law treats a non-resident's SEP as a "business connection", i.e., a virtual PE-type nexus, even if the non-resident has no office, employees or physical presence in India
- Treaty provisions generally override India's unilateral SEP/virtual PE rules wherever they are more beneficial to the taxpayer, so domestic SEP cannot expand taxing rights beyond what the applicable DTAA allows *(Clifford Chance Pte Ltd, Delhi HC 2025)*

Certain Advantageous Features of Specific DTAA

A. India-US DTAA

- "Make-available" test for services (narrow FIS scope):
  - Article 12 uses the concept of "fees for included services" that generally taxes services only if they make available technical knowledge, experience, skill, know-how or processes, or are ancillary and subsidiary to a royalty.
  - Many managerial/consulting/support services fail this test and fall outside FTS, becoming business profits taxable in India only if there is a PE
- Detailed Limitation-of-Benefits (LOB) article:
  - Article 24 has stringent ownership and base-erosion tests; companies that are not sufficiently "resident-owned and financed" or not actively trading may be denied treaty benefits
- Broad Service-PE concept: Article 5 includes a service PE when services are furnished in India for >90 days in any 12-month period; this can create a PE even without a fixed office

B. India-Mauritius DTAA

- Grandfathered capital-gains exemption on pre-1 April 2017 shares:
  - Article 13(4) as preserved by the 2016 Protocol gives residence-only taxation for gains on shares of Indian companies acquired before 1-4-2017, even if sold later — those gains remain taxable only in Mauritius

C. India – Netherlands DTAA

- Definition of "royalties" does not cover payments for the use or right to use industrial, commercial or scientific equipment; the earlier inclusion of equipment in 1997 was expressly removed by the subsequent 1998 amendment

D. India – Ireland DTAA

- "Royalties" include payments for the use of, or the right to use, industrial, commercial or scientific equipment, but explicitly exclude equipment that is an aircraft from this definition

DTAA vs. Domestic Law: Which Prevails ?

Principle - DTAA Overrides Domestic Law to the Extent Beneficial

Domestic Law (No)

Section 160 relief; credit is lower of Indian or foreign tax rate

DTAA / Provisions

Override domestic law where more beneficial; tax exemption or credit methods apply

Countries with no DTAA – Domestic Law applies

1. What It Means When There Is No DTAA

- If a country does not have a DTAA with the source country, **each country's domestic tax law applies**
- There is no treaty-based relief from double taxation, no reduced rates, and no special allocation rules for taxing rights. However, relief in form of foreign tax credit may be available under the domestic tax laws

2. Key Tax Consequences

- **Full Withholding Tax Rates**: The source country can levy WHT at its full statutory domestic rate (no treaty reduction)
- **Residence Country Taxation**: The country of residence will tax the same income under its own rules (worldwide income, if applicable)
- **Risk of Double Taxation**: The same income may be taxed both in the source country and in the residence country, with no obligation (by treaty) for either to provide relief

3. Relief Options Without a DTAA

- **Unilateral Relief under section 160[1]**: Credit allowed is lower of: (a) Indian tax rate, OR (b) Foreign tax rate, Relief available on doubly taxed income only

4. Practical Implications for Taxpayers

- **Higher Effective Tax Cost**: Without treaty benefits, the combined tax burden on cross-border income is often significantly higher
- **Structuring Considerations**: Businesses may consider operating via or from jurisdictions that do have DTAAs

[1] *Section 91 of Income-tax Act, 1961*

What is MFN?

The underlying principle is, if a country extends favourable treatment to another country on a particular subject under a given agreement, it must treat other parties to the agreement equally with regard to that subject.

Meaning of **Most Favoured Nation** ('MFN') clause in **tax treaties**:

- The extends similar benefits to one country as extended to certain other countries
- Generally triggered or activated when India enters into a more beneficial provision with a third country under a bilateral agreement
- Attempts to avoid discrimination between a subset of countries/resident of different countries
- Normally benefit under this clause is restricted to a specific group like OECD countries or developing countries

There are many tax treaties signed by India which have MFN clause.

Country	Benefit
France	Limits rate and scope of interest, dividend, royalty and FTS
Hungary	
Sweden	
Finland	
Netherland	
Spain	Limits rate and scope of royalty and FTS
Belgium	
Switzerland	Limits rate of interest, dividend, royalty and FTS. Also, limit scope of royalty and FTS

CBDT's Evolving Stance on MFN Benefits

Steria India [2016]

Delhi High Court upheld MFN-based reduced rates, holding Protocol is integral to and operates automatically.

Nestle SA

Supreme Court held that MFN clause does not automatically extend treaty benefits, and requires appropriate notifications to be issued for each tax treaty

Earlier → **HC Rulings** → **Circular 2022** → **SC Ruling** → **Post-2023**

Departmental Practice

Revenue denied MFN benefits, arguing Protocol requires separate notification under Section 90 of Income-tax Act.

Department's Position

MFN benefits not automatically available; require separate Section 90 notification (CBDT Circular 3/2022)

Current Position

MFN benefits not available, unless specific notification is issued

Treaty override by GAAR & domestic provisions

How a DTAA benefit is displaced by domestic anti-avoidance law under the Income-tax Act

General rule - S. 90(2): a tax treaty prevails to the extent more beneficial than the Act

…but expressly made subject to GAAR by S. 90(2A) — "notwithstanding" the beneficial-treaty rule

GAAR - Chapter X-A (S. 90(2A))

Overrides the tax treaty where the arrangement is an impermissible avoidance arrangement and the main purpose is a tax benefit and it lacks commercial substance.

Grandfathering

Amended Rule 10U(1)(d) and 10U(2) now make clear that income (including deemed/received income) from transfer of investments made before 1-4-2017 is outside GAAR's scope*

Treaty benefit denied where an Impermissible Avoidance Arrangement is established

Note: Section reference from Income-tax Act, 1961

* Notification No. 54/2026/F. No. 370142/15/2026-TPL, dated 31 March 2026 and Notification No. 55/2026/F. No. 370142/15/2026-TPL, dated 31 March 2026

Backed by CBDT, affirmed by the Supreme Court

CBDT Circular No. 7 of 2017 recognises the override and Tiger Global (SC, 2026) applies it

CBDT Circular No. 7 of 2017

(27 January 2017 — 16 FAQs on GAAR)

- GAAR can deny treaty benefits where the arrangement is an impermissible avoidance arrangement
- GAAR and SAAR co-exist, GAAR may apply even where specific rules exist
- If a Limitation-of-Benefits article adequately addresses the avoidance, GAAR is not invoked
- GAAR does not disturb rights expressly and unambiguously granted by the treaty

affirmed in →

Tiger Global v. AAR — SC

(15 January 2026 — Tiger Global ruling)

- GAAR overrides the India–Mauritius treaty where the structure lacks substance
- A valid TRC is not conclusive, the veil can be pierced to test control and substance
- Treaty benefit denied; matter an impermissible avoidance arrangement

Circular + judgment together confirm: substance, not paperwork, decides treaty entitlement

Limitation of Benefits (LoB) clauses in tax treaties

A treaty-level anti-abuse provision, restricting relief to genuine residents with real substance

Need for LoB

- To curb treaty shopping & round-tripping. Third-country investors routing through a treaty state purely for tax treaty benefit
- Confine relief to residents with genuine substance and not shell/ conduit entities

Treaty	LOB provision	Safe harbour - not a shell if...
India–Singapore	Article 24A	Listed, or operating spend ≥ S$200,000 / ₹50 lakh
India–Mauritius	Article 27A	Listed, or operating spend ≥ MUR 15 lakh / ₹27 lakh
India–USA	Article 24	Listed, beneficial ownership > 50% with residents or active business
India–UK	Article 28C	Main-purpose tests

Expenditure tested over the preceding 12 months (India–Singapore capital gains: each 12-month period in the prior 24 months).

LOB polices treaty access at the door; GAAR & domestic provisions can still override once inside

Q & A

Thank you