TECHNICAL GUIDE
ON
EXPATRIATES TAXATION

Committee on International Taxation

The Institute of Chartered Accountants of India

(Set up by an Act of Parliament)

New Delhi

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Foreword to the Fourth Edition

Over a period of time, the world has emerged as a single big market place enabling increased cross border flow of capital, human resources and technology resulting into various legislation reforms, new regulatory environment and increased compliance requirements for corporate. Tax challenges arising therefrom are being addressed simultaneously thereby providing ease of doing cross border trade.

Working overseas provides an opportunity for business as well as personal growth. Enterprises send their employees overseas and vice-versa ensuring that the remuneration is competitive and that tax, pension and social security issues associated with relocation are duly addressed. Complexities involved due to multijurisdictional issues that arise in rendering dependent and Independent services across the globe require Chartered Accountants to provide a better understanding of the tax, expatriation, social security and other allied laws and to comply with relevant requirements for the expatriates.

Given this scenario, the Committee on International Taxation of ICAI has taken efforts to revise its existing publication "Technical Guide on Expatriates Taxation".

I would like to express my gratitude to CA. Nihar N. Jambusaria, Chairman and CA. Pramod Jain, Vice-Chairman, Committee on International Taxation of ICAI for the initiative taken to revise the said publication.

I am sure that this publication would be of immense use for our members practising in the area of expat taxation.

Best Wishes,

Place: New Delhi — **CA. Prafulla P. Chhajed**

Date : 1.10.2019 — ***President, ICAI***

Preface to the Fourth Edition

Seamless flow of technology, cross border trade, mergers and acquisitions across the globe have witnessed remarkable increase in recent times. This continuous and rapid global integration has impacted the economies of different countries differently and in a positive manner. Consequently, knowledge, experience and skills of human capital have also been seamlessly shared, which in turn has placed expatriate employees in the most vital position.

The income of an inbound expatriate or an outbound expatriate is taxable in either of the countries i.e. country in which he is a resident and/or the country in which he has his source of income. Thus it is important for these expatriate employees to understand the provisions as applicable to them. Bearing in mind the above aspects, the Committee on International Taxation, in the year 2011 brought out this publication along with WIRC of ICAI. The publication was later revised in the year 2014 and 2017. Considering the changes in the law, the Committee on International taxation of ICAI decided to make available the fourth revised edition of the publication to the members of ICAI.

I am sincerely thankful to CA. Prafulla P. Chajjed, President, ICAI and CA. Atul Kumar Gupta, Vice-President, ICAI for being guiding force behind all initiatives being taken by the Committee.

I am highly appreciative of the time and efforts put in by Past Central Council member CA. Sanjiv Chaudhary in revising this publication. He was actively supported by CA. Deepashree Shetty.

I also whole heartedly acknowledge the efforts of CA. Hiten Shah, Kaustubh Mohta and CA. Jagdeep Sadhale who assisted the Committee in reviewing the revised publication in a timely manner.

I am also grateful for the unstinted support provided by Vice-Chairman CA. Pramod K. Jain and other members (including co-opted members) and special invitees of the Committee on International Taxation; CA. Tarun Jamnadas Ghia; CA. Nandkishore Hegde ; CA. Chandrashekhar Vasant Chitale; CA. Aniket Sunil Talati; CA. Dayaniwas Sharma; CA. G. Sekar; CA. Pramod Kumar Boob; CA. Satish Kumar Gupta; CA. Hans Raj Chugh ;Shri Sunil Kanoria; Shri Chandra Wadhwa ;Dr. Ravi Gupta ; CA.T.P.Ostwal; CA. Padam Chand Khincha; CA. Yogesh Thar; CA. Ameya Kunte and CA. Vijay

Gupta.

Last, but not the least, I appreciate the efforts made by CA. Mukta Kathuria Verma, Secretary, Committee on International Taxation and CA. Vikas Kumar, Assistant Secretary for co-ordinating the project and for rendering secretarial assistance.

I am hopeful that this revised edition will be of immense use to the members.

Place: New Delhi

Date : 1.10.2019

CA. Nihar N. Jambusaria

Chairman,

Committee on International Taxation, ICAI

Foreword to the Third Edition

Globalisation has over a period of time increased the cross border flow of capital, human resource and technology. This, in turn, has led to various tax challenges across the globe. Extensive efforts are being made to provide ease of doing cross border trade through implementation of BEPS Action Plans, signing of Multilateral Instruments etc.

Dependent and Independent services rendered by the human capital across the globe have increased manifold times due to opening up of the economies. Many Indians have moved out of India to take up job opportunities abroad and vice-a-versa. The continuous rise in the movement, assignment or secondment of human capital from one state to another state in the course of employment springs up various tax issues on income like: remuneration, social security and pension received by the expatriate employees.

Having regard to the same, the Committee on International taxation of ICAI has taken efforts to revise its existing publication "Technical Guide on Expatriates Taxation".

I would like to express my gratitude to CA. Sanjiv Kumar Chaudhary, Chairman and CA. Nand Kishore Hegde, Vice-Chairman, Committee on International Taxation of ICAI for the initiative taken to revise the said publication.

I am sure that this publication would be of great use for our members practising in the area of expat taxation.

Best Wishes

Place: New Delhi **CA. Nilesh Shivji Vikamsey**

Date : 30.06.2017 ***President, ICAI***

Preface to the Third Edition

In the recent years, each one of us has witnessed the continuous enhancement of global integration around the world. Increase in seamless flow of technology, cross border trade, mergers, acquisitions has positively impacted the economies of different countries. This, in turn, has led to seamless sharing of required knowledge and skills of the human capital across the world. The expatriate employees, thus, play a vital role in global economic restructuring.

The income received by expatriate employees is subject to taxation in either of the countries i.e. country in which he is a resident and/or the country in which he has his source of income. It is important for these expatriate employees to understand the international taxation aspects of the income arising from employment.

Considering the significance of the subject, the Committee on International Taxation, in the year 2011 brought out this publication along with WIRC of ICAI. The publication was later revised in the year 2014. Witnessing persistent changes in law, the Committee on International taxation of ICAI thought it fit to make available the third revised edition of the publication to the members of ICAI.

I am sincerely thankful to CA. Nilesh Shivji Vikamsey, President, ICAI and CA. Naveen N. D. Gupta, Vice-President, ICAI for being guiding force behind all initiatives being taken by the Committee.

I am appreciative of the efforts put in by CA. Ashish Gupta and CA. Naveen Bagga who supported me in revising this publication in a timely manner.

I am also grateful for the unstinted support provided by Vice-Chairman CA. Nandkishore Chidamber Hegde and other members (including co-opted members) and special invitees of the Committee on International Taxation; CA. Prafulla Premsukh Chhajed ;CA. Tarun Jamnadas Ghia; CA. Nihar Niranjan Jambusaria; CA. Dhinal Ashvinbhai Shah; CA. Madhukar Narayan Hiregange; CA. G. Sekar; CA. Sushil Kumar Goyal; CA. Mukesh Singh Kushwah; CA. Sanjay Kumar Agarwal; CA. Atul Kumar Gupta; Shri Sunil Kanoria; Dr. Ravi Gupta; CA. Dharini Shah; CA. Pinky Mehta; CA. Mahesh P. Sarda; CA. G. Karthikeyan; CA. Gopal Choudhury; CA Parul Jolly ; CA. T G Suresh; CA. Surabhi Agarwal; CA. Arun Gupta and CA. Vipin Verma.

Last, but not the least, I appreciate the efforts made by CA. Mukta Kathuria Verma, Secretary, Committee on International Taxation and CA. Dhiraj Shrivastav, Project Associate for co-ordinating the project and for rendering secretarial assistance.

Place: New Delhi
Date: 30.06.2017

CA. Sanjiv Kumar Chaudhary
Chairman,
Committee on International Taxation, ICAI

Foreword to the Second Edition

In the era of innovation, the organisations seek and rewards ideas, irrespective of where they originate and reside. Our country is bestowed with a unique wealth of qualified professionals that gets richer every day. The perennial source of human capital of India has to be tapped and converted into value.

With increasing globalization, wide spectrum of opportunities is available for the human capital and the talent plays a bigger role in the different organizations worldwide. The imprint of excellence of Indian professionals is visible in different fields on wide canvas of the globe. Recently, the Indian talent had hit the headlines of the leading dailies stating that '13 Indians now head major global firms.'

I am pleased that Committee on International Taxation of the Institute of Chartered Accountants of India (ICAI) has done a splendid work and has come out with the second edition of "Technical Guide on Expatriates". I express my appreciation to CA. Dhinal A. Shah, Chairman, Committee on International Taxation of ICAI for the initiative taken to revise the publication.

I am sure that the book will be immensely useful to the readers.

Best Wishes

Place: New Delhi **CA. Subodh K. Agrawal**

February 7, 2014 *President, ICAI*

Preface to the Second Edition

Globalizations of economics and the need to develop a global competitive advantage, an increasing number of companies are transferring personnel between countries. India is on a fast track of development and is a highly promising destination for various kinds of skilled workers and executives to work in India. As of now, there is a considerable chunk of foreign origin people who are employed in India and similarly Indian nations are deputed outside India. They broadly belong to two categories - Foreign Expatriates working in foreign companies which have opened operations in India. Foreign Expatriates who are working in Indian Corporates and Indian Companies.

The law both enacted law as well as judge made law had undergone substantial changes. Therefore, urgent need to update the publication was widely felt.

I am happy to state that CA. Sonu Iyer accepted our request to revise the edition. The revised edition would not have seen light of the day without his untiring efforts. I do not think her efforts can be effectively appreciated through the medium of words.

CA. Sonu Iyer has been actively supported by CA. Preeti Sharma. I place on record our sincere appreciation of the contribution made by each of them.

I express my gratitude to CA. Subodh Kumar Agrawal, President and CA. K. Raghu, Vice-President for their motivation and guidance. I thank CA. Sanjiv Kumar Chaudhary Vice-Chairman, CA. Jay Ajit Chhaira, CA. Tarun Jamnadas Ghia, CA. Nihar Niranjan Jambusaria, CA. Sanjeev Maheshwari, CA. Shiwaji Bhikaji Zaware, CA. S. Santhana Krishnan, CA. G. Sekar, CA. J. Venkateswarlu, CA. Manoj Fadnis, CA. Sanjay Agarwal, CA. Naveen N.D. Gupta, CA. Vijay Kumar Gupta, Shri Manoj Kumar, Shri Bhaskar Chatterjee, CA. T.P. Ostwal, CA. Gurunath Kanathur, CA. Mahesh P. Sarda, CA. Vivek Newatia, CA. Kuntal Dave, CA. Rajneesh Agarwal, CA. Sachin Vasudeva and CA. (Dr.) Girish Ahuja who have contributed by giving valuable inputs in revising this technical guide.

I appreciate the efforts made by Mr. Ashish Bhansali, Secretary, Committee on International Taxation for co-ordination and Mr. Govind Agarwal for rendering secretarial assistance.

Place: New Delhi **CA. Dhinal A. Shah**

Date: 05.02.2014 *Chairman,*

Committee on International Taxation,

ICAI

Foreword to the First Edition

The opening up of the Indian economy and its globalization has resulted in far reaching changes. The inflow of funds from foreign institutional investors and non-residents has led to the emergence of taxation of non-residents as an extremely important topic in the current context.

Income from Employment has also been the most significant component of income derived from personal services in international taxation perspective. Working people from one state have been on the move to other states by taking employment always. Such movements have been increase in the recent past due to opening of global economies and increased cross-border trade. Formation of European Union, SAARC and other regional co-operation group are just a few examples. All these activities have encouraged free movement of people both on temporary and permanent basis.

Realizing the importance of the subject, Committee on International Taxation of ICAI and Taxation Committee of WIRC has taken an initiative to come out with a Technical Guide on "Expatriates Taxation" which provides a detailed study on the subject in a simple language.

I record my appreciation for the initiatives taken by CA. Mahesh P. Sarda, Chairman, Committee on International Taxation of ICAI. I congratulate contribution of CA N.C.Hegde for the hard work put in by him for providing the basic draft and in bringing out this Technical Guide. I also appreciate CA Shriniwas Y. Joshi, Chairman WIRC of ICAI for his coordination of the project.

I am sure that this Technical Guide will be of immense use to the readers.

Date 1st July, 2011
New Delhi

CA. G. Ramaswamy
President
ICAI

Preface to the First Edition

The advent of economic reforms in the form of globalization and liberalization in our country has resulted in the rapid growth of the economy in general and cross border transactions in particular. The process of globalization is set to gain further impetus with the good performance of the economy in recent past. There has been manifold increase in the cross border activities of Indian and MNCs business entities in the manufacturing and service sectors. The movement of manpower is an integral part of the entire process and has substantially increased in the recent past. The international taxations aspects related to income sourced from Expatriate Employment requires greater level of understanding.

Looking to the importance of the subject, the Committee on International of ICAI in collaboration with WIRC of ICAI undertook project to come out with a study addressing issues relating to Expatriates Taxation. Accordingly, CA. N. C. Hegde FCA, Mumbai (Regional Council Member of WIRC) was requested to pilot the project. I am extremely thankful to CA. Shriniwas Joshi, Chairman of the Western India Regional Council and CA. N. C. Hegde for their efforts in bringing out this publication. I place my appreciation on record for the valuable contributions made by CA. Alpana Rao, CA. Arvind Rao and CA. Hiten Shah.

I wish to thank Hon'ble CA. G. Ramaswamy, President, ICAI and Hon'ble CA. Jaydeep N. Shah, Vice President, ICAI for their continuous support and encouragement to the initiatives of the Committee.

I am sure that this study will help all the members in better understanding of the issues involved in Expatriates Taxation.

Date 1st July, 2011

CA. Mahesh P. Sarda
New Delhi
Chairman
Committee on International Taxation
ICAI

Preface to the First Edition

The Industrial Policy of 1991 welcomed both foreign investment and allowed hiring of foreign technicians. Since then, we have seen both Indian subsidiaries of foreign companies as well as Indian corporates having a choice in attracting the best talent that is available globally. The hire of expatriates is no longer a phenomenon which is limited to the major metropolitan cities.

The Government has made it extremely easy for Indian corporates to remunerate them as well as enable the expatriates to repatriate their salaries.

However whilst on hand there is greater operational freedom for residents for hire of expatriates as well complete freedom to remunerate them, the tax treatment of salaries has often been a subject matter of concern both to the Indian employer and the expatriate.

Tax treaties that India has entered into have no doubt provided respite but one still is left with a lot of issues which are often unresolved.

It is in this background that the book on "Taxation of Expatriates" gives a detailed study on the said subject. The study provides for an analysis of the law and a lucid and practical discussion on various connected issues. The study has employed simple language that is easy to comprehend.

I wish to thank the Taxation Committee of WIRC and CA N.C. Hegde to take this important project so as to provide all information related to the subject in a concise form.

I would also like to thank my professional colleagues, CA Alpana Rao, CA Arvind Rao and CA Hiten Shah for having spared the time from their busy schedule to bring out this excellent booklet .

I am confident that the book will immensely useful for members in understanding the subject as well as help them in discharging their professional responsibilities especially in regard to the preparation of tax returns.

CA Shriniwas Y. Joshi

Chairman, WIRC

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Chapter 1
Introduction

The term 'Expatriate' is derived from Latin (ex-patria) which means "out of the country". The Oxford Dictionary defines an expatriate as 'a person who lives outside their native country'. Similarly, the Webster Dictionary defines the term as 'a person residing in a foreign country'. Technically an expatriate is a person temporarily or permanently residing in a country and culture other than that of his/her upbringing or legal residence. The term 'expatriate' in some countries also has a legal context used for tax purposes.

The Income-tax Act, 1961 ('ITA') does not define the term 'Expatriate'. But as pointed out above it essentially refers to an employee who is working abroad on deputation or secondment. In terms of the Oxford Dictionary, deputation means 'to appoint someone to perform a task for which one is responsible'. Secondment is defined in the Oxford Dictionary as 'to temporarily transfer a worker to another position'.

The concept of 'deputation' is well understood in service law and has a recognized meaning, as observed by the *Apex Court in State of Punjab and others vs. Inder Singh and Others,* (1997 8 Supreme Court Cases 372). The Apex Court pointed out that :

"'Deputation' has a different connotation in service law and the dictionary meaning of the word deputation is of no help. In simple words "deputation" means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry (of) period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the recruitment rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post."

For the purpose of easy understanding, it can be said that an expatriate is a person based in a foreign country (likely national of the said foreign country) working in another country. It includes a person who, for tax treaty purposes, may continue to be a resident in his/her home country.

Thus, in the Indian context expatriate means a person based in a foreign country working in India (inbound) or a person based in India (likely Indian citizen) working abroad (outbound).

Depending upon the work requirements, an inbound expatriate may work in India under any of the below structures:

- Business visit
- Short term assignment
- Medium to Long term assignment
- Permanent relocation
- Consultant

The broad issues involved in a typical assignment structure which an employer and an expatriate need to be aware of are provided below:

(a) **Immigration:** The expatriate should travel on correct visa category (business visa /employment visa/student visa- depending upon the purpose of visit) and should get himself/herself registered with Foreign Regional Registration Office ('FRRO') in India within 14 days of arrival in India, if required as per his/her visa endorsement.

(b) **Taxability of the employee:** Salary received by an employee for rendering services in India would be liable to tax in India as employment income irrespective of its place of receipt, as the source of the same lies in India. Hence, any salary/ allowance/ benefit paid/provided to an employee outside India which is related to assignment period in India will be subject to tax in India. Employer is required to comply with withholding tax obligation on such payments. The maximum marginal tax rate for the Financial Year ('FY') 2019-20 is 42.744% provided total income exceeds ₹ 5 Crores in the FY.

A short stay exemption may be claimed subject to satisfaction of conditions, as per the applicable clause of tax treaty / ITA, as may be beneficial to the expatriate.

(c) **Social security:** Social security in India is governed by Provident Fund Regulations under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ('the EPF Act'). A foreign passport holder, working for a covered establishment in India under the EPF

Act, is mandatorily required to contribute under the EPF Act. A covered establishment is one which is registered under the EPF Act. Registration is mandatory the moment employee strength (including persons employed through contractors) becomes 20 or more. The employer is mandatorily required to contribute 12% of "salary" prescribed for provident fund contribution and the employee is required to make a matching contribution. The employer has a right to recover 12% of such contribution from the employee's salary. The employer also has to make 0.5% contribution capped at a monthly salary of ₹ 15,000, towards an insurance scheme under the EPF Act.

In relation to the withdrawal of social security contributions, the same cannot be applied for till the expatriate attains 58 years of age (in case the expatriate is from a country with which India does not have an effective SSA) or till a SSA is signed with the respective country from which the expatriate has come to India. For expatriates coming from a country with which India has an effective SSA, provident and pension fund may be withdrawn, subject to certain restrictions/ provisions of the applicable SSA.

(d) **Payment of salary outside India:** Under the exchange control regulations of India, it is permissible for the employees of a foreign entity seconded to branch, office, joint venture, subsidiary or group company of such foreign entity in India, to receive their entire salary in a bank outside India provided the income tax as per the domestic tax laws of India has been duly paid on the entire salary as accrued in India.

(e) **Other issues:** The presence of employees of a foreign entity in India may create a Permanent Establishment (PE) exposure for the foreign entity. The arrangement between the foreign entity and the Indian entity to second the employees of the foreign entity to work for the Indian entity needs to be evaluated from Goods and Services Tax (GST) perspective. The secondment/deputation transaction between related parties would be subject to transfer pricing regulation and hence any cost sharing arrangement should satisfy arm's length principle. Any taxable payment from Indian entity to a Non Resident ('NR') would be subject to withholding tax provisions.

The typical characteristics of various deployment structures and tax implications for inbound expatriates are indicated below.

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
(a)	**Business visits – Short Term Business Travelers (STBTs) / Frequent Business Travelers (FBTs)**	• Employee visiting India for short business visits upto 180 days spread over the FY • Purely for the limited purpose of attending meetings/ conferences in the capacity of employee of foreign entity	• Traditionally, the expatriates come to India for business visits / secondment / deputation. However, off late the concept of STBTs / FBTs is catching up globally and its necessary for home and host country entity to examine in detail the purpose of visit to examine if such visits does not trigger any compliance obligation in the host country i.e. India. • A short business visit of 20-30 days may not create tax implications for foreign entity. However, if the transaction is between related parties, it is advisable to evaluate PE risk

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
			for foreign entity. • Employee may be eligible to claim short stay exemption under the ITA or applicable tax treaty subject to satisfaction of given conditions and thus, salary may not be taxable in India.
(b)	**Short-term Assignments**	• Employee would be sent to India for short period of 6 months. • He/ she would be working in India but as an employee of the foreign entity and would continue to be on its payroll. Normally, Indian entity would compensate the foreign counterpart for the services rendered by the expatriate. • Generally, such arrangement is made for performing training or supervisory	• Employee would be taxable on the salary income earned for services rendered in India. • There could be PE exposure for the foreign entity because of presence of the expatriate employees of foreign entity in India on behalf of foreign entity. • Foreign entity would have to comply with the withholding tax obligation in relation to salary paid to its

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
		functions or executing short term projects.	employees for services rendered in India or alternatively have the Indian entity to discharge the obligation as an Agent of the foreign entity • However, where the India entity is compensating the foreign counterpart for the salary paid to the expatriates, then the India entity may comply with the withholding obligations instead of foreign entity. • Short stay exemption provided under the tax treaty may be claimed subject to satisfaction of given conditions.
(c)	**Medium-term & Long-term assignments — Secondment / deputation**	• Employee would be deputed to India for rendering services to the Indian entity for a period of 2 – 3 years or more. • He/ she would be working in India in	• Employee would be taxable on the salary income earned for services rendered in India. • Indian entity will have to comply with the

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
		the capacity of Employee of Indian entity which is the economic employer. • Expatriate may be on the payroll of Indian entity or the remuneration is solely borne by the Indian entity.	withholding tax obligations and the related compliances under ITA in respect of the employee. • The foreign entity may not have any PE exposure in India subject to appropriate documentary evidence to substantiate that expatriate employees are working under the direction, control and supervision of the Indian entity and the expatriate does not have any lien of his employment with the foreign entity. However, it is advisable to analyze the PE exposure on a case to case basis.
(d)	**Permanent Relocation**	• Employee will resign from home country entity and join the Indian entity as a local hire	• Employee would be taxable on the salary income earned for services rendered in India.

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
		(working on the payroll of Indian entity).	• Indian entity will have to comply with tax obligations and the related compliances under ITA, similar to local Indian employee. • There is no PE exposure for home country entity.

Sometimes, a company may choose to hire independent foreign consultants. The taxability of independent expatriate consultants differs from that of expatriate employees.

Similarly, in case of outbound expatriates the assignment could be in the nature of business visits, short-term, medium-term or long-term assignments.

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
(a)	**Short Term Business Travelers (STBTs) / Frequent Business Travelers (FBTs)**	• Employee visiting foreign country for short business visits of 20-60 days spread over the year. • Purely for the limited purpose of attending meetings/conferences in the capacity of employee of the Indian entity.	• Employee would remain a resident in India (subject to his physical presence in India) and hence salary in respect of period of foreign visits would continue to be taxable in India. • However, such arrangement may trigger a PE risk which needs to be analyzed on case to case basis.

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
(b)	**Short-term assignments**	• Employee would be sent out of India for short period of 6 months. • He/ she would be working outside India but as an employee of the Indian entity & would continue to be on its payroll. • Foreign entity may compensate the Indian entity for the services rendered by the expatriate • Generally, such arrangement is made for performing training or supervisory functions or executing short term projects	• There could be PE exposure for the Indian entity in the foreign country. Further, if, salary is received in India, the same may be taxable on receipt basis under ITA. • In case the outbound expatriate qualifies as a NR in India, possibility of claiming income exemption under applicable tax treaty may be explored. • In case the employee continues to be resident in India, short stay exemption may be claimed in the host country subject to fulfilment of conditions specified under the domestic tax law of host country or the tax treaty • In case the employee is not eligible for short stay exemption in host country, the double taxation can be eliminated by

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
			claiming credit of taxes paid in the host country in India, provided such an expatriate is considered as an ultimate treaty resident of India.
(c)	**Medium-term & Long-term assignments- Secondment / deputation**	• Employee would be deputed to the foreign entity for rendering services for a period of 2-3 years or more. • He/ she would be working abroad in the capacity of employee of the foreign entity. • He/ she would be on the payroll of foreign entity and the remuneration would be solely borne by such foreign entity.	• In case the outbound expatriate qualifies as a NR in India, he/she would not be liable to pay tax on salary income received outside India for the period of service rendered outside India. • In case the employee is on split payroll meaning receives part of the salary in home country, it would be advisable to evaluate whether such receipt in India can be claimed as non-tax in India subject to conditions provided in the tax treaty. • In case the employee continues to be resident in India, he/ she would be liable to pay tax

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
			on his/her global income in India. However, at the same time, he/she would be eligible to claim credit of taxes paid in the host country on the doubly taxed income related to period of services rendered outside India.
(d)	**Permanent Relocation**	• Employee would be sent to overseas entity on a permanent basis. • He/she would no longer be a part of Indian entity. • Legal and social ties with India would be detached.	• In case the outbound expatriate qualifies as a NR in India, he/she would not be liable to pay tax on salary income received outside India for the period of service rendered outside India. • In case the employee continues to be resident in India, he/she would be liable to pay tax on his/her global income in India. However, at the same time, he/she would be eligible to claim credit of taxes paid in the host country on the doubly taxed

S. No.	Type / Nature of Assignments	Typical Characteristics	India Tax implications
			income related to period of service rendered outside India.

Chapter 2
Taxation

2.1 Basic concepts — Domestic Law

Under the ITA, incidence of tax depends on the residential status of the taxpayer as well as on the place and time of accrual or receipt of any income. Each of these components is discussed in the following paragraphs.

2.1.1 Residential status

In India charge of income-tax is not based on domicile or citizenship. The extent of Indian tax liability depends on the residential status of an individual based on the individual's physical stay in India.

Residential status is determined on the basis of the physical presence in India during each previous year i.e. the FY commencing from 1st April.

For tax purposes, an individual may be Resident and Ordinarily Resident ('ROR'), Resident but Not Ordinarily Resident ('RNOR') or Non-Resident ('NR'). The conditions to be satisfied to qualify in any of these categories are discussed below:

(a) Basic residency test

An individual is regarded as a resident in India in any previous year, if he/ she is present in India for:

— 182 days or more during that year; or

— 60 days* or more during that year and 365 days or more during the preceding 4 years.

**To be replaced by 182 days in following two cases:*

— an Indian citizen who leaves India for the purpose of employment abroad or as a crew member of an Indian ship; or

— an Indian citizen or Person of Indian Origin[1] employed abroad

[1] As per Explanation to Section 115C(e) of the ITA, a person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India.

who comes to India on a visit.

What constitutes '**leaving for the purpose of employment outside India**' has not been defined/explained in the Act. Therefore, this phrase can be said to be wide enough to cover the following situations:

- an Indian employee leaving India for taking up a new employment with an overseas employer while continuing his legal employment with his existing employer (e.g. on deputation), or
- an Indian employee leaving India for taking up a new employment, with a new employer.

A case to case evaluation is required in order to determine whether an individual can be said to have left for the purpose of employment or not.

Also, the word "visit" is not defined under the ITA. However, basis the general interpretation of the term and judicial pronouncements, visit includes coming to India for both social and employment purposes.

(b) Non-Resident (NR)

An individual fulfilling neither of the above basic residency test is regarded as a NR in India.

(c) Resident but Not Ordinarily Resident (RNOR) and / or Resident and Ordinarily Resident (ROR)

A person resident in India may be further classified as ROR or RNOR based on the below mentioned criteria.

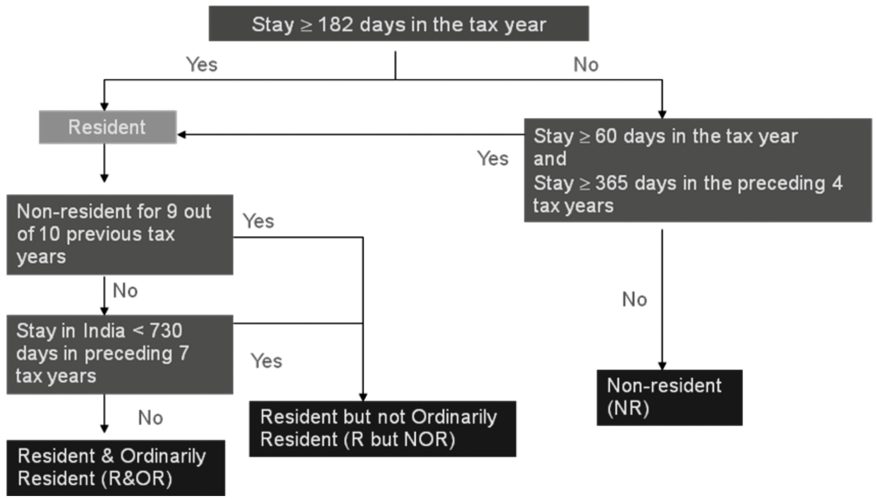
A resident individual (i.e. satisfying the basic residency test specified in clause (a)) would be regarded as a ROR in India in any FY if both the following conditions are satisfied:

— He/ she has been resident in India for at least 2 out of 10 preceding FYs; and

— He/ she has been present in India for a period or periods aggregating to 730 days or more, during the 7 preceding FYs.

A resident individual who does not satisfy any one or both of these additional conditions would be regarded as RNOR.

The above residency rules are summarized in the below matrix:



The actual number of days an individual is present in India is generally determined on the basis of entries in the passport, taking into account the day of entry as well as the day of exit. Further, stay in the territorial waters of India would also constitute presence in India for the purpose of determining the residential status.

Illustration 1

Mr. ABC, a Canadian citizen, arrives in India for the first time on October 02, 2015. Assuming he continues to stay in India, his residential status would be as follows:

Year Number	Previous Year	Days present in India	Cumulative stay in preceding previous year	Residential status
1	2015-16	181	0	NR
2	2016-17	365	181	RNOR
3	2017-18	366	546	RNOR
4	2018-19	365	912	ROR

Normally, an inbound expatriate coming to India for the first time will become ROR in the third/ fourth year from the year of arrival.

Illustration 2

Mr. XYZ, an Indian citizen, who is appointed as a Senior Manager by an Australian company, leaves India for the first time on September 10, 2016. Details of his India visits in the subsequent years and his residential status would be as follows:

Year Number	Previous Year	Days present in India	Cumulative stay in preceding previous year	Residential status
1	2016-17	163	>365	NR*
2	2017-18	75	>365	NR**
3	2018-19	185	>365	ROR

* Indian citizen going outside for the purpose of employment, the 60 days condition shall be replaced by 182 days

** Indian citizen or Person of Indian Origin employed abroad who comes to India on a visit, the 60 days condition shall be replaced by 182 days

Normally an outbound expatriate would remain NR in all the years of assignment (except year of return) when the total stay in India is less than 182 days.

2.1.2 Scope of income

While residents i.e. taxpayers whose residential status is ROR are taxed on their worldwide income, NRs are taxed only on income that is received or deemed to be received in India or income that accrues/ arises or is deemed to accrue/ arise in India. For this purpose, a RNOR is taxed like a NR with the only difference that he/ she is also liable to tax on income accruing abroad if it is from a business controlled from or a profession set up in India.

The above rules can be broadly depicted as follows:

Nature of income	Taxability in case of		
	ROR	RNOR	NR
Income received or deemed to be received in India by or on behalf of the individual	√	√	√
Income accruing / arising or deemed	√	√	√

Nature of income	Taxability in case of		
	ROR	RNOR	NR
to be accrued /arising in India			
Income from a business controlled from India or from a profession set up in India but not received or accrued in India	√	√	X
Income not received or not deemed to be received in India	√	X	X
Income not accruing / arising or not deemed to be accrued / arising in India	√	X	X

Thus, depending upon its nature, income is taxed in India either on receipt or on accrual basis. Income is said to be received when it actually reaches the taxpayer; however, it is said to accrue or arise when the right to receive such income becomes vested to the taxpayer.

It may be noted that any income which is taxed on accrual basis cannot again be taxed on receipt of the same. Further, once an amount is received as income, any remittance of such amount to another place does not result in receipt at another place – for instance if a ROR taxpayer is receiving income abroad in financial year 2018-19, he cannot be said to have received the same when he brings or remits such income to India subsequently.

2.1.3 General scheme of taxation

Under the ITA, income is classified and accordingly taxable under any of the following heads:

(a) **Income from Salaries:** The income arising on account of employee-employer relationship is taxable under this head and inter alia includes salary, allowances, perquisites, provident fund contributions, income received from previous employers, retirement benefits, salary arrears, profits in lieu of salary, income on termination of employment etc.

(b) **Income from House Property:** Under this head of income, income is computed on the basis of the potential of property (i.e., land and/ or building, commercial as well as residential) to generate income not merely on the actual rent received there from. Specific rules are laid down for computing the taxable value of a property for taxation purpose.

(c) **Profits and Gains from Business or Profession:** Income earned by a taxpayer on exercise of a business or profession is taxable under this head. Generally, business/ profession income is arrived at after deducting from the gross sale/ revenue all the expenses incidental to such business/ profession, including depreciation. Weighted deduction is available in case of certain specified expenses such as research & development whereas certain expenses are deductible on fulfilment of prescribed conditions (for instance only on actual payment or on compliance with withholding tax procedures).

(d) **Capital Gains:** Capital Gains represent the profit or gain arising to a taxpayer on transfer of a capital asset during the FY. Generally, capital gains are calculated by deducting from the net sale consideration the cost of acquisition and cost of improvement incurred by the transferor on the capital asset. In case of long-term capital assets i.e. those held for a period of more than 36 months (12 months in case of listed securities (other than a unit) listed in recognized stock exchanges in India or a unit of Unit Trust of India or a unit of an equity oriented fund or a zero coupon bond; 24 months in case of unlisted share of a company and immovable property). In order to give effect to inflation the cost of acquisition and improvement are indexed using the cost inflation index numbers notified by the Government; however indexation benefit is not available for bonds and debentures other than :-

— Capital indexed bonds issued by the Government;

— Sovereign Gold Bonds issued by Reserve Bank of India under Sovereign Gold Bond Scheme, 2015.

Short term capital gain, arising from the sale of equity shares or units of an equity oriented fund or unit of a business trust on which Securities Transaction Tax (STT) is paid, is taxable at 15%. Other short term capital gain is taxable at normal income-tax rates.

For an individual being a resident, long term capital gain is taxable at 20% (with cost indexation benefit). However, capital gain arising on sale of listed securities (other than debt-oriented units and those covered under Section 112A) is taxable at 20% (with cost indexation benefit) or at 10% without indexation benefit, whichever is lower.

For a non-residents, sale of unlisted securities or shares in a company not being a company in which public are substantially is taxable at 10% without indexation benefits.

As per Section 112A of ITA, capital gains arising from transfer of a long-term capital asset (being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust) shall be taxed at the rate of 10% for capital gains exceeding ₹ 100,000. This concessional rate of 10% will be applicable if:

— in a case of an equity share in a company, Securities Transaction Tax (STT) has been paid on both acquisition and transfer of such capital asset; and

— in a case a unit of an equity oriented fund or a unit of a business trust, STT has been paid on transfer of such capital asset.

Grandfathering provisions have been provided for gains accrued till 31st January 2018.

Long term capital gains are exempt from tax in certain cases if the gains are reinvested within the specified period. For example, capital gains on transfer of residential house held for more than 24 months are exempt if they are reinvested in acquiring or constructing another residential house within a specified period. Similarly, capital gains from the sale of any long term capital asset are exempt if the amount of capital gains is reinvested in certain specified assets, being redeemable bonds issued by the National Highways Authority of India/ Rural Electrification Corporation/ any other specified bonds or units of a specified fund, within six months and for a lock-in period of 3years.

(e) **Income from other sources:** This is the residual head of income and any income which is not covered under the earlier heads is covered in 'income from other sources' for instance interest, gifts, dividends, lottery winnings, etc.

2.1.4 Computation Mechanism

The computation mechanism for income under each of the above-mentioned head is distinct and the total income under all the heads, after setting off brought forward losses, if any, constitutes the **Gross Total Income ('GTI')** for a particular FY. From the GTI a tax-payer/ assessee is entitled to claim certain deductions in respect of specific investments and/ or expenses (for instance provident fund investments, life insurance premiums, housing loan repayments, etc.) up to the prescribed limits so as to arrive at the **Net Taxable Income** for the year.

As discussed earlier, expatriate employees are in essence employees working in a country away from their country of legal residence. Thus, for the purpose of easy understanding, normally the income earned by an expatriate working in India would be arising from the employee-employer relationship, irrespective whether he/she is on the payroll of the foreign entity or the Indian entity, and therefore the same would be taxed as their 'Salary income'. The taxability of such salary income and related issues are discussed in the forthcoming topics.

2.1.5 Tax Rates

Income tax is payable on the Net Taxable Income at the rates specified for the relevant year. The tax rates for every FY are proposed the Finance Minister and then adopted by the Parliament in the Annual Budget. The tax rates applicable for individuals for the financial years 2018-19 and 2019-20 are as follows:

Income slabs	**Tax rates**
Taxable income up to ₹ 250,000	Nil
Taxable income between ₹ 250,001 & 500,000	5%
Taxable income between ₹ 500,001 & 1,000,000	20% plus ₹ 12,500
Taxable income above ₹ 1,000,000	30% plus ₹ 112,500

The basic exemption limit of ₹ 250,000 is increased to ₹ 300,000 in case of resident taxpayers who are 60 years of age or more but less than 80 years of age (at any time during the FY) and ₹ 500,000 in case of resident taxpayers who are of the age of 80 years or more (at any time during the FY).

A rebate of upto ₹ 2,500 is available to resident individuals whose total income does not exceed ₹ 350,000 during FY 2018-19. Whereas the applicable rebate for FY 2019-20 is upto to ₹ 12,500 for resident individuals whose total income does not exceed to ₹ 500,000.

Surcharge is applicable @ 10% of tax to individuals with taxable income exceeding ₹ 5,000,000 but not exceeding ₹ 10,000,000. Also, surcharge is applicable @ 15% of tax to individuals with taxable income exceeding ₹ 10,000,000.

Taxable Income	Applicable Surcharge Rate	
	FY 2018-19	FY 2019-20
Exceeding ₹ 50,00,000 but not exceeding ₹ 1,00,00,000	10%	10%
Exceeding ₹ 1,00,00,000 but not exceeding ₹ 2,00,00,000	15%	15%
Exceeding ₹ 2,00,00,000 but not exceeding ₹ 5,00,00,000	15%	25%
Exceeding ₹ 5,00,00,000	15%	37%

Further, marginal relief is allowed to ensure that the additional amount of income-tax payable including surcharge, on the excess of income over ₹ 5,000,000 / ₹ 10,000,000 is limited to the amount by which the income is more than ₹ 5,000,000 / ₹ 10,000,000.

The above tax rates are required to be increased by Health and Education Cess of 4% in all cases.

2.2 Basic concepts — Tax Treaties

In case resident of one country (home/ residence country) derives income from another country (host/ source country) there arises a possibility of 'double taxation' of the same income in the source country and subsequently in the residence country. Such double taxation can also arise due to difference in the definition of tax residency and in the scope of taxation of various countries.

Thus, with respect to an expatriate, double taxation may arise on account of the following reasons:

— He/she is a resident of two countries and each country seeks to tax the individual on worldwide income;

— He/she is a resident of one country deriving income from another country.

In order to prevent such double taxation, governments engage in efforts to avoid double taxation by entering into Double Taxation Avoidance Agreements/ Tax Treaty ('DTAA'). The adoption of a DTAA requires modification to the internal tax laws of the respective state and as such, an enabling provision in an Act passed by the Parliament.

Under Section 90 of the ITA, the Central Government of India is empowered to enter into an agreement with any country for granting relief from double taxation, exchange of information, recovery of tax and to make such provisions as may be necessary for implementing the agreement. In India, a DTAA becomes a law without any further legislation having to be enacted.

DTAA divide the taxing rights between the countries that are party to the agreement. India has entered into two types of DTAA with other countries:

— Comprehensive DTAA, which covers all income flows; and

— Limited DTAA that covers only shipping and/ or air transport income.

India has concluded comprehensive DTAA with almost 97 countries including major countries like Australia, Belgium, Brazil, Canada, China, Germany, Hong Kong, Italy, Japan, Mauritius, New Zealand, Singapore, United Kingdom, United States, etc.

India has also entered into 'Tax Information Exchange Agreements' with 19 countries[2] i.e. Argentine, Bahamas, Bahrain, Belize, Bermuda, British Virgin Islands, Cayman Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Liberia, Macao, Maldives, Principality of Liechtenstein, Principality of Monaco, Saint Kitts and Nevis, San Marino and Seychelles.

Section 90 further provides that where the provisions of the DTAA entered into by India with another country are more beneficial to any assessee, the assessee would be governed by such beneficial provisions of the DTAA. This position has been upheld by the Apex Court in the case of UOI vs. Azadi Bachao Andolan (263 ITR 706). Hence, in the case of an expatriate, the provisions of the treaty need to be examined for the purpose of ascertaining the tax liability.

2.2.1 Residential status under DTAA

Generally, Article 4(1) of a DTAA, defines the term 'resident' of a country to

[2] Source: https://www.incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx

mean any person who, under the laws of that country, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political sub-division or local authority thereof. Thus, in order to qualify as a resident under a DTAA entered into by India, an expatriate should be a resident either in the overseas country or in India under the domestic laws. It may be noted that the residential status of the employer is not relevant in determining the status of the expatriate.

However, if by virtue of the above provision, an individual is a resident of both the contracting countries, the distributive rules cannot apply. Therefore, for such cases, clause 2 of the residency article provides the tie breaker test for determining in which country from the two countries the person would be deemed to be a resident as per the DTAA. The relevant factors to be considered in the tie-breaker test are as follows:

(a) **Permanent home:** The country in which he/she has a permanent home available to him/her;

(b) **Centre of vital interest:** The country with which his/her personal and economic relations are closer;

(c) **Habitual abode:** The country in which he/she has habitual abode;

(d) **Nationality:** Country of which he/ she is a national;

(e) **Competent authorities:** As determined by mutual agreement between both the countries competent authorities.

The tie-breaker rules are required to be followed sequentially as may be provided in the DTAA.

2.3 Salary

Any salary due or received from the employer or the former employer is charged to tax in India as 'Income from Salary '. Further, it is taxed on due or receipt basis, whichever is earlier.

As discussed earlier, salary income of expatriates would be taxable in India under the provisions of ITA in case the same is received or deemed to be received in India or in case it accrues or is deemed to be accrued in India.

Further, Section 7 of ITA provides that the following incomes are deemed to be received in India:

(i) Annual increase in the recognized provident fund balance of an employee, in excess of the prescribed percentage

(ii) Transferred balance in the recognized provident fund to the extent specified

(iii) Contribution made by the employer to the specified employee pension scheme.

Section 9 *inter alia* provides that income from salary shall be deemed to be accrued in India in case the same is in respect of:

— services rendered in India; and

— Leave period which is preceded and succeeded by services rendered in India and forms part of contract of employment.

Thus, salary income of an expatriate would be deemed to arise in India and hence taxable, if the services are rendered in India, irrespective of the place of entering into the contract of employment or receipt of the income.

2.3.1 Inbound Expatriate Employees

An inbound expatriate employee working in India would be liable to tax in India on the salary earned during the period of services rendered in India, whether he/ she is on the payroll of the Indian entity or of the foreign entity, subject to certain exemptions provided in the domestic law as well as the respective DTAA.

(a) Salary components

ITA provides an inclusive definition of the term salary and perquisites. The term 'salary' includes wages, any annuity or pension, gratuity, any fees, commission, perquisites or profits in lieu of or in addition to any salary or wages, advance salary, leave salary, etc. Thus, essentially salary includes all consideration in money or money's worth (cash or kind) for services rendered arising out of an employer-employee relationship. The definition is wide enough to cover all types of payments whether in cash or kind; whether immediate or lump sum and whether from or on behalf of current or past employer.

In addition to the normal components included in salary structure of any employee, some typical components of the remuneration package of an expatriate employee and the tax treatment of the same are discussed below:

1. Daily allowance/ Per Diem

Daily allowance/ per diem is generally paid to employees in addition to their regular salary in order to meet their daily living expenses.

Such daily allowance/ per diem is includible in the taxable salary income of employees. However, exemption from tax in some cases, particularly in case of short-term business travelers who are on tour, may be claimed in respect of the actual expenses incurred by the expatriate towards ordinary daily charges on account of absence from the normal place of duty.

2. Relocation allowance

The employees may be paid an allowance to meet relocation/ transfer expenses, shipment cost, excess baggage cost, etc. In case such allowance is actually used by the employees for travel and shipment purposes and the same can be substantiated by adequate documentation, the amount of allowance which is actually used to meet such expenses can arguably be claimed as exempt. Any cash relocation allowance which cannot be substantiated with actual proof of expenditure (limited to travel and shipment of goods) is fully taxable.

3. House Rent Allowance ('HRA')

In case the employee has taken accommodation on rent in India, the employee shall be eligible for exemption on account of the rent paid by the him to the extent of lower of the following:

- Actual HRA received for the period during which the rented accommodation was occupied; or
- Excess of rent paid over 10% of salary for the period; or
- 50% of the salary, in case accommodation is situated in Mumbai, Delhi, Kolkata or Chennai, or 40% in all other cases

Salary for the purpose of computing the aforesaid exemption means basic salary, dearness allowance if terms of employment so provide and commission earned by the employee based on a fixed percentage of turnover achieved.

An employee is required to submit Form No. 12BB providing relevant details viz. name, address and PAN of landlord (where rental payments exceed ₹ 100,000 per annum) along with proof of making rental payments for claiming exemption of HRA.

4. Provident Fund

Any contribution made by the employer to Provident Fund up to 12% of 'salary' (as defined for the purpose of Provident Fund contribution is exempt from tax). However, any contribution in excess of 12% of the employee's contribution paid by the employer (on employees' behalf) is taxable in the hands of the employee.

(b) Perquisites

The term perquisite is defined widely to include all the benefits/ concessions received by an employee from an employer. It includes both, monetary as well as non-monetary perquisites. Rules have been prescribed for valuing the perquisites and the same are discussed below:

1. Accommodation

Free or concessional accommodation provided by the employer constitutes a taxable perquisite under ITA. In terms of the valuation rules such accommodation perquisite is valued as follows:

S. No.	Accommodation perquisite	Valuation Rules prescribed	
		Where accommodation is unfurnished	**Where accommodation is furnished**
A.	Provided by Central/ State Government	License fee determined by Central/State Government reduced by rent recovered from employee.	Value of unfurnished accommodation to be increased by 10% of the cost of furniture, in case owned, or actual hire charges where it is hired as reduced by any charges paid for the same by the employee.
B.	Provided by any other employer who owns the accommodation	— 15% of salary in cities having population above 2.5 million as per 2001 census. — 10% of salary in cities	Value of unfurnished accommodation to be increased by 10% of the cost of furniture, in case owned, or actual hire charges where it is hired as reduced by any

S. No.	Accommodation perquisite	Valuation Rules prescribed	
		Where accommodation is unfurnished	Where accommodation is furnished
		having population exceeding 1 million but not exceeding 2.5 million as per 2001 census. — 7.5% of salary in other case **Less**: Rent recovered from employee.	charges paid for the same by the employee.
C.	Provided by any other employer who has taken the accommodation on lease or rent.	Actual amount of lease rental paid or payable by the employer or 15% of salary whichever is lower **Less:** Rent recovered from employee	Value of unfurnished accommodation to be increased by 10% of the cost of furniture, in case owned, or actual hire charges where it is hired as reduced by any charges paid for the same by the employee
D.	Provided in a hotel — Up to 15 days on transfer of the employee — For more than 15 days	Nil **Lower of** actual hotel charges **or** 24% of salary for the period of stay as reduced by the rent, if any, actually paid	

S. No.	Accommodation perquisite	Valuation Rules prescribed	
		Where accommodation is unfurnished	Where accommodation is furnished
		by the employee.	

2. Vehicle

	Nature of perquisite	Valuation Rules prescribed	
		Small car (engine cc up to1.6 litres)	Big car (engine cc above 1.6 litres)
A	In case car is provided by employer		
A.1	Used exclusively for official purposes	Nil, subject to prescribed conditions **(see note) ***	Nil, subject to prescribed conditions **(see note) ***
A.2	Used exclusively for private purposes of employee and expense reimbursed by employer	Actual expenditure incurred (including amount representing wear and tear of the car) as reduced by amount charged from the employee for such use	Actual expenditure incurred (including amount representing wear and tear of the car) as reduced by amount charged from the employee for such use
A.3	Used partly for official purpose and partly for private purpose and the running and maintenance expenses are reimbursed by the employer	₹ 1,800 p.m. (plus ₹ 900 if driver is provided)	₹ 2,400 p.m. (plus ₹ 900 if driver is provided)
A.4	Used partly for official purpose and partly for	₹ 600 p.m. (plus ₹ 900 if driver is	₹ 900 p.m. (plus ₹ 900 if driver is

	Nature of perquisite	Valuation Rules prescribed	
		Small car (engine cc up to1.6 litres)	**Big car (engine cc above 1.6 litres)**
	private purpose and the running and maintenance expenses for private use are fully met by the employee	provided)	provided)
B	In case car is owned by employee and employer reimburses running and maintenance expenses		
B.1	Used exclusively for official purposes	Nil, subject to prescribed conditions **(see note)***	Nil, subject to prescribed conditions **(see note)***
B.2	Used partly for official purpose and partly for private purposes	Actual expenses reimbursed reduced by ₹ 1,800 p.m. (plus ₹ 900 if driver is provided)	Actual expenses Reimbursed reduced by ₹ 2,400 p.m. (plus ₹ 900 if driver is provided)

Note:

* A log book containing details of journey undertaken, viz. date of journey, destination, mileage and the amount of expenditure incurred, for official purpose needs to be maintained.
* A certificate from the employer to the effect that expenses were incurred wholly and exclusively for the performance of official duties should be obtained.

3. Employee Stock based incentives

A company may reward its employees through any of the following forms of stock-based incentives:

— Employee Stock Option Plans (ESOPs)

— Stock Appreciation Rights ('SAR')/ Phantom Equity Plan ('PEP')

— Restricted Stock Plans

— Employee Stock Purchase Plans

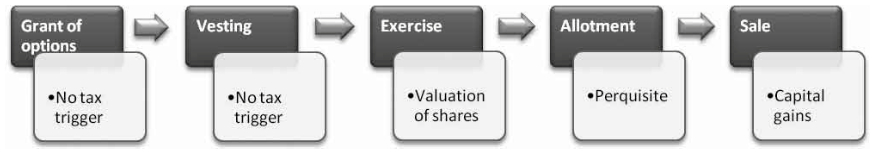
Securities allotted to employees under ESOP or similar share settled programs constitute benefit derived by the employee and is taxed as salary income in the year of allotment of shares to the employees.

The taxable value is the Fair Market Value ('FMV') of the specified securities on the date on which the option is exercised by the employee as reduced by the exercise price recovered from the employee.

The FMV of the securities is determined as follows:

S. No		Type of securities (equity shares)	FMV on date of exercise
A.	**Listed securities (equity shares)**	Traded on one Indian stock exchange	Average of the opening and closing price
		Traded on more than one Indian stock exchange	Average of the opening and closing price on the stock exchange that recorded highest trading
		Not traded on date of exercise	Closing price of the share on a closest date preceding the date of exercise
B.	**Unlisted securities** (equity shares)		As determined by a Category I Merchant banker : — on date of exercise or — any date not more than 180 days preceding the date of exercise

The flow of events and the relevance of the same in determining the levy of taxation on ESOP can be depicted as follows:



In case of cash settled stock-based incentive plan (SAR/ PEP), the cash payout is taxable as salary income.

The employer is required to withhold tax at the time of allotment of securities (in case of stock settled incentive plan) and at the time of cash payout (in case of cash settled incentive plan) to the employees. In case of global stock option plans, it is the responsibility of the Indian entity to withhold tax on the perquisite value of such stock options under Section 192 of the ITA.

Further, individuals qualifying as NR or RNOR in India are liable to tax only on their India sourced income. ITA does not specifically provide for apportionment of stock-based income in relation to mobile employees. However, guidance may be drawn from the Delhi Income Tax Appellate Tribunal (ITAT) in the case of Robert Arthur Keltz (represented by United Technologies International Operation), according to which if an employee is based in India only for a part of vesting period (i.e. period beginning with the date of grant of the stock options and ending with the date of vesting of the stock options), then proportionate amount of the value of benefit will be liable to tax in India. The proportionate value shall be determined by applying to the value of benefit, the proportion which the length of the period of stay in India by the expatriate during the vesting period bears to the length of the total vesting period. This proposition is supported by CBDT circulars in the erstwhile Fringe Benefits Regime.

Hence, in case of NRs and RNORs, only that benefit which is attributable to the period of services rendered in India during the vesting period shall be taxable in the financial year in which taxable event occurs.

In case of Bharat Financial Inclusion Ltd (ITA No 237/Hyd/2017), dated 3 August 2018), the Hyderabad Tribunal held that allotment of shares by the employer is relevant for taxation of ESOP perquisite and not on exercise of option by employee. Accordingly, tax withholding obligation arises on allotment of shares.

4. Other perquisites

S. No.	Perquisite	Valuation
A	**Sweeper, gardener, watchman, personal attendant**	Actual cost to the employer **Less:** Amount recovered from the employee for services
B	**Supply of gas, electric energy, water**	Actual amount of expenditure incurred or reimbursed by employer on that account **Less:** Amount, if any recovered from the employee for such benefit or amenity **Note:** Where supply of gas, electric energy, and water is made from resources owned by the employer, without purchasing them from any outside agency then the value of perquisite would be manufacturing cost per unit incurred by the employer.
C	**Free or concessional educational facilities for any member of employee's household**	Actual amount of expenditure incurred or reimbursed by employer or cost of such education in similar school **Less:** Amount, if any recovered from the employee for such benefit or amenity.
D	**Interest free concessional loan**	Interest calculated using State Bank of India rates as on 1 April of the relevant FY on maximum outstanding monthly balance **Less:** Interest paid by employee The provision is not applicable on petty loan up to ₹ 20,000 or loan for medical treatment in respect of specified diseases. However, exemption is not applicable to so much of the loan as has been reimbursed to the employee under any medical insurance scheme.
E	**Free food and non-alcoholic beverages**	Amount of expenditure incurred by the employer **Less:** Amount recovered from the

S. No.	Perquisite	Valuation
		employee Except if employer provides free food and Non-alcoholic beverages during the office working hour at office premises or through paid **meal voucher** and amount of expenditure not exceeding ₹ 50 per meal.
F	**Gifts, Vouchers or token to employees**	Actual amount of expenditure incurred However, such value to be considered Nil, if the value of gift per employee during the FYin aggregate is below ₹ 5,000
G	**Memberships and annual fees charged on credit card**	Actual amount of expenditure which is personal in nature, incurred or reimbursed by such employer on that account **Less:** Amount, if any recovered from the employee for such benefit or amenity. **Note:** However, there will be no perquisite in the hands of employees where expenses incurred wholly and exclusively for official purposes and if complete detail in respect of such expenditure are maintained by the employer & the employer gives the certificate to the effect that the expenditure was incurred wholly and exclusively for the performance of official duties
H	**Use of movable assets (other than Laptops)**	10% of actual cost of the asset or the amount of rent paid or payable Less: Amount, if any recovered from the employee for such benefit or amenity
I	**Home Leave**	Any expense incurred by the employer on the home leave travel for journey outside India for employee and his/her family is fully taxable

S. No.	Perquisite	Valuation
J	**Telephone facility**	Any expense reimbursed by Employer to the employee on account of telephone expenses incurred by an employee is exempt under Section 17(2) read with Rule 3 (7)(ix) of the IT Rules
K	**Transfer of movable asset to the employee directly or indirectly**	Actual cost of movable asset **Less:** 10% of depreciation for each completed year which such assets were put to use by the employer (the depreciation rate to be used in case of computer and electronic items is 50% and in case of motor car is 20% by reducing balance method Less: Amount, if any recovered from the employee for such benefit or amenity
L	**Any other benefits or amenities, services, rights or privilege**	Cost to employer **Less:** Amount, if any recovered from the employee

5. Standard deduction

Standard deduction from gross salary has been introduced from FY 2018-19. The deduction is the least amount from the below:

- Amount of ₹ 40,000 for FY 2018-19 or ₹ 50,000 for FY 2019-20; or
- Amount of gross salary

6. Tax equalization and Hypothetical tax

Most of the companies follow a principle wherein an expatriate should be neither better off nor worse off by taking up an international assignment and therefore he/ she should pay no more or no less tax on the salary income than what would have been payable had the employee continued in the home country.

This principle is known as 'tax equalization' which means that a hypothetical tax is deducted from the salary in the home country and actual taxes in respect of income from employment in the home and host country would be borne by the employer and not by the employee.

Hypothetical tax is a part of the tax equalization policy under which the expatriate employee is responsible during the assignment for "hypothetical" or "stay-at-home" tax, which would be calculated on the remuneration the expatriate employee would have earned if he/she continued to live and work in the home location.

Hypothetical tax is withheld from the expatriate's normal pay and is retained by the employer as a "tax reserve". The company would then pay all applicable home and host country taxes on employment income (including taxes on expatriate benefits) during the assignment.

There are judicial precedents to support the position that the hypothetical tax reduced from the salary does not constitute income in the hands of the expatriate and therefore cannot be treated as part of the employee's taxable salary. This has also been re-affirmed by the Bombay High Court in the case of Jaydev H. Raja (ITA No 87/2000).

The tax so borne by the employer, would form part of the expatriate's salary and therefore in computation of the 'income from salaries' the taxes so borne by the employer have to be grossed up and included therein.

As per provisions of ITA, the employer could, at its option pay taxes on the non-monetary perquisites provided to employees, and such taxes need not be grossed up as per Section 10(10CC) of the Act. Considering that normally expatriate employees are tax equalized, the benefit of this could be availed. However, there would be a disallowance of expense under Section 40(a)(v) of the ITA, in the corporate tax return of the employer to this extent.

The Uttarakhand High Court in case of Sedco Forex International Drilling Inc. (TS-603-HC-2012) and the Delhi High Court in case of Yoshio Kubo & Ors. (ITA No 441/2003/Del) have held that amounts paid by the employer, directly to the Indian income tax authorities, in discharge of an employee's income tax liability do not fall into the category of monetary benefits and hence eligible for exemption under Section 10(10CC) of ITA. The impact of the exemption is that, instead of applying for multiple gross-up, the employer can pay tax on employee's behalf on the value of non-monetary benefits with a single stage gross up.

It may, however, be noted that the above said position will receive finality only after an affirmative decision by Supreme Court.

The table below shows the total cost for an employer where the tax liability borne by it is calculated with multiple stage gross up and with single stage gross up relying on the High Court judgment.

	Particulars	**Tax liability (single stage grossing up) ₹**	**Tax liability (multiple stage gross up) ₹**
(a)	Total Income	100	100
(b)	Tax Perquisite (tax liability borne by the employer)**#**	31	45[100*31/ (100-31)]
(c)	Total Income including perquisite	131	145
(d)	Tax payable (@ 31%)	41	45
(e)	Total cost for the employer (a) + (d)	141	145

#assuming tax rate @ 31% for simplicity

Please note that the exemption under Section 10(10CC) of ITA is a trade off with the corporate tax deductibility of such amount which is claimed as exempt (refer Section 40(a)(v) of ITA).

7. Overseas social security

a) Taxability of employer's contribution

There is no specific provision under ITA that governs the tax treatment for social security contributions made by an employer to the overseas social security scheme on behalf of its employees or by the inbound expatriate employees who continue to contribute to their home social security scheme.

Guidance can be drawn from past judicial rulings where it has been held that employer contribution may not be considered as a taxable perquisite provided the following conditions are satisfied:

(i) The contribution made is an obligation of employer and is mandatory in nature;

(ii) The contribution made is not an obligation of the employee being met by employer;

(iii) The contribution is not actually paid to the employee or allowed to the employee or due/accrued to the employee from the employer;

(iv) The employee does not have vested right at the time when contribution is made;

(v) The receipt of the contribution made to the fund is contingent in nature;

(vi) The employees do not have any right to claim the amount payable under the policy on the date on which the contribution is being made.

b) Employee's contribution

Likewise, based on judicial precedents, in respect of inbound employee's contribution to home social security, a deduction may be available from the salary income if the contributions made by employee meet the following conditions:

(i) The employer is authorized to deduct the social security contribution from the remuneration payable to the employee;

(ii) The provisions of the home country income tax laws allow full deduction of the social security contributions from the income and it is only on the net income that the tax is levied;

(iii) The scheme to which the contributions are made is not a 'company framed scheme' and are statutorily required by law;

(iv) The contributions are required to be made by employees compulsorily;

(v) The contributions are deducted from the employee's salary as a prior charge by overriding title.

The Delhi HC in case of Yoshio Kubo & Ors. vs CIT (ITA No 441/2003/Del) has held that the amounts paid by employers to pensions or social security funds are not perquisite since no immediate vesting is derived to employee at the time of contribution to such funds. Hence, the same were held as non-taxable in the hands of employees.

A case specific evaluation shall need to be done on the basis of the above, to determine income-tax implications.

8. Storage Expenses

At the time of secondment / deputation from home country to an overseas location, the employer may permit the expatriate to leave his personal belongings/ goods in his home country for the period of the international assignment depending upon the secondment/deputation/relocation policy of the company. In such case, the employer would incur storage expenses on behalf of the expatriate to enable him to retain his personal belongings in his home country until his repatriation upon completion of the technical assignment. On the other hand, some belongings/ goods, up to a specific weight, could be allowed to be transferred to the host location depending upon expatriate's requirements.

Where the overseas employer has incurred the expenditure (either direct payment to the third party or reimbursement to the expatriate) on storage of household goods in the home country, prior to moving of the expatriate to India and is unconnected with the Indian assignment, then it may be said that such expenditure has no nexus with the expatriate's Indian assignment (i.e. services rendered in India), and hence, the same may be treated as non-taxable benefit/perquisite in the hands of the expatriate.

However, any expenses incurred by the employer in relation to shipment and storage of goods on transfer of the expatriate to India can be argued to be wholly and necessarily incurred in performance of his official duties, and hence, are exempt under Section 10(14)(i) of ITA read with rule 2BB(1)(a) of the Rules, meeting the cost of traveling on transfer to India and spent in packaging and transportation of the personal effects of the assessee.

Further, if the employer has incurred the expenditure (either direct payment to the third party or reimbursement to the expatriate) on storage of household goods in the home country, after moving of the expatriate to India or during the Indian assignment, then it may be said that employer has reimbursed the expenditure due to the expatriate rendering services in India. Hence, it may be considered as a monetary obligation of the employee met by the employer on behalf of the employee, and hence, a taxable perquisite in view of Section 17(2)(iv) of ITA.

(c) Exemptions

1. Short-stay exemption

ITA provides for a short stay exemption in case of an individual who is not a citizen of India. The remuneration received by an individual as an employee of a foreign entity for services rendered during his/her stay in India is exempt from tax subject to fulfilment of all the following conditions:

— The foreign enterprise is not engaged in any trade or business in India;

— His/ her stay in India does not exceed in the aggregate a period of 90 days in such previous year; and

— Such remuneration is not deductible from the income of the employer chargeable under ITA.

Similarly, India's DTAAs with different countries also provide for a short stay exemption for DTAA residents of other countries in respect of employment exercised in India. Generally, Article 15 or 16 (Dependent Personal Services) of the DTAAs, deal with taxation of employment income.

The said Article provides that salaries, wages and other similar remuneration derived by a resident in respect of employment exercised in the host country would be taxable in the host country; however, such income would be taxed exclusively in the home country/ country of residence provided:

— The employee is present in the host country for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned as defined in the relevant Article of the respective DTAA (usually Article 3 which defines the terms used in DTAA);

— The remuneration is paid by, or on behalf of, an employer who is not a resident of the host country; and

— The remuneration is not deductible in computing the profits of an enterprise chargeable to tax in the host country. In other words, such remuneration is neither deductible nor borne by the PE of the foreign employer in the host country or any other entity which has taxable presence in India.

The aforesaid conditions may differ from country to country and the relevant DTAA should be referred to before application. A claim for the beneficial provisions under this Article should also be substantiated with evidence.

Thus, it could be concluded that inbound expatriates whose presence in India is for a short-term duration could be exempt from tax in India under the relevant DTAA subject to fulfilment of all the conditions mentioned in the relevant clause of the respective DTAA.

Further, in order to claim any benefit under the applicable DTAA by a resident of other country, the person is required to obtain a Tax Residency Certificate from the revenue authorities of the other country apart from other documents and information as may be prescribed by the Indian tax authorities.

2. Tax credits

An inbound expatriate earning income in India may be liable to tax in India under the 'source' rule and may also be taxable in respect of the same income in his/ her home country as per the 'residence' rule. This scenario can lead to double taxation of the said income and in order to avoid the same DTAAs provide for specific provisions for elimination of such double taxation. The most common methodology for avoidance of double taxation used in Indian DTAAs are:

— **Exemption method:** Income or capital that is taxable in the country of source may be fully exempted in the country of residence or vice versa. Alternatively, the country of source limits its right to tax income from sources in its country. Tax Residency Certificate is required from the revenue authorities of foreign country to substantiate the claim of considering tax resident of foreign country as per the relevant DTAA.

— **Credit method:** Income or capital that is taxable in the country of source may be subject to tax in the country of residence. However, the tax levied in the country of source may be available as a credit to the extent of tax levied by the country of residence on such income or capital.

Generally, in terms of the DTAAs income arising to an expatriate is taxed with or without limitation in the source country and therefore the country of residence has the obligation to eliminate double taxation through credit method.

An individual (qualifying as tax resident of India) must furnish a statement of income and certificate in Form No. 67 before filing return of income under Section 139(1) of ITA in order to claim Foreign Tax Credit in his/her return of income.

In case there is no DTAA, signed between India and the other country, the taxpayer can take benefit under Section 91 of ITA. This relief is available to the individuals who qualify as resident of India in any tax year. The individual will be entitled to the deduction from the Indian income-tax payable of a sum calculated on the doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal.

3. Conversion of home country salary in Indian rupees in order to calculate Indian taxes

Generally, expatriates receive whole/part of their salaries in foreign currency especially when they continue to remain on the payroll of the foreign employer. In such cases, the salary denominated in foreign currency is to be converted to Indian rupees using the Telegraphic Transfer Buying Rate of such foreign currency as on the following dates:

— In case where tax is deducted at source by the employer: the date on which tax is required to be deducted at source i.e. at the time of payment of such salary

— In other cases: the last day of the month immediately preceding the month in which the salary is due or is paid in advance or in arrears.

Telegraphic Transfer Buying Rate in relation to a foreign currency means the rate of exchange adopted by the State Bank of India for buying such currency having regard to the guidelines specified from time to time by the Reserve Bank of India.

4. Withholding tax implications on the employer

Section 192 of ITA governs withholding tax provisions for payments in the nature of "Salaries". It casts an obligation on the 'person responsible for paying' salary to deduct and deposit withholding taxes at the appropriate rates of tax, as prescribed by ITA.

Based on Section 192(1) of the ITA, the employer, being a person responsible to pay salary is under an obligation under Section 192(1) of ITA to deposit withholding taxes (on an average basis) at the applicable rates, on the salary payments to the expatriates. Failure to withhold appropriate taxes would expose the employer to interest and penalties under ITA.

In this regard, it is pertinent to note that the Supreme Court of India[3] has ruled that in case salary paid to the expatriate is for rendition of services in India, with no part of such services being performed for the foreign entity, tax has to be deducted at source from salaries of expatriate employees working in India even in cases where such salaries were paid abroad. In other words, salary payable for services rendered in India should be subject to tax deducted at source/ withholding tax provisions, even on that part of the salary which is paid in the home country to the expatriate employee.

The sum of all the salary components, after considering the exemptions and including the value of monetary as well as non- monetary perquisites, would constitute the total salary income chargeable to tax in India.

Further, there may be situations where salary is paid in India (though taxable

[3] **Eli Lilly & Company (India) Pvt. Ltd. (SC) (178 Taxmann 505)**

on receipt basis as per ITA) is not taxable under the applicable DTAA (due to the employee qualifying as tax treaty resident of the overseas country and also rendering services overseas).

Conversely, where an employee qualifies as tax treaty resident of India and liable to tax in India may also be taxable in the overseas country (say due to part of services being rendered overseas and not eligible to short stay exemption) and eligible to foreign tax credit in India in respect of such foreign taxes.

As regards tax withholding in India by the employer, though there is no explicit provision in section 192, the employer can arguably consider the above mentioned tax treaty benefits (ie non-taxability of salary / foreign tax credit) at the stage of Indian tax withholding. This approach has been upheld in recent AAR rulings in the case of Texas Instruments as well as Hewlett Packard.

5. Goods and Services Tax (GST) Implications

GST is an indirect tax applicable on supply of goods and services. The Central Goods and Services Act (CGST Act) came into effect from 1st July 2017.

Services by an employee to the employer in the course of or in relation to employment is excluded as per Schedule III of the CGST Act 2017.

In case of reimbursement of secondment / deputation costs by Indian entity to a foreign entity, the secondment / deputation arrangement and relationship between the foreign entity, Indian entity and the expatriate needs to be evaluated to ascertain any GST obligation.

Here, in case of reimbursement of salary cost, the Hon'ble Supreme Court[4] has held that disbursement of salary through group company cannot qualify as a service. The Supreme Court decision was based on the following key observations:

a. The deputed person works under the control, direction and supervision of the assessee, and the compliance to withhold tax was also undertaken as an employer by the assessee.

[4] Nissin Brake India Pvt. Ltd (TS-230-SC-2019-ST)

b. The assessee did not pay any direct or indirect compensation to its parent company for the deployment of employees, apart from the reimbursement of salary at cost.

c. The terms of the agreement make it clear that the relationship between the assessee and the deputed employee is that of employer-employee.

Accordingly, the essential principles laid down by the Supreme Court need to be considered while determining an employer-employee relationship and consequent GST implications. It would be pertinent to note that in case the transaction qualifies as a service, the Indian entity will be required to pay GST under reverse charge mechanism on the said import of services.

6. Transfer Pricing

Under the Indian transfer pricing regulations (provided under Sections 92, 92A to 92F of the ITA and the rules thereunder), any "international transaction" between two or more Associate Enterprises (AEs) would need to satisfy the arm's length principle. The term "international transaction" is defined as a transaction between two or more associated enterprises, either or both of whom are NRs, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

The transfer pricing regulations also requires taxpayer to maintain specified contemporaneous transfer pricing documentation to establish the arm's length nature of its international transaction with the AEs, and also to report all such transactions to the Indian tax authorities in the specified form (i.e. Form 3CEB – Accountants Report) to be filed along with corporate income-tax return.

The secondment / deputation arrangements (inbound as well as outbound assignments) between related parties are subject to Indian transfer pricing regulations. Thus, any cross charge between related parties qualifies as an international transaction and requires arm's length justification. The factual matrix of the particular arrangement/ engagement plays determinative role for the purposes arm's length analysis.

2.3.2 Outbound Expatriate Employees

An overview of the significant issues arising in case of an outbound assignment and the general taxability in such cases are discussed below:

(a) Residential Status and taxability of income under ITA

(i) NR/ RNOR in India

An outbound expatriate employee who is a citizen of India going for employment outside India shall qualify for the NR status if the total stay in India is less than 182 days during the year of departure and any subsequent year of assignment outside India (when he/she is on a visit to India) and in such a case, he/ she would be liable to tax in India only in respect of the following:

— Salary actually received in India;

— Salary deemed to be received in India i.e. annual accretion to the recognized provident fund in excess of the prescribed percentage and employer's contribution to notified pension scheme;

— Salary in respect of services rendered in India;

— Salary in respect of rest or leave period which is preceded or succeeded by service in India.

(ii) ROR of India

Outbound expatriate employees qualifying as resident (ROR) in India would be subject to tax on their worldwide income under the ITA and eligible for foreign tax credit on foreign sourced income.

(b) Taxability of income under applicable DTAA

(i) DTAA resident of India

Further, in terms of DTAA, an outbound expatriate employee would be deemed to be a resident in India, if he/she is resident under the ITA and accordingly may be entitled to claim the short stay exemption in the host/source country subject to fulfilment of all the conditions prescribed in the Dependent Personal Service Article of respective DTAA.

(ii) DTAA resident of host country

An outbound expatriate employee who qualifies as a NR in the relevant FY under ITA and a resident of host country under its domestic tax laws, may claim the income received in India for services rendered in the host country as exempt in India under Article 15 /16 (the Dependent Personal Services) of the applicable DTAA. In order to claim any such exemption, Tax Residency Certificate issued by the Revenue Authorities of host country is required. Further, the employee may be required to furnish prescribed information in prescribed Form 10F of the Rules which is to be self-certified if Tax Residency Certificate does not capture the information prescribed under the rules of the ITA

(iii) Split Residency

There is no specific provision provided under the ITA specifying the split residency. However, in case of Raman Chopra[5], Delhi Tribunal discussed the matter relating to split residency. It was discussed that in case of an individual who qualifies as a ROR in India during the relevant FY and also a tax resident of overseas country, his residential status is required to be determined under the relevant DTAA between India and overseas country where the individual is considered as a resident. Based on the tie-breaker analysis, in case the individual qualifies as a resident of overseas country as per the DTAA for the said period of services rendered in the overseas country, the individual may claim exemption from tax in India in respect of the salary earned in the overseas country for such period as per the 'Dependent Personal Services' Article of the relevant DTAA, based on a split residency position. The split residency position was also upheld by Bangalore Tribunal in case of Sanjeev Kumar Ranjan[6].

2.4 Taxability of Salary Income

The tax treatment of the various salary components and computation of the taxable salary in case of outbound expatriate employees would be similar as in the case of inbound expatriate employees, discussed above. However, there are few typical issues in case of outbound expatriate employees which have been discussed below:

— Generally, an outbound expatriate employee who is a citizen of India who goes for employment outside India or an employee who is a citizen of India / person of Indian origin who comes to India for visit

[5]Raman Chopra vs. DCIT (ITAT Delhi) [(2016) 69 taxmann 452]

[6]DCIT vs. Sanjeev Kumar Ranjan (Bangalore ITAT) (ITA No. 1655/Bang/2017)

while employed overseas would qualify for the beneficial provisions for determination of residential status and therefore can continue to enjoy NR status as long as total stay in India does not exceed 181 days.

— Even though the services are rendered outside India, in case the outbound expatriate employee continues to receive salaries in India under a short-term assignment, such salary would be taxable in India. However, if the outbound expatriate employee satisfies the conditions as provided in the sub article 1 of Article 15/16 of the DTAA, the same may not be taxed in India. Accordingly, the Indian employer may not deduct tax in respect of such salary payments upon a satisfaction that the resulting tax liability has been discharged in the host country. However, conservatively, exemption at withholding stage may only be allowed on receipt of a valid Tax Residency Certificate from the overseas tax authorities.

— Outbound expatriate employees contributing to foreign social security scheme pursuant to their posting to a foreign country can still contribute to Provident Fund in India if they continue to be employees of Indian employer during the period of their assignment and continues to receive salary in India. However, it is worthwhile to note that as per an EPFO circular of January 2016, contribution to PF is required only if wages are paid or payable by the Indian establishment.

2.5 Issues

2.5.1 Taxation of employees working abroad on ship or aircraft

In terms of Articles 8/9 of the applicable DTAAs dealing with air transport and shipping business, the remuneration in respect of an employment exercised aboard on a ship or aircraft in international traffic may be taxed in the country of which the person deriving the profits from the operation of the ship or aircraft is a resident.

2.5.2 Taxation of director's fees

Director's fee is the remuneration received by an individual, in the capacity of a member of a Board of Directors of a company. Services are deemed to have been rendered in the country where the company is a resident. Remuneration would cover all payments in cash and kind. It is pertinent to mention here that the OECD definition restricts itself to only directorial remuneration in the capacity as a member of the board of directors of a company and excludes all payments made to a director in any other capacity.

2.5.3 Taxation of accidental expatriates

An accidental expatriate is an employee who has travelled overseas enough so as to trigger taxation in that country. Besides taxation, accidental expatriates may trigger immigration and permanent establishment risks for the employer in that country.

For instance, a business visitor to India whose business visits aggregate to a physical presence of more than 182 days in the given financial year would be an accidental expatriate. The employer would be required to comply with the withholding tax requirements in respect of such expatriate and might be exposed to interests and penalties for delay in withholding and deposit of tax.

2.5.4 Tax Residency Certificate

In order to claim relief under DTAA, Section 90 of the ITA has been amended to provide for an additional requirement. Sections 90(4) and 90A(4) of the ITA provide a condition for submission of tax residency certificate to avail the benefits under a DTAA. The certificate would have to be obtained from the Revenue Authorities of the host country. Please note that where the entire prescribed information is not captured in the TRC, Form 10F would be required separately.

Further, a standard format has also been issued for making an application for requesting tax residency certificate from the Indian tax office if the individual qualifies as a resident of India, where the certificate is required by the authorities of another country.

2.5.5 Reporting requirements for payments made to NRs

Any payment made to a NR which is "chargeable to tax in India" is required to be reported electronically in Form 15CA and or Form 15CB. Thus, salary payments made to NR expatriates are required to be reported by the employer in case they are chargeable to tax in India.

2.5.6 Obligation to pay Gratuity

As per Section 4 of the Payment of Gratuity Act, 1972, gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years;

— on his superannuation, or

— on his retirement or resignation, or

— on his death or disablement due to accident or disease.

An expatriate who have already rendered five years of service reserve the right to claim gratuity from the Indian employer at the time of termination.

2.6 Other heads of income and deductions

As discussed earlier, apart from salary, income arising to a taxpayer in India can be classified into four heads. Each of these heads of income and the distributive rights for taxation of the same are discussed below:

2.6.1 Income from house property

An expatriate who is NR/RNOR in India, shall be taxable in India in respect of income from immovable property provided that either such income is received in India or the underlying property is situated in India. However, in case the expatriate is ROR in India, his/her global income would be liable to tax in India and accordingly, income arising from immovable property situated outside India would also be taxable in India.

In this regard, Article 6 of India's DTAAs, dealing with income from immovable property generally provide that such income 'may be taxed in the country where the property is situated' (i.e., the source country).

Hence in case of double taxation, country of residence can provide the credit of taxes paid in the country of source i.e. in the country where the property is situated.

2.6.2 Income from Business or Profession

In terms of India's DTAAs, business income derived by a NR shall be taxable in India provided such business is carried on in India through a Permanent Establishment (PE) situated in India. A PE primarily means an industrial or commercial establishment that is equipped with sufficient resources to operate as an independent business unit ('fixed base PE') and includes within its ambit a PE arising on account rendition of services by a NR ('service PE') as well as an agency Permanent Establishment ('agency PE'). It would basically mean a 'virtual projection' of the resident of a foreign country into India.

Thus, in case a person resident abroad is carrying on a business in India through a PE, income attributable to such PE shall be taxable in India.

2.6.3 Income from profession

In terms of India's DTAAs, income derived by a NR in India in respect of professional services shall be taxable in India provided the NR professional has a fixed base available to him/her in India or his/her stay in India is equal to around 90 days or more (threshold varies depending on the DTAA) or more in the relevant financial year.

For the purpose of this Article 'professional services' includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

2.6.4 Capital gains

Under the ITA, NR expatriates are subject to tax only on gains from the transfer of capital assets situated in India or on the sales proceeds received directly in India on account of transfer of foreign assets made outside India.

Generally, the Article dealing with capital gains in India's DTAAs also provide for the source-based taxation in case of immovable properties, movable properties forming part of the business assets of a permanent establishment as well as for shares. For all other assets, usually taxation would be in the country of residence of the taxpayer.

2.6.5 Income from other sources

Any residual income not covered in the earlier heads of income is taxable as "Income from other sources". It includes interest, dividend (excluding exempt dividend under Section 10 of the ITA, limited to ₹ 10,00,000), royalties, fees for technical services, etc. Generally, in terms of tax treaties, NR expatriates would be taxable in India in respect of such income provided the same is arising in India. The tax rates for the same are specified in the respective Article of the DTAAs.

Under the domestic tax law, the following interest incomes are exempt from tax:

— Interest on Non-resident (external) account in the hands of individual who is a person resident outside India under the Foreign Exchange Management Act or is permitted by RBI to maintain such account

— Interest on **Foreign Currency (Non-Resident) Account** (FCNR) deposits exempt in the hands of individual who are NR or RNOR and where acceptance of deposit by bank is permitted by RBI.

— A deduction of up to ₹ 10,000 (under Section 80TTA of ITA) may be claimed by individuals with respect to interest on deposits in a savings account with a banking company, specified co-operative society or post office in India. The deduction limit in case of senior citizens (resident individual of the age of 60 years or more at any time during the year) is ₹ 50,000 (under Section 80TTB of ITA).

The total of income under each of the heads discussed above would constitute the gross total income from which the expatriate can claim certain deductions on account of investments in eligible securities, payment of life insurance premium, contribution to provident fund, contribution to certain pension funds, payment towards children tuition fee and other specified payments up to a maximum amount of ₹ 150,000 per annum under Section 80C of the ITA.

2.7 Procedural Compliances

Expatriates coming to India have to comply with the following procedural formalities in India:

2.7.1 Entry procedures – inbound employees

(a) Before arrival

Foreign nationals arriving in India must hold valid visa or travel authorization. The Indian Embassy/High Commission located in various countries issues the correct type of visa to foreign nationals based on the proposed activities of foreign nationals in India. Foreign nationals can secure below illustrative list of visas to enter India depending upon their purpose to visit India:

S. No.	Nature of visa	Purpose of Visit to India
(i)	Employment visa	Individuals intending to take up employment and for executing projects in power and steel sectors
(ii)	Business visa	Visiting India on business visits. Electronic Travel Authorisation ('e-Visa') facility is also available. For professional and amateur sports people, judges and adjudicators who want to come to India to participate in their field of sport.
(iii)	Entry visa	Other purposes not covered elsewhere

S. No.	Nature of visa	Purpose of Visit to India
		(including accompanying dependent family members of foreign nationals)
(iv)	Tourist visa	Visiting India on tourism. e-Visa facility is also available.
(v)	Student visa	1) Pursuing studies/academic courses 2)For Internship purposes with Indian companies, NGOs and educational institutes including French VIE Programme, AIESEC, etc. 3) Pursuing research in any field
(vi)	Transit visa	Travellers passing through the country
(vii)	Missionary visa	Missionaries of registered charitable trusts
(viii)	Journalist visa	Media representatives
(ix)	Conference visa	Event organizers and visitors. E-visa facility is available.
(x)	Medical visa / Medical attendant visa	For seeking medical treatment in India at recognized and specialized hospitals and treatment centres. e-Visa facility is also available for both visas

The Government of India has issued guidelines on the grant of visa to foreign nationals visiting India. The guidelines specify the conditions for issuing the visa to foreign nationals upon submission of prescribed documents and payment of prescribed fee. The process, documentation, fee etc depends upon place of visa application. It is noteworthy that the place of visa application depends upon country of origin/country of domicile of foreign nationals.

A brief of various categories of Visa have been mentioned hereunder:

(i) Employment Visa

Employment visa are generally granted to a highly skilled and/or a qualified foreign national who desire to come to India for employment purposes. Employment visas are not granted for jobs for which large numbers of qualified Indians are available and for those jobs which are routine/ordinary/secretarial in nature.

Employment visa may be granted to foreign nationals only if the salary is in excess of ₹ 16.25 lakhs per annum (at present). However, the said limit is not applicable for a few specified cases like ethnic cooks, language (other than English) teachers/translators and staff working for a high commission/ consulate in India etc.

The employment visa can also be issued to foreign nationals engaged in execution of project in power sector and steel sector. The number of project visas that may be granted per power and steel project is subject to a ceiling.

(ii) Business Visa

Business visas may be granted to foreign nationals who desire to visit India to establish industrial/business venture or to explore possibilities to set up an industrial/business venture in India.

The guidelines issued by the Ministry of Home Affairs ('MHA'), apex immigration body in India, provide various illustrative scenarios under which business visas may be granted to foreign nationals, e.g. those who intend to visit India for participation in trade fairs, meetings, purchase/ sale of goods, etc.

Multiple entry business visas may be granted for a maximum period of five/ten years subject to bilateral agreement between the two governments.

Recently, Government of India introduced e-business visa facility as well wherein foreign nationals intend from specified countries may obtain business visas electronically to visit India.

(iii) Entry (X) Visa

Entry (X) visas are granted to the spouse and dependents of foreign nationals who desire to visit India or are already in India on any other type of visas, i.e. business, employment, etc. An entry (X) visa may also be granted to foreign nationals of Indian origin and spouse/dependents of such foreign nationals who desire to visit India for meeting relatives, holidays, sightseeing, etc.

The Indian immigration laws do not permit grant of entry (X) visa to unmarried partners.

The validity of the entry (X) visa is co-terminus with the visa of the principal visa holder or a shorter duration but limited to five years from the date of initial issue.

Foreign nationals holding entry (X) visas cannot accept any employment in India or undertake/engage in any business/economic activity in India.

(iv) Tourist Visa

Tourist visas are generally granted to foreign nationals who are desirous of visiting India for recreational purposes, meet family members or friends etc. and do not have any permanent residence or occupation in India. In order to boost tourism in India, government of India has introduced e-tourist visa facility for 166 countries and visa-on-arrival facility for Japanese nationals and Korean nationals.

Tourist visa is non-extendable and non-convertible in India.

(b) After arrival

(i) Foreigners' Registration

Foreign nationals visiting India are generally required to get themselves registered with concerned Foreigner's Registration Office ('FRRO/FRO') where the validity of visa exceeds 180 days or within the stipulated time period as endorsed on visa if any. Generally foreign nationals are required to obtain registration within 14 days of arrival in India. Penalty applicable if there is a delay in registration.

The process, documentation, fee etc. depends on many aspects like nationality, place of residence in India, etc. The registration process is generally the same, but some requirements may be different at various jurisdictional FRRO/FRO.

(ii) Provisions related to Visa extension

Generally, long term visas such as Employment, Business, Entry(X), etc., are extendable on year to year basis. The process, documentation, fee etc. depends on many aspects like nationality, place of residence in India, etc. The registration and extension process is generally the same, but some requirements may be different at various jurisdictional FRRO/FRO.

(iii) Surrender of Residential Permit

While finally exiting India post completion of Indian assignment, the foreign nationals are required to surrender residential permit to the concerned FRRO/FRO or the immigration officer at the Immigration checkpoint.

(iv) Overseas Citizenship of India ('OCI') / Person of India Origin ('PIO') Card Schemes

Both OCI and PIO cards are multi-purpose, multi-entry life-long visa facility which allow specified foreign nationals to enter into India without need of any separate activity-based visas specified by MHA. Typically, these cards are issued to foreign nationals of Indian origin or their spouse/dependents.

Foreigners holding OCI or PIO cards are exempted from FRRO registration. Effective 9 January 2015, both OCI card and PIO card schemes have been merged and under the new scheme no further PIO cards shall be issued. Existing PIO cardholders shall enjoy the same benefits as that of OCI cardholders.

(v) Other Matters

Foreigners need to inform the FRO in case change in accommodation and obtain certificate of change of address.

Generally, employment/business visa cannot be converted into any other kind of visa during a foreign national's stay in India. However, such visas may be converted into "X" visa (dependent visa)/ "Medical" visa, subject to the prescribed conditions and the prior approval of MHA in India.

Conversion of the Entry (X) visa of the spouse of the employee on an intra-company transfer to employment visa may be permitted in India with the prior approval of the MHA and subject to fulfillment of prescribed conditions.

Change of employer is generally not permitted on an employment visa. However, MHA has clarified that the change of employer by foreign nationals in India may be permitted in cases where the transfer is between a parent company and its subsidiary or vice versa, and between subsidiaries of a parent company.

Considering the numerous security concerns, the Government of India has declared a few areas ('Specified Areas') to be known as 'Protected / Restricted Areas' governed by the rules framed under Foreigners (Protected Area) Order, 1958 and Foreigners (Restricted Area) Order, 1963. As per the orders, foreign nationals are not allowed to visit specified areas without prior approval from the immigration authorities.

2.8 Permanent Account Number (PAN)

PAN is akin to an Income-tax registration number and any person earning taxable income in India has to obtain the PAN. The application for a foreign citizen is to be made in Form 49AA to the National Securities Depository Ltd. Facilitation centers together with a copy of prescribed documents.

The documents accepted as proof of identity, proof of residence and proof of date of birth is stipulated under Rule 114 of the Rules.

PAN application can also be made online on the website of National Securities Depository Ltd.

The PAN is to be quoted on all tax returns, correspondence with the tax authorities and on all documents relating to prescribed categories of transactions.

2.9 Advance Tax

Where the total tax liability after TDS (subject to actual deduction by the deductor) exceeds ₹ 10,000, advance tax is payable within the same FY on the principle of pay-as-you-earn. The due dates for payment of advance tax and the amount payable are:

Due Date	Amount Payable
On or before 15th June of the year	15% of estimated tax
On or before 15th September of the year	45% of estimated tax less earlier installment
On or before 15th December of the year	75% of the estimated tax less earlier installment
On or before 15th March of the year	Whole of the estimated tax less earlier installments

Failure to pay advance tax invites interest liability under Sections 234B and 234C of ITA. Interest is payable at 1% per month for three months in case of deferral of tax payment which is due on 15th June (except if 12% of estimated tax is paid), 15th September (except if 36% of estimated tax is paid)and 15th December and for one month in case of deferral of payment of the last instalment i.e. tax which is due on 15th March. No interest is charged in respect of advance tax on dividend referred to in Section 115BBDA, on capital gains and windfall gains if the tax on such income is paid in subsequent installments due when the gain arises before 15th March. If such gain arises after 15th March, no interest will be charged if the tax is paid on or before 31st March.

If the total amount of advance tax is less than 90% of the taxpayer's actual liability after Tax Deducted at Source (including foreign tax credit), interest is payable at the rate of 1% per month from 1st April following the year in which the tax is due until full payment of the tax occurs.

The amount paid after 15th March but on or before 31st March is also treated as advance tax paid. Thus, if estimated income is likely to exceed the amount estimated on or before 15 March, then additional advance tax can be paid and penal interest can be saved.

Advance tax provisions are not applicable to resident individual who is of the age of 60 years or more and does not have any income from 'Profits and gains of business or profession'.

2.10 Self-assessment Tax

Any remaining tax due after claiming credit for Tax Deducted at Source/Tax Collected at Source, advance tax payments and foreign tax credits is to be paid by way of Self-assessment tax. Self-assessment tax is a tax paid after the end of the tax year by an individual and generally at the time of filing the tax return.

2.11 Tax return

Every expatriate earning taxable income in India is required to furnish a return of income, in the prescribed form, giving details of his/her income under different heads, tax liability thereon, deductions claimed, etc. The due date for filing such tax return is 31st July of the assessment year i.e. the following financial year. For instance, the tax return for the FY ended 31st March 2019 is required to be filed by 31st July 2019.

return of income (filed within the due date or a belated return) can be revised at any time before the expiry of one year from the end of the relevant FY (i.e., till 31st March, 2020 for financial year 2018-19) or before completion of the assessment by the tax department, whichever is earlier.

Fee chargeable for default in furnishing return of income under Section 234F of the ITA is as follows:

- Late fees shall be ₹ 5,000 if return of income is filed after the specified due date but on or before 31st December of the FY subsequent to the relevant FY (i.e. 31st December 2019 for FY 2018-19).
- Late fee shall be ₹ 10,000 if return of income is filed after 31st December

of the FY subsequent to the relevant FY.

However, if the total income of the taxpayer is less than ₹ 500,000 then such fee shall not exceed ₹ 1,000.

RORs in India who have assets (including financial interest in any entity) located outside India or a signing authority on any account located outside India or is a beneficiary of an asset outside India are mandatorily required to file a tax return electronically in India (irrespective of their level of income). This provision will apply even to individuals accompanying expatriates to India qualifying as ROR as it is unrelated to whether the individual has taxable income in India.

It is to be noted that a tax return shall need to be filed where an individual's total income before giving effect to tax exemptions under section 10(38), deductions under Chapter VI-A, certain capital gains exemptions eg under section 54F, exceeds the maximum amount not chargeable to income-tax.

Additionally, The Finance (No. 2) Act, 2019 requires the following individuals to mandatorily file their tax return (w.e.f. from FY 2019-20) who during the FY:

(a) Deposit an amount / aggregate of amounts exceeding ` 1 crore in one or more current accounts maintained with banking company or a co-operative bank; or

(b) Incur expenditure of an amount / aggregate of amounts exceeding ` 2 lakhs for himself or any other person for foreign travel; or

(c) Incur expenditure of an amount / aggregate of amounts exceeding ` 1 lakh towards consumption of electricity.

The income tax return forms also require information relating to such assets including foreign assets and foreign income(along with other disclosures) to be set out in the forms. It may be noted that non-disclosure of such foreign assets and foreign income in the tax return triggers onerous consequences under the Black Money law.

As per Notification dated 11 May 2017 issued by Government of India, in case of a foreign national or individual qualifying as NR who has not be allotted Aadhar, quoting of Aadhar in application for PAN and in the Income-tax return is not mandatory.

2.12 Tax clearance certificates

The ITA provides for procedures to be followed by any person leaving India to obtain a no-objection certificate and the same are summarized below:

2.12.1 Foreign Nationals

In terms of Section 230(1) of the ITA a foreign national who has come to India in connection with business, profession or employment and has derived income from any source in India has to furnish an undertaking in the prescribed Form 30A to the tax authorities. The said form is basically an undertaking to be given by the employer of the expatriate to the effect that any future tax liability arising in case of the expatriate would be paid by the employer. The purpose of the undertaking is that the Indian Government should not be at loss in terms of collection of taxes in case any tax liability arises in India after repatriation of the expatriate. The tax authorities upon receipt of the undertaking and verification of the documents filed shall issue a no objection certificate in Form No. 30B to the expatriate. Such certificate issued by the tax authorities is valid for the period specified in the certificate from the date of issue. Due to any reason, if the expatriate has to defer his departure date beyond the period stated in the certificate, he is required to obtain a fresh certificate from the tax authorities.

The above compliance procedure is not applicable to a foreign national who visits India as a foreign tourist or for any other purpose not connected with business, profession or employment.

2.12.2 Individuals domiciled in India – outbound employees

In case of a person domiciled in India, leaving India the relevant information needs to be furnished to the tax authorities in Form No. 30C which is a self-declaration by the outbound expatriate that includes his/her details such as PAN, passport details, purpose of visit outside India and estimated period of stay outside India, etc.

Thus, it may be seen that an inbound expatriate shall file Form No. 30A and obtain No Objection Certificate in Form 30B from the tax authorities in India while an outbound expatriate shall furnish his/her information in Form No. 30C to the tax authorities.

Chapter 3
Social Security in India

3.1 Provident Fund Obligation in India

Social Security in India is predominantly governed by the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (the EPF Act) which is operated through the following schemes:

- Employees Provident Funds Scheme, 1952 (EPF Scheme)
- Employees' Pension Scheme, 1995 (Pension Scheme)
- Employees Deposit Linked Insurance Scheme, 1976 (EDLI scheme)

The EPF Act applies to:

- an establishment employing 20 or more persons engaged in a specified industries notified by the Central Government from time to time.
- any establishment employing even less than 20 persons that has opted to be covered voluntarily under the EPF Act.

3.2 Applicability of Indian Social Security Schemes to International Workers

In October 2008, the Government of India issued notifications extending the applicability of EPF Act to a new category of workers called 'International Workers' requiring them to mandatorily contribute into its schemes with effect from 1 November 2008.

'International Worker' has been defined to mean:

- Indian employee having worked or going to work in a foreign country with which India has a Social Security Agreement (SSA);and being eligible to avail the benefits under the social security programme of that country, by virtue of eligibility gained or going to gain, under the said SSA
- An employee other than an Indian employee, holding other than an Indian passport, working for an establishment in India to which the

EPF Act applies.

— However, a Nepalese national and a Bhutanese national shall be deemed to be an Indian worker and not an International Worker under the EPF Act

The Employees' Provident Fund Organisation (EPFO) vide its Circular[7] dated 23rd June 2017 has clarified that Indian expatriates who qualify as International Worker while on employment abroad would become domestic employees once they come back to India.

3.2.1 Contribution for International Workers

Both the employer and employee are required to contribute 12% of "salary" under the EPF regulations. The employer also has to make 0.5% contribution (capped at a monthly salary of ₹ 15,000) towards EDLI scheme which is an insurance scheme under the EPF Act.

For International Workers, the wage ceiling of ₹ 15,000 is not applicable and contributions are required to be made on full monthly pay. An analysis of salary components is required to be determined if it constitutes a part of 'monthly pay' having regard to the test of universality and contingency as laid down by the past judicial rulings.

The 24% contribution in case of International workers will be split as follows:

— For an International Worker who has joined before 1st September 2014 or who is an existing member of the Provident Fund: 12% of 'Monthly Pay' as employee's contribution to EPF Scheme

— 8.33% of 'Monthly Pay' as employer's contribution to Pension Scheme

— 3.67% of 'Monthly Pay' as employer's contribution to EPF Scheme.

For an International Worker who has joined and become the member of the Fund for the first time on or after 1st September 2014 and having monthly pay which exceeds the statutory limit of ₹ 15000:

— 12% of 'Monthly Pay' as employee's contribution to EPF Scheme

— 12% of 'Monthly Pay' as employer's contribution to EPF Scheme

Apart from the above-mentioned contributions, the employer is also required to contribute towards administrative charges of accounts under EPF and

[7] HO No. IWU/7/(25)/2017/Clarification reg. Para83/5041 dated 23/06/2017

EDLI Scheme.

The SC in its recent decision[8] has clarified the term 'basic wages' for EPF contributions to include allowances paid by employer to employees. It held that emoluments provided "universally, necessarily and ordinarily" to all employees should be considered as wages for the EPF purposes. Further, the Supreme Court has held that allowances which are variable in nature, linked to any incentive for production resulting in greater output by an employee or paid especially to those who avail opportunity are excluded from 'basic wages' for calculation of Provident Fund contributions.

3.2.2 Withdrawal of social security contribution

(a) Provident Fund accumulations

International Workers will be entitled to withdraw accumulated balance in the Provident Fund Scheme in the following circumstances:

1. International Workers covered under an SSA

— On ceasing to be an employee in an establishment covered under the EPF Act; or

— On retirement from service in the company at any time after 58 years of age; or

— Faced with certain contingencies mentioned in the EPF Act.

2. International Workers not covered under an SSA

In case a person is not covered under SSA, he may withdraw the EPF balance on retirement from service in the company at any time after 58 years of age or is faced with certain contingencies mentioned in the EPF Act.

(b) Pension accumulations

In relation to pension withdrawal, the lump sum refund will be available only to those employees who are covered under an SSA in force and who have not completed the eligible service of 10 years even after including the totalization of service under the respective SSAs. Employees not covered under an SSA will not get the lump sum refund.

[8] Civil appeal nos. 6221 of 2011, 3965-3966/3967-3968/3969-3970 of 2013, Transfer Case (C) No(s).19 OF 2019 (arising out of T.P.(C)No. 1273 OF 2013)

In case of employees (both from SSA as well as non-SSA countries) having 10 years or more contributory service, they would be qualified to receive a monthly pension.

Further, PF accumulations can be withdrawn by International Workers by way of credit to their Indian or overseas bank accounts. Alternatively, withdrawal is also possible by way of credit to the Indian employer's bank account.

3.3 Social Security Agreements ('SSA')

India has currently signed SSAs with 20 countries and out of which, agreements with Belgium, Germany, Switzerland, Denmark, Luxembourg, France, Republic of Korea, Netherlands, Hungary, Finland, Sweden, Czech Republic, Norway, Austria, Canada, Australia, Japan and Portugal have entered into force.

3.3.1 Advantages of Signing SSA

The various advantages of signing an SSA are:

(a) Exemption from Contribution-COC

A Certificate of Coverage (COC) is a confirmation from home country social security authorities that the individual is covered under the respective home country social security and continues to be covered during the period of assignment. Foreign passport holders can obtain COC in home country and claim exemption in India. Similarly, Indian passport holders can obtain COC in India and claim exemption in the host country with which India has a SSA. In many SSAs, one of the eligibility conditions for obtaining a COC is the requirement for the employee to work in the host country on behalf of the home country entity. This could lead to a potential Permanent Establishment exposure.

(b) Equality of treatment

An SSA ensures that persons who ordinarily reside in either country receive equal treatment with the nationals of the other country in the application of the social security legislation.

(c) Export of benefits

SSAs contain provision for payment of benefits to the International Workers irrespective of the location (India, home country or a third country).

(d) Totalization of service periods

Totalization of periods means aggregation of duration of employment in home country and host country to determine eligibility to social security benefit. Aggregation of periods is permissible only for determining eligibility and not for the purpose of determining actual level of benefit payable.

The process of application for COC has been made online by the EPFO[9]. An Indian worker having Indian passport going to work in a country with which India has an effective SSA needs to file an online application for COC. In view of the online application, manual COC application forms have been discontinued.

[9] File No.IWU/7(31)/Application for COC/1708 dated 31st July 2017

Chapter 4

Exchange Control

4.1 Residential status

The Foreign Exchange Management Act, 1999 (FEMA) along with its various regulations defines a Non- Resident Indian ('NRI') / Person Resident outside India ('PROI') as a person who is not resident in India.

In terms of the aforesaid definitions an individual shall be a PROI where the person:

— has gone out of India or who stays outside India either for employment outside India, or for carrying business outside India, or for any other purpose as would indicate his/ her intention to stay outside India for an uncertain period; and

— has come to or stays in India for purposes other than for taking up employment in India, or for carrying on business in India, or for any other purpose as would indicate his/her intention to stay in India for an uncertain period.

On the basis of the nationality and residential status of the individual under the foreign exchange laws, an individual may be categorized as a (NRI) or a PROI/PRI or PIO(Person of Indian Origin) or a Foreign National.

NRI has not been defined in FEMA. However, the term NRI has been used and defined in many regulations issued by Reserve Bank of India (RBI). Basis the various regulations issued by RBI, an NRI is defined as a person resident outside India who is a citizen of India.

A PIO has also not been defined in FEMA. However, the term PIO has been used and defined in various regulation issued by RBI. Basis the various regulations issued by RBI, PIO means a citizen of any country other than Bangladesh or Pakistan or any other specified country satisfying the following conditions :

(a) who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 or

(b) who belonged to a territory that became part of India after independence or

(c) who is a child or grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b) or

(d) who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c).

A PIO will include an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955. Such an OCI Card holder should also be a PROI.

4.2 Bank accounts

Banks offer two types of accounts to PROI / NRIs, based on whether funds available in the account are repatriable i.e. whether such funds can be transferred or repatriated abroad.

4.2.1 Repatriable accounts

(a) Non-Resident (External) Rupee Account Scheme ('NRE' Account)

— NRE accounts are rupee denominated accounts.

— Can be opened by NRIs and PIOs as savings, current, recurring or fixed deposit account.

— Both principal and interest can be repatriated / transferred out of India.

— Generally, term deposits can be made for 1 to 3 years.

— The interest rates on Non-Resident (External) Rupee (NRE) Deposits are deregulated. Accordingly, banks are free to determine their interest rates on both term deposits of maturity of one year and above under NRE Deposit accounts.

(b) Foreign Currency (Non-Resident) Account (Banks) Scheme ('FCNR (B)' Account)

— Deposits in FCNR (B) accounts can be made in freely convertible foreign currency.

— Can be opened by NRIs and PIOs as term deposit account only.

— Term deposits can be made for 1 to 5 years.

— Similar to NRE accounts, in FCNR (B) Accounts both principal and interest are repatriable.

Interest rates are fixed on the basis of directions from the RBI regulations

(c) Non-Resident Ordinary Account Scheme ('NRO' Account)

— NRO accounts are rupee denominated accounts.

— Can be opened by a PROI (individually or jointly with NRIs/ PIOs) or the purpose of putting through bona fide transactions denominated in Indian Rupees.

— Can be opened as savings, current, recurring or fixed deposit account.

— In NRO Account, only current incomes are repatriable. Savings NRO accounts are normally operated to credit rupee income from shares, interest, rent from property in India, etc.

— The banks are allowed to determine their own interest rates on both savings and term deposit accounts

— Banks can allow remittance up to USD 1 million per financial year for bona fide purposes from balances in the NRO accounts once taxes are paid out without any prior approval from Reserve Bank of India.

— This limit includes the sale proceeds of immovable properties held by NRIs and PIOs.

(d) Resident Foreign Currency Account ('RFC' Account)

— Can be opened by a PRII (Person Resident in India) as savings, current or term deposit account

— NRIs and PIOs returning to India can maintain an RFC account with an authorized bank in India to transfer funds from their NRE/ FCNR (B) accounts.

— Proceeds of assets held outside India at the time of their return to India can be credited to the RFC account.

— These funds are free from all restrictions as to their utilization or in investment in any form outside India.

4.2.2 Non-Repatriable accounts

Non-repatriable funds are those which cannot be taken out of India.

These have to be maintained in a separate bank account i.e. a NRO account.. Money once transferred from an NRE account to an NRO account cannot be transferred back to an NRE account.

Generally, when a resident becomes an NRI, his existing savings account is designated as an NRO account. The NRO accounts could be maintained in the nature of current, saving, recurring or fixed deposits. NRIs can also open

NRO accounts for depositing their funds from local transactions. The interest earned from NRO accounts is fully taxable in India. NRO accounts can be opened in the name of NRIs who have left India to take up employment or business temporarily or permanently in a foreign country.

Funds from NRO accounts are non repatriable / cannot be transferred to NRE accounts without the prior approval of RBI.

However, NRIs, PIOs, foreign nationals, retired employees or non-resident widows of Indian citizens can remit, through the Authorized Dealer, up to USD one million per calendar year from the NRO account or from income from sale of assets in India.

It may be noted that foreign nationals are permitted to re-designate their resident account maintained in India as NRO account on leaving the country after their employment in order to enable them to receive their pending bonafide dues such as income tax refunds, Provident Fund withdrawals, etc. subject to certain conditions.

4.3 Remittance of salary

A citizen of a foreign state resident in India, being an employee of a foreign entity and on deputation to India with the office/ branch/ subsidiary / joint venture/ group company in India of such foreign entity or being an employee of an Indian entity, may open, hold and maintain a foreign currency account with a bank outside India and receive/remit the whole salary payable to him/her for the services rendered, by credit to such account, provided that income tax chargeable under the ITA is paid on the entire salary as accrued in India.

Similarly a citizen of India, employed by a foreign entity outside India and on deputation to India, may open, hold and maintain a foreign currency account with a bank outside India and receive the whole salary payable to him/her for the services rendered in India, by credit to such account, provided that income tax chargeable under the ITA is paid on the entire salary as accrued in India.

A foreign national not on deputation but in direct employment with an Indian company shall need to receive his salary in India and then remit the same (after payment of appropriate taxes) overseas.

Also, under the Liberalised Remittance Scheme, a FEMA resident individual (including a foreign national) is permitted to freely remit upto USD 250,000 per annum for specified purposes such as maintenance of close relatives, gifts etc.

4.4 Permissible investments

The permissible investments for different categories of individuals under the foreign exchange laws in India are tabulated as under:

Status of individual	Investments	General / Special permission
NRI	Shares, convertible debentures*, real estate (other than an agricultural land, plantation property or farm house etc.)	General Permission granted
PIO/OCI	Shares, convertible debentures*, real estate (other than an agricultural land, plantation property or farm house etc.)	General Permission granted
Foreign national	Shares, convertible debentures*, real estate (including an agricultural land, plantation property or farm house)	General Permission granted Not permitted**

* The foreign exchange regulations provide that an Indian entity shall issue any security (eg. shares, convertible debentures etc.,) to a non- resident subject to conditions prescribed under the FDI policy and prior permission of Reserve Bank of India (RBI), if required. A foreign national, being a person resident outside India, may acquire shares listed on an Indian stock exchange only through a registered foreign institutional investor route under the portfolio investment scheme. Similarly, an NRI/OCI, being a person resident outside India, may acquire shares listed on an Indian stock exchange under the portfolio investment scheme. It may be noted here that once the individual gains the status of being a resident as per the exchange control regulations, the individual may acquire securities through a recognized stock exchange in India.

** A foreign national is generally not permitted to acquire any property or invest in real estate in India when he/she qualifies as PROI. However, he may acquire an immovable property in India by obtaining a prior permission from the RBI. The RBI may grant permission to the foreign national after satisfying certain conditions, on a case to case basis.

Hence, it may be observed that an NRI/OCI may be privileged to make investments into most forms of investments, whereas certain restrictions are applicable in case of investments made by foreign nationals.

Gist of Important Judicial decisions

1. ACIT vs. Robert Arthur Keltz (represented by United Technologies International Operation) (3452/DEL/2011) (Delhi ITAT)

The Delhi Tribunal held that as the employee has not rendered service in India for the whole grant period of stock option, only such proportion of the stock options as is relatable to the service rendered in India during the grant period is taxable in India.

2. CIT vs. Jaydev H. Raja (Mumbai High Court) (Income tax appeal No. 87 OF 2000)

The Mumbai High Court in the case of a resident but not ordinary resident held that only actual reimbursement of tax by his overseas employer can be treated as his perquisite and taxed accordingly. Any tax which is borne by the assessee cannot be treated as his income. The High Court reaffirms the Delhi High Court ruling on hypothetical taxes not forming part of the taxable salary of an employee.

3. DIT vs. Sedco Forex International Drilling Inc (Uttarakhand High Court). (TS-603-HC-2012)

The employer entered into an agreement with its employees pursuant to which the employer agreed to bear the income tax payable by the employees on their salary. The question was whether such tax payment was "income" in the nature of a perquisite, not provided for by way of monetary payment, within the meaning of clause (2) of Section 17 of the ITA and hence eligible for exemption under Section 10(10CC) of the ITA. In this case High Court held that the tax on the salary paid by the employer was a "perquisite" under Section 17(2)(iv) because it was paid in respect of the employees' obligation and it was not by way of monetary payment to the employees concerned but for or on their account to the Income-tax department. Consequently, it is a "non-monetary" payment of a perquisite to the employee which is eligible for exemption under Section 10(10CC).

4. Yoshio Kubo & Ors. vs Commissioner of Income Tax (Delhi High Court) (ITA No 441/2003/Del)

This common judgment disposes a bunch of appeals in which the High Court ruled on a number of issues related to expatriate employees. The ruling includes:

— Amounts paid by the employer, directly to the Indian income tax authorities, in discharge of an employee's income tax liability do not fall into the category of monetary benefits. Hence, the same is eligible for exemption under Section 10(10CC) of the ITA.

— Employer contributions to overseas social security, pension and medical insurance plans are not taxable if such contribution does not result in any direct present benefit to the employee but assures him/her of a future benefit subject to certain contingencies.

— Tax paid the by employer is excluded from the definition of salary for the purpose of valuing accommodation benefits provided by the employer.

— A deduction on account of hypothetical taxes is allowed from the salary income of employees covered under the employer's tax equalization policy.

— A refund of excess tax ultimately due to the employer is not treated as a taxable benefit for the employee since the employee is obliged to repay the refund back to the employer and does not derive any benefit from it.

— Fees paid by an employer to a tax consultant for tax compliance for expatriates are not considered to be a taxable benefit.

5. Eli Lilly & Company (India) Pvt. Ltd. (SC) (178 Taxmann 505)

The withholding tax provisions relating to salary payments are distinct from with the withholding tax provisions on other income. If the salary paid by the foreign entity abroad was for rendition of services in India and if no work was found to have been performed for the foreign entity, such payments would be subject to withholding tax provisions in India. The Indian entity was required to comply with the withholding tax provisions even in case of salary paid overseas by the foreign entity.

Interest will be charged only in cases where no taxes have been paid on foreign salary or where there is a gap between the date on which tax was deductible and the date of actual tax remittance of salary.

6. British Gas India Ltd. (AAR) (285 ITR 218)

The Authorities for Advance Ruling (AAR) was of the view that the requirement under Explanation (a) to Section 6(1) of the ITA was not leaving India for employment but it was leaving India for the purposes of employment outside India and a person who was leaving India for employment outside India need not be an unemployed person in order to be entitled to claim the beneficial provisions of the said Explanation. Accordingly, the salary paid by the Indian entity to such non- resident employee shall not be taxable in India, if the same has been offered for tax in the foreign country.

7. Gallotti Raoul vs. ACIT (Mumbai ITAT) (61 ITD 453)

Mandatory contribution by the employer towards the social security in the home country of the employee (foreign national), wherein no benefit/ right gets vested in the year of contribution should not be considered as a taxable perquisite in hands of such employee. Also see *ACIT vs. Harashima Naoki Tashio,* ITA No. 4634/Del)

8. Bholanath Pal vs. ITO (Bangalore ITAT) (ITA No. 10) 2011

Salary is taxable on accrual basis and not on receipt (unless received in advance or arrears). Normal place of employment relevant in determining place of accrual.

9. Eric Moroux, C/o Air France (Delhi ITAT) (ITA No. 1174) 2005

Where the expatriate has regional responsibilities during his India assignment (i.e. in India and outside India), whether the entire salary should be offered to tax in India or proportionate salary for the number of days for services rendered in India

10. ITO vs. Saptarshi Ghosh (Kolkata ITAT) (15 Taxmann 328)

Living allowance exempt from tax, if paid to employees of Indian company who are temporarily deployed in US to work for Indian Company and employee continued to receive salary and benefits in India. This judgment highlights the principle that duration of posting is a relevant consideration in deciding whether the person has been sent on tour or transfer, but it cannot be considered as a conclusive factor. Further, the factors such as transfer of payroll, nature of service provided, relation with the entity transferred to, visa travelled on, location of family, etc. also needs to be analysed in detail.

11. Raman Chopra vs. DCIT (ITAT Delhi) [(2016) 69 taxmann 452]

The individual qualified as a ROR in India during tax year 2010-11 and also a tax resident of USA during the period 1 April to 30 June 2010. As he qualified as a resident of both the countries, his residential status was determined under Article 4(2) of DTAA between India and USA. Based on the tie-breaker analysis, the individual qualified as a resident of USA as per the DTAA for the said period of 1 April to 30 June 2010. As a resident of USA, the individual/ assessee/ taxpayer was entitled to claim exemption from tax in India in respect of the salary earned in USA for such period as per Article 16(1) of DTAA, based on a split residency position.

12. DCIT vs. Sanjeev Kumar Ranjan (Bangalore ITAT) (ITA No. 1655/Bang/2017)

The assessee was a resident of India and US as per domestic tax laws of both countries. By applying the tie-breaker tests contained in Article 4 of India-US Tax Treaty, the assessee had permanent home in both India and US. However, the assessee's economic and social interests (centre of vital interest) were closer to US. The Tribunal held that he was a resident of US for the split period and therefore, the salary received in US for the period post assessee's Indian assignment was not taxable in India.

13. Deepak Kumar Todi vs. DDIT (Kolkata ITAT) (ITA No. 1918/Kol/2017)

Assessee rendered services in Nigeria and received salary in Indian NRE account. The employer/payer deducted tax at source in India on salary and bonus earned in Nigeria. The Kolkata Tribunal held that salary for services rendered outside India has to be considered as income accrued and received outside India and, therefore, not taxable in India.

14. Texas Instruments (India) Pvt. Ltd. (A.A.R. No 1299 of 2012)

Employees of Indian company (Applicant) were deputed to overseas group companies. Such employees rendered services in USA and qualified as NR in India.

Since service rendition is outside India, the salary income has accrued outside India. Only because salary is received in India, it cannot be treated as earned in India. AAR held that the Applicant was not liable to deduct TDS on salary paid in India to employees.

AAR further held that when employees become resident of India, the Applicant employer can consider foreign tax credit (FTC) for taxes paid in the USA on salary while determining TDS liability under Section 192(2) of the ITA. Employee has to provide details of salary income received from other employer during the year to the current employer. The employer i.e. the Applicant should carry out necessary verification before granting FTC at withholding stage.

AAR has pronounced similar ruling in case of Hewlett Packard India Software Operation Private Limited (A.A.R. No 1217 of 2011)

15. Smt. Sumana Bandyopadhyay & Anr. Vs. DDIT (Calcutta High Court) (GA 3745 of 2016 With ITAT 374 of 2016)

Calcutta HC held that salary is not taxable in India on 'receipt basis'. It further held that remuneration received by NR assessee working as marine engineer in foreign waters in his NRE account in India, is not taxable in India. Also relies on CBDT circular 13/2017 wherein it was clarified that salary accrued to NR seafarers for services rendered outside India on foreign ships shall not be included in the total income merely because such salary was credited to NRE account in India.

16. Utanka Roy vs. DIT (Calcutta High Court) W.P. No. 369 of 2014)

The petitioner (a marine engineer) rendered services outside India for a period of 286 days and received his remuneration from a foreign company for work performed outside India. The Calcutta HC held such income as accrued and received outside India and treated as non-taxable in India.

17. Dr. Rajiv I. Modi vs. DCIT (Ahmedabad ITAT) (IT Appeal No. 1285 (Ahd.) Of 2014)

The Ahmedabad Tribunal held that the taxpayer is entitled to credit of State taxes paid in the USA as per Section 91 of the ITA. Such credit was subject to the rider that credit for all taxes paid in USA cannot exceed the Indian income-tax liability in respect of the same income.

18. Bharat Financial Inclusion Ltd. vs. DCIT (Hyderabad ITAT) (ITA No. 237/Hyd/2017, dated 03. August 2018)

The Hyderabad Tribunal held that allotment of shares by the employer is relevant for taxation of ESOP perquisite and not on exercise of option by employee. Accordingly, tax withholding obligation arises on allotment of shares.

Important EPF Circulars

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File No: IWU/7/(25)/2017/ Clarification reg. Para 83/ 5041 Dated: 23 JUN 2017

To,

All Addl. C.P.F.Cs (Zones),
All R.P.F.Cs –In Charge.

Subject:-Definition of "International Worker" as given in Para 83 (2)(ja)(a) of EPF scheme 1952 and Para 43 A(1) (viii a) (a) of EPS 1995 –Regarding.

Sir,

It has come to notice that Indian International workers on coming back to India are continoed to be considered as International Worker and PF deductions are made accordingly by certain offices.

As per Para 83(2) (ja) " International Worker" means:-

a) An Indian employee having worked or going to work in a foreign country with which India has entered into social security agreement and being eligible to avail the benefits under a social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement.

A reading of the above definition clearly implies that an Indian employee will be treated as International Worker only when (i) he has worked or is going to work in a foreign country with which India has entered into Social Security Agreement and (ii) he is eligible to avail the benefits under a social security programme of the said foreign country.

Hence, Indian Expatriate Employees who, having been an International Worker as per the above definition and who comes back to work in India, will fall under the definition of employees as given in section 2(f) of the EPF & MP Act and not of International Worker under Para 83(2) (ja) (a) of the EPF Scheme, 1952.

The circular of even number dated 08.06.2017 stands withdrawn.

Yours faithfully,

(Dr. V.P. Joy)
Central PF Commissioner

Copy to:

1. ACC (HQ)(IS)/ACC (HQ) HR/ACC (HQ) Finance, FA&CAO/CVO for information.
2. All ACCs in Head Office for information.
3. Director, NATRSS for information.
4. All RPFCs in Head Office for information.
5. RPFC-II (NDC) with request to upload the same on EPFO website.
6. DD (OL) for providing Hindi Version.

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Bhavishya Nidhi Bhawan, 14, Bhikaiji Cama Place, New Delhi - 110 066

File No.IWU/7(31) /Application for COC 1708 **Dated:** 31 JUL 2017

To,

All Addl. C.P.F.Cs (Zones)
All R.P.F.Cs – In Charge (Regions)

Subject: Software for generation of Certificate of Coverage (URL: http://112.133.230.36:8484/IWU) –reg.

Sir,

1. Attention is drawn to circular of even number dated 30.06.12017 , vide which the revised composite application form of Certificate of Coverage (COC) in respect of Indian Worker (having Indian passport) going to work in a country with which India is having Social Security Agreement was issued.

2. The new application software , (having URL address: **http://112.133.230.36:8484/IWU**) has been launched on 20.07.2017 for online generation of Certificate of Coverage and it is available on the " International Workers Portal" accessible on the home page of EPFO's Website, http://www.epfindia.in.

3. In view of the launch of the online system for generation of CoC, the physical application for CoC will stand discontinued . All employees may be advised to utilize the online system only .

4. The EPFO field office User IDs and passwords to use the new application software shall remain the same as earlier user IDs and passwords issued by IS Division. Any issues regarding User ID/Password may please be addressed to Shri. Dinesh Dharni, Deputy Director (IS) at dd.caiu@epfindia.in and dk.dharni@epfindia.gov.in .

5. You are requested to give wide publicity amongst Employers' and Employees' Organisations to spread awareness about the new COC application software and ensure that it is used for online generation of Certificate of Coverage.

(This issues with approval of CPFC)

Yours faithfully,

(R.M.Verma)
Additional Central PF Commissioner-II (IWU)