AN ANALYSIS OF INTERNATIONAL TAX AGREEMENTS IN PREVENTING DOUBLE TAXATION

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ABSTRACT

Taxes are main source of revenue for governments, for spending on public welfare. Taxes are paid as voluntary contribution for which nothing comes in return, to say that "no quid pro". The taxes are extraction of money from the public, either with or without consent. International taxation is imposed upon the individual's whose income or transaction falls within the cross-borders territory of the foreign nation. International taxation is also called as the double taxation, because taxes are imposed more than once or double time, on the same individual. As, it creates burden on the individual to pay additional taxes, so the tax evasion occurs. To avoid paying taxes in two countries, the individual or the company will transfer its profits by investing in Tax Heaven countries, and where the taxes are very low. This kind of transfer of profits from the base and shifting to some other location is called as the "Base Erosion and Profit Shifting".

If the transaction is done internationally, then the place where, the income is generated is called the source country and the individual or company resides is the resident country. Both these countries have sovereign right to tax a particular transaction, and if they do so international double taxation occurs. To prevent the double taxation and fiscal evasion the OECD and the UN have come up with a model draft convention as a base. With this base convention, countries may either bi-laterally or multi-laterally sign the Double Taxation Avoidance Agreement (DTAA) to prevent tax evasion and exchange the tax information for the effective collection of taxes. These double taxation practices are prevented by the countries with their mutual cooperation, by way of international agreements.

Keywords: International taxation, cross-borders, double taxation, Tax Heaven, DTAA

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INTRODUCTION

‘International Taxation’ is otherwise called as International Tax, International Tax Law or International Taxation System. But taxes cannot be collected based on the international sovereignty, it is the nation’s statutory law and the bilateral/ multilateral treaties signed by the nation will decide the issue of how much tax should be paid on the income earned by an ‘assessee’ by way of international transactions and to which government it should be paid. International incomes which are taxed, based on the residential status, are assessed by the municipal law of the country.

INTERNATIONAL LAW AND DOUBLE TAXATION

‘International Tax Law’ mainly consists of 2 components i.e., Taxation Agreements & Domestic Tax laws. These Agreements are signed between two or many states to avoid double taxation, in which the taxation of the same income on the same subject is prevented by taxing twice. These agreements also help in preventing the revenue loss by sharing information related to taxes and help in collect tax dues. The dual purposes of the agreement are prevention of double taxation and avoiding tax evasion. The Domestic Taxation laws are the nation’s private law which determines the percentage and ratio of taxes to be collected from the subjects.[1]

This double taxation can be prevented unilaterally or bilaterally by signing an agreement with the concerned countries. By the unilateral method, either a country of source or a country where the taxpayer is resident, unilaterally relinquishes the right to tax, to the other nation. This bilateral method includes **‘proportionate division’** method, which means dividing taxes between two nations according to the pre-decided formula and classification method by classifying the income according to its type and assigning primary right to tax.[2]

The rapid growth & development of Industrialization and the investment by the Multinational Companies, relaxation in the rules by governments relating to investment of capital, had numerously paved way for evasion of taxes. Some of these entities misuse the loopholes available in law and exploit the advantages, due to which their income is not taxed in any of the country, adopting a method of shifting their profits to the country’s jurisdiction where tax rates are low. This

[1] UN, Department of Economic and Social Affairs, UN Model Double Taxation Convention (March 2011).
[2] League of Nations, Report on Double Taxation, (Doc. E.F.S. 73 F 19, p. 42).

problem has become worse, day-by-day due to the existence of tax haven countries and harmful tax competition. Preventing this menace is of vital importance, to the economic interests of the country and its development.

OBJECTIVES OF TAXATION

Every taxation system must define its distinctiveness, it is the basic framework for such taxation. **Value Added Taxes (VAT)** and **Service Tax** are the two major taxations prevailing in India as far as indirect taxes are concerned, and later replaced by a new taxation regime called as the **'GST'** (Goods and Service Tax Act, 2017). The basic and foremost idea behind the concept is that the single taxation system across the country. The motto is that the **"One Nation, One Taxation, One Slab"** and the primary objective is that the transparency in levying and collection of taxes. The exact slab rates and the percentage of taxes paid by the individual should be certain and should be known to the tax payers for the convenience in tax payment and collection.

Now the GST collection is very easy for the traders and also the tax department, and recently the CBIC had also submitted the report to the Ministry of Finance about the collection of GST. In that report the Board has confirmed that the collection of GST is increasing every year with good growth in tax collection. But this is not to be so, before the regime of GST because of the difficulties and complexity of the old taxation system. VAT which created a burden on the consumer and the price is also increased by way of cascading effect by way of the additional tax paid on the tax.

Like the principle stated above one nation one tax, international taxation should also be one. The income which is earned by the individual and the company should be taxed only at one jurisdiction or in one country. How the cascading effect had been removed by the introduction of GST, the dual or the multiple international taxes should be avoided. If this has happened the collection of taxes will increase and the free flow of capital and investment may accumulate the country and as a result the economy may be boosted.

SUBSTANCE AND FORM

The Word **'Substance and Form'** was used for the first time in the Common Law Countries, related to tax avoidance.[3] There is always a thin line drawn by the government of a particular country which classifies tax planning and tax evasion (i.e. in other words called as the walls of the prison). Once if this line has crossed, then the transaction may be valid under the Municipal law of one country as it appears in the *form,* but in *substance* it will not be considered as valid in the international law of the other country, then the tax liability arose. If *substance* prevails over *form* in a particular income tax, then the tax authorities can exclude the transaction entered by the tax payer which may appear to be valid in *form*, if there exists a valid double taxation avoidance agreement.

(For Example; if the trade done by way of international transaction and the municipal law contemplates valid provision, but absence of valid DTAA, then it is taxed in both countries, and the tax payer is liable to pay taxes for the intended cross-border transaction. In other case existence of valid DTAA and absence of exemption provisions in Municipal law, the tax authorities of that country will allow that transaction as a valid under the DTAA's and single taxation is imposed).

AVOIDANCE AND EVASION OF TAXES

'**Avoidance** & **Evasion of Taxes'** are totally a different concept, but both has a thin line of distinction within it (i.e., the Lakshman Rekha). In case of ***tax evasion***, the tax payer produces false/incomplete information to the I.T. authorities, but as far as ***tax avoidance*** is concerned, filing of returns and submitting accounts by availing privileges, under the valid sections of Income Tax Act, of that country. It is to be noted that, tax evasion takes place when, failure to strictly comply with law and paying lesser tax than the actual tax or no tax at all, but whereas tax avoidance occurs when certain lawful deductions and exemptions are claimed by the tax payer.

In today's world of globalization, the investment of capital by way of FDI, import and export of goods and services takes place through the borders of different countries, both by way of physically and electronically. The thin division between tax avoidance and tax evasion, becomes even thinner, because of the international transaction made using of technology

[3] Frederik Zimmer, "Substance and Form of International Taxation, Vol. 8, (2002 p. 26).

advancements, it is easy to evade tax in one country by taking advantage, not only by the provisions of his own country's tax law, but also of the transaction made in other country's tax laws.[4] Hence tax evasion and tax avoidance may occur in the same case in the same subject matter.

DOUBLE TAXATION

The Basic understanding of double taxation in legal context is, taxing the same subject/income more than once for the same purpose upon an individual during same taxing period. To constitute double taxation, the two or more taxes must have been:

i *levied on the same subject matter;*
ii *by the same government*
iii *during the same taxing period; and*
iv *for the same purpose.*[5]

International double taxation arises due to the overlap of two or more tax claims by two or more countries. It can be of two kinds namely, 'juridical double taxation' and 'economic double taxation'. The term **'juridical double taxation'** can be generally defined as the imposition of comparable taxes in two (or more) states on the same taxpayer in respect of the same subject matter and for the identical period.[6] E.g., Mr. 'X' who is resident of country 'USA' has a term deposit in country 'INDIA'. The country 'USA' levies tax as Mr. 'X' is the resident of that country and even the interest income earned on term deposit in other country can be taxed on grounds of *residential status*.

The Country 'INDIA' levies tax, as the source of earning of that income arises in their jurisdiction. i.e., the term deposit is situated in its country and can be taxed on ground of *source rule*. Thus, both country 'INDIA' (country of source) and country 'USA' (country of residence) levying tax on interest income of Mr. 'X' on grounds of source and residence principle respectively amounts to juridical/jurisdictional double taxation.

The term **'Economic Double Taxation'** is opposite to juridical double taxation, which arises when the same economic transaction or asset is taxed in two or more states during the same

4 M.B. Rao, Taxation of Foreign Income - India's Double Tax Treaties, (1997, p. 13).
5 Krishna Das v. Town Area Committee, (1983) ITR 401 (SC).
6 Report of the OECD Committee, Model Double Taxation Convention on Income and Capital gains, (Para 3, 1977).

period, in the hands of different taxpayers. Economic double taxation takes place if assets are attributed to different persons by the domestic law of the states involved. The contrary occurs when the tax law of one state, tax the asset to its legal owner while the tax law of the other state, tax the person who is in possession or control.

TYPES OF COMPANIES IN INTERNATIONAL TAXATION

'Company' means an **artificial legal person** created by virtue of law by registration of necessary documents with its regulations and having the distinct features of separate/independent legal entity, perpetual succession and common seal as per the relevant provisions of the statues. The different kinds of companies which involving in the international tax system are different from the companies under the company law. Company law discusses, kinds of company on the basis of ownership (public, private and government), control (holding and subsidiary) and incorporation (statutory, registered and charter). But contrarily, international taxation is more concerned about the structure of a company. Some of the company depending on the basis of structure are conduit companies, base companies and letter box companies.

CONDUIT COMPANIES

Conduit Companies are legal entity created in a particular country with an intention to avail the benefits of tax treaty, which are not available to the person who creates such company directly in that country. For example, a company 'X' in country USA creates a conduit company 'Y' in country UK to do business in country India. The main purpose of creating such company in country UK is to take benefit of the treaty between country UK and country India (say exemption from capital gains tax) which is not available under the treaty between country India and country USA.

BASE COMPANIES

Base Companies is also similar to that of the conduit companies, however, the only difference between them is the base companies are used as the ***accumulation centers,*** and the income is not transferred or taken back to the country of the investing country, whereas in case of the conduit companies the income earned by them is transferred to the ultimate beneficial owner.

The concept of base companies has been systematically analysed by ‘William Gibbons’ and he labelled the foreign bases/company incorporated in a *country having negligible or no taxes* at all as ‘base companies’ in the following words: “Companies/ Corporations or other limited liability companies organised in a base country for the purpose of conducting business operations in third country will be referred to as base companies.” Business operations in third country is meant both business through agents or branches and holding companies. Thus, the essential element of base companies is holding of legal title by a person who resides outside the country where base company is formed.

P.G. Keller has further made a distinction between a **‘**Typical’ base company and **‘**Atypical’ base company. In case of a ‘typical’ base company, three countries are involved. An entity X in country one, incorporates a base company in country two, to invest in country three. In ‘Atypical’ base company, only two countries are involved and it is a case of reinvestment in country one by forming a base company in country two.

LETTER BOX COMPANIES

‘Letter Box Companies’ are those companies which exist only on papers and absence in actual performance by managing directors or other employees of manufacturing or commercial activities. The underlying activities like invoicing are performed elsewhere.

TAX HAVENS

There is a lack of understandings in the concept of ‘Tax Havens’.[7] Tax haven refers to a jurisdiction with negligible or no tax rates, but, the Rotterdam Institute of Fiscal Studies has explained in detailed about the tax havens under three categories.[8] The First category includes those countries where there is no income tax on individuals or corporations, net wealth, inheritance or gift taxes. This includes the states like Bahamas, Bermuda and Cayman Island etc. The second category refers to those countries where taxes are levied at low rates which includes Cyprus, British Virgin Island and Isle of Man etc. Such countries give special exemptions to the foreign business/operations but levy a low rate of tax on local business/operations. The third category countries levy normal taxation, however, give some special advantage like Canada, Greece, Ireland and Luxembourg etc.

[7] M.J. Langer, “Tax Havens of the World,” International Financial Documentation, Vol. 24, (1970, p. 424).
[8] Journal of the Rotterdam Institute of Financial Studies, (1979, p. 70).

NEED FOR INTERNATIONAL TAX AGREEMENTS

The burden of double taxation caused on the individual can be avoided unilaterally, if any one of the states involving taxing jurisdiction withdraws its tax claim. Eg: India gives tax deduction to the assessee which is equivalent to the tax rates applicable in India.[9] (in other words the tax so collected is refunded fully to the assessee, if existence of valid double tax avoidance agreement while filing returns). In some countries double taxation is avoided unilaterally through exemptions and allowances. Switzerland exempts the tax on income, which arises from permanent establishments and property located abroad. Netherlands and Australia exempt the tax on income from foreign, if the income is taxed in source country.[10] The existing provisions of international tax law by way of unilateral measures are not enough, to avoid double taxation, because the available rules does not cover all situations which arises to double taxation. It is to be accepted that unilateral measures lack in curbing/preventing the menace of international tax evasion which ultimately require a coordinated action by different countries.

International tax agreements signed by the countries, provides relief for an assessee from tax claims made by both governments, where each having a legitimate interest in taxing that particular source of income. It can be done, either by assigning the whole claim to one of the two countries or by dividing the tax claims between them.[11] The objective of these agreements is to eliminate double taxation of certain income, where a ***resident*** of one country receives income from a ***source*** in another country which ensure the facilitation of international trade and commerce, flow of investments as equitable collection of revenue, if there is absence of these agreements the income so generated is redirected to tax free or low tax countries or nil tax heavens.[12]

The Agreements aim to achieve the objectives by:

i. Providing a Clarification, where a source country may tax non-resident in respect of certain types of income,

ii. Specifying the Limit on the rates of tax, as a source country may apply to certain types of income

[9] Income Tax Act, 1961, S. 91.
[10] Walter Ryser, Introduction au droit fiscal international de la Suisse, 1980, p. 35).
[11] Ostime (Inspector of Taxes) v. Australian Mutual Provident Society, (1960) 39 ITR 210 (HL).
[12] D.P. Mittal, Indian Double Taxation Agreements and Tax Laws, Vol. 1, Taxmann (2007, at p. 186).

iii. By giving foreign tax credits in the residence country against the taxes paid in the source country.

Based on the above classification, clarification and assignment of jurisdiction of tax rates agreed by the countries, prevents tax evasion by exchanging information which avoids double taxation. Another benefit to the taxpayers is that to some extent, a tax treaty contains non-discrimination related to foreign tax payers or the permanent establishments in the country of source as compared to domestic taxpayers, by which the resident citizen and foreign tax payer are treated only as tax payer. Usually, every treaty contains a 'non-discrimination' article.[13] A provision to this effect was also added in the Indian *Income Tax Act*, *1961* as amendment by the *Finance Act*, 2001.[14]

Tax treaties signed between the countries help a taxpayer to identify his tax liability in other country, and these treaties play an important role in promoting international investment i.e., foreign investment and transfer of technology. Until, a particular tax treaty is revoked or amended, the foreign taxpayer has a clarity about the percentage of tax liability in source country, which the domestic taxpayers of the residence country do not generally have because of the unilateral sovereignty of the domestic legislature to make amendments in tax laws. These tax agreements generally provide various kinds of administrative assistance, like assistance in recovery and collection of tax by sharing essential documents. Assistance is defined broadly by initiating action against one who is liable both directly and indirectly for non-payment of tax.[15] These provisions widen the applicability of domestic tax powers in another jurisdiction. Under this clause, the requested state recovers tax claim from the applicant as if they were his own taxing state.

HISTORICAL DEVELOPMENT OF TAX TREATIES

The Knowledge of tax history is essential and also a basic foundation for understanding the current tax practice and the past tax system prevailed, for initiating the possibility of future tax reform. This includes some information on what has been practiced before, how these

[13] Article 24 of the Model Convention of OECD (22 July 2010).
[14] Income Tax Act, 1961, Explanation to section 91.
[15] Karen B. Brown, Brooklyn Journal of International Law, Vol. 15, (1989, at p. 66).

methods worked, why they were discarded, what are the historical developments occurred and why various tax relationships exist now and so on.[16]

It is to be specifically noted that, the problems in the international taxation are of not recent one. It exists even during the ancient and Middle Ages. During the Middle Ages theologians and canonists discussed the context of property taxes, the moral right of one city or kingdom to tax the wealth situated within its territory owned by a foreigner, or wealth owned by its own subjects situated in other kingdoms. These conflicting claims were settled by following '*situs rule'* in case of immovable property, however in the case of taxation of movable property the problem had continued. In May 1819, the Dutch introduced a law, which provided that foreign ships would be exempted from paying a license tax *(droit de patente)* where the country whose flag the ship flew granted a similar exemption to Dutch ships.[17]

Great Britain introduced a law in 1823, which declared that any country could export goods to the British colonies in its own as well as in English ships on the condition that the corresponding privileges were granted by the countries benefiting from that law.[18] In India, the problem came only when the income tax was first levied on 1860 by the provinces of princely states and also by the British Government at the centre.[19] It was decided that the lesser of the two taxes imposed on the same taxpayer will be refunded to the taxpayer by the Government of the British India and that the cost of the refund will be borne equally by the two taxing authorities. But in United States, the *Revenue Act of 1918* introduced adaptation of foreign tax credit.[20] Allowing a credit rather than a deduction for foreign taxes was a brave move that exposed the United States to significant revenue loss. All these happenings were unilateral in nature and have not contributed much towards the development of tax treaties.

Before the First World War there were only few tax treaties and only few countries participated in the conference on treaties. But there existed a doubt regarding the long-term validity of these treaties in modern international tax relations. The early treaties signed were shorter in contents than the present one, however the essential elements (reciprocity, residence and source) remain the same.[21] The earliest agreement specifically in the field of

[16] Paul Hewitt & Andrew Lymer, Lynne Oats, "History of International Business Taxation," (2002, at p. 43).
[17] J. Herndon, Relief from International Income Taxation, (1932, p. 11).
[18] J.L. Laughlin & H.P. Willis, Reciprocity, The Baker & Taylor Co, (1903, p. 5).
[19] C.L. Jenkins, "1860: India's First Income Tax," British Tax Review, Vol. 1, (2012, p. 87).
[20] Revenue Act of United States 1918, Sections 222(a) (1), 238 (a) and 240 (c).
[21] Sunita Jogarajan, 1815-1914 Early Tax Treaties," Oxford Journal of Legal Studies, Vol. 31, (2011, at p. 684).

taxation was signed in 1843, was between France and Belgium regarding administrative co-operation between the two countries regarding tax matters. Under the agreement, officials in-charge of the land register offices were required to share, documents and information which would assist the effective and regular collection of taxes imposed by the laws of the two countries, or estates in which these countries are alternatively interested. The first steps, which ultimately led to the formation of international tax regime after the First World War can be discussed under the following heads.

THE LEAGUE OF NATIONS

In Geneva Conference, 1921 the Economic and Finance Commission of the League of Nations recommended, that double taxation should be avoided by agreement between nations. To facilitate and proceed with this process two committees of experts, namely the Committee of Economic Experts (CEE) and Committee of Technical Experts (CTE) were constituted. The CEE submitted their report on double taxation in 1923 and the CTE submitted their report on double taxation and financial evasion in 1925. The enlarged CTE submitted its report in 1927. The reports submitted by the Committee of Technical Experts and enlarged committee of technical experts were then considered by a general meeting of Government experts. This general meeting of government experts consisted of representatives of 27 countries and gave their first draft in 1928.

After considering the new emerging problems and various improvements made in tax treaties the Fiscal Committee on 1939, recommended revised draft of 1928. This codification was made by a sub-committee, which came up with a model convention namely, **'Bilateral Convention on Preventing Double Taxation and Financial Evasion'** otherwise called as **'Mexico Model Tax Convention, 1943'**. On March 1946, the Tenth Session of the Fiscal Committee was held at London, which further reviewed the Mexico Model, and this review is popularly known as **'London Model Convention, 1946'**. Mexico Model gave exclusive jurisdiction of taxation to source country, but London Model sought to encourage capital flow from industrialized countries to developing country by giving exclusive jurisdiction to the country of residence.

CONTRIBUTION OF THE OECD

Based upon the two model conventions developed by League of Nations, the Fiscal Committee of **“Organisation for Economic Cooperation and Development (OECD)”** felt to make some changes. This committee prepared four reports from 1958 to 1961 and came out with a final draft popularly called as “OECD Model Convention 1963”. The 1963 Convention had small differences from London Model Convention given by the League of Nations. However, this convention has great impact upon the subsequent negotiations on tax treaties, as it was a reference material for bargaining tax claims.[22]

The Convention and its commentary had consistently elaborated and revised by the organisation based on the experience and developments faced by it. The organisation came out with its Second Model Convention along with commentary on 1977, and this was further improved in 1992. Subsequently, the Model Convention has been revised in the years 2000, 2003, 2005, 2008 2010, 2014 and 2017 respectively. The main approach which is followed by the OECD Convention is that the **“residence country”** will avoid dual taxation and the **“source country”** will reduce its jurisdiction to tax.

UNITED NATIONS

In 1965, Secretariat General of UN expressed concerned about existing tax conventions did not fulfil the needs of the developing countries due to which there is a need for appropriate treaty. Further, Economic Council also expressed their belief that there is a need for treaties on taxation with developing and developed countries, so these treaties could promote the flow of investment which would be helpful for economic development of developing countries.

Based on the request of Economic council, **“UN Adhoc Experts Group”** was set up on 1968 comprising eighteen people, ten from developing and eight from developed countries. Later, two more experts from different countries were added. The group organised a number of meetings from 1968 to 1979 and prepared eight reports. It also formulated few guidelines which provide technical assistance for the formulation of future treaties. Based on these guidelines, a Draft Model Convention was prepared by the UN Secretariat. This Draft was

[22] Report of the OECD Committee of Fiscal Affairs, (Chapter II Para 9, 1977).

reviewed by the group and final text of the convention was adopted at Geneva in December, 1979. This convention was reviewed and updated in 2001, 2011 and more recently in 2017.

CLASSIFICATION OF TAXATION AGREEMENTS

i. Double Taxation Avoidance Agreements

ii. Agreement on Exchange of Tax Information

iii. Agreements on Administrative Assistance

ANALYSIS OF DOUBLE TAXATION AND MODEL TAX AGREEMENTS

The model Tax convention developed by OECD and UN were applied in all taxation convention, which acts as genuine and transparent in 'International Taxation System'. In case of variation in these treaties, it is only the intention and financial policy of that particular country. India's bilateral tax treaties consists of **"Double Taxation Conventions and exchange of tax information"** both are essentially the need of the hour in preventing the tax evasion and increasing the nation's tax revenue for developments.

PREAMBLE

Preamble contains the aim and objectives for signing the agreement with two governments for avoiding dual taxation and preventing financial evasion. One cannot find any difference from this objective which is similar in all tax treaties.

TAXES COVERED

The word 'Tax' has neither been defined in "Model Conventions nor its commentaries". However, the terms 'Tax' and 'Taxation' are frequently used in tax treaties. They are not interchangeable and give different meanings. According to Webster's Dictionary and

Encyclopaedia 'Taxation' is defined as an act of collecting tax or a process of taxing, whereas 'Tax' is defined as a compulsory levy upon income or property.[23]

Generally, Article 2 of the Double Taxation Conventions define taxes covered. The article of OECD draft Convention is reproduced as unchanged in UN draft Convention. The main intention of this article is to know whether the treaty applies to the taxes in question. OECD has highlighted its intention of having this article as follows:[24]

i. By fixing the standard terms and conditions of taxation,
ii. By analysing the taxes covered by the convention,
iii. By incorporating the treaty provisions in the domestic laws,
iv. By preventing new treaty or amending the existing one in the event of changes in the municipal law,
v. By providing information about the changes in the taxation laws to member states.

RESIDENT

The advantages of tax convention applicable only to the individuals who are the **"resident"** of the member states. To claim the benefits of residence, the residential status of the individual is determined based on the municipal law of the member state. It is classified that, when an individual is a citizen in country X, and habitually residing over the period exceeding six months in country Y, then both the countries may claim him to be a resident under their domestic laws respectively. In such cases, the treaty proceeds to assign a single state of residence to such person.[25] Thus, the main idea of the concept **"residence of an individual"** can be highlighted as follows:

i. It determines application of personal scope of the individual,

ii. It resolves the conflicts between two residences,

iii. It resolves the conflict between residence and source jurisdiction.

[23] Webster's Unified Dictionary and Encyclopaedia, Webster's Unified Incorporation, New York, 1970, p. 1649.
[24] OECD, Commentary on Model Convention, (Article 2, Paragraph 1, 2010).
[25] C.I.T v. P.V.A.L. Kulandagan Chettiar, (2004) 267 ITR 654 (SC).

The phrases defined in, both OECD and UN draft Conventions are similarly worded, except in UN draft Convention 'place of incorporating' (setting up of the business or company) is expressly mentioned as a criterion for availing the advantages of the convention. In case of Indian treaties are concerned, some of them use a word '*Fiscal Domicile*' instead of '*Residence*' in the title. Domicile referred as civil rights.[26] It determines a person's personal status and the law applicable to him in the matters such as majority or minority, marriage, divorce or succession.[27] But on the other hand, 'citizenship' refers to a political status of an individual conferred usually by way of some law, and 'residence' refers to physical connection with a particular territory.[28]

PERMANENT ESTABLISHMENT

This article provides relevant taxable jurisdiction of Multinational Companies having physical existence in several jurisdictions by attaining profits.[29] In the event when a company having its branches at several countries, then each of the branch is defined as permanent establishment at that particular country, subject to be taxed with respect to the profits received by the branch at their particular jurisdiction. By doing so, the income earned by the principal company in other country is exempted from taxes as the taxes are paid in the source country. The other important functions of defining permanent establishment are:

i. An investor may invest his capital in other jurisdiction, in a deposit or an asset or in business. The investment income connected with permanent establishment (PE) is always treated as business income and not as royalty, interest, dividend or capital gains.

ii. The employment remuneration paid to the employees of PE is taxed in state of PE irrespective of the duration of stay.

ASSOCIATED ENTERPRISES

Associated enterprises are those which is the subject matter of, same centre of direction, control or management, or if an entity involves expressly or impliedly towards the administration and governance of other entity in the decision making. Due to their relationship and association with

26 Shrivas Rajeshkumar Satyanarain v. The Chairman Selection Committee, AIR 1987 Guj 4.
27 K. Radha Krishnan Nayyar v. Radha, AIR 1992 J & K 1.
28 D.P. Mittal, International Agreements related to Taxes, (2007, at p. 379).
29 OECD Model Convention, 2010 (Article 5).

each other, they try to move the profits to a low tax country by altering or manipulating the financial transaction. For example, an associated enterprise in jurisdiction USA may overcharge its own subsidiary in Jurisdiction INDIA to shift the profits from jurisdiction INDIA to jurisdiction USA. The main motive being to lower the tax burden, as jurisdiction USA is having low tax rates. This is why this specific field of taxation has been labelled as 'transfer pricing'.

The Article 9, related to associated enterprises, allocates/transfers the overall profits derived by such enterprises, in accordance with functions actually performed and risks actually borne by them.[30] The first para of this article contemplates the general rule that, the tax authorities of one jurisdiction may increase the taxable income of an enterprise, if there is a variation in profits amongst two associated enterprises as compared with two non-associated enterprises. The second para deals with the financial adjustments in the other jurisdiction as an upward adjustment in one jurisdiction shall have a corresponding effect of downward adjustment in another jurisdiction. Which in turn creates a bogus records or transfer of profits to another jurisdiction and impacts the revenue loss to the particular jurisdiction. This is done to prevent dual taxes on the same value.

Indian double taxation conventions are following the Model Conventions in substance with some variations. Some treaties have given an overriding effect to the domestic law in place of treaty provisions (which means the domestic laws are superseding and prevailing over the treaties).[31] Therefore, the provisions under the domestic law of India shall apply in such cases.[32] Some treaties have omitted the provisions of second paragraph relating to financial adjustments.[33]

NON-DISCRIMINATION

Article 24, of the treaty contains a non-discrimination clause which is similar in both the draft conventions and is divided as paras.[34] 1st para states, that similar relief to be provide to the residents of member states (irrespective of nationals and non-nationals). This treatment is

30 OECD Model Convention, 2010, Article 9; UN Model Convention, 2011, Article 9.
31 Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Malta, 1995, Article 9.
32 Income Tax Act, 1961, Sections 92 to 92F.
33 Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Singapore, 1994, Article 9.
34 OECD Model Convention, 2010, Article 24 & UN Model Convention, 2011, Article 24.

extending to all individuals who are residents of member states. This similar relief does not permanent one and it is subject to the prevailing situations between the member states.

The second para deals with the persons who are stateless, but resident of a contracting country. Such persons can also claim the benefit of equal national treatment under this para. The third para provides equal treatment to permanent establishment of other contracting state, in relation to the taxes levied upon the entity of the state carrying same activities in that state.

EXCHANGE OF INFORMATION

Article 26, of both the draft conventions relates to exchanging information to the appropriate officials of the member states. Based on the commentaries provided in the OECD draft Treaty, this provision is incorporated to provide administration support in applying the relevant clause to the particular individual. The information shared by the officials of both the member state will helpful in the process of preventing tax evasion and assessing the tax returns filed by the individual.

All the information which are shared by the officers related to taxes are kept as secret and revealed or disclosed only in the court of law, and not to anyone else. The provisions in the Article are not restricted by Article 1 (persons covered). Therefore, the contracting countries can share information regarding residents of third countries available to them however subject to the secrecy provisions. The reference to Article 1 is not included in many of India's treaties. In that case, the obligation to supply information does not exist.

The Second para states that, the contracting state can refuse to share information on following cases:

i. *Where the contracting state has to implement the laws of other country?*
ii. *Where the information cannot obtained according to their country laws?*
iii. *Where the sharing of information will be prejudice the sovereignty and public policy of their country?*

Due to these limitations, as mentioned above in para 2, this article is an important tool for preventing international avoidance and evasion of taxes.

CONCLUSION

The International law, is always a law of cooperation, friendship, unity and recommendatory in nature. Each and every nation has its own sovereignty and integrity and it cannot be questioned or objected by the other nations in the international forums. The international community promised themselves, that they will not interfere with the internal affairs of the nation, even though it is a member. They will impose sanctions and other administration measures against the state who involve in inhuman act. Similarly, the international taxation law is also recommendary and obligatory in nature. Each and every country has its own foreign policy and internal administration it should not be compromised for the others. Taxation being the sovereign right of the state and describes their position to the world, so relinquishing or give away the tax claims in favour of other nations are unacceptable by the nations and they also not do it. The jurisdiction of the country to tax its resident and non-resident depending on their municipal law is their vested right.

If the country tax their resident and non-resident (resident of some other state) double taxation will be incidence on the individual. If the person is identified as resident in one country and non-resident in his country, he is subjected to tax on both countries. This creates double taxation and the individual will sometimes involve in tax evasion by hiding his income in other country or Tax Heavens, which not only reduce the revenue to both the government but also the funds may be used for illegal activity.

To avoid the double taxation by preventing tax evasion and exchange of information in collecting the taxes effectively, the OECD and UN drafted the model convention as Double Taxation Avoidance Agreement (DTAA). With this DTAA’s country across the world can sign DTAA with other country, either bilaterally or multilaterally for preventing double taxation and exchange of information. India being the signatory of the DTAA’s with more than 195 countries to avoid dual taxes. This has not only prevented dual taxation but also maintains a friendly relationship with the member country in administrative assistance on tax cases and mutual agreement procedure helps the assessee filing the returns.

These DTAA has played a significant role in preventing tax evasion and single tax is imposed on the assessee. In the event of non-payment of taxes in both the country, then exchange of information is used to collect the tax dues. The International Tax Agreements to some extent prevent the double taxation and determined the classification of the taxes to be collected by

the source country and tax collected by the resident country. Which result in the harmony of tax claims and the individual is paid single tax and the nations taxing sovereignty is not compromised. In the event of tax collection is in foreign jurisdiction, the member country will provide all possible help in courts and judicial forums.

Now the current position of these DTAA's is to be taken in to consideration before concluding its effectiveness. These agreements play an important role in the smooth functioning of the government and in deciding the administrative matters and foreign policies relating tax disputes. The tax dues of the foreign entity and NRI's had been settled and adjudicated with the best support of the contracting states, even during the period of covid pandemic. The cooperation, assistance and support rendered by the contracting states towards India and India to others are highly remarkable, related to the taxation policy. The revenue generation and collection boosted the economy from bottom to top within few months of the covid normalcy. These all are best possible only with the help and support of the DTAA agreements and the organisations such as OECD and UN.