

Taxation of Independent Personal Services (including Entertainers)

**A Presentation by
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Presentation Outline

- ◆ Overview of IPS / Artists income
- ◆ Fixed Base vis-à-vis PE/ Elimination of Article 14 in the OECD MC
- ◆ IPS - Key Issues: Global Experience
- ◆ IPS / Artists: Indian experience



Overview of IPS/Artists Income

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Article 14 ... IPS - Overview

- ◆ Income from professional services/other activities of independent character
- ◆ Excludes professional services performed in employment
- ◆ Professional services includes
 - Independent scientific, literary, artistic, educational or teaching activities
 - Independent activities of physicians, lawyers, engineers, architects, dentists and accountants

Article 14 ... Taxability Criteria and Income Covered

OECD

UN

US

Income derived by providing **professional services** or other activities of independent character

Income derived by performance of **personal services** in an independent capacity

OECD

US

If FB in
"other state"

UN

FB

Stay

Remuneration
Threshold

in "other state"

Article 17 ... Artistes etc - Overview

Article 17 overrides IPS clause

Entertainers/(Musicians, actors etc)/Sportsmen (or Athletes) \longrightarrow Taxed where activity is carried out

OECD \longrightarrow UN
 \downarrow

Taxed where activity is carried out

US
 \downarrow

Taxed where activity is carried out, unless gross receipts does not exceed US \$ 20000

Entertainer excludes

- Support staff like cameraman, director, choreographer
- People producing works, such as painters, sculptors, composers, writers

Practical Relevance - Overview

- ◆ Freeing up of economy including exchange controls
 - Increased use of services of overseas professionals/entertainers

Category	Illustrative service user
Lawyers/Accts	- Power/Infrastructure projects - Setting up overseas presence
Architects	Various
Entertainers	Hotels

**Issues of
WHT
(payer
perspective)
and
taxability
(recipient
perspective)**



IPS: Fixed Base Vs. Permanent Establishment

FB Vs. PE - An Overview

FB	PE
Not defined - Understood in entirety of things used in performance of professional services	Fixed place of business through which business of the enterprise is wholly or partly carried on
FB needs to be regularly available	PE requires that business be actually carried on in a fixed place
Place need not be especially equipped for performance and activity	Place needs to be especially equipped for performance and activity

Differences not very “strong”



FB Vs. PE - International Rulings

- US Revenue Ruling** → PE definition can be used to clarify
FB under Article 14
- German
Bundesfinanzhof
case** → Advisory work should be actually
carried out from the FB; concept
similar to principle of PE
- Court of Appeal
of Brussels** → FB is similar to PE

Deletion of IPS from OECD MC - Rationale



- ◆ Article 14 deleted from OECD MC; all incomes previously covered by Article 14, now within the scope of Article 7
- ◆ Key issues leading to deletion of Article 14 in OECD MC
 - No valid justification for differences between Article 7 vs. Article 14
 - No practical difference between FB and PE
 - Exception- Construction PE, Dependent agent PE
 - Difference between source taxation rights granted under Article 7 and Article 14
 - Distinction between activities and entities (legal persons, partnerships) falling under Article 7 Vs. Article 14 - not satisfactory and difficult to apply

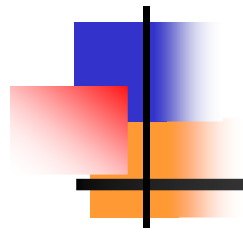
**IPS still in existence in Indian tax treaties:
Old Provisions continue**



Deletion of IPS - Implications

- ◆ Clear applicability of PE concept
- ◆ Taxability under FTS clause?
- ◆ Taxability under Business profits (only where no FTS clause?)
 - Expense deductibility restrictions

India centric issues:
IPS → FTS or
IPS → BP



IPS - Key Issues/Global experience

Individual Vs. Partnership Vs. Company



- ◆ Whether Article 14 applies to partnerships/ legal persons
 - OECD and UN MC - “income derived by a **resident**”
 - Companies and other bodies of persons covered by IPS
 - US MC - “income derived by an **individual**”
 - Technical Explanation covers group of individuals/ partnerships
 - Applicable to income derived by partner to the extent it is attributable to personal services performed by partner

Global Precedents on IPS - FB Concept

◆ William Dudney (Canada)

→ US resident, working in Canada at third party's premises.

→ No control of US resident over premises

→ No FB

◆ Hoge Raad, Re the Netherlands' DTAA with France and Germany

An agent enters
into contracts for
a model



Rents studio for
photographic
services



Rented studio does
not constitute FB of
the model

◆ OstBMF Re. Austria - Spain DTAA

Desk made available
to a manager in
another enterprise



Does not constitute a FB
without the presence of
office equipment

Global Precedents on IPS - Other Issues

→ Meyer-Marsilius/Hangarter re Germany - Switzerland DTAA

Physician resident in
foreign country
received pension



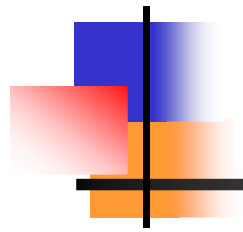
Retrospective income
from professional
services



Taxable under
IPS clause

◆ US Revenue Ruling (1993): Foreign branch distribution

- German Law firm having branch in USA with US resident partner
- German partners did not perform services through its branch in USA
- German resident partners not liable to US tax on their distributive share attributable to the US office
- Only the US resident partner taxable in USA



IPS / Artists - Indian Experience

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IPS - Domestic Law Provisions

- ◆ Section 9(1)(vii) deals with FTS (which includes managerial or consultancy services); taxable @ 20% on gross
- ◆ No specific IPS clause

No FB condition: taxable if paid by resident



Indian Tax Treaties

- ◆ Based on UN Model
- ◆ Taxability
 - Most Cases
 - Unique Cases
 - Canada and Zambia - FB, Stay, Remuneration
 - UAE, Sri Lanka - Stay
 - Mauritius, South Korea - FB
 - Greece - 'Personal Services'; Switzerland - 'Professional Services'
 - Malaysia- No IPS Article
 - Expressly applicable to 'firm/ 'firm of individuals'/ 'partnership of individuals'/ 'individual as a member of a partnership' in treaties with Australia, Canada, France, UK, US

Judicial Precedents - Foreign Law Firm



◆ Barendra Prasad Ray 129 ITR 95 (SC)

- A, firm of solicitors in India, rendering services to X Corp.
- B, the solicitor of X Corp. in London, appeared and argued the case in India along with A; B to be paid for his services by X Corp.
- Business Connection between A & B existed u/s 9 of ITA
 - Copies of pleadings handed over indirectly by A to B; B argued case only with co-operation and permission of A
 - Discussions between A & B before the hearing
 - B earned fees for arguing the case only through the connection with A

Position under India - UK ADTA different



Judicial Precedents - Others

- ◆ Corporate Entity - Christiani & Nielsen Copenhagen (39 ITD 355)
 - Danish Ltd. Co. received fees for preparing feasibility report for Indian entity
 - Corporate entity cannot perform “personal” services; Article 14 not applicable to corporate entities (Denmark)

- ◆ Engineering Consultant- Von Der Mark (235 ITR 698 - AAR)
 - German consultant appointed to render technical/ marketing services
 - Primarily skills - technical
 - Held, not taxable since IPS taxability criteria not satisfied

“Other Independent Activities of Similar Character”

- ◆ UK resident individual appointed by I Ltd., Mumbai for providing soft skills training for grooming of top personnel
 - Stays in India for 80 days
- ◆ **Issue - taxability of U in India**
 - IPS includes - “educational or teaching activities” as also “other independent activities of similar character”
 - services covered by Article 15
 - Not taxable, since no FB and stay less than 90 days

**“Similar character” concept
absent in certain
treaties**



Artists / Entertainers : Indian Experience

Indian Tax Treaties - Artists / Entertainers



◆ Taxability

- Usually taxed in source country
- Clause regarding “accrual to another person” mostly present

◆ Unique treaties

- US → Net Income > USD 1500 p.a → Taxed in source country
- Egypt → Period of Performance > 15 days → Taxed in source country

Except in US MC, artists / entertainers need not participate in profits of “another person”

Artists and Entertainers - CBDT Circular 787 dated February 10, 2000



Scenario	Taxability
No consideration (even if for promotion of records)	Not taxable
Live performance and/ or telecast	Taxable
Consideration for purchase of copyrights of Indian performance <ul style="list-style-type: none"> ▪ To sell abroad ▪ To sell in India 	Under Section 9(1)(vi) of the IT Act <ul style="list-style-type: none"> ▪ Not taxable ▪ Taxable as royalties
Endorsement fees	Taxable
Advertising and sponsorship income	Taxable if related to performance in India
Royalty for recording of performance	Taxable under DTAA as “royalties”

Thank you

