CHAPTER - IX DOUBLE TAXATION RELIEF

Sl.	Particulars
1	What is 'Double Taxation'? : 'Double Taxation' means the same income getting taxed twice in the hands of the same assessee in the same year. The two legal criteria for taxing any income under the taxation laws of any country are:- a. Residence Rule and b. Source Rule
	> Double Taxation is possible only in a situation where an assessee is a resident of one country and derives income from another country. > The country of which assessee is resident, called as 'Home State' will levy tax, applying 'Residence Rule' and the country, from which the income was derived, called as 'Host State' will also levy tax on the same income applying 'Source Rule'. > Thus, resulting into double taxation of the same income. It is well known that a person, who is resident of India, will be taxed in India on his Global income. > Therefore, if a person, who is resident of India, derives an income from USA, then India will tax such income applying 'Residence Rule' and USA will also tax such income applying 'Source Rule', as the source of such income was in USA. This will result into double taxation of the same income. > Similarly, if a person, who is resident of USA, derives an income from India, then USA will tax such income applying 'Residence Rule' and India will also tax such income applying 'Source Rule', as the income was earned in India. > An Agreement entered into between governments of two countries to avoid such double taxation is called as 'Double Taxation Avoidance Agreement (DTAA)'.
2	**Two types of Double Taxation:-** (a.) Juridical Double Taxation: Under this the same income gets taxed twice in the hands of the same person in two different countries (i.e. in two different juridical territories). Chapter IX deals only with Juridical Double Taxation. (b.) Economic Double Taxation: Under this the same income gets taxed twice, but in the hands of two different persons in two different countries. Chapter IX does not deal with Economic Double Taxation.
	A DTAA would generally give relief in the case of juridical double taxation except in the case of Article 9 (Associated Enterprise) which deals with economic double taxation.
3	> A person, whose income has been taxed twice, would face genuine hardship and he therefore, needs some relief. > The double taxation relief provisions are incorporated as Articles in DTAA. Article 23 provides for elimination of double taxation. > T**wo types of Double Taxation Relief :** (a.) Unilateral Relief: Where only one country provide relief, then it is called as 'Unilateral Relief'. This is possible only in a case, where there is no DTAA between India and the other country. In such situation Government of India will provide double taxation relief U/S 91 of the Income Tax Act. Such one side relief offered by Government of India is called as 'Unilateral Relief'. However, such Unilateral Relief will be provided only to those who are residents of India. (b.) Bilateral Relief: Where both the countries provide relief, it is called as 'Bilateral Relief'. Under this, the Government of India will enter into a DTAA with the Government of Foreign country U/S 90 of the Income Tax Act, to provide relief from double taxation.

4		**Tie - Breaker Rule :** If a person is resident in two contracting states in a year, there arises an issue as to which country the person is a resident for the purpose of applying tax laws. In such situation, the tie breaker rule shall apply, where the following criterion in that sequence to be considered : (i) the place of Permanent Home ; (ii) the centre of vital interest - economic & personal interest ; (iii) the place of habitual abode (stay for business leisure) ; (iv) nationality ; (v) mutual agreement between the competent authorities of the contracting States shall settle the question. > If the tie is not resolved by the first criterion then the second shall be applied and so on..
5	**90 (2)**	> The provisions of DTAA are called as 'Specific Provisions' and the provisions of the Income Tax Act, 1961 are called as 'General Provisions'. Normally, the specific provisions shall override the general provisions. However, if the general provisions of the Income Tax Act, 1961, are found to be more beneficial over the specific provisions of DTAA, then to that extent assessee can seek application of general provisions of the Income Tax Act. > Even in case of a person, who is responsible to deduct tax at source from such income, which is payable by him to any person outside India, the tax shall be deducted either at that rate, which is prescribed by the Finance Act or at that rate, which is prescribed in the relevant DTAA, whichever rate is more beneficial to the recipient of the income. > Normally, Surcharge and Education Cess are both not attracted when DTAA rates are applied. > In case where the charge of tax in respect of a foreign co. at a rate higher than the rate at which a domestic Co. is chargeable, shall not be regarded as less favorable charge or levy of tax in respect of such foreign Co.
6	**90A**	> Normally, a DTAA can be entered into only between governments of two countries. > But an agreement, similar to DTAA can now be entered into between a 'Specified Association' in India and a 'Specified Association' in a territory outside India. > For e.g.: An agreement entered into between 'ICAI' of India and 'CIMA' of London. > 'Specified Association' means an Association, whether incorporated or not, functioning under any law in force in India or in a territory outside India. > Such agreements will then be adopted or implemented by GOI, by way of issuing a Notification in the Official Gazette of India for -- a. adopting of double taxation ; b. avoidance of double taxation ; c. exchange of information ; d. the prevention of evasion or avoidance of income tax ; or e. recovery of income tax.
7	**Expl 3 in Sec. 90 & 90A**	> In case, any term used in the agreement, which is not defined under the agreement or in Act, and meaning to such term is assigned by way of a notification u/s 90(3) or 90A(3), > Such meaning would be deemed to have come to effect, from the date on which the said agreement came into force, and not from the date of the said notification. **Amendment**

8	**Amnd. In Sec. 90 & 90A**	**Amendment** > The non-resident to whom the agreement applies, shall be allowed to claim the relief under such agreement, if Tax Residence Certificate (TRC) is obtained by him from Govt. of that country or specified territory, and is furnished, containing such particulars as may be prescribed, declaring his residence of the country outside India (or the specified territory outside India). > The submission of TRC, shall be **a necessary but not sufficient condition** , for availing benefit of the agreement(s). > Further conditions can be sitpulated for claiming treaty benefits, in addition to requirement of submission of TRC.
9	**91**	**Double Taxation Relief, if there's no DTAA:** **>** If there's no DTAA between GOI and government of a country from which income has been derived, then GOI will unilaterally provide some relief to its residents U/S 91. > However, relief U/S 91 is possible only if all the following conditions are satisfied:- (a.) Assessee is Resident of India during the relevant Previous Year, (b.) Income should have been derived from a country outside India, (c.) Tax should have been paid or deducted in that country from such income and (d.) There should be no DTAA between India and that country.

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Steps to find out Relief U/S 91:

(1.) Compute the Net Taxable Income (NTI)
[after including the doubly taxed income or foreign income with Indian income and after claiming all the available exemptions and deductions].

(2.) Find out the amount of 'Gross Tax'
[before claiming any Rebate / Relief / TDS / Advance Tax / SA Tax but after adding Surcharge and Education Cess].

(3.) Find out the Average Rate of Tax (A.R.T.) on NTI
[where ART means as defined in section 2(10)]

$$\text{A.R.T.} = \frac{\text{Gross Tax payable}}{\text{Net Taxable income (NTI)}} \times 100$$

(4.) Find out the rate, at which the tax was deducted / paid in foreign country.

(5.) Find out the lower of rate of tax from step no. (3) and (4).

(6.) Relief U/S 91 = [(Doubly taxed income included in NTI) X (Rate of Tax found out in step no. (5) above)]

11	**Concept of Permanent Establishment (PE) :** > An enterprise, resident of 'R' country shall be liable for the taxes on the profits derived by it in a source country 'S', only if it carries on business in other country through a PE in that country. > PE means a fixed place of business through which the business of enterprise wholly or partly carried on. A place to be considered as a PE, it needs to fulfill -- Physical Criterion (it should be in existence) ; Subjective Criterion (assessee should have right to use that place) and Functional Criterion (business activity must be carried on). > PE includes a place of management ; a branch ; an office ; a factory ; a workshop ; a mine; an oil or gas well ; a quary or any other place of extraction of natural resources. > If business activities involve insufficient economic activities like preparatory or auxiliary activities, it will not constitute PE. E.g.. Collecting information of customer, storage, display, etc. > Every DTAA has a specific clause, which will deal with an explanation of PE for purpose of such DTAA. > Income of Non-resident will not be taxed in India, unless such non-resident has a PE in India. However, income of a non resident relating to interest, royalty or fee from technical service deemed to accrue or arise in India, shall be included in the total income, whether or not the non-resident has a place of business connection or PE in India as per Sec 9. > Even if income is deemed to accrue or arise in India u/s 9 in particular case, the chargeability fails if according to relevant DTAA such income is not taxable in India. > The concept of Business Connection and PE should go together in order to make an assessee liable to pay tax in a particular country. In case where there is business connection, PE as per relevant DTAA does not exist, the assessee shall not be liable to pay tax.
12	**Fees for Technical Service and Royalty :** > The DTAA between the countries also provides for the taxation of Fees for Technical Service. > The taxability of Fees for Technical Services shall fulfill the requirements of "make available". > Services are considered as "make available" where the recipient of such service is at liberty to use the technical knowledge, skills and process in his own right. > It is necessary that the recipient of service is enabled and empowered to make use of the technical knowledge by himself in his business or for his own benefit without any recourse to the original service provider in future. > Thus, mere availing of service alone does not fall within the purview of the term "make available" and accordingly, not to be considered as Fees for Technical Services.
13	**TAXATION OF I.T. ENABLED B.P.O. UNITS' IN INDIA: [CBDT Circular No. 5/2004 dated. 28-09-2004]:** (1.) There will be two parties involved:- (a.) A Foreign Company --> Non-Resident Entity (N.R.E.) and (b.) An Indian Company --> Resident Indian Entity (R.I.E.) (2.) If RIE is a Permanent Establishment (P.E.) of NRE, then NRE will have to pay tax in India. (3.) However, if RIE does not constitute a PE of NRE, then RIE itself will have to bear the tax burden in India as an independent entity.