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GUIDE ON

EXPATRIATES

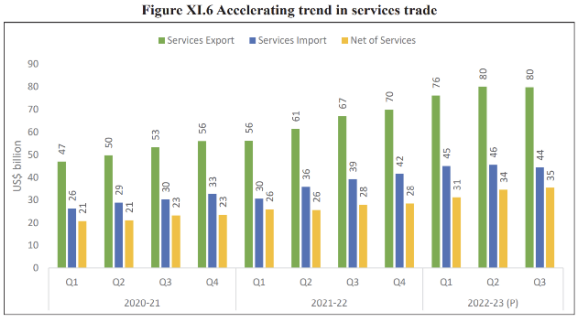
LAW, TAXATION, COMPLIANCE AND STRATEGY

Preface to the publication

In the present globalised and integrated world, trade is essential for developing countries to reap the benefit of increased globalisation of products and financial markets. For the world as a whole, the share of trade as a percentage of world GDP has been in the range of 50-60 per cent since 2003 and stood at 52 per cent in 2020, according to the World Bank database. For India as well, the share of trade as a percentage of GDP has been steadily increasing, being above 40 per cent since 2005 (except 2020 being the pandemic year). The ratio stands at 46 per cent in 2021 and 50 per cent for H1 of 2022.

India maintained its dominance in the world services trade in FY22. India's services exports stood at US$ 254.5 billion in FY22 recording a growth of 23.5 per cent over FY21 and registered a growth of 32.7 per cent in April-September 2022 over the same period of FY22. Software and business services together constitute more than 60 per cent of India's total services exports and exhibited strong growth during Q2FY23. While strong revenues in major information technology (IT) companies from various segments such as retail and consumer business; communications and media; healthcare; and banking, financial and insurance services drove the growth in software exports, a significant pick-up in engineering, and research and development related services boosted the growth in business services exports during the quarter.

Figure XI.6 Accelerating trend in services trade



Source: Department of Commerce, RBI ; P: provisional

This increase in trade leads to increase in movement of human capital. The world has become a single big market place which enables increased cross border flow of capital, human resources and technology. This flow of capital along with human resources gives rise to new regulatory environment and increased compliance requirements. Complexities involved due to multi jurisdictional issues that arise in rendering dependent and independent services across the globerequires the multinational entities and employees to have a better understanding of the tax, social security and other allied laws and to comply with relevant requirements for the expatriates.

Indians move out of India to take up job opportunities abroad and many foreigners have come to India for job opportunities in India. The continuous rise in the movement, assignment or secondment of human capital from one country to another country in the course of employment gives rise to various tax issues on income like: remuneration, social security and pension received by the expatriate employees. This movement of employees originates various peculiar situations arising out of dual employment/multiple countries and different tax regimes.

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.

Extensive efforts are being made to provide ease of doing cross border trade through signing of FTA, entering into DTAA implementation of BEPS Action Plans, signing of Multilateral Instruments etc. 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.

As far as India is concerned, Reserve Bank of India allows Indian corporates to remunerate expatriates as well as has enabled the expatriates to repatriate their salaries. On one 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.

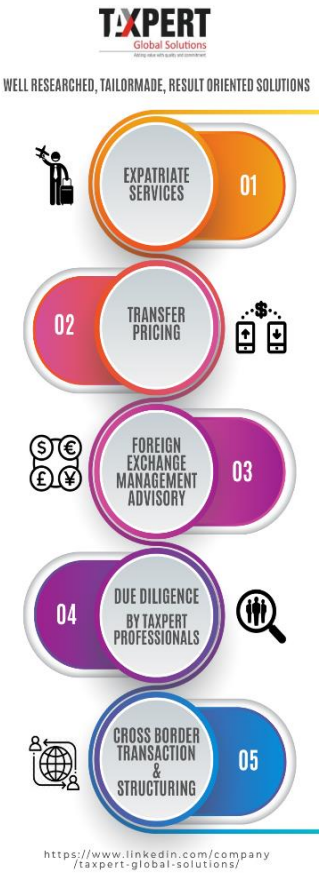
Thus, it is important for these expatriate employees as well as Multi National Organisation to understand the provisions as applicable to them.

It is in this background we have published our publication on "**Guide to Expatriates - Compliance, Tax, Regulatory and Strategy"**

The Booklet covers all aspects applicable to expat in detail.

Thank you.

Taxpert Global Solutions,



Content

01. About Expatriates

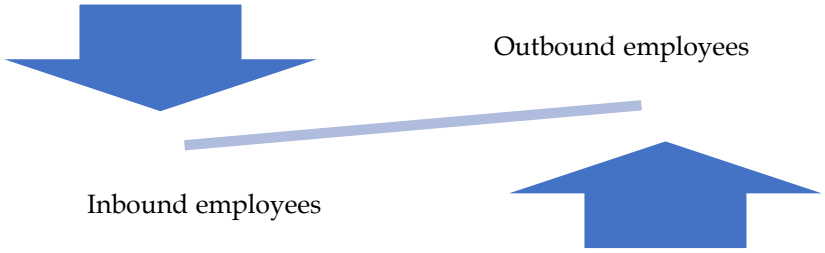
"Expatriate" or **"Expat"** is a person residing in a country temporarily or permanently which is different from his/her home country, i.e, the country in which he/she is a resident. Usually, this term is used in case of technicians and professionals sent by their companies to their associated enterprises or foreign subsidiaries.

There are employees of overseas parent company serving the Indian company on deputation or it may be the case that employees of Indian entity are deputed to overseas subsidiary/parent company. The resident of a country working in another country is called an expatriate.

Expatriates often work in a country or they are deputed to another country wherein the tax brackets, credits, deductions immensely differ from their home country and hence they face the issues which are different from normal employees of the multinational entities

In the Indian context, expatriate means a resident of foreign country working in India (inbound) or an Indian resident working abroad (outbound).

Expatriate can be of two types: Inbound and outbound



A person resident of a foreign country working in another country will be known as Inbound Expatriates for another country. At the same time, the same person will be considered as outbound expatriate for the country in which he is resident.

For eg. Resident of USA Mr. John working in an MNC in USA deployed in India for working for its Indian counterpart.

For India – Mr. John will be considered as an **In**bound expatriate as he is coming **IN** India.

A person resident of a country seconded abroad is known as outbound expatriates for the resident country.

Taking ahead the same example:

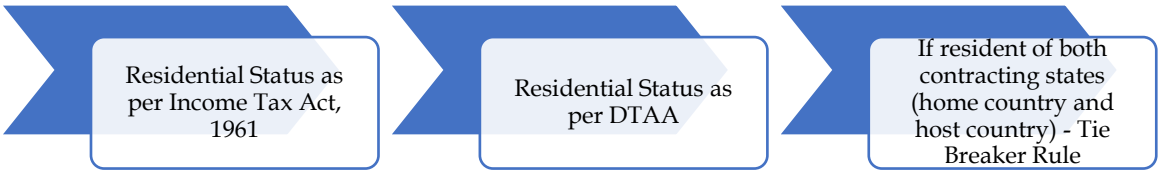
Mr. John is resident of USA and will be considered as an outbound expatriate for USA as he is going **OUT** of USA.

02. Residential Status

Citizenship and Residential Status are distinct aspects. A person may be Indian citizen, but it does not necessarily mean that they must be resident in India for a specific year. The income tax in India is charged on the basis of the residential status of an individual and not on the basis of their domicile or citizenship. It is necessary to determine the country of residence as this has a direct impact on taxability of the income.

In case resident of one country derives income from another 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.

Therefore, the residential status needs to be determined in following manner:



02.a. As per Income Tax Act, 1961

Under Indian Income Tax Act, 1961, Residential status is determined on the basis of the physical presence in India during each previous year, ie, the FY commencing from 1st April.

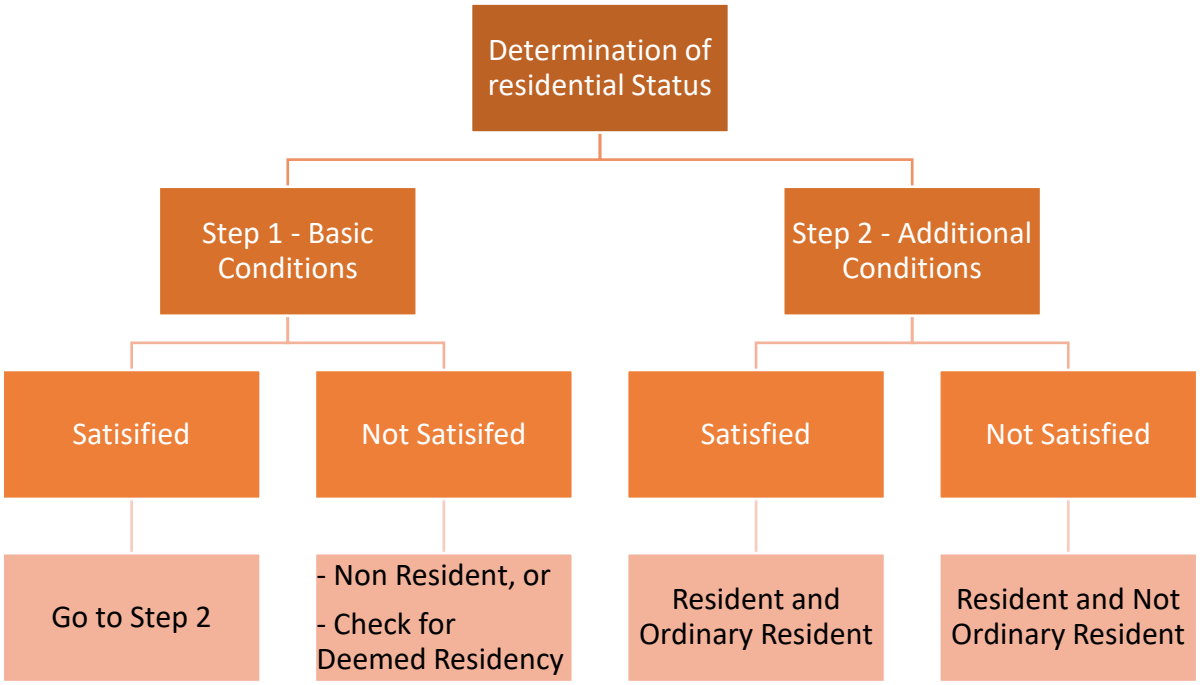
For the purpose of the Income Tax Act, 1961, an individual may have any one of the following residential status:

(1) Resident and ordinarily resident in India;

(2) Resident but not ordinarily resident in India; or

(3) Non-resident.

Residential status of an individual is based on Section 6 of the Income Tax Act.



Step 1: Basic Conditions

As per Section 6 of the Income Tax Act, 1961:

(1) An individual is said to be resident in India in any previous year, if he—

(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or

(b) [***]

(c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.

Explanation. 1—In the case of an individual,—

(a) being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the

words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted ;

(b) being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C*, who, being outside India, comes on a visit to India in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted.*

Explanation 2.—For the purposes of this clause, in the case of an individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.

Step 2: Additional Conditions

Section 6

A person is said to be "not ordinarily resident" in India in any previous year if such person is—

(a) an individual who has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less; or

(b) a Hindu undivided family whose manager has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less."

Note:

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 and the day of exit.

The Indian Finance Act, 2020 has inserted section 6(1A) to IT Act. It provides that an individual, who is citizen of India and have total income (excluding income from foreign sources) in

excess of INR 15 lakhs shall be considered as resident in India. However, if he liable to tax in any other country in that case he shall not be considered as resident.

An individual who is Indian citizen

- who is having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be deemed to be resident in India in that previous year, and
- if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature, and
- who is not a resident in India in the previous year as per the above clause.

“Income from foreign sources" means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).

A deemed resident in India will be considered as Resident and Not Ordinary Resident for taxation purposes and there by liable to pay tax in India for income earned in India from sources in India and from Business / Profession set up in India.

02.b. Double Taxation Avoidance Agreement

In case resident of one country derives income from another 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 enter into Double Taxation Avoidance Agreements/ Tax Treaty ('DTAA').

Section 90 of Income Tax Act, 1961 ["**ITA**"/'IT Act"] 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. Hence, in the case of an expatriate, the provisions of the DTAA need to be examined for the purpose of ascertaining the tax liability.

- **Residential status under DTAA**

It is necessary to determine the country of residence as this has a direct impact on taxability of the income. Generally, a person is subject to tax on global income in the resident country.

Mostly, in all DTAAs, Article 4(1) defines the term 'resident' of a country. Article 4 of India and Singapore treaty is produced below for ready reference:

> *"ARTICLE 4*
>
> ***RESIDENT***
>
> *1. For the purposes of this Agreement, the term "resident of a Contracting State" means any person who is a resident of a Contracting State in accordance with the taxation laws of that State.*
>
> *2. Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows:*

(a)	*he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests) ;*
(b)	*if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode ;*
(c)	*if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national ;*
(d)	*if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.*

3. Where by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated."

Article 4(1) of a DTAA defines resident to 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, 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:

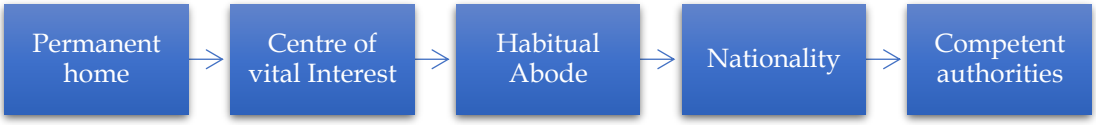
(a) Permanent home: The country in which he/she has a permanent home available to him/her;

(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.



On an analysis of Article 4 of the relevant treaty, the following tests have to be conducted to determine the ultimate tax residency of an individual:

— The first test to establish ultimate residency is to determine the permanent home.

Under this test, an individual would qualify as a resident of the country where he has a permanent home available to him. A permanent home in a literal sense would not mean owning a house. Any form of home, including a rented apartment or rented room which brings some degree of permanence at all times continuously can be considered as a permanent home.

A parental home or a home rented in someone else's name, even if available to the individual in which he does not have any ownership, is not considered as a permanent home available to him.

If an individual has a permanent home in two states (in India on account of family stay and in Singapore by virtue of employment), the next test needs to be analysed.

— The second test is identifying the centre of vital interest.

Under this test, an individual would be a resident of the country where he has retained his personal and economic ties, ie, a place where the individual's family, social relations, investments, occupation, political and cultural activities are closer. These circumstances need to be examined in totality. In case social and economic interests are also split between two states or are undeterminable, the next test shall be examined.

— The third test is determining the habitual abode.

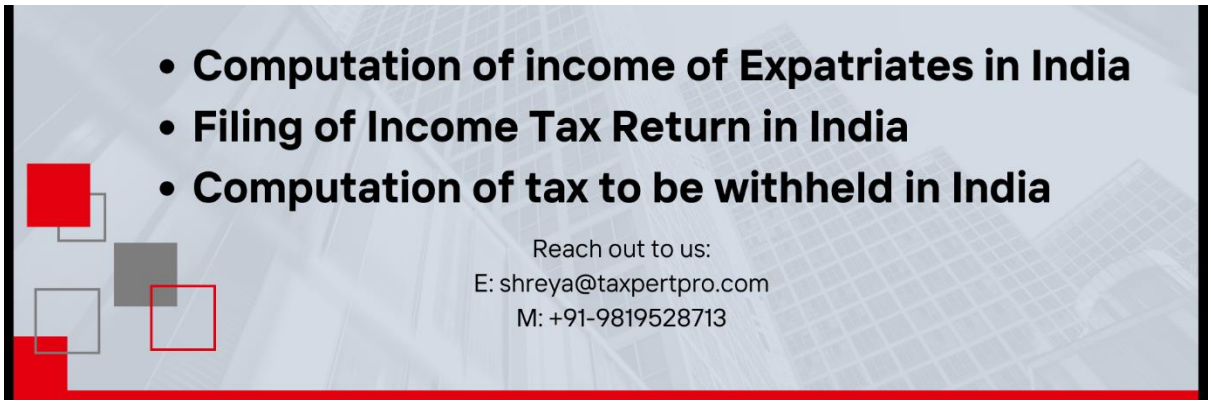
An individual would tie-break his residency to the country in which he has a habitual abode, ie, the place where he has stayed for a longer duration or the country he would like to stay after completion of the deputation.

— The fourth test is nationality.

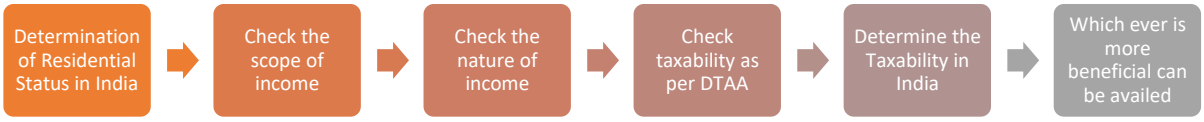
When the residency cannot be determined by any of the above tests, the next step is to determine an individual's nationality. In case the individual is a national of both the countries or neither of the countries, the competent authorities of India and the other country shall endeavour to settle the question by mutual agreement.

The above tests would resolve the conflict relating to an individual's ultimate residency and tie-break in favour of one of the two countries.

03. Taxability



The taxability is determined in the following manner:



Any employee working in India would be liable to tax in India on the salary earned during the period of services rendered in India. It is immaterial who is bearing the expense of salary, whether he/she is on the payroll of the Indian entity or of the foreign entity because, as per the Income Tax Act, 1961, incidence of tax depends on the residential status of the taxpayer and on the place and time of accrual or receipt of any income.

The scope of income of a person is determined based on section 5 and is as specified below:

The following chart highlights the tax incidence in case of different persons:

Nature of income	***ROR (*)***	***RNOR (*)***	***NR (*)***
Income which accrues or arises in India	Taxed	Taxed	Taxed
Income which is deemed to accrue or arise in India	Taxed	Taxed	Taxed
Income which is received in India	Taxed	Taxed	Taxed
Income which is deemed to be received in India	Taxed	Taxed	Taxed
Income accruing outside India from a business controlled from India or from a profession set up in India	Taxed	Taxed	Not taxed
Income other than above (ie, income which has no relation with India)	Taxed	Not taxed	Not taxed

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. Salary income of expatriates would be taxable in India under the provisions of Income Tax Act, 1961 ("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 the ITA provides that the following incomes are deemed to be received in India:

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

(ii) Transferred balance in the recognised provident fund to the extent specified; and

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

Deemed to accrue in India

Section 9 of the Income Tax Act, 1961 *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.

Taxability under DTAA

The taxability under DTAA of an individual is determined by Article 4 read with Article 14/15 as the case may be.

For ready reference, we have reproduced Article 15 of India-Singapore treaty:

"ARTICLE 15

DEPENDENT PERSONAL SERVICES

1. Subject to the provisions of Articles 16, 18, 19, 20 and 21, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State, if :

(a)	*the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the relevant fiscal year ; and*
(b)	*the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State ; and*
(c)	*the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.*

3. In the case of a recipient who satisfies all the conditions under sub-paragraphs (a), (b) and (c) of paragraph 2, if his remuneration is deductible as an expense against fees for technical services (dealt with under Article 12) derived by his employer and the employer has no permanent establishment in the other Contracting State, the remuneration may, notwithstanding the provisions of paragraph 2, be taxed in that State. In such case, the tax so charged shall not exceed 15 per cent of the gross amount of the remuneration.

4. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting State shall be taxable only in that State."

Further, as per above in the terms of DTAA, an 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.

For an expatriate employee who becomes a non-resident under the Indian Income Tax Act and resident of other country of his employment, the income received in India for services rendered in the host country may be exempt in India under Article 15/16 (the Dependent Personal Services) of the applicable DTAA. Further, where the income is doubly taxed, the benefit of avoiding double taxation, i.e, either by credit method or exemption method, can be claimed in the country of ultimate residency.

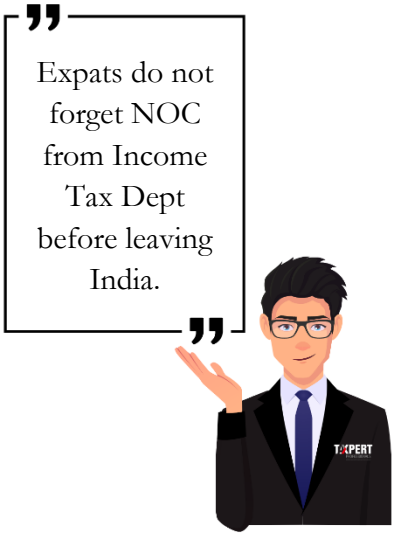
04. Inbound Expatriates

Life cycle of inbound Expat

The expat have a life cycle as an expat, i.e.

1. Before arrival in India,
2. On Arrival,
3. When stay in India,
4. When leaving from India,
5. After leaving India

First stage of an inbound expat employee's life cycle is before arrival in India. An expat needs to get a proper VISA before arriving in India. An employer needs to be ready with the understanding of Social Security Agreement entered into by Indian Government with other countries and the Hypothetical tax which will provide an employee to be tax equal in India. The next stage will be Arrival of the inbound expat employee in India. On arrival, the employee is required to get its FRRO registration within 14 days of arrival. Also, the expat needs to understand the residential status as per Indian Laws. At the same time, the employer needs to be ready with the employment agreement which would have been shared with the employee prior to initiation of the employment. When in India, the employee should obtain its PAN, get all the tax compliances done and the employer should ensure that all the benefits available to the employee in India is passed on to them.



At the time of leaving India, No objection Certificate, Foreign tax Credit (if any) and Income Tax Return needs to be taken care by the Employee. At the same time, employer should ensure Form 30A is signed by the Employer for further processing with Income Tax Authorities in India.

On leaving India, in case any assessment comes in near future after the employee has left India, needs to be addressed lawfully by the employee and employer.

Life cycle of an Inbound Expat

	Before arrival	Arrival	In India	Leaving India	After leaving India
Employee	1. Visa	1. FRRO Registration 2. Residential status	1. Tax compliances 2. PAN Application 3. TRC	1. NOC 2. Foreign Tax Credit 3. Income Tax Return	1. Assessment
Employer	1. Hypothetical tax computation 2. Social Security Agreement	1. Employment Agreement	1. Providing employees with benefits provided in Act. 2. Computation & deduction of TDS	1. Form 30A	1. Assessment

Expatriate Services

TAXPERT Global Solutions

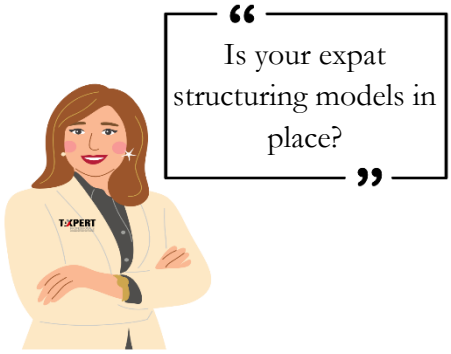
Entry & Exit Strategies

- Obtaining Permanent Account Number
- Registration with Foreigners Regional Registration Officer
- Advisory & Consultancy
- Surrender of Residential Permit & FRRO registration
- Closure of bank accounts in India and other formalities
- Obtaining No Objection Certificate and Income Tax Clearance Certificate

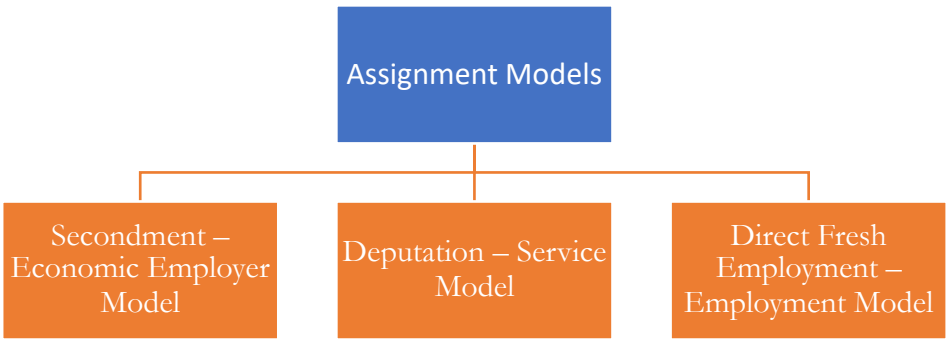
Arrangement of Inbound Expat employee:

Inbound Expats may work in India in the following arrangement:

- Business Visit
- Short term assignment
- Medium to long term assignment
- Permanent relocation
- Consultant



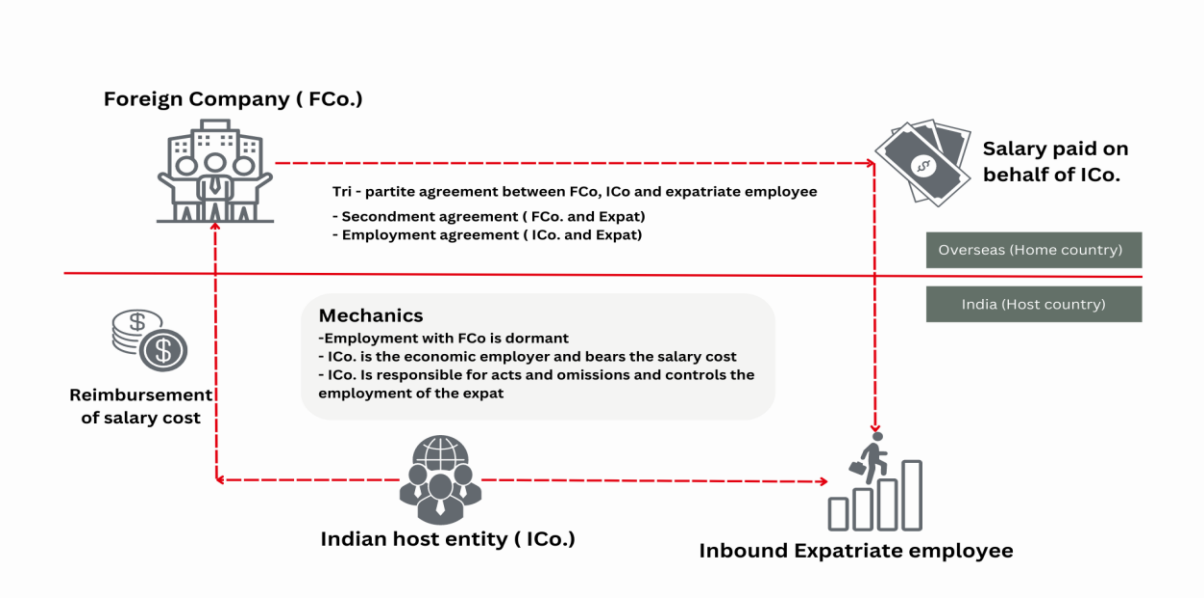
There are majorly three assignment models which are usually deployed by multinational entities in case of an Inbound Expatriate employees:



Secondment Model

In secondment model, expatriate employee effectively becomes an employee of the Indian entity, his salary costs are borne by the Indian entity, who is responsible for all the acts/ omissions of the employee.

Secondment of employees, as a concept, has evolved in the era of global commercial mobility. Secondment is where an employee of one organization is working for one or more other organization(s), basis a mutual understanding between the organizations. Secondment is a temporary phase of arrangement where an employee is transferred from one job to another, usually in the same group of company for a definite period of time for the mutual benefit of all parties involved in the arrangement.



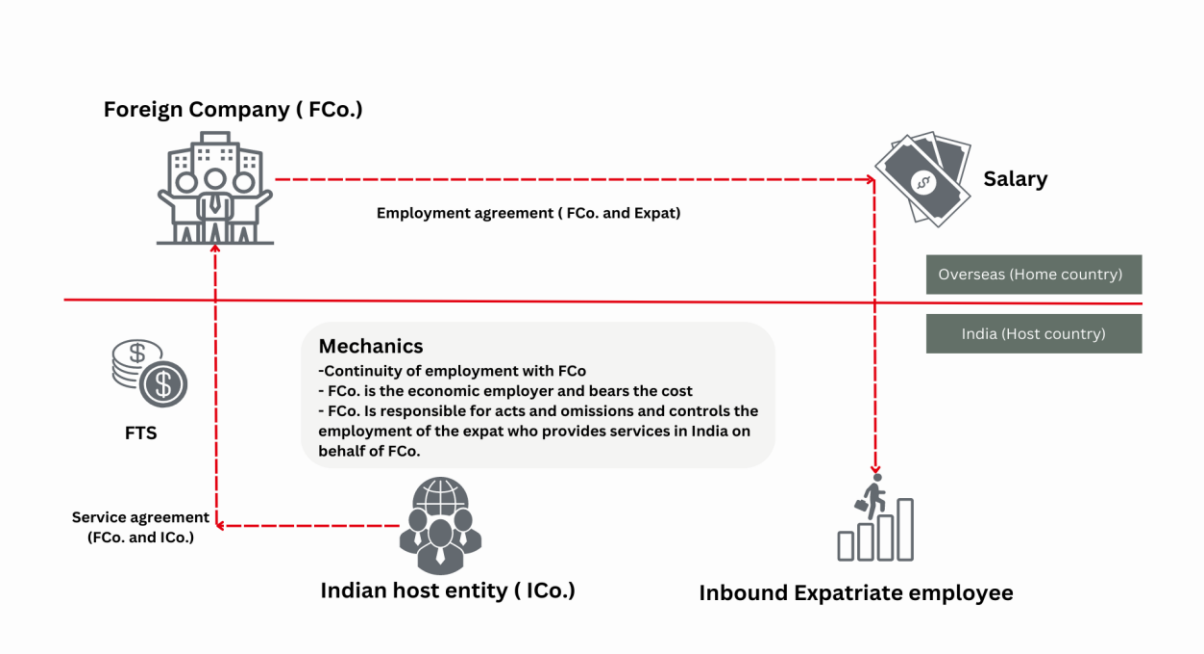
Deputation Model

Under deputation model the expatriate employee is on roll of the foreign entity and is considered to provide service to the Indian Entity, on behalf of the foreign entity, while in India.

Under the deputation model:

- the foreign company enters into employment agreement with the expat,
- The Indian Company enters into service agreement with the foreign company

In this type of arrangement, the foreign company continues to be the employer of the Expat employee and the expat employee works for the Indian Company merely on behalf of the Foreign Company and there is no employer employee relationship between the expat and the Indian Entity.



Agreement plays an important role in determining the type of arrangement. Therefore, the drafting of the agreement should be done with utmost care and diligence.

Comparison

The taxation under ITA will be dependent upon the type of arrangement. The arrangement type determines the relationship between the Expat Employee, the Foreign Company and the Indian Company. Let us understand the taxation in case of each arrangement model:

In Secondment Model, the Indian Company being the employer of the Expat Employee will bear the salary cost of the Expat Employee. The payment will be done in the following manner:

i. Foreign Company will make the payment to the Expat Employee,
ii. The Indian Company will reimburse the salary cost to the Foreign Company.

The Indian Company before reimbursing the salary cost to the Foreign Company will withheld the tax on the salary cost u/s 192 of the IT Act. Section 192 of the IT Act provides that every person responsible for paying any income which is chargeable under the head 'salary', shall deduct income tax on the estimated income of the assessee under the head salaries.

Under Deputation Model, the Foreign Company being the employer of the Expat Employee will bear the salary cost of the Expat Employee. The payment will be done in the following manner:

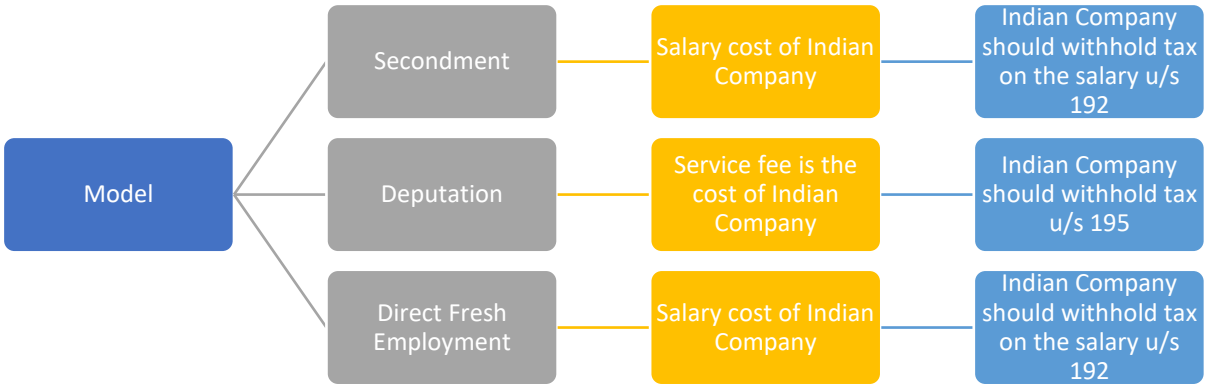
i. Foreign Company will make salary payment to the Expat Employee,
ii. The Indian Company will pay the Service Fee towards the receipt of services to the Foreign Company.

The Indian Company before paying the service fee to the Foreign Company will withheld the tax on such income u/s 195 of the IT Act. Section 195 of the Income Tax Act, 1961 specifies the TDS provision in the case of any person making a payment by way of interest or any other amount other than salary to an NRI or a foreign company.

Under Direct Fresh Employment Model, the payment of salary will be done by the Indian Company to the Expat Employee after withholding the tax.

The Indian Company before reimbursing the salary cost to the Foreign Company will withheld the tax on the salary cost u/s 192 of the IT Act. Section 192 of the IT Act provides that every person responsible for paying any income which is chargeable under the head 'salary', shall deduct income tax on the estimated income of the assessee under the head salaries.

Summary:



Expatriate Services

Procedural compliances

Reach out to us at shreya@taxpertpro.com/+91-9819528713

The procedural compliances to be taken care by an Inbound Expat and his employer are as under:

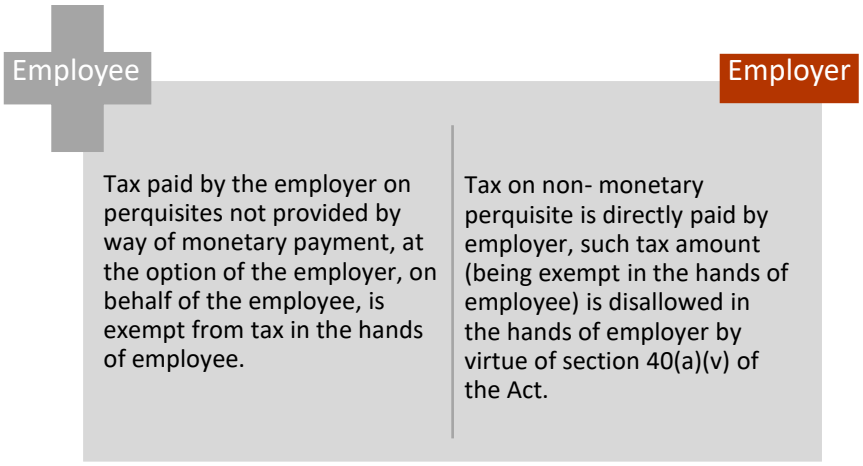
- Obtaining a valid VISA
- Registration with Foreigners Regional Registration Officer (FRRO)
- Opening of Bank Account in India
- Obtaining Permanent Account Number (PAN)
- Filing of Return of Income
- Form 67 along with Return of Income if claiming Foreign Tax Credit (FTC)in Return of Income in India
- Undertaking to be furnished by a person not domiciled in India at the time of his departure from India in Form No. 30A
- Income Tax Authority shall on receipt of such undertaking in Form No. 30A, immediately give to such person a no objection certificate (Tax Clearance Certificate) for leaving India in Form No. 30B
- Surrender of Residential Permit post completion of Indian assignment to the concerned FRRO/FRO
- Closure of Bank Account in India

Others

i. Non monetary perquisite u/s 10(10CC)

The provisions of section 10(10CC) of the Income Tax Act, 1961 provides:

i. The employee should be deriving income in the nature of a perquisite [as defined under section 17(2) of the Income Tax Act],
ii. Such income (i.e. perquisite) should be non-monetary,
iii. The employer should have paid the income tax (on behalf of the employee) on such non-monetary perquisite.



ii. Short Stay Exemption

Under the Income Tax Act, as per s 10(vi), the remuneration received by an employee of a foreign enterprise for services rendered by him during his stay in India shall not form part of his total income provided the following conditions are fulfilled:

(a) The foreign enterprise is not engaged in any trade or business in India;

(b) His stay in India does not exceed in the aggregate a period of 90 days in such previous year; and

(c) Such remuneration is not liable to be deducted from the income of the employer chargeable under this Act.

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 deals with taxation of employment income.

The said Article[1] 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 12-month period commencing or ending in the fiscal year concerned depending upon the relevant clause of the respective 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.

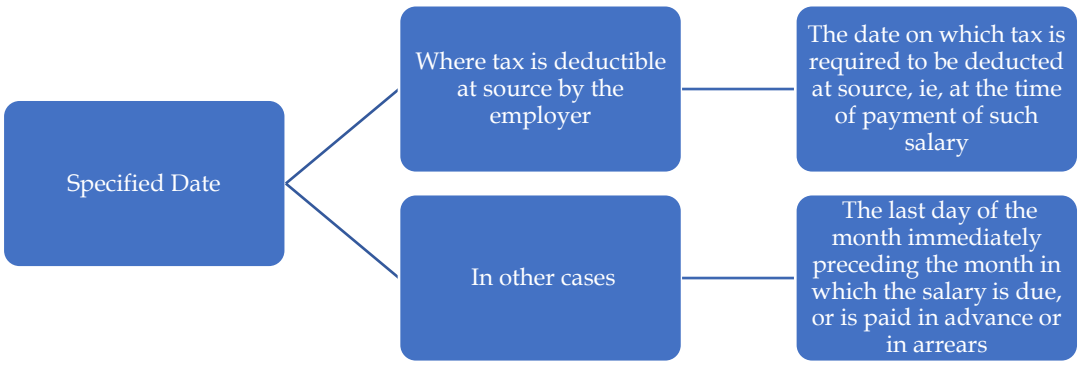
A claim for the beneficial provisions under this Article should also be substantiated with evidence.

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.

iii. Conversion of salary in Indian rupees in order to calculate Indian taxes

As per Rule 115 of the Income Tax Rules where expatriates receive their salaries in foreign currency, the rate of exchange for the calculation of the value in rupees shall be the telegraphic transfer buying rate of such currency as on the specified date.

Specified date is the date as given below (Explanation 2 to Rule 115)



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 [*Explanation* to r 26].

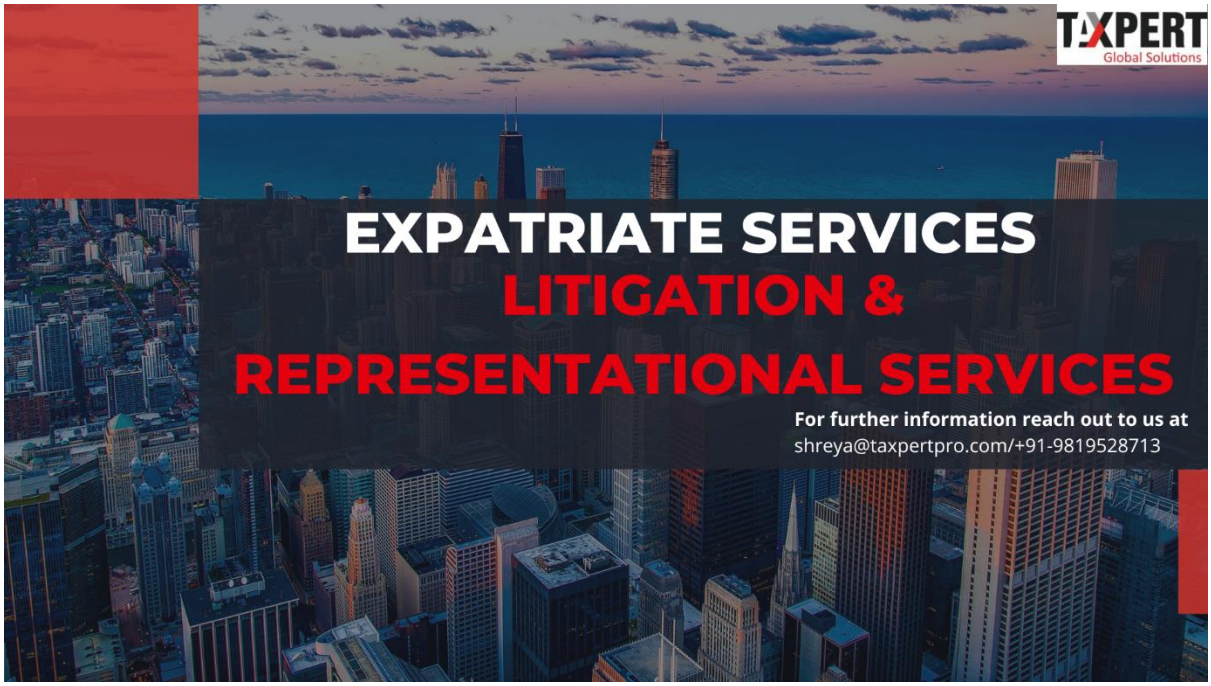
iv. Withholding tax implications on the employer

As per s 192 of the Income Tax Act, there is an obligation on the 'person responsible for paying' salary to deduct and deposit withholding taxes at the prescribed rates of tax.

[1] The aforesaid conditions may differ from country to country and the relevant DTAA should be referred to before application.

Therefore, the employer is under an obligation under s 192(1) of the ITA to deposit withholding taxes (on an average basis) at the applicable rates, on the salary payments to the expatriates.

In cases where salaries are paid abroad, where the 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. 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.



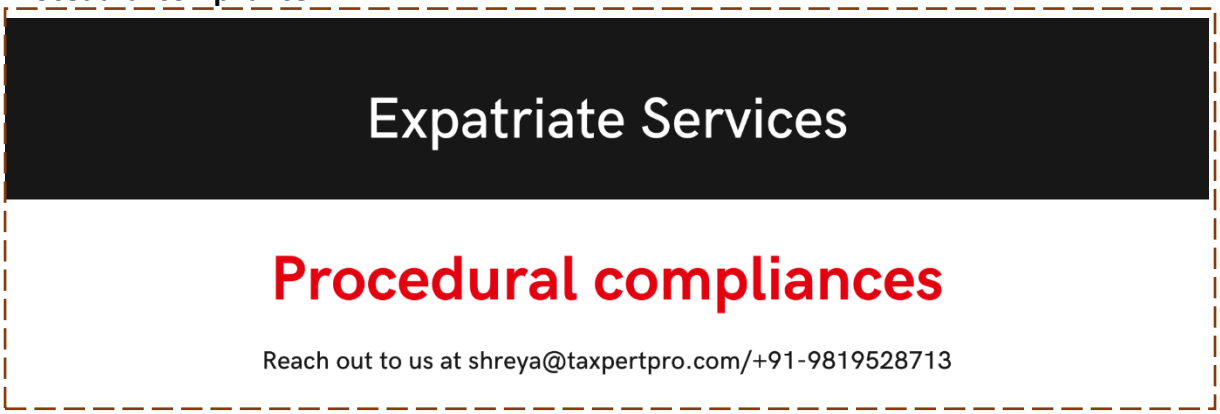
05. Outbound expatriate employees

A person resident of a country going out of its home/resident country for employment is known as outbound expatriates for the resident country.

Reporting requirements for payments made to non-residents

As per section 195, any payment made to a non-resident which is "chargeable to tax in India" is required to be reported electronically in Form 15CA and/or Form 15CB. Salary payments made to non-resident expatriates are required to be reported by the employer in case they are chargeable to tax in India.

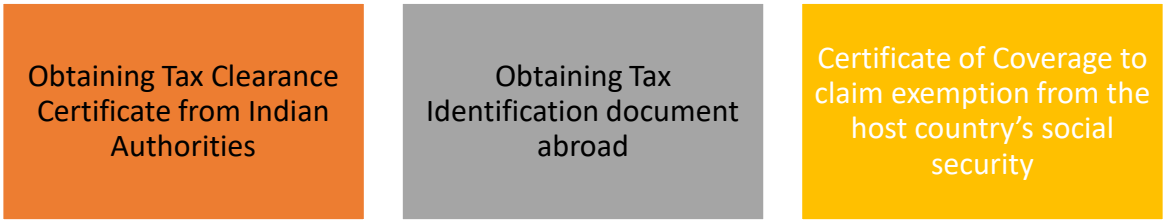
Procedural compliance



Employee

The Compliance to be undertaken by an outbound employee are:

- Obtaining Tax Clearance Certificate from Indian Authorities
- Obtaining Tax Identification document abroad
- Certificate of Coverage to claim exemption from the host country's social security



Employer

The Compliance to be undertaken by employer of an outbound employee are:

- Check for Place of Effective Management,
- Check for Permanent Establishment

Tax residency certificate

In order to claim relief under DTAA, Section 90 of the ITA provides 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. Where the entire prescribed information is not captured in the TRC, Form 10F would be required separately. 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.

As per rule 21AB of the Income Tax Rules

Certificate for claiming relief under an agreement referred to in sections 90 and 90A.

21AB. [*(1) Subject to the provisions of sub-rule (2), for the purposes of sub-section (5) of section 90 and sub-section (5) of section 90A, the following information shall be provided by an assessee in Form No. 10F, namely:—*

(i) Status (individual, company, firm etc.) of the assessee;

(ii) Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);

(iii) Assessee's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the asseessee claims to be a resident;

(iv) Period for which the residential status, as mentioned in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A, is applicable; and

(v) Address of the assessee in the country or specified territory outside India, during the period for which the certificate, as mentioned in (iv) above, is applicable.

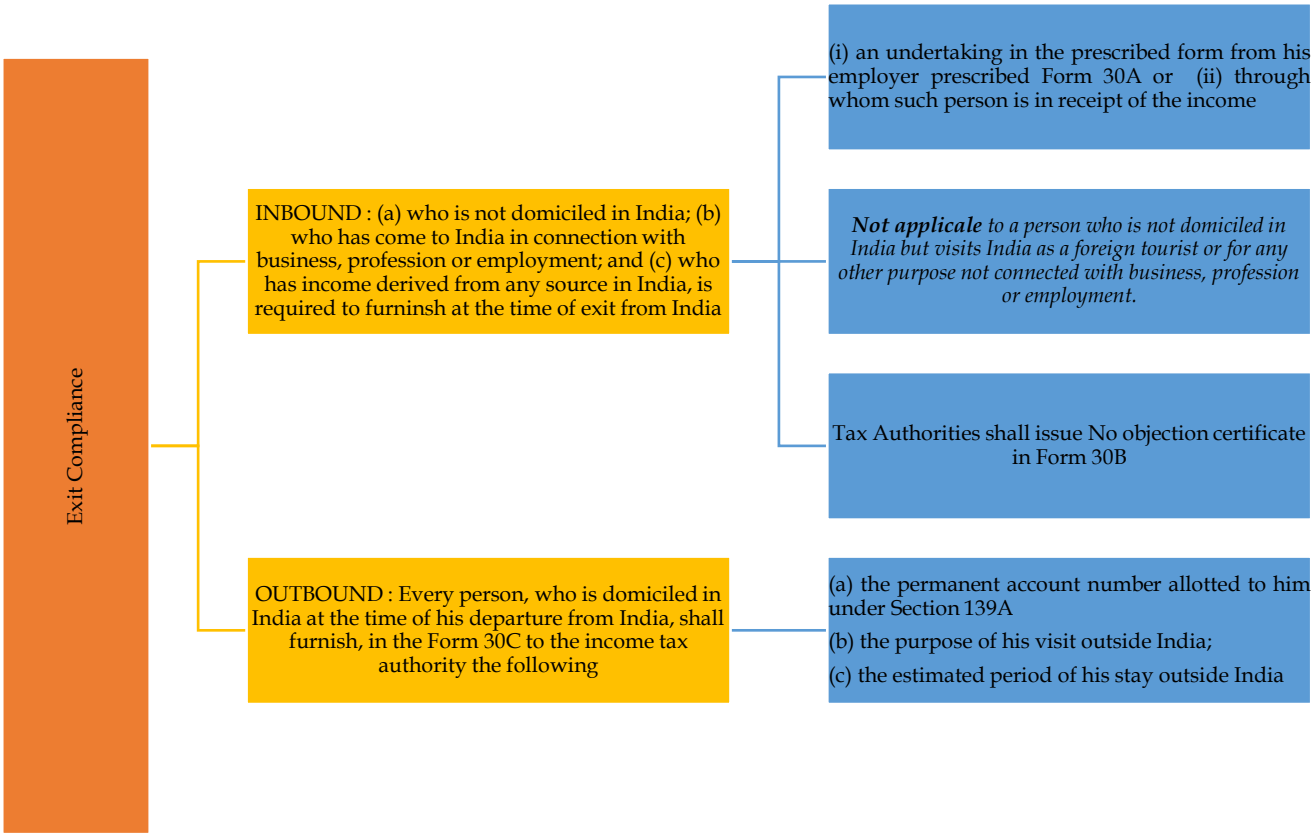
(2) The assessee may not be required to provide the information or any part thereof referred to in sub-rule (1) if the information or the part thereof, as the case may be, is contained in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A.

*(2A) The assessee shall keep and maintain such documents as are necessary to substantiate the information provided under sub-rule (1) and an income-tax authority may require the assessee to provide the said documents in relation to a claim by the said assessee of any relief under an agreement referred to in sub-section (1) of section 90 or sub-section (1) of section 90A, as the case may be.****]***

(3) An assessee, being a resident in India, shall, for obtaining a certificate of residence for the purposes of an agreement referred to in section 90 and section 90A, make an application in Form No. 10FA to the Assessing Officer.

*(4) The Assessing Officer on receipt of an application referred to in sub-rule (3) and being satisfied in this behalf, shall issue a certificate of residence in respect of the assessee in Form No. 10FB.**]***

06. Exit compliance



There are exit requirements to be complied with by inbound as well as outbound employees. Section 230(1) deals with inbound expatriates and s 230(2) deals with outbound expatriates. As per s, 230(1), a person who is not domiciled in India, has come to India in connection with business, profession or employment, and has income derived from any source in India, shall not leave the territory of India by land, sea or air unless he furnishes an undertaking in the Form 30A from his employer, or through whom such person is in receipt of the income, to the tax authorities. The undertaking to be given to the effect that any future tax liability arising in case of the expatriate would be paid by the respective person (employer/through whom expatriate is in receipt of the income). 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.

As per s 230(2), every person who is domiciled in India at the time of his departure from India shall furnish Form 30C to the Income Tax Authority the following details:

(a) The permanent account number allotted to him under Sec 139A: **where** no such permanent account number has been allotted to him, or his total income is not chargeable to income tax or he is not required to obtain a permanent account number under this Act, such person shall furnish a certificate in the prescribed form;

(b) the purpose of his visit outside India;

(c) the estimated period of his stay outside India.

Also, in case of a person who is domiciled in India at the time of his departure and in respect of whom circumstances exist which, in the opinion of an Income Tax Authority render it necessary for such person to obtain a certificate under this section, shall leave the territory of India by land, sea or air unless he obtains a certificate from the income-tax authority stating that he has no liabilities under this Act, or the Wealth Tax Act, 1957 (27 of 1957), or the Gif Tax Act, 1958 (18 of 1958), or the Expenditure Tax Act, 1987 (35 of 1987), or that satisfactory arrangements have been made for the payment of all or any of such taxes which are or may become payable by that person.

07. Tax equalisation and hypothetical tax

Tax regimes vary significantly around the world. Employees in Denmark can expect to spend up to half of their income on taxes, while in Qatar there is no personal income tax at all. Russia applies a flat rate of tax for all residents, while many other countries implement progressive rates based on income.

Moving an employee from one country to another may also impact their tax residency and tax liability. Once they become a tax resident in the host country, an assignee's income will be subject to income tax there, regardless of where they are paid. At the same time, there may be continuing tax and social security liabilities in the home country if they remain tax resident there during the assignment. Countries such as the Netherlands also offer tax concessions for highly skilled foreign workers, which may result in a tax liability that is much lower than that of a local national.

'Tax equalisation' is a measure used to neutralise the impact of taxation on an expatriate worker in respect of his/her assignment in a country where he is not a resident. This basically encourages the workers to work for their employer wherever they may be sent, having an assurance that they are not disadvantaged due to the tax policy of the host country. For example, under tax equalisation, if an employee who is a resident of India and working in India, is sent to America for employment would continue to bear taxes at the same rate as he would have borne had he continued in his/her employment in India.

To determine who is responsible for bearing the cost of these potential tax differences, it is critical that companies have tax management policies in place when sending employees on assignment. An effective tax management policy also helps promote mobility by ensuring that the tax regime in the host country is not the deciding factor for whether to accept an assignment.

A tax equalisation policy is formulated by employer. Under this policy, hypothetical tax is calculated. Hypothetical tax is calculated before assignments, based on the amount of income earned by assignees, irrespective of their place of work, which usually comprises salary and bonuses. For purposes of tax equalisation, employers may calculate hypothetical tax for employees using the rates of the home country, the country where the employer's head office is located and the country of an employee's permanent residence or citizenship. This means that assignees pay hypothetical tax directly to their employer instead of paying it in the host country. The employer, in turn, uses these funds to pay the assignees' tax liabilities in their home and host countries. The word "hypothetical" is used as the salary income of the expatriate is taxed at the rate as if the foreign assignment never occurred.

For example, if a worker working in Africa which is his/her home country is sent to India on an assignment by the employer, then according to the concept of hypothetical taxation, he is liable to pay tax on a hypothetical rate, ie, on the rate prevailing in his/her home country Africa. This concept completely negates the fact that such a person has been sent for an assignment to India. Whereas the difference between the actual tax of the host country and the hypothetical tax paid is known as "tax perquisite" and it is taken care of by the employer.

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.

A tax Management policy should include the following provisions:

- If the employees are tax equalized
- An explanation as to what compensation will be used to calculate the expat employee's equalization payment for each year
- Specific guidance on how personal income and deductions will be handled on a hypothetical basis
- Specific guidance on the types of tax burdens covered under the policy. For example, tax equalized assignees from the US may be held to hypothetical state income tax based on their most recent work or residence location, regardless of whether state residency will continue to apply while on assignment.
- A statement that it is the employee's responsibility to fully comply with all the tax laws of the Home and Host country
- A provision requiring the expat employee to work with the company's tax provider to ensure that all tax filing deadlines are met and that they will be personally responsible for any additional taxes, interest, or penalties resulting from failing to provide information in a timely manner
- A statement that the company will be responsible for paying any taxes (as covered under the policy) arising from the compensation paid to a expat employee while they are on assignment
- A statement to comply with requirements of local laws as applicable
- An explanation of how tax equalization payments will be calculated in the year that the mobile employee is repatriated to their Home country and in subsequent years

08. Social Security Agreement

Social Security Agreement (SSA) is a **bilateral agreement** between India and a foreign country designed to protect the interests of cross border workers. The agreement provides for avoidance of '**double coverage**' and ensures equality of treatment to workers of both countries from a social security perspective.

Under detachment or elimination of dual contribution, employees moving on employment to any SSA country are exempt from making social security contributions in the host country for a specified period (specific to each SSA), provided they continue to make social security contributions in their home countries. The said benefit can be claimed by obtaining a **'Certificate of Coverage' (CoC)** from the home social security authorities and submitting the same with the social security authorities of the host country.

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.

The various advantages of signing an SSA are:

a. Exemption from contribution,
b. Equality of treatment,
c. Totalisation of service proceeds,
d. Export of benefits

(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.

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) 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.

For eg. If In India benefits of provident fund exemption is provided on withdrawal of such amount not before 5 years of continuous service.

In such case, totalization of service period provides an opportunity to combine the number of days of service of home and host country both for availing any benefits.

(d) 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).

09. Tax credits and exemptions

An 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. There are two methods which are mostly prescribed in the DTAAs for avoidance of double taxation used in Indian DTAAs are:

Exemption method	Credit 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.	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 is credited to the extent of tax levied by the country of residence on such income or capital.

In case there is no DTAA, signed between India and the other country, the taxpayer can take benefit under s 91 of the ITA. The above relief is available to the individuals who qualify as residents 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.

Availing the benefit of DTAA:

Under Section 90(4) of the Act, an assessee, not being a resident in India, shall not be entitled to claim any relief under a DTAA unless a certificate of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory. Assignees require a TRC, from the tax authorities of the resident country to avail treaty benefits in the India tax return.

- Indian residents who earn income from countries with which India have a DTAA can obtain a Tax Residency Certificate, to claim DTAA benefit, from Income Tax Department.
- To obtain a certificate of residence for the purposes of an agreement referred to in section 90 and section 90A, the assesse, who is a resident of India, needs to make an application in Form No. 10F to the Assessing Officer.

Application in Form 10F requires mentioning of:

- Full Name and address of the assessee
- Status (Individual, HUF, Partnership Firm, Body of Individuals, Company, etc)
- Nationality (in case of individual)

- Country of Incorporation/Registration
- Address of the assessee during the period for which TRC is desired
- Email ID
- PAN/TAN
- Basis on which the status of being resident in India is claimed
- Period for which the TRC is applicable
- Purpose of obtaining TRC
- Any other detail

On 16 July, 2022, the Indian Tax Administration issued a notification mandating non-resident (NR) taxpayer to electronically furnish specific information in specified form (Form 10F) to avail Double Taxation Avoidance Agreements (DTAA) benefits.

Prior to the notification dated 16th July 2022, Taxpayers were not required to file the Tax Residency Certificate (TRC) and Form 10F along with the tax returns. These documents were to be retained by the taxpayers and furnished to the Indian Tax Administration upon request or during a tax assessment.

Said notification now requires NR taxpayers to electronically file Form 10F on the Portal. The TRC is also required to be attached when e-filing Form 10F. Many practical challenges were faced by the non-resident taxpayer without a PAN. The Central Board of Direct Taxes (CBDT) vide notification dated 12th December 2022 provides that Non-Resident taxpayers who are not having PAN and not required to have PAN as per relevant provisions of the ITA and Income-tax Rules, 1962 (IT Rules) are exempted from mandatory electronic filing of Form 10F till 31st March 2023.

Foreign Tax Credit:

The concept of claiming deduction or credit of taxes paid in Source State against tax liability in Residence State is called Foreign Tax Credit.

In India,

Sections 90 and 91 of the Income-tax Act deal with the concept of Foreign Tax Credit (FTC).

Section 90 discusses claiming of FTC in a case where India has entered into a Double Taxation Avoidance Agreement (DTAA) with another country and such DTAA provides for claiming of such FTC while Section 91 deals with claiming of FTC in scenarios where India has not entered into a DTAA with the country where the income arises for a taxpayer.

Under these sections, if the taxpayer is a resident of India, and he has paid taxes outside India, he can claim a credit of such foreign taxes paid against his tax payable in India.

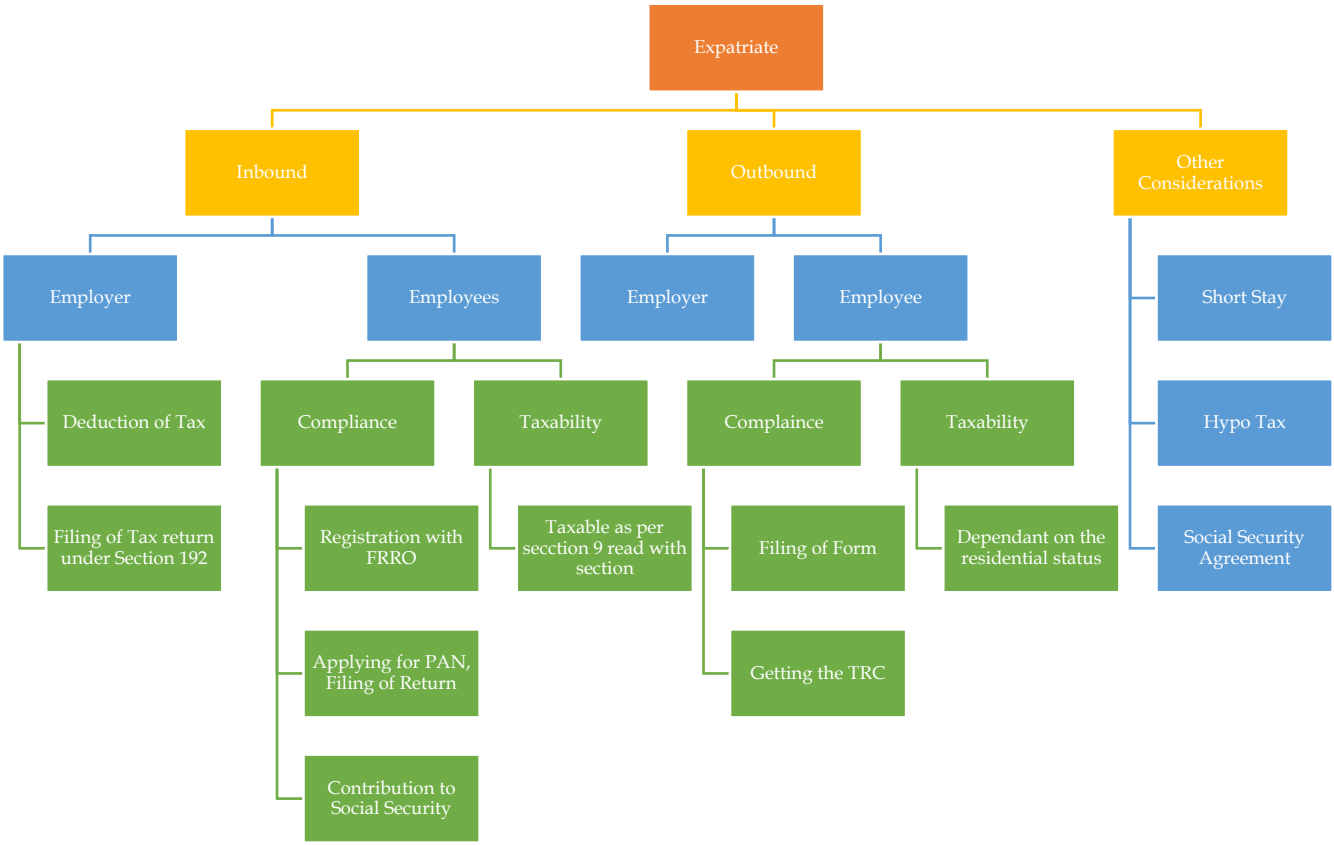
Form 67 is a crucial document that has to be furnished in order to claim FTC by a taxpayer. It is also essential that it be furnished on or before the due date of filing return of income under section 139(1) i.e. the original return of income.

The CBDT, vide notification no. 9/2017 dated 19 September 2017 has prescribed the procedure for filing Form 67:

- Form 67 is to be prepared and submitted online for taxpayers who are mandated to file their income tax returns electronically;
- This form is available on the e-filing portal of the income tax department in the taxpayer's account.
- Digital Signature Certificate (DSC) or Electronic Verification Code (EVC) is mandatory to submit Form 67
- Submission of Form 67 shall precede the filing of return of income

Expatriate employees are important for any organisation as they bring in not only the Human Resource strength to the organisation but also the work culture for different countries. These employees should be nurture with extreme diligence and care. It should be kept in mind that the benefits, credits, exemptions available for the expatriate employee is passed on to them.

The compliances for an employer and the employee in case of an inbound and outbound expatriate employee is provided below:

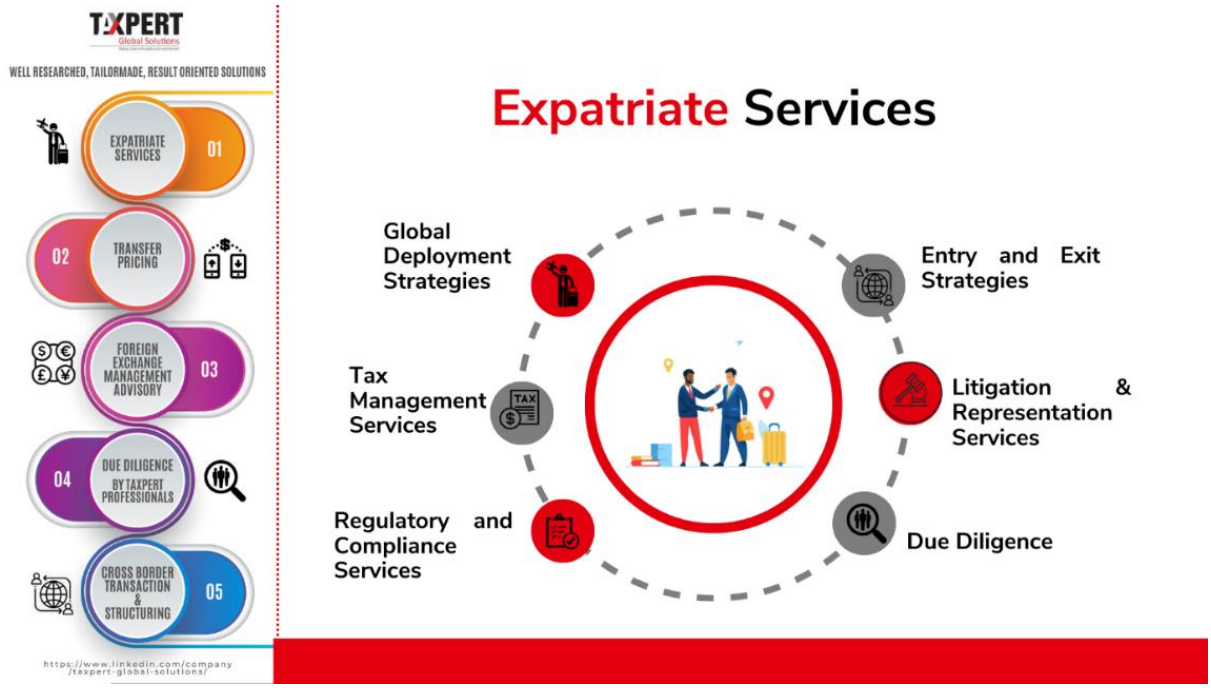


In our last many years of working in the area, we see multiple area of where the complexities and uncertainties with regard to Expatriate taxation and regulatory framework can be reduced.

It is essential for Senior Management, CFOs of multinational companies and the Sr. HR professionals to understand the specific requirements and issues with respect to these inbound and outbound employees which if not given due attention may give rise to dual taxation, exposures and the penalties.

Understanding of the arrangement of expat employees, its taxation, benefits available to them and carefully assessing each and every aspect related to inbound employees in India is very essential for the multinational Entities. As an employer, we should never be in a situation where due to lack of knowledge, our employee is at loss or authorities and procedural burden on the employee is increased. An employer should always provide ease to the inbound employees which can be achieved with the help of right knowledge.

We are Taxpert Professionals, a multifaceted consulting company. We take this opportunity to present our Expatriate Services to your esteemed organization.



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