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Taxation of Individuals

Expatriates & Outbound assignees

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AUDIT ▪ TAX ▪ ADVISORY

Overview

- Residential status
- International assignments
- Inbound expatriates
- Outbound assignees
- Planning opportunities
- Recent developments

Residential Status

Residential Status

- **Residential Status**
  - **Resident**
    - ***Resident & Ordinarily Resident (ROR)***
    - ***Not Ordinarily Resident (NOR)***
  - **Non Resident *(NR)***

Residential Status (Cont'd)

Basic conditions:

(a) 182 days or more in a financial year

(b) 60 days or more in a financial year plus 365 days or more in four financial years preceding the relevant financial year

Any one of the two conditions satisfied → **Resident**

None of the conditions satisfied → **Non Resident**

Residential Status (Cont'd)

Exceptions

Period of 60 days substituted by 182 days in following cases:

- An Indian citizen who leaves India during the tax year
  - for the purposes of employment outside India
  - as a member of crew of an Indian ship
- Indian citizen or a person of Indian origin who comes on a visit to India during the tax year

Residential Status (Cont'd)

60 days v/s 182 days

- Leaving for purposes of employment outside India
  - New employment
  - Existing employment
  - Deputation / Secondment
- Visit to India

Residential Status (Cont'd)

Purpose of employment outside India

- Person leaving India on deputation outside India

  British Gas India (P) Ltd. , 287 ITR 462 (AAR)

- Posted outside India either temporarily or for a long period; not few days

  ITO vs. Abbott Laboratories , 31 ITD 183 (ITAT Bombay)

- Intention of staying abroad on a permanent or semi-permanent basis; not tours

  ITO vs. K Y Patel , 33 ITD 714 (ITAT Bombay)

Residential status (Cont'd)

Additional conditions:

(a) "Non-resident" in India in **nine** out of ten financial years preceding the relevant financial year

(b) Present in India for **729 days or less** during the 7 financial years preceding the relevant financial year

None of the conditions satisfied → **ROR**

One or both the conditions satisfied → **NOR**

International Assignment

Challenges

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International Assignment : Challenges – Tax / legal / HR

Social Security planning

Package design, Assignment policy, Pensions

Relocation process and Control

Corporate Tax, Transfer Pricing, PE issues, Service tax issues

Costs of employment / Risks

Work permit/ visa obligations

Assignment contracts, Minimum wage requirements

Tax deduction at source requirements / filings

Host and Home country taxation

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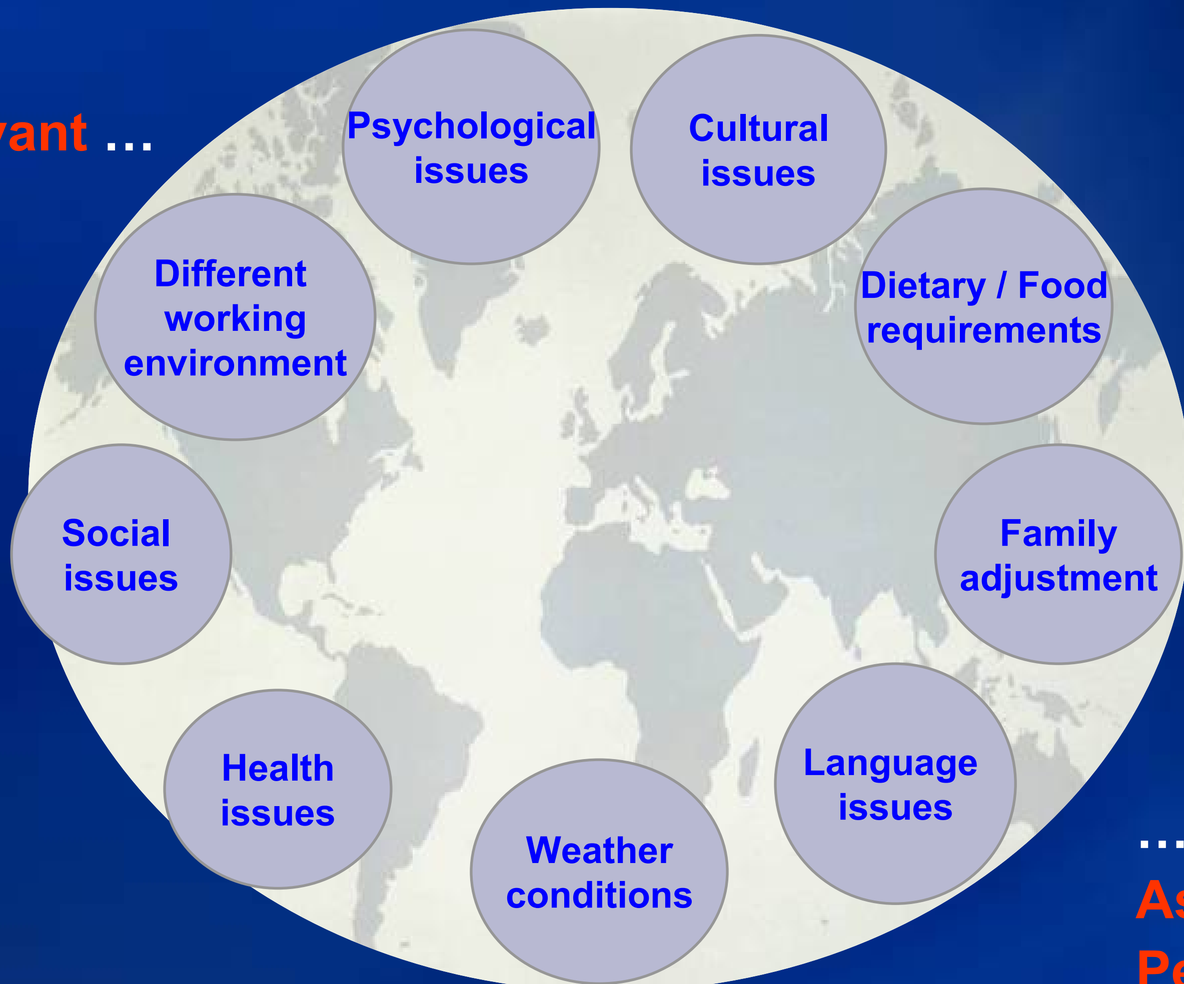
International Assignment : Challenges – Soft issues

Often
more relevant …



… from
Assignee's Perspective !

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Inbound Expatriates

Key considerations

Inbound expatriates

- Short term assignment
- Long term assignment
- International transfer
- Key issues
- Exemptions
- Visa

Short term assignment

Characteristics

- Generally, less than six months
- Assignee on the payroll of overseas employer
- Reporting to overseas employer
- Assignee receives per diem in India
- Generally, NOR / NR in India

Long term assignment

Characteristics

- Generally, six months to two years
- Salary cross charged to Indian entity
- Assignee reports to Indian employer
- Residential status both in India and Overseas need to be examined
- Dual residency - Tie breaker clause to be examined

International transfer

Characteristics

- Transfer to the payroll of Indian entity
- Salary received in India
- Residential status both in India and Overseas needs to be examined
- Dual residency - Tie breaker clause to be examined

Key Issues - Expatriate remuneration

Salary, deemed to accrue or arise in India if it is earned in India

- If services rendered in India
- Rest / leave period preceded and succeeded by services rendered in India

[Section 9(1)(ii)]

Key Issues - Expatriate remuneration (Cont'd)

Place where services are rendered

Where individual is physically present and not where the employer is situated or salary is paid

Performing Art Society vs. CIT,106 ITR 11 (SC)

Key Issues - Expatriate remuneration (Cont'd)

- **Tax equalisation-** Employee is **neither better off nor worse off** due to foreign assignment
- **Hypothetical tax**
  - ✓ Represents the home country tax that would have been paid had he continued to be in the home country
  - ✓ Reduced from employee's gross salary in the home country
  - ✓ Final actual **home tax liability** paid by the employer
- Employer responsible for paying actual / additional **host country tax liability**
- Net salary after hypo tax reduction to be considered

– Jaydev Raja - ITAT Mumbai

Exemption under the Act

Short Stay Exemption

- Employee is a foreign citizen
- employed by foreign enterprise
- foreign entity not engaged in trade / business in India
- stay in India ≤ 90 days in a financial year
- remuneration not liable to be deducted from employer's income chargeable to tax

[Section 10(6)(vi)]

Exemption under DTAA

Place of work principle

- Remuneration derived by a resident of a Contracting State (USA)
- in respect of an employment
- shall be taxable only in that Contracting State (USA)
- If employment is exercised in other Contracting state (India), it may be taxable in that other state (India)

Article 16(1) of India USA DTAA

Exemption under DTAA (Cont'd)

Short stay exemption

Remuneration derived by a resident of a Contracting State (USA) in respect of an employment exercised in the other Contracting State (India) shall be taxable only in the first-mentioned State (USA) if:

- Recipient is present in the other state (India) for a period or periods not exceeding 183 days in the relevant taxable year
- remuneration is paid by, or on behalf of, an employer who is not a resident of the other state (India)
- remuneration is not borne by a permanant establishment or a fixed base or a trade or business which the employer has in the other State (India)

Article 16(2) of India US DTAA

Tax credit

Credit allowed in the country of residence

- Income-tax Act, 1961 (Section 91)
  - *If no DTAA*
- Double Taxation Avoidance Agreements (Relief from double taxation)

Caution Points

- **Different DTAA's – Different provisions**

  India USA DTAA - relevant taxable year

  India South Africa DTAA - any twelve month period

- **Different countries – Different tax year**

  US - 01 January to 31 December

  UK - 06 April to 05 April

Caution Points (Cont'd)

- Tax credit available **only** for Federal Income tax, whereas individual subject to various taxes in overseas country (e.g USA)
- No DTAA benefit / relief, if **Non Resident** in both countries

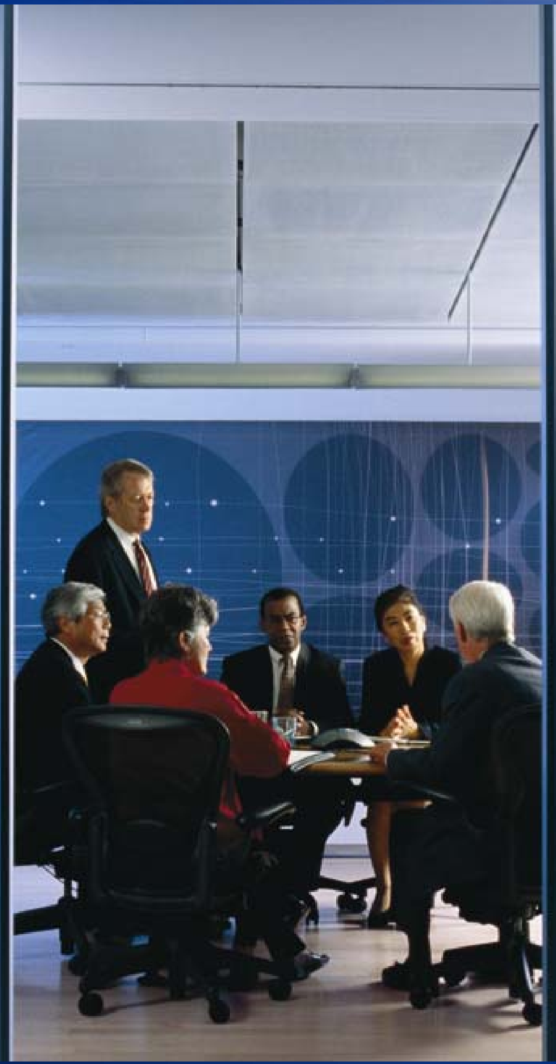
Visa

- **Employment visa**
  - *employment purposes*

- **Business visa**
  - *trade, occupation, or business*

- **Tourist visa**
  - *tourism*

- **Spouse / Other visa**
  - *accompanying spouse*



Outbound Assignees

Key considerations

Outbound assignees

- Short term assignment
- Long term assignment
- International transfer
- Key issues
- Exemptions / Credit

Assignment arrangements

- Short term assignment
- Long term assignment
- International transfer

Characteristics - Similar to Inbound Expatriates

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Key issues

- **Salary paid in India, assignee working overseas**

  - *Salary not taxable in India*

    (British gas India Pvt Ltd (AAR)

- **Leaving for purposes of employment outside India**

- **Social security – European Union countries have high social security costs**

  - *additional cost for Indian employer*

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Exemption / Credit

- Relief under DTAA

  - Article 16(1) - Place of work principle

  - Article 16(2) - Short stay exemption

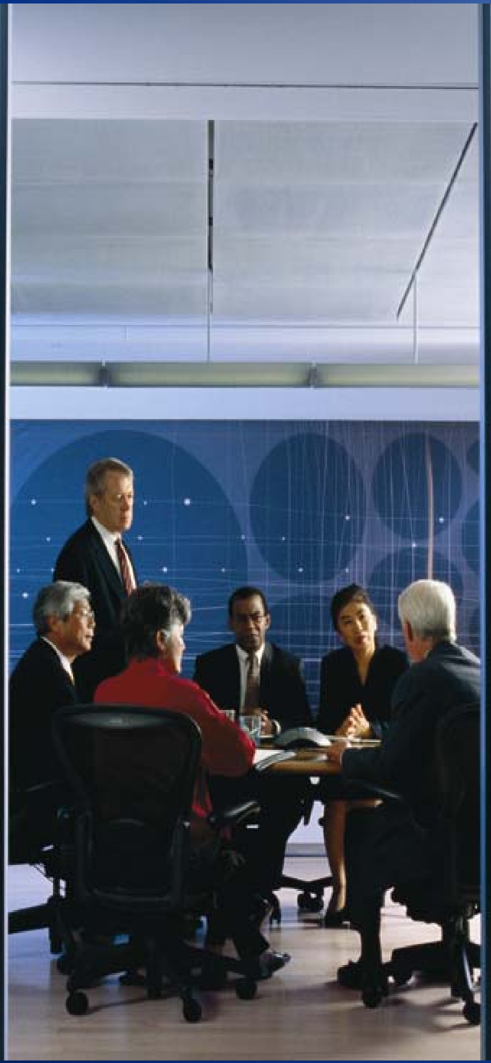
  - Tax Credit - Relief from double taxation

(India US DTAA)

Planning opportunities

Planning Opportunities

- Timing of arrival / departure
- Nature of the assignment
- Payroll transfer to mitigate PE exposure
- Regional responsibilities



Recent developments

Morgan Stanley & Co. (SC)

MSCo (USA)

MSCo pays for services rendered by MSAS at cost plus mark up

Deputation (long term) and Stewardship

Provides Back office and support services

MSAS (India)

Subsidiary of MSCo

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Morgan Stanley & Co. (SC) (Contd.)

- **No Fixed base PE**
  - *preparatory and auxiliary activities*
- **No Agency PE**
  - *no authority to conclude contracts*
- **Deputation – Service PE**
- **Stewardship activities - No Service PE**

RBF Rig Corporation (Delhi ITAT - Special Bench)

Issue

Tax paid by employer -
Monetary v/s Non monetary Payment?

Held

Tax paid by employer -
Non Monetary Payment

- single grossing up of tax
- exemption u/s 10(10CC) available

British Gas India Pvt. Ltd (AAR)

Facts

- Employees deputed to group company in UK
- Salary cross charged to UK company
- Resident in UK / NR in India
- Taxes paid in UK

Held

- Salary not taxable in India
- Indian Company not liable to withhold tax
- Article 16(1) of India UK DTAA

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Eric Moroux c/o Air France (Delhi ITAT)

Facts

- Assessee is a French citizen
- Employment contract – regional responsibilities
- NOR in India
- Mandatory contribution by assessee to social security scheme in France

Held

- Services rendered outside India - Not taxable
- Assessee's contribution to social security - to be deducted

Hiromi Hirose (Delhi ITAT)

Facts

- Assessee appointed as bureau chief of NHK Japan's- Delhi office
- Received salary & bonus in Japan and accommodation in India
- Duties as per employment contract:

  (a) gather news for South Asia and neighboring countries and convey it to NHK

  (b) to go on other assignment outside India from time to time
- NOR in India

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Hiromi Hirose – (Delhi ITAT) (Contd.)

Held

- Services rendered outside India - *inextricably linked with the functions of Indian assignment as bureau chief*
- Travel abroad - *not for any separate and distinct assignment*
- Entire salary and bonus accrued in India
- Taxed in India u/s 5(1)(b) – *no deemed accrual u/s 9*

R & B Falcon (SC)

Issue

Whether Australian Company liable to pay FBT on transportation cost on movement of off shore employees from overseas residence to place of work in India

Held

- Residence u/s 115WB(3) – not restricted within India
- Section 115WB(1) and 115WB(2) operate in different fields

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It’s your time now !

Questions?

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Thank you!

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