

The image features four stacks of Indian coins of varying heights, placed on a document with some text and numbers. The background is a blurred outdoor scene. The text 'TDS on Foreign Payments' is overlaid in white on an orange rectangular background.

TDS on Foreign Payments

What is Section 195

Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:

What is Section 195

Section 195(1) covers:

- *interest payments*
- ***any other sum chargeable to tax***

Exclusions from section 195(1):

- *Salaries*
- *Dividend payments which are subject to DDT*
- *interest payments to specified infrastructure debt funds*
- *interest payments by Indian companies / business trusts on specific borrowings* • *interest on certain bonds / government securities*

Tax to be deducted at the time of credit of income to the account of the payee or at the time of payment, whichever is earlier

Tax to be deducted at the rates in force

Key Factors

In determining the sum chargeable under the provisions of the Act, the entire scheme of non-resident taxation would be relevant. Key considerations in determining whether the payment made to non-resident is taxable in India in the hands of the non-resident:

Residential status as per section 6

Scope of total income in terms of section 5 and 9

Provisions applying to non-resident (e.g. 115A dealing with tax on dividends, royalty and technical service fees in case of non-residents)

Section 90 permits a non-resident to opt between Income-tax Act and tax treaty, whichever is beneficial

Scheme of presumptive taxation (e.g. 44BB, .. etc.)

Requirement to get PAN or TRC .

Section 206AA

In case of non-availability of PAN, tax is to be deducted at the higher of the following:

- Rates specified in the Act*
- Rates in force*
- 20%*

The Finance Act 2016 has amended section 206AA so as to provide that effective 1 June 2016, tax shall not be deducted at a higher rate in case of non-residents not having PAN subject to prescribed conditions . Prescribed conditions for relaxation of deduction of tax at higher rate in case of non-residents under section 206AA:

- The deductee to furnish following details for non deduction of tax at higher rates:*
- Name, email ID, contact number*
- Address in the country or specified territory outside India of which deductee is a resident*
- A certificate of his being resident in any country or specified territory outside India from the Government of that country or specified territory if the law of that country or specified territory provides for issuance of such certificate*

Grossing up u/s 195A

- If the payee bears the tax liability i.e. payment is “net of tax” then for computing TDS, income should be grossed up*
- Example –Amount payable to non-resident is 100 and TDS rate is 10%; gross amount for TDS purpose would be 111.11 (100*100/90)*
- Whether grossing up would be required to be done in case payment is made net of tax to a foreign company which does not have a PAN in India, considering the provisions of section 206AA*
- Income could be grossed up using the applicable rate; example 10% and tax could be withheld at 20%*
- For example: say total amount to be paid net of tax as per agreement be INR 100. Income increased to INR 111.11 (grossed by 10%). Tax needs to be withheld @ 20% on 111.11 = 22.22*

Section 9

As per section 9, income is said to be deemed to accrue or arise in India if the same is accruing or arising directly or indirectly, through:

A business connection in India (PE) or

- from any property in India or*

- from any asset or source of income in India or*

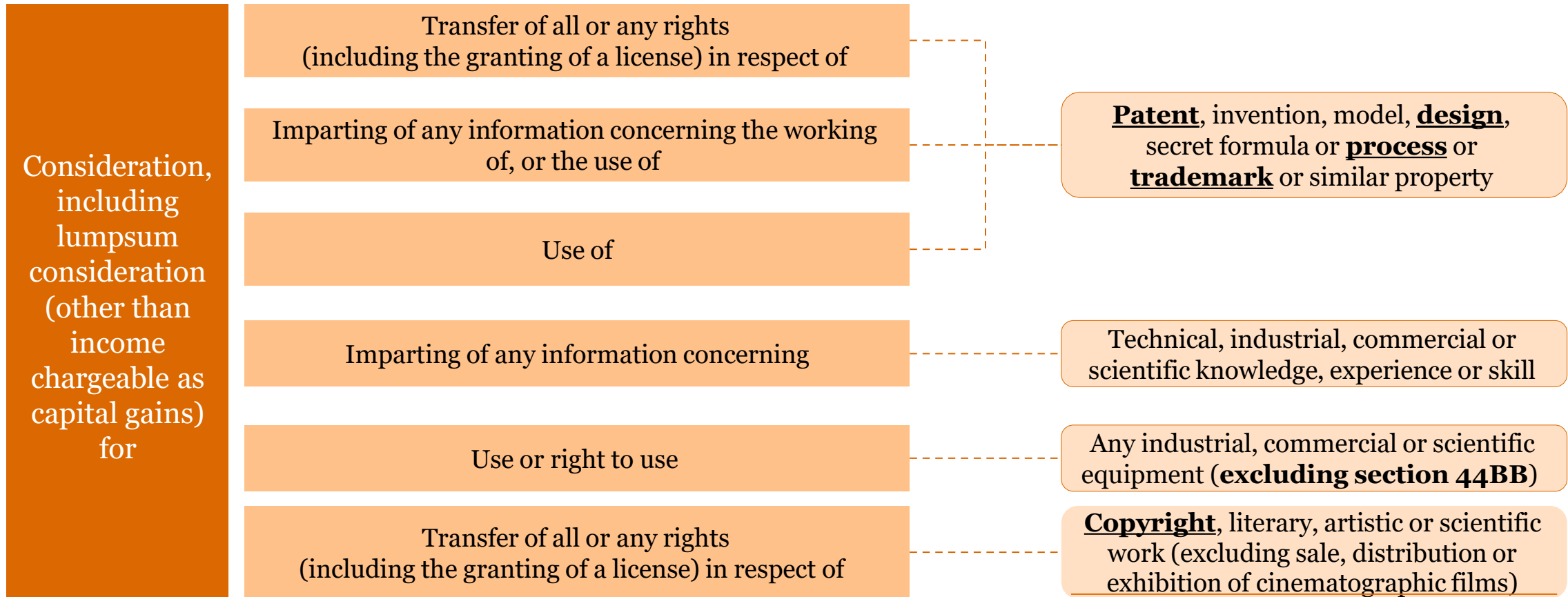
- the transfer of a capital asset in India*

- It also includes any share or interest in a company or entity registered or incorporated outside India, which derives its value substantially from assets in India*

The image features four stacks of coins of increasing height from left to right, placed on a document with some text and numbers. The background is a blurred outdoor scene. The text 'Royalties and FTS' is overlaid in a white serif font on an orange banner.

Royalties and FTS

Royalty – Definition u/s 9(1)(vi) of the Act



Royalty also includes income from rendering of services in connection with above

Royalty u/s 9(1)(vi) of the Act

Royalty deemed to accrue or arise in India when

- Payable by the Government
- Payable by resident to non-resident, except
 - where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person (i.e., the payer) outside India
 - for the purpose of making or earning any income from any source outside India
- Payable by non-resident to resident, only if
 - the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person in India
 - for the purpose of making or earning any income from any source in India

Definition of Royalty u/s 9(1)(vi) of the Act

Retrospective amendments made by Finance Act, 2012 with effect from 1 June, 1976

- Explanation 4
 - Transfer of all or any rights in respect of any right, property or information includes transfer of all or right for use or right to use a computer software (including granting of a license) irrespective of the medium through which the right is transferred

Judgements sought to be overruled by Explanation 4:
Ericsson AB (2012), 343 ITR 470 (Delhi), Nokia Networks
OY (20120) 25 taxmann.com 225 (Delhi)

Definition of Royalty u/s 9(1)(vi) of the Act

Retrospective amendments made by Finance Act, 2012 with effect from 1 June, 1976

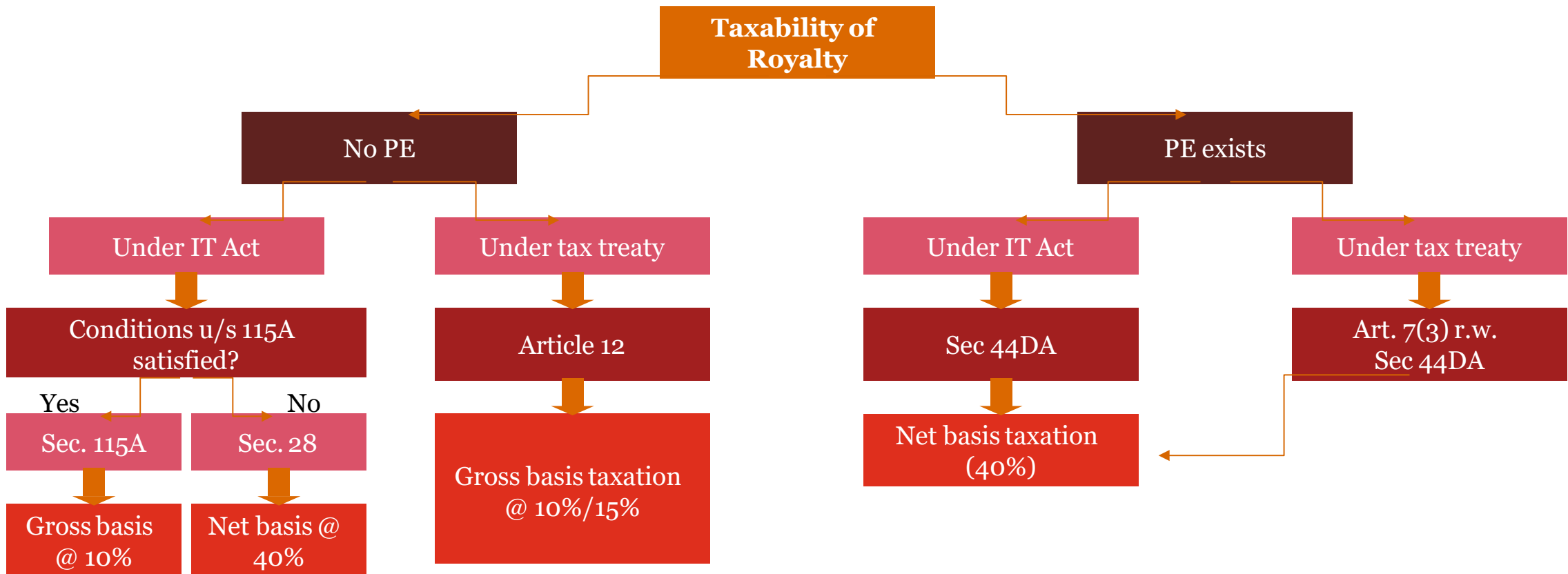
- Explanation 5
 - Royalty includes consideration in respect of any right, property or information, whether or not –
 - The possession or control is with the payer;
 - It is used directly by the payer;
 - Location is in India
- Explanation 6
 - “Process” includes transmission by satellite, cable, optic fibre or by any other similar technology, whether or not such process is secret

Judgements sought to be overruled by explanation 5 and 6: Asia
Satellite Telecommunications Ltd. (2011) 332 ITR 340 (Delhi),
ISRO Satellite Centre (2008) 307 ITR 59 (AAR)

Taxation of Royalty under the Act

- Royalty taxable @ 10% (plus surcharge and education cess) on gross basis u/s 115A if
 - Received by non-resident from a resident; and
 - Non-resident does not have a PE in India
- Royalty taxable @ 40% (plus surcharge and education cess) on net income basis under 44DA of Act if
 - Received by non-resident from government/Indian concern; and
 - Non-resident has a PE in India and the right/property/contract in respect of which Royalty /FTS are paid, is effectively connected with the PE

Current Taxation Regime for Royalty



Royalty under Indian tax treaties

Royalty clauses based on UN Model generally except in case of US/OECD countries

Country	Definition
Singapore	Includes gains from alienation of right, property or information
USA	Includes gains derived from the alienation of right or property which are contingent on the productivity, use, etc.
Singapore, USA and Canada	Rental of Ships or Aircrafts / Containers incidental to any activity directly connected with operation of ships / aircrafts in international traffic specifically excluded from Royalty
Australia	Specific inclusion of Fees for Included Services
Morocco, Namibia, Russia, Trinidad & Tobago, Turkmenistan, Kazakstan and Kyrgyz Republic	Specific inclusion of software
Libya	Rental and other income from cinematograph films considered as business profits and not Royalties
Greece, Israel, Sweden	Does not include 'Equipment Royalty'
Belgium, France, Kazakhstan, Netherlands and Spain	Does not include 'Equipment Royalty' – MFN clause

Typical structure of Royalty article under Indian tax treaties

- Article 12(1) – State of residence to have right to tax royalty
- Article 12(2) – State of source also to have right to tax royalty, however ceiling of tax rate by the state of source subject to Beneficial Ownership
- Article 12(3) – Meaning of the term ‘Royalty’
- Article 12(4) – Taxation of Royalty if effectively connected with PE / Fixed Base of Non-Residents in the State of Source
- Article 12(5) – Arising of Royalty in the State of Source
 - Where payer is Resident; and / or
 - If the Payer has a PE / Fixed Base in the State of Source and the Royalty is connected and borne by such PE / Fixed Base
- Article 12(6) – Adjustments for related party transactions
 - Excess over Arm’s-length price to be taxable as per domestic provisions

Beneficial ownership

- OECD
 - Term not to be used in a narrow or technical sense but object and purpose of tax conventions
- IBFD
 - common law term developed by the Courts and is distinct from 'Legal Owner'
- US Model Technical Explanation
 - Not defined in the convention – to be interpreted as per domestic law of source state
- Indian context
 - CBDT Circular 789 dt .3 April 2000 - Tax Residency Certificates issued by Mauritius Tax Authorities sufficient evidence of residence status as well as Beneficial ownership
 - Whether the circular can be applied in case of royalty also?
 - TRC was held to be sufficient evidence for beneficial ownership Universal International Music B.V (45 SOT 219) (Mumbai); appeal not admitted by Bombay High Court (214 Taxman 19)

Royalties – Key issues



Common Types of IPRs

	Meaning	Few Examples	Legislations
Patent	Rights granted in relation to an invention to protect its commercial exploitation by others	Chemical / Pharmaceutical products	Patents Act, 1970
Copyright	Exclusive right with respect to literary, artistic, etc. work	A painting, book, piece of music, film	Indian Copyright Act, 1957
Trade mark	Distinctive sign that identifies goods / services of an enterprise	Logos of McDonalds, Coco Cola	Trade Marks Act, 1999
Design	Features of shape, pattern, etc. – includes element of industrial production	Drawings of cartoon characters	Designs Act, 2000

Royalties – Product v. IPR

Product	IPR	Licensee of IPR gets	Purchaser of product gets
T.V. shows	Right to Telecast	Right to telecast	Entertainment
Medicines	Patent	License to manufacture and sell medicines	Ownership of medicine
Books	Copyright	License to publish i.e make copies and sell	Ownership of book
Packaged food	Trademark	Franchisee gets right to manufacture and sell under trademark	Ownership of product
High Definition TVs	Patent, Design	License to manufacture and sell	Ownership of product

Royalty
Taxed on gross basis; on net basis if effectively connected with PE

Business income
Taxed on net basis if PE/business connection

Shrink wrapped Software – Arguments against Royalty

- For captive use
- No right to reproduce / distribute/ resell, etc.
- May be in the form of a network/site license
- For multiple users of the tax payer organisation
- No commercial exploitation of Intellectual Property by licensee
- Software supplied in CD is 'goods' TCS (271 ITR 401)(SC)
- Use of 'copyrighted article' (software) and not 'copyright' in software
 - Para 12.2 of OECD commentary
 - Reliance Inds. (43 SOT 506)(Mum.)
 - TII team Telecom (140 TTJ 649)(Mum.)
 - Samsung Technologies (94 ITD 91) (Bang. ITAT) and other decisions

Issue pending for adjudication before Supreme Court

Embedded Software

Typical Facts

- Supply of integrated equipment comprising hardware and software
- Supply of Software is inextricably linked to supply of the hardware and, both
- do not have independent existence / use
- Example – Telecom equipment's in fixed and mobile networks

Key Aspects

- Payment made for supply of 'goods' and not for use of software
- Contract cannot be separated in two components i.e. Hardware and Software
- Amendment in domestic law not to impact tax treaty interpretation
 - Distinction between copyright and copyrighted article still relevant under tax treaties

Legal principles continue to be applicable post retro amendments

Imparting of information concerning technical, industrial, commercial or scientific knowledge, experience or skill

- Every information concerning the industries or commercial ventures does not qualify as royalty. Some sort of expertise or skill is required. Some sort of confidentiality/secretcy & exclusivity is required. It should not be something readily available in the market.
 - HEG Ltd. (263 ITR 230) (MP)
- Allowing access and downloading business information reports, which is a compilation of publicly available commercial information is not royalty.
 - Dun & Bradstreet Espana SA (272 ITR 99) (AAR)
- Royalty signifies an extended or perpetual use for the payee, where as FTS are relevant for one time job and useful for which they are rendered. Similar interpretation should also apply to information concerning 'industrial experience'.
 - Kirloskar Oil Ltd. (83 ITD 436) (Pune)

Engineering Drawings / designs / technical documentation

- Supply of machine design to enable buyer to operate it without transfer of license of patent/copyright, thereby not allowing buyer to manufacture machine itself, cannot be regarded as Royalty. [Neyveli Lignite Corporation Ltd. (243 ITR 459) (Mad) & Mitsui Engg. & ship Bldg. Co. Ltd (259 ITR 248 (Del))]
- Supply of technical documentations like designs, process, specification etc. before commencement of production is not royalty [Nisshinbo Ind. Inc. vs. ACIT (83 ITD 748)(Chennai)]
- Consideration for outright purchase of drawings and designs (i.e. transfer of ownership per se) is not royalty [CIT v Davy Ashmore India Ltd. 190 ITR 626 (Cal), Leonhardt Andra Und Partner, GmbH v. CIT (2001) 249 ITR 418 (Cal), Swadesh Polytex (38 ITD 326)]
- Engineering drawings & designs supplied to an Indian Co. for lump sum consideration for setting up plant for its own client with the right to use, sell or transfer it is not alienation of right/property contingent upon productivity/use or disposition but an 'out and out' sale of property. [Pro-quip Corporation (AAR) (255 ITR 354)]

Royalties – Other points

- Payments made for transfer of full ownership would not be taxable as Royalty but would be taxable as capital gains
 - HCL Ltd. (372 ITR 441) (Delhi HC)
- Term “industrial, commercial or scientific equipment” includes Ship
 - Poompuhar Shipping Corporation Ltd (360 ITR 257) (Madras HC)
- Wet lease/time charter payments constitute Royalties
 - Poompuhar Shipping Corporation Ltd (360 ITR 257) (Madras HC)

Satellite / Transponder Payments

Mechanism

- Process of transmission of TV programme starts with TV channels uplinking the signals containing TV programme
- Satellite receives signals; Post amplification and changing frequency, it relays down in India where cable operators catch them and distribute to public

Position after Retro Amendment

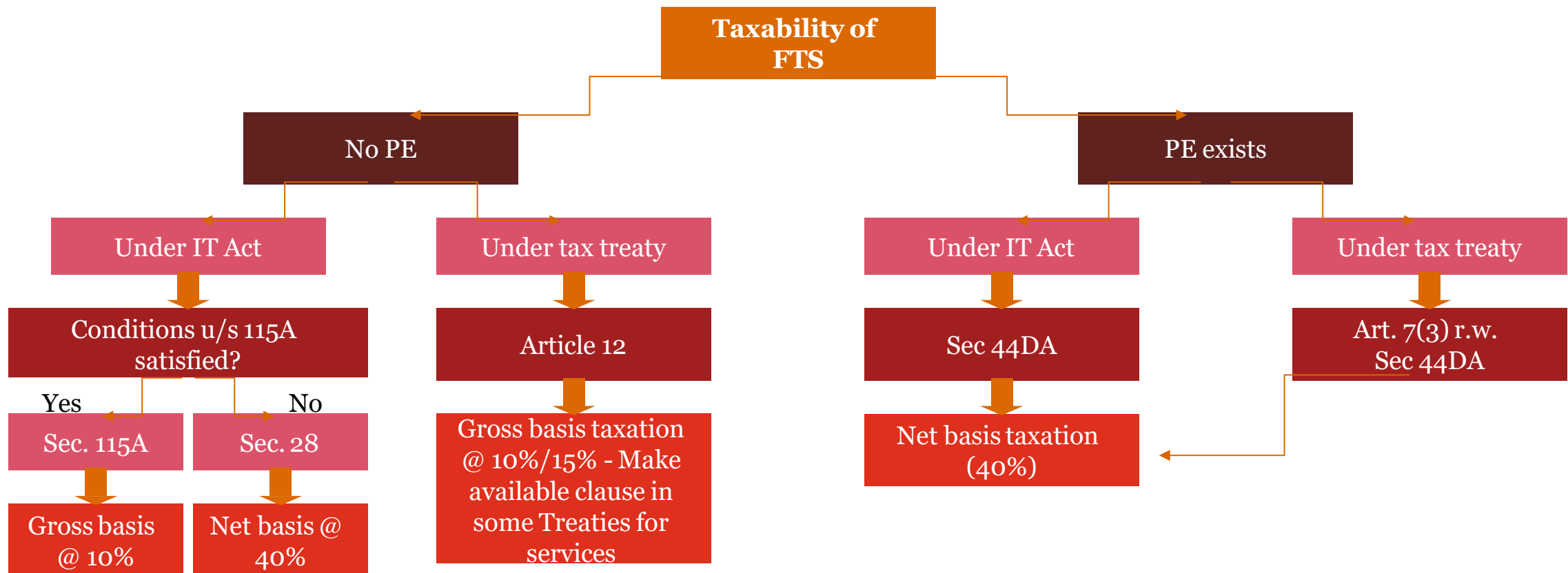
- Royalty under domestic law ? [Refer Explanation 5 and 6]
- Under tax treaty scenario – Beneficial provisions would prevail - New Skies Satellite (382 ITR 114) (Delhi HC)
- Revenue's appeal against above High Court Order admitted in Supreme Court (73 taxmann.com 38)

Impact of amendment by Finance Act, 2017 in Section 90 – Explanation 4 which provides that any term not defined in the tax treaty but defined under the Act, will have the same meaning assigned under the Act and explanation, if any given by the government

Fees for Technical Services (FTS)



Current Taxation Regime for FTS



FTS under the Act

- FTS means
 - any consideration (including any lump sum consideration) for the rendering of any **managerial, technical or consultancy** services
 - including the **provision of services of technical or other personnel**
 - but does not include
 - consideration for any construction, assembly, mining or like project undertaken by the recipient; or
 - consideration which would be income of the recipient chargeable under the head "Salaries"

FTS under the Act

- FTS is deemed to accrue or arise in India when
 - Paid by government
 - Paid by resident except where
 - Services are utilized in business or profession carried outside India;
 - Services are rendered for earning income from any source outside India
 - Paid by non-resident where
 - Services are utilized in business or profession carried in India;
 - Services are rendered for earning income from any source in India

FTS under Indian tax treaties

- FTS generally defined to mean:
 - payments of any amount in consideration for the rendering of managerial, technical or consultancy services
 - including the **provision of services of technical or other personnel**
 - but does not include
 - payments for services mentioned in Independent / Dependent Personal Services
 - services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment
- Few treaties have narrow scope in form of “make available” clauses to cover only those services
 - which **make available technical knowledge, experience, skill know-how or processes**; or
 - Consist of the **development and transfer of a technical plan or technical design**

FTS under the Indian tax treaties – Make available clauses

- India-USA tax treaty
 - *"fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :*
 - (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or*
 - (b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design."*

FTS under the Indian tax treaties – Make available clauses

- India-Singapore tax treaty
 - The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services :
 - (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
 - (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or
 - (c) consist of the development and transfer of a technical plan or technical design, **but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.**

FTS under Indian tax treaties – Make available meaning

- MoU to India-US tax treaty:
 - Person acquiring the service is enabled to apply the technology
 - Mere requirement of technical input by a person providing services does not necessarily mean that technical knowledge is “made available”
 - Use of a product which embodies technology cannot be considered to make technology available
- Factors held to be making available technical knowledge etc as per judicial precedents
 - Make use without recourse to the performer of the services in future
 - Should remain with the person even after the services comes to an end
 - There should be transmission from the person rendering the services to the person utilizing the same
 - Durability

FTS - Key Issues



FTS – Place of Accrual

- FTS is deemed to accrue at the place where the source of payment i.e payer is located
 - Supreme Court in GVK Industries Ltd (371 ITR 453) (SC)
 - *On a studied scrutiny of said clause (Section 9(1)(vii)(b)), it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located.*

Scope of FTS – Managerial, Technical or Consultancy services

- **Managerial, Technical or Consultancy services**

- *“Managerial, Technical or Consultancy services have not been defined in the Act, and, therefore, it is obligatory on our part to examine how the said expressions are used and understood by the persons engaged in business. The general and common usage of the said words has to be understood at common parlance” – GVK Industries Ltd (371 ITR 453) (SC)*
- *“Managerial and consultancy services” and, therefore, necessarily “technical services”, would obviously involve services rendered by human efforts. This has been the consistent view taken by the courts including this Court in Bharti Cellular Ltd. (supra). However, it cannot be lost sight of that modern day scientific and technological developments may tend to blur the specific human element in an otherwise fully automated process by which such services may be provided. The search for a more effective basis, therefore, must be made.”- Kotak Securities (383 ITR 1) (SC)*

Scope of Managerial, Technical or Consultancy services evolving

Scope of FTS – Managerial, Technical or Consultancy services

- **Managerial Services**

- *“The words "person concerned in the management of the business" mean a person not only directly participates or engages in the management of the business but also one who indirectly controls its management through the managerial staff, from behind the scenes. Management includes the act of managing by direction, or regulation or administration or control or superintendence of the business.”*
R. Dalmia (106 ITR 895) (SC)

Scope of FTS – Technical Services

- Technical" has to be construed as involving direct human involvement without that, technical services cannot be held to be made available
 - Bharti Cellular ltd (319 ITR 139)(Delhi) and Supreme Court in (330 ITR 239)
 - Skycell Communications Ltd. (251 ITR 53) (Madras)
- Supreme Court in Kotak Securities Ltd held that for a service to qualify as a technical service, following elements are necessary:
 - Service must be customized to cater to specific needs of service recipient;
 - Service must not be a common facility that is available for use of every customer of service provider
 - In the absence of the above distinguishing features, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered as technical service
- However Supreme Court also noted *“However, it cannot be lost sight of that modern day scientific and technological developments may tend to blur the specific human element in an otherwise fully automated process by which such services may be provided. The search for a more effective basis, therefore, must be made”*

Scope of FTS – Consultancy services

- Supreme Court in GVK Industries Ltd (371 ITR 453) (SC)
 - *“By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service.*
 - *However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it. The word “consultancy” has been defined in the Dictionary as “the work or position of a consultant; a department of consultants.” “Consultant” itself has been defined, inter alia, as “a person who gives professional advice or services in a specialized field.” It is obvious that the word “consultant” is a derivative of the word “consult” which entails deliberations, consideration, conferring with someone, conferring about or upon a matter”*

Make Available – Judicial view

- Karnataka High Court decision in case of India-Netherlands Treaty - De Beers India Minerals (346 ITR 467)(Kar.)
 - Service provider should “make available” technical knowledge, skill, experience so that service recipient acquires the same
 - Once technology “made available”, taxation not dependent on use by the recipient
 - Relevant Criterion – Whether service recipient enabled to use the technology after rendering of technical services by service provider

No FTS Article – Key Aspects

- No Separate FTS Article in some Indian Treaties – Brazil, UAE, Greece, Mauritius, Saudi Arabia, Indonesia, etc.
- *Characterization of FTS income*
- View 1 – FTS income taxable in India only if non-resident payee has PE in India
[View supported by various judicial decisions]*
- View 2 – Income covered under “Other Income” Article vis-à-vis Business Profits
[Lanka Hydraulic Institute Limited (337 ITR 47)(AAR)]
- View 3 – Income to be taxed in accordance with domestic law *[DCIT vs. TVS Electronics Ltd (TS-421-ITAT-2012-CHNY)]*
- FTS income may also get covered under IPS Article (Article 15)

Judicial view seems to be divided

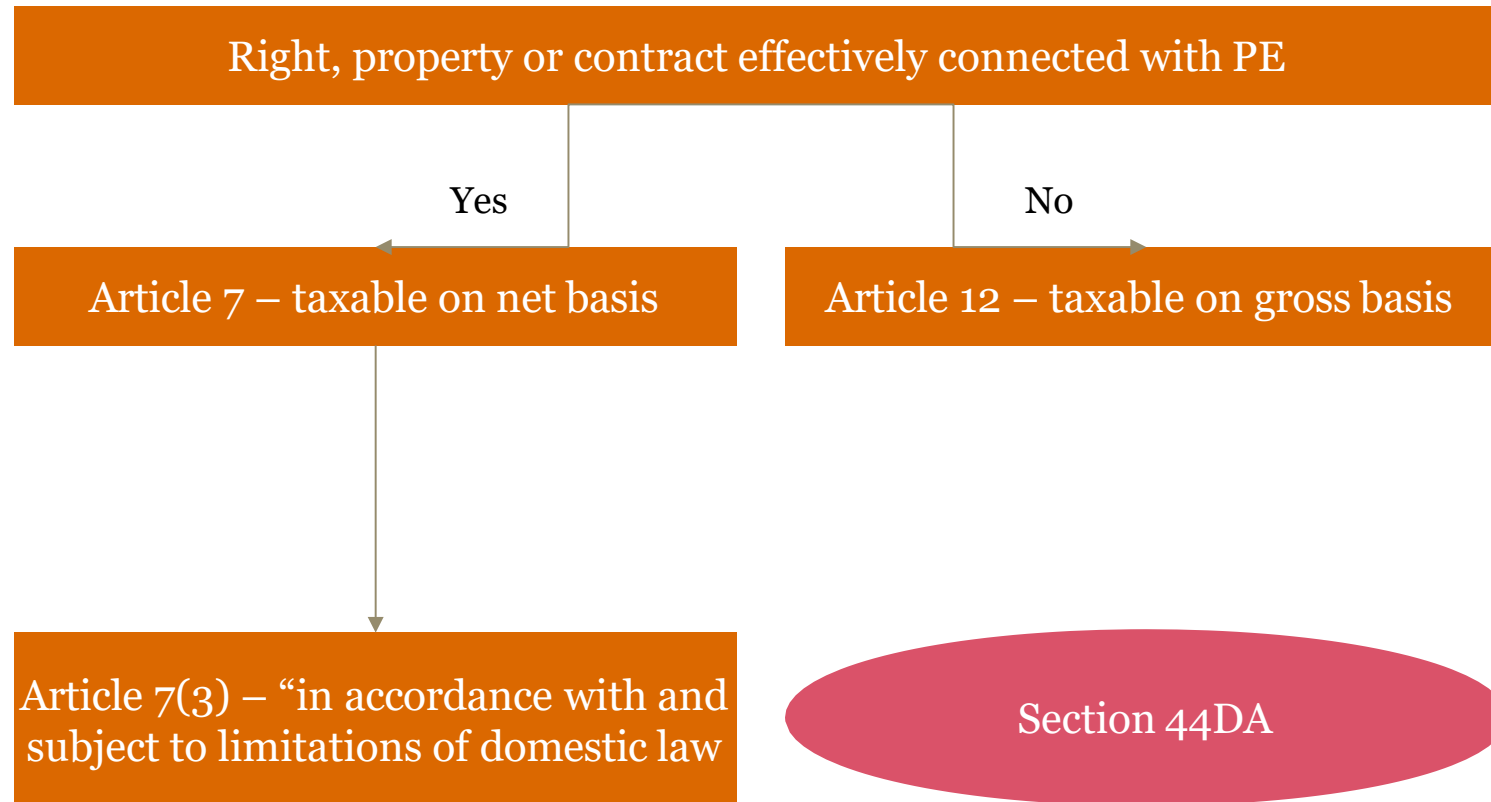
Nature of services, business of service provider – Key Aspects !

* McKinsey & Company vs. DDIT [TS-332-ITAT-2013-Mum], ACIT vs. Viceroy Hotels Ltd (46 SOT 4)(Hyd), Tekniskil (Seniderian) Berhard vs.CIT (222 ITR 551)(AAR)

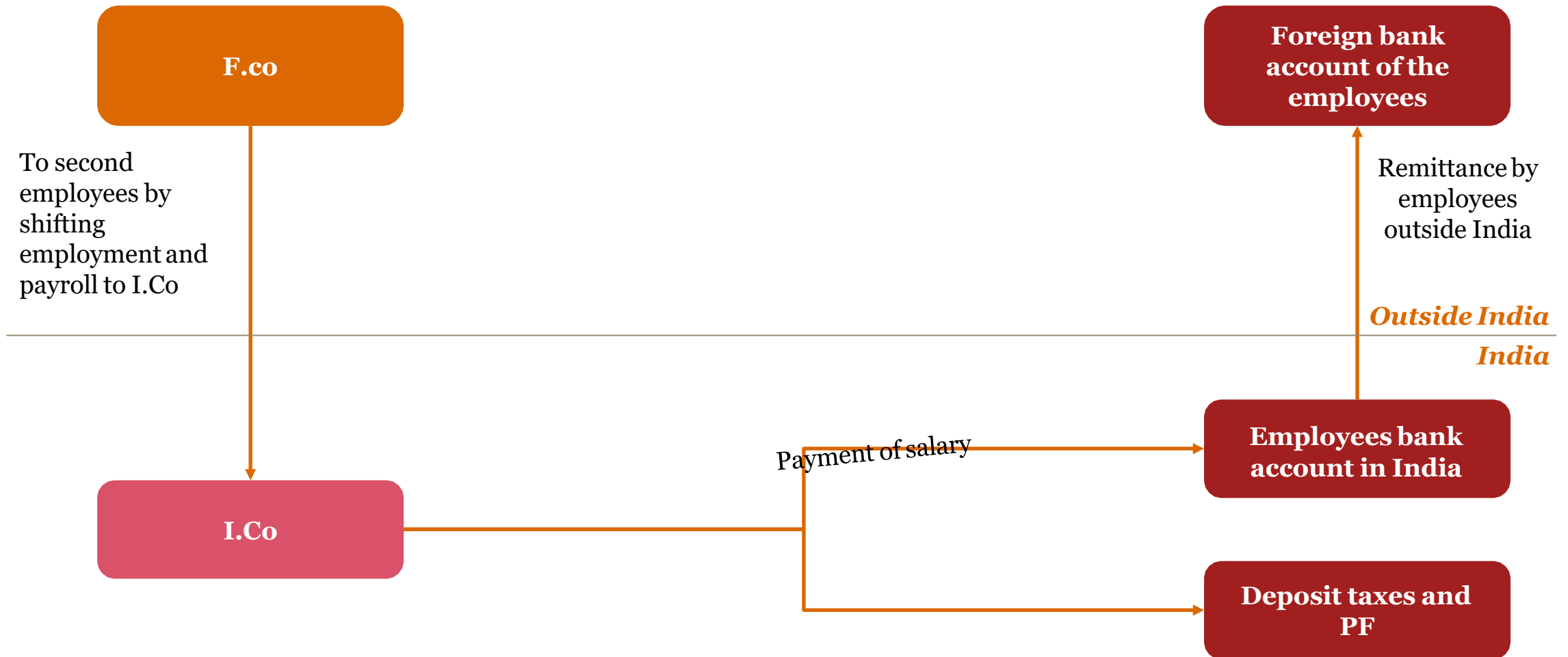
Most Favoured Nation (MFN) clause under the Tax Treaties

- More favorable tax treaty terms granted to other countries extended to existing treaty countries by source Country
 - Lower tax rate or narrowing the scope of income liable to tax
- Generally MFN status is contained in the protocol/ exchange of notes – MFN Clause is generally only prospective
- Application is automatically or by negotiation and then notification
- Examples -
 - India - Netherlands tax treaty
 - India - Belgium tax treaty
 - India - France tax treaty
 - India - Sweden tax treaty
 - India - Switzerland tax treaty (to be negotiated)
 - India - Spain tax treaty

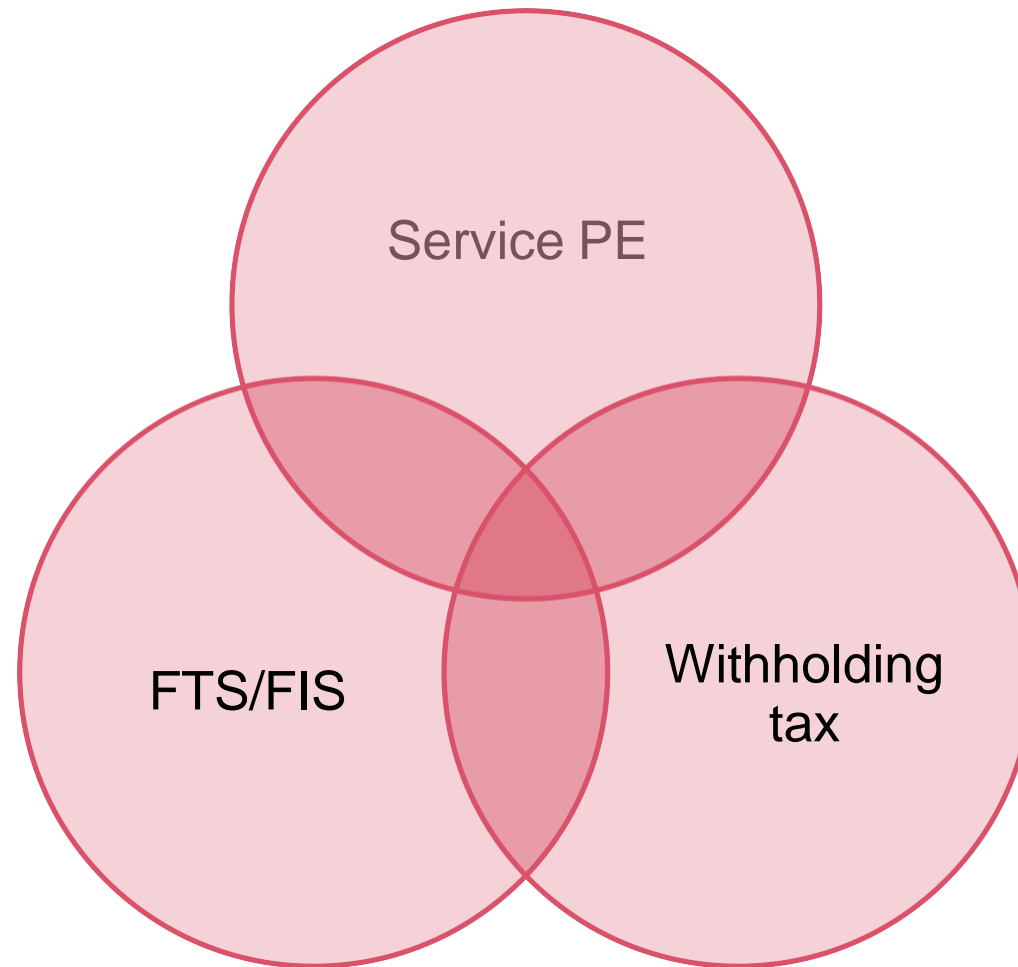
Interplay between Royalty/FTS and PE Articles of Tax Treaties



Global mobility services – typical structure



Global mobility arrangements – tax issues



Global mobility arrangements – tax issues

- Whether reimbursement of payroll costs constitutes FTS?
 - Delhi High Court in Centrica India Offshore Private Limited (364 ITR 336) held reimbursement of payroll costs of seconded employees to be FTS:
 - Seconded employees made available their technical expertise and know-how to regular employees. Accordingly, reimbursement of salary cost to overseas entities under secondment agreement is FTS
 - Supreme Court has dismissed the SLP simpliciter i.e. without giving any reason.
 - Dismissal of SLP simpliciter is not law of the land under Article 141 of the Constitution of India – SC Employee Welfare Association v UOI & Anr (1990)
 - Supreme Court in A.P. Moller Maersk A S (392 ITR 186) held that reimbursements of costs cannot be regarded as FTS/cannot be brought to tax where there was no profit element involved
- Whether deputation of employees leads to service PE ?
 - Conclusion based on facts of each case
 - Delhi High Court held in Centrica India Offshore Private Limited (364 ITR 336) that seconded employees constitute service PE under India-UK tax treaty

Thank You