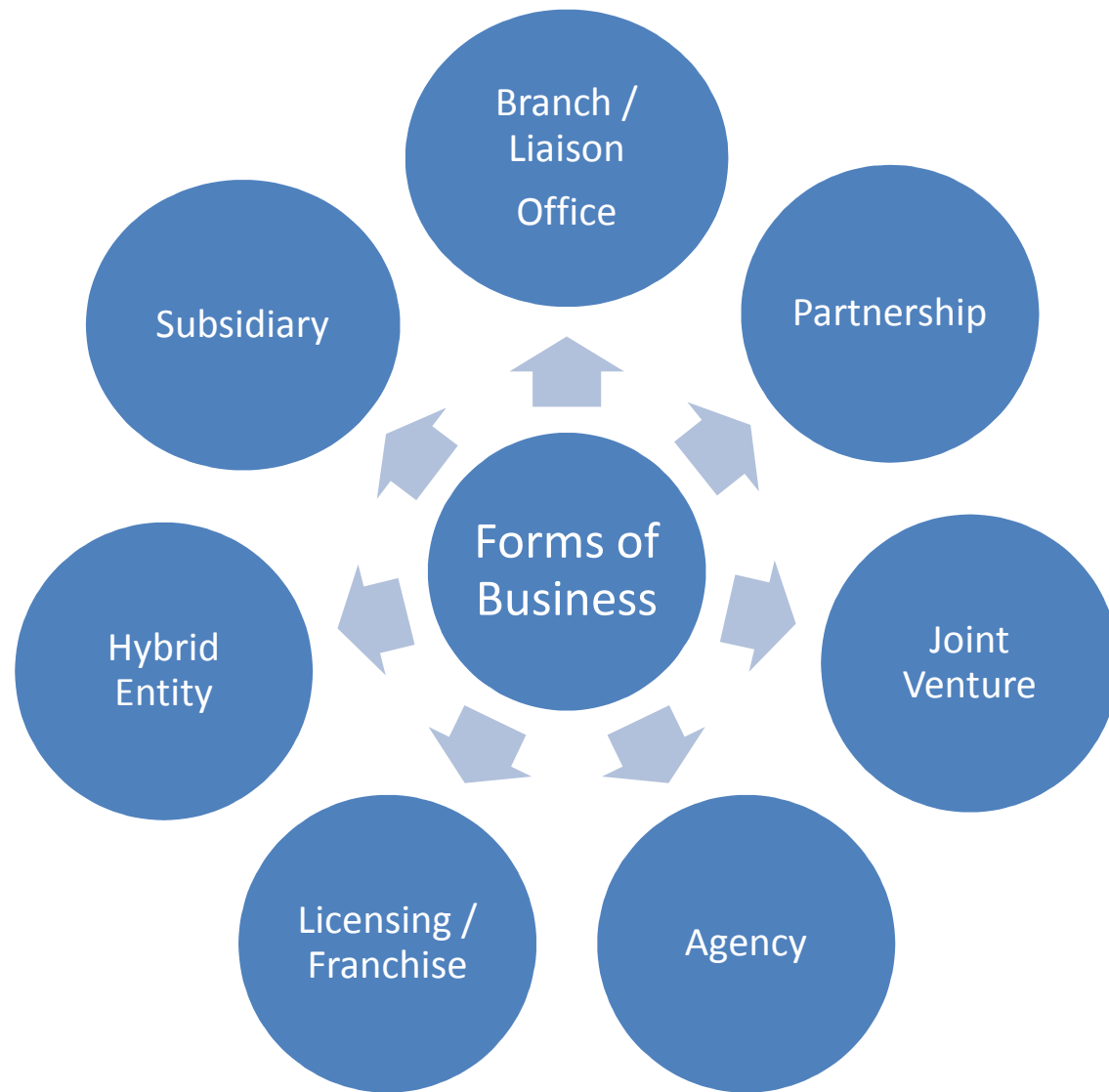


# All about Branch Office-Liason Office –Project Office 14<sup>th</sup> Feb, 2017



CA. Ashwani Rastogi

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### **Branch or Liaison Office**

- A body corporate incorporated outside India desirous of having presence in India may set-up Branch (BO) or Liaison Offices (LO) in India
- BO or LO can be set-up only after obtaining prior specific permission from RBI as per FEMA Regulations

### ***Branch Office***

- BO of a non-resident is not allowed to undertake retail trading, manufacture or processing activities for the non-resident
- BO will operate as an extension of the non-resident Body Corporate and should be engaged in enhancing activities of its Parent

### ***Liaison Office***

- In case of an LO, it can undertake only liaison activities i.e., act as a channel of communication between its Parent and parties in India such as suppliers, customers etc.,
- LO is allowed to undertake any business activities in India and earn any income out of such activities
- All expenses of LO are to be necessarily carried out of inward remittances received from Parent

## **Branch and Liaison Office**

### ***Activities that can be carried out by BO and LO as per extant FEMA Regulations -***

- Represent the non-resident Body Corporate in India to its customers, suppliers etc.
- Promote export from / import into India
- Promoting technical / financial collaboration between its parent and parties in India
- Act as a channel of communication
- BO can carry out research work in areas in which the parent company is engaged
- BO can render services in information technology and development of software in India
- BO can render technical support to the products supplied by parent/group companies

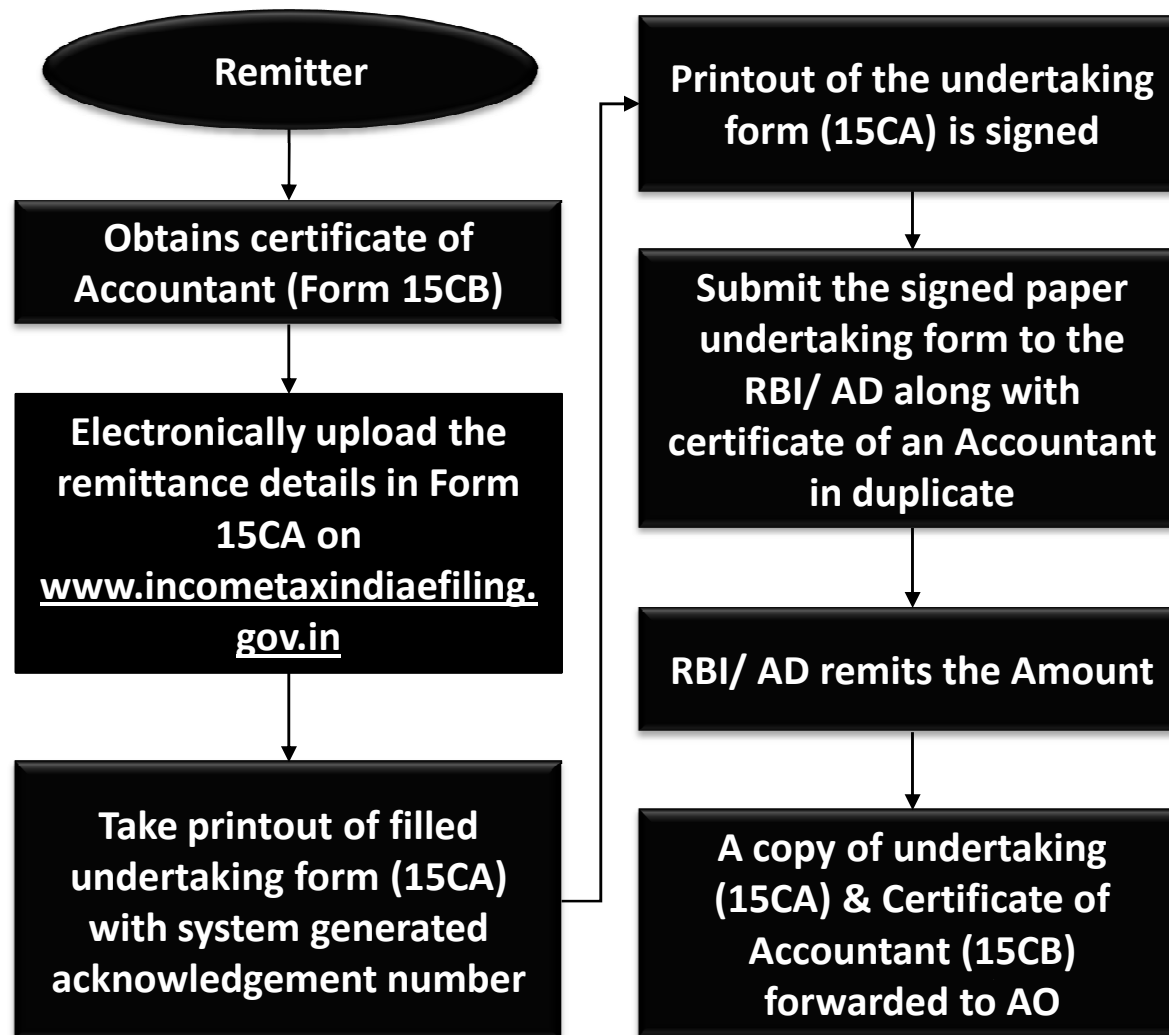
If your Company LO/BO/PO, incorporated before 1<sup>st</sup> January 2017 than financial year ended on 31<sup>st</sup> March 2017. However those offices incorporated after 1<sup>st</sup> January 2016 its financial year closing would be next year i.e. ended on 31<sup>st</sup> March 2018.

<b>Event Compliance</b>	<b>Existing Incorporated or Incorporation in during the year but before 1st January 2017</b>	<b>Incorporation during the year After 1<sup>st</sup> January 2017, but before 31st March 2017</b>
<b>Financial year ended</b>	<b>31<sup>st</sup> March 2017</b>	<b>31<sup>st</sup> March 2018</b>
<b>Form FC-4 filing by</b>	<b>31<sup>st</sup> May 2017</b>	<b>31<sup>st</sup> May 2018</b>
<b>Income Tax Return – Branch Office etc. (not for Liaison office)</b>	<b>30<sup>th</sup> September 2017</b>	<b>30<sup>th</sup> September 2017 (For the period 16-17)</b>
<b>AAC in form 49C online to Income Tax department- Liaison Office only</b>	<b>30<sup>th</sup> September 2017</b>	<b>30<sup>th</sup> September 2017 (For the period 16-17)</b>
<b>AAC filling with AD (RBI)</b>	<b>30<sup>th</sup> September 2017</b>	<b>30<sup>th</sup> September 2017 (For the period 16-17)</b>
<b>Form FC-3 filing by</b>	<b>30<sup>th</sup> September 2017</b>	<b>30<sup>th</sup> September 2018 (For the year 17-18)</b>

If you have any query for any regulatory compliances please feel free to contact with us at [info@globaltaxation.in](mailto:info@globaltaxation.in)

# Procedure

## Form 15CA and 15CB



1. Every remittance other than those covered under specified list required to follow procedure even if not chargeable to tax in India.
2. Requires the payer to provide PAN of the non resident
3. Form 15CB needs to be uploaded electronically – information requirement is same as Form 15CA

# Sec 195 - Summary

Who is responsible to deduct TDS	<ul style="list-style-type: none"> <li>-Any person - as defined u/s 2(31)</li> <li>-Includes virtually everyone</li> </ul>
Payment made to non resident	<ul style="list-style-type: none"> <li>- Includes all non- resident having presence in India or not</li> </ul>
Determine-Status of NR	<ul style="list-style-type: none"> <li>- Under sec 6</li> <li>-In case of dual residence and if tie breaker - DTAA is applied</li> </ul>
Payment covered	<ul style="list-style-type: none"> <li>-Any sum chargeable under the Act</li> <li>- Except Salary and dividend referred u/s 115O</li> </ul>
At what time TDS has to be deducted	At the time of credit or payment whichever is earlier.
Rate of TDS	Relevant rates in force Sec. 2(37A)(iii);Cir.No.728 dt:30/10/1995 & Cir.No.740 dt:17/04/1996 or rates as per DTAA whichever is beneficial

# Scope and Applicability

## Chargeability to tax governed by provisions of Act / DTAA

Nature of Income	Act*	DTAA (OECD model)
Business/ Profession	S.9(1)(i)	A.5 , A.7 & A.14
Salary Income	S.9(1)(ii), S.9(1)(iii)	A.15
Dividend Income	S.9(1)(iv), S.115A	A.10
Interest Income	S.9(1)(v), S.115A	A.11
Royalties	S.9(1)(vi), S.115A	A.12
FTS	S.9(1)(vii), S.115A	A.12
Capital Gains	S.9(i)(i), S.45	A.13

\* Apart from S. 5, wherever applicable

Act/ DTAA, whichever is beneficial prevails

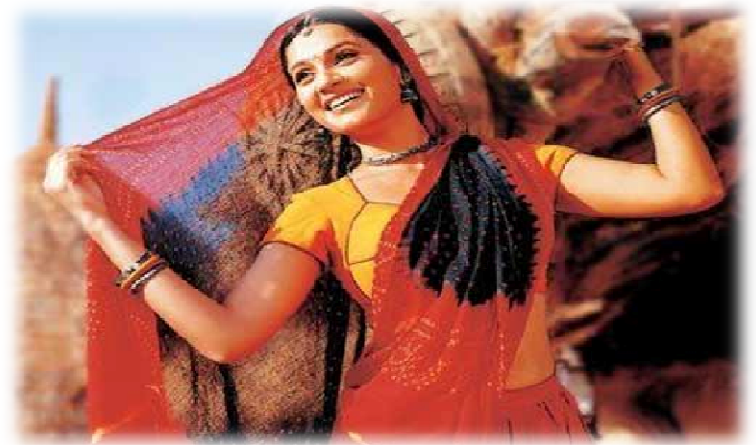


# Consequences of non compliance

Applicable section	Nature of default	Consequence
40(a)(i)	Withholding tax not deducted or not deposited within prescribed time	Disallowance of expenses in computation of taxable income of payer; deduction in year of payment
201(1A)	Tax not withheld/ deposited appropriately	Interest @ 1% per month or part of the month
221	Tax withheld not paid	Penalty, not exceeding the amount of tax not paid
271C	Tax not withheld or short withheld	Penalty, not exceeding the amount of tax not withheld
272A	Failure to file TDS Return	Penalty of Rs.100 per day (maximum upto the tax deducted) for failure to file the TDS return on time.
272B	Failure to pay tax deducted	Rigorous imprisonment for 3 months to 7 years along with fine



## **Tax Implications on Inbound-Outbound Secondment Employee**



## Secondment outside India

- Globalisation of the Indian economy has provided opportunities for many Indian employees to work abroad
- Many Indian companies are sending their employees on secondment to group companies for a few years, wherein the employee works with the overseas company and gains international experience
- This process of working overseas has taken on a whole new dimension as Indian and multinational companies are sending technical and managerial personnel overseas by the thousands
- Seconding people overseas is a complex business and there are a host of tax, immigration regulatory and human resource issues that need to be addressed
- There are tax consequences for both the employees as well as their employer depending on the nature of the assignment
- Typical assignment models are discussed in the following slide

## Basic tax provisions relating to outbound assignments

The table below outlines the most likely tax residency scenarios of Indian citizens going on overseas assignment

Stay in India	Status in year of Departure	Status in middle year –(Visit to India)	Status in year of arrival into India
> 181 days	ROR*	ROR*	ROR*
< 182 days but > 59 days & >364 days during preceding 4 tax years	NR	NR	ROR*
< 60 days	NR	NR	NR

As per section 5(1) of the Act, an individual who qualifies to be ROR is taxable on all income

from whatever source derived which—

- is received or is deemed to be received in India; or
- accrues or arises or is deemed to accrue or arise to him in India; or
- accrues or arises to him outside India

Thus, ROR is taxable on their worldwide income whereas individuals who qualify to be RNOR or NR are liable to tax only on India sourced income (i.e. income directly received in India or accrued in India)

## Article 4: Resident



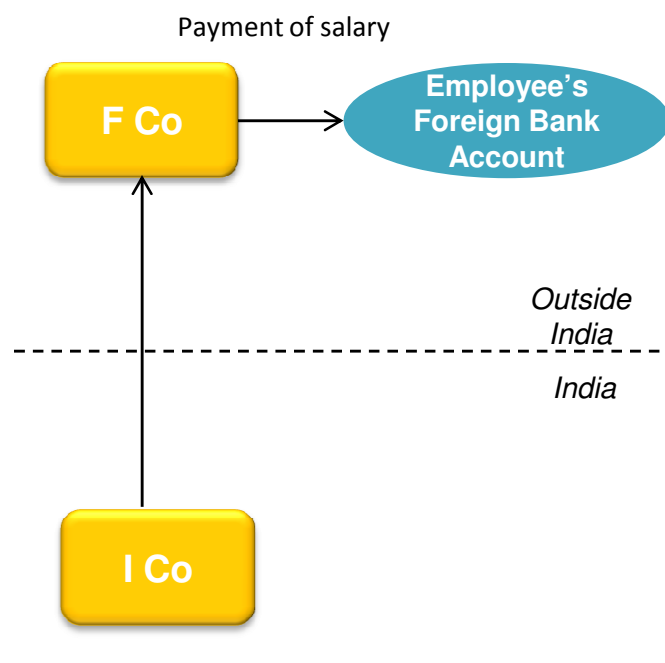
### Tax implications under DTAA/ Tax Treaty

- Where an individual qualifies as a ROR in India and is also a tax resident of host country say USA, recourse would then have to be made to the tie-breaker rules under the DTAA
- Generally Article 4 deals with the tie-breaker rules which ensure that an individual's tax residency is established in only one country on the basis of following pre-defined parameters:
  - Permanent home: Permanence of home means that the individual has arranged to have the dwelling available to him at all times continuously and not occasionally for short duration (i.e. travel for pleasure, educational travel, etc.)
  - Centre of vital interests: Centre of vital interest means personal and economic relations of an individual and his proximity to a jurisdiction location.
  - Habitual abode: The dictionary meaning of habitual abode is a place in which a person resides, his residence, home or dwelling.
  - Nationality of the individual

- Tax residency under DTAA is required to be determined on case to case basis
- On secondment outside, taxability in case salary is paid in India would be as follows:

Particulars	Taxability in India
Taxability under the Act (ROR/ NR/ RNOR)	Taxable
Taxability under DTAA -	
Resident in India and Non-Resident in host country	Taxable (Subject to Foreign Tax Credit)
Non-Resident in India and Resident in host country	Not Taxable (TRC required)
Resident in India and Resident in the host country but tie breaks to host Country	Not Taxable (TRC required)
Resident in India and Resident in the host country but tie breaks to India	Taxable (Subject to Foreign Tax Credit)

## Preferable outbound secondment arrangement



### Typical features:

- I Co will depute the employee to F Co and will issue a letter to the employee for a long term secondment
- F Co will enter into an employment agreement with the employee
- F Co will pay the entire salary into the employee's overseas bank account
- Such employee would work under supervision, direction and under the control of F Co

### Tax Implications in the hands of the employee:

#### Tax implications under the Act

- The deputed employees qualifying as NR or RNOR under the Act would not be subject to tax in India as the entire salary will be received and accrued outside India
- If the deputed assignee qualifies as ROR, then he would be liable to tax on his world wide income. Accordingly, he would be taxable on the entire salary.

## Sec. 44C:Head Office expenses

- › Income computed by reducing expenses from revenues
- › BO / PE can claim **deduction u/s 44C** of certain **general admin. expenses** incurred by foreign HO, attributable to BO
- › Deduction of HO expenses shall be lower of:
  - 5 % of ATI (Av. ATI of past yrs, in case ATI itself is a loss)
  - Admin. expenditure incurred by HO attributable to business in India
- › Applies to all NR tax payers – not only to F Co



# Illustrations – Business Connection

## › **Illustration 1:**

- LO is set-up in India by ABC Co, a co. resident in Dubai, to receive trade inquiries from customers in India. The work of the LO is restricted only to forwarding the trade inquiries to ABC Co. - No BC exists.
- If the LO negotiates and enters into contracts on behalf of ABC LLC with customers then – BC exists. In such a scenario, the profits attributable to the operations conducted in India will be taxable in India in the hands of ABC Co.

# Illustrations – Business Connection

## › **Illustration 2**

- XYZ Inc, a resident of USA has set up a branch in India for the purpose of purchase of raw materials for manufacturing its products. The BO is also engaged in selling the products manufactured by XYZ Inc in India and in providing sales related services to customers in India on behalf of XYZ Inc.
- BC exists

# Article 5(2) – Illustrative list of PE

- Article 5(2) of the UN Model Commentary provides inclusive definition of PE
- Basic rule reads as under –  
  
The term ‘Permanent Establishment’ **includes** especially:
  - A place of management;
  - A branch;
  - An office;
  - A factory;
  - A workshop, and
  - A mine, an oil or gas well, a quarry or any other place of extraction of natural resources
- This list is inclusive and not exhaustive
- Examples provided above **should meet the requirements of Article 5(1)** in order to qualify as a PE
- Definition is identical under OECD and US Models

# Landmark verdicts

Whether a Branch Office LO/PO constitutes a PE /  
business connection



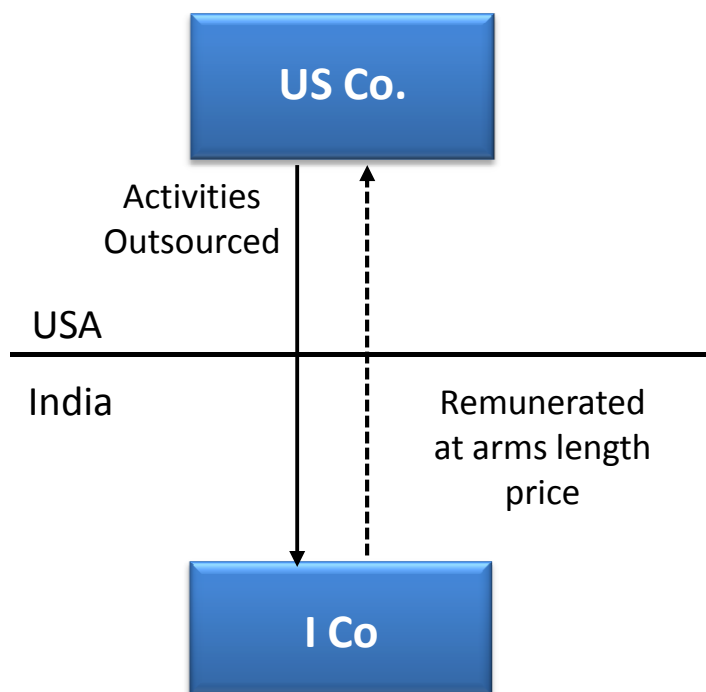
# Whether a Branch Office LO/PO constitutes a PE

NAME	DECISION
GE Energy Parts Inc., Vs. ADIT (Delhi ITAT, 2017)	<ul style="list-style-type: none"> <li>A survey u/s 133A of the Act was conducted, being the Delhi address of Liaison office (LO). This deciphered that the activities of the person leading to the 'authority to conclude' a contract, so as to form an agency PE.</li> <li>They constituted PE of GE overseas entities in India and their activities were not of the preparatory or auxiliary character. Profit of various GE overseas entities making sales in India with the active involvement of their PEs, was liable to be taxed in India.</li> </ul>
Morgan Stanley & Co [2007] 162 Taxman 165 (SC) <b>Refer case study-1</b>	<ul style="list-style-type: none"> <li>AE that constitutes PE and is remunerated on arms length basis taking into account all risk taking functions of the multinational enterprise – no further attribution</li> <li>If TP analysis does not adequately reflect functions performed / risks assumed by the MNE – there would be need to attribute profits for those functions / risks</li> </ul>
Nortel Networks India International Inc. [2014] 49 taxmann.com 147 (Del) <b>Refer case study-2</b>	<p>Liaison office of Nortel Canada was rendering all kinds of services to all the group companies including the taxpayer – Fixed place PE.</p> <p>Based on the facts attribution of 50 per cent of the profits to the activities of PE in India would be a reasonable attribution</p>
National Petroleum Corporation Limited V. DIT [2016] 66 taxmann.com 16 (Del – HC)	Activities of project office of the taxpayers fall within the exclusionary clause of 5(3)(e) of the India - UAE tax treaty and therefore can not be construed as PE in India.
Consulting Engineering Corpn. [2014] (I.T.A.No.1597/Del/2009) (Del) <b>Refer case study-3</b>	Indian branch represented a fixed place of business of the taxpayer in India through which substantial work was carried out. Therefore, 50 per cent of the profit determined by the AO based on global profit rate, was attributed to the Indian PE

# Case Study



# Case Study-1



## Facts

- **Activities outsourced by US Co. to Indian group entity I Co:**
  - Equity / fixed income research
  - Account reconciliation;
  - IT enabled services, etc
- US Co. staff visited India for monitoring/quality control (stewardship)
- **US Co. staff deputed to I Co**
  - I Co reimburses salary cost to US Co.
  - Employees deputed continue to be employed with US Co., which pays salary to the deputees outside India

- PE definition under Section 92F(iii) of the IT Act is inclusive so as cover various types of PE under DTAA such as Service PE, Agency PE, Construction PE, etc.

# Case Study-1

Type of PE	Decision
<b>Fixed place PE</b>	<ul style="list-style-type: none"> <li>• Functional and factual analysis of activities relevant for PE determination</li> <li>• Business of USCo not carried on through ICo</li> <li>• In any case, activities are preparatory and auxiliary</li> <li>• No fixed place PE</li> </ul>
<b>Agency PE</b>	<ul style="list-style-type: none"> <li>• No authority to conclude contracts on behalf of USCo;</li> <li>• ICo in fact implemented contracts concluded outside India by USCo</li> <li>• No agency PE</li> </ul>
<b>Service PE</b>	<ul style="list-style-type: none"> <li>• Service PE can trigger only through presence of employees of FE in India</li> <li>• Employees of subsidiary are not 'personnel' of parent</li> <li>• Stewardship activities for monitoring of outsourcing activity and to protect interest of USCo is outside scope of service PE</li> <li>• Trigger of service PE for activities when employees of USCo deputed at ICo request for expert service</li> </ul>
<b>Profit Attribution</b>	<ul style="list-style-type: none"> <li>• AE that constitutes PE and is remunerated on arms length basis taking into account all risk taking functions of the multinational enterprise – no further attribution</li> <li>• If TP analysis does not adequately reflect functions performed / risks assumed by the MNE – there would be need to attribute profits for those functions / risks</li> </ul>

***Morgan Stanley & Co [2007] 162 Taxman 165 (SC)***



# Case Study-2

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## **Facts**

- Taxpayer was a leading supplier of hardware and software products for GSM cellular radio telephones system
- Indian subsidiary of the taxpayer, entered into a contract with Reliance Infocom for supply of hardware equipment
- AO held that the taxpayer does not have any manufacturing or trading infrastructure
- It does not have any financial or technological capability of its own. The taxpayer was only a paper company incorporated for the sole purpose of evading taxes in India
- Indian Subsidiary was a fixed place of business and DAPE of the taxpayer as well as it had a business connection in India

## **Permanent Establishment**

- Indian Co. had undertaken the responsibility for negotiating and securing the contracts. The contract for installation and commissioning was also undertaken by Indian Co.
- The taxpayer was merely a shadow company of Nortel group.
- Since the hardware supplied by the taxpayer was installed by Nortel India and the contracts were pre-negotiated by the same, it was constituted a fixed place of business and DAPE of the taxpayer in India.

# Case Study-2

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- Liaison office of Nortel Canada was rendering all kinds of services to all the group companies including the taxpayer – Fixed place PE
- The subsidiary acted as a service provider and at the same time acted as a sale outlet co-operating with after sale service
- The activities carried out by the PE are the core activities of the taxpayer resulting in generation of income and they cannot be considered to be preparatory and auxiliary

## **Attribution of income**

- The accounts of the taxpayer furnished in the assessment proceedings have no sanctity and the same were not audited.
- AO's reference to the global accounts of the Nortel and gross profit margin percentage as 42.6 per cent was accepted.
- The tax authorities were justified in resorting to Rule 10. However, when profits are computed under Rule 10 after applying the profit rate, the expenses pertaining to the PE have to be allowed as deduction
- Based on the facts attribution of 50 per cent of the profits to the activities of PE in India would be a reasonable attribution

***Nortel Networks India International Inc. [2014] 49  
taxmann.com  
147 (Del)***

# Case Study-3

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- Indian branch of a foreign company forms a PE in India. Profit attributed on the basis of 50 per cent of the global profit rate of the foreign company
- Indian branch represented a fixed place of business of the taxpayer in India through which substantial work was carried out
- Therefore, the taxpayer had a PE in India under the tax treaty
- Accordingly, the income attributable to the operations carried out by the PE was held to be taxable in India
- Risk was not exclusively borne by the Indian branch or the US company
- Therefore, 50 per cent of the profit determined by the AO based on global profit rate, was attributed to the Indian PE

***Consulting Engineering Corporation [2014]  
(I.T.A.No.1597/Del/2009) (Del)***

# Thank You



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