Answer-to-Question-_7_

1. Residential status of an individual in India is determined as per section 6 of the Income tax Act, 1961.
2. As per section 6 an individual will be treated as resident for that financial year if either of two condition is satisfied
i.his/her stay in India during the previous year is 182 days or more or
ii.his/her stay in the preceeding 4 years exceeds 365 days and in that current year is 60 days or more.
3. This condition of 60 days shall be replaced with following
i. 120 days - if citizen of india comes on a visit to India during that year and his/her income from sources other than foreign sources exceeds INR 15,00,000.
ii. 182 days - if citizen of india comes on a visit to India during that year and his/her income from sources other than foreign sources is less than INR 15,00,000.
4. Such changes (as mentioned in point 3 was inserted vide Finance Act, 2020 w.e.f. FY 2020-2021.

5. Apart from above, vide Finance Act, 2020 w.e.f. FY 2020-2021 subsection 1A has been inserted to section 6 wherein , a citizen or person of india origin will be deemed to be resident in India if his income from sources other than foreign sources is more than INR 15,00,000 and he is not liable to tax on any income earned country or territory outside India. meaning he is not liable to pay taxes outside India.
6. After determining residential status, it has to be determined if the person is Resident and ordinarily resident (RNOR) or Not ordinarily resident (NOR). If any of the following condition is satisfied individual will qualify to be NOR.
i. If qualifies to be non resident in 9 out of last 10 years.
ii. If his/her stay in India is 729 days or less in last 7 years.

7. Part 1 Income from India is less than INR 15,00,000.

Residential status of Ms Ranya Ms Shilpa and Mr Tanvir who are NRI (citizens) and visited India during the FY 2020-2021 is as follows:

Ms Ranya

1. Current FY 2020-21 stay in India exceeds 182 days.Also, current year stay exceeds 182 days and last four years exceeds 365 days. Since stay in India exceeds 182 days she will qualify to be resident in India for FY 2020-21.
2. Whether she is Resident and ordinarily resident or Not ordinarily resident, will be determined as follows.

Data is available only for last 4 years, Based on the data we understand that stay in last 4 years is 370 days. Assuming she is NR for all other past years (her stay in India is less than 729 days). she would qualify to be Resident but not ordinarily resident.

Ms Shilpa

1. Current FY 2020-21 stay in India is 135 days.Also, current year stay does not exceed 182 days and last four years exceeds 365 days (its 370 days). Since both the conditions of being resident in India is not satisfied she will qualify to be Non resident for the FY 2020-21.

Mr Tanvir

1. Current FY 2020-21 stay in India is 110 days.Also, current year stay does not exceed 182 days and last four years does not exceeds 365 days (its 311 days). Since both the conditions of being resident in India is not satisfied he will qualify to be Non resident for the FY 2020-21.

In all the above cases, as income from India was less than 15 lakhs, ii. condition stay limit was 182 days.

8. Part 2 Income from India is more than INR 15,00,000.

Ms Ranya

1. Current FY 2020-21 stay in India exceeds 182 days.Also, current year stay exceeds 182 days and last four years exceeds 365 days. Since stay in India exceeds 182 days she will qualify to be resident in India for FY 2020-21.

Whether she is Resident and ordinarily resident or Not ordinarily resident, will be determined as follows.

Data is available only for last 4 years, Based on the data we understand that stay in last 4 years is 370 days. Assuming she is NR for all other past years (her stay in India is less than 729 days). she would qualify to be Resident but not ordinarily resident.

Ms Shilpa

1. Current FY 2020-21 stay in India is 135 days.But, current year stay exceeds 120 days (its 135 days) and last four years exceeds 365 days (its 370 days).

Here the 60 days condition will be replaced with 120 since she is citizen of India and came on a visit to India during FY 2020-21 and income from sources other than foriegn sources exceeds INR 15,00,000. As the second conditions of being resident in India are satisfied she will qualify to be Resident for-the FY 2020-21.

Whether she is Resident and ordinarily resident or Not ordinarily resident, will be determined as follows.

Data is available only for last 4 years, Based on the data we understand that stay in last 4 years is 370 days. Assuming she is NR for all other past years (her stay in India is less than 729 days). she would qualify to be Resident but not ordinarily resident.

Mr Tanvir

1. Current FY 2020-21 stay in India is 110 days.Also, current year stay does not exceeds 120 days and last four years does not exceeds 365 days (its 311 days). Since both the conditions of being resident in India is not satisfied he will qualify to be Non resident for the FY 2020-21.
In all the above cases, as income from India was more than 15 lakhs, ii. condition stay limit was 120 days.

Answer-to-Question-__4_

Part 1

1. Best Plc (UK based company) shall qualify to be non resident in India considering its Place of effective management would be outside India.
2. Income shall accrue or arise in India under section 9.
Under section 9(1)(vi) royalty income would deemed to accrue or arise in India irrespective of such NR renders services in India or has residence or place of business in India.
3. Royalty is defined under section 9(1)(vi) to mean any payment including lumpsum payment made for use of any patent, invention, model, design, secrect formula or process , trademark and similar property etc.
4. Explanation 4 was added to clarify that right to use or right to use a computer software (including granting of a licence) shall deemed to form part of definition of royalty.
5. It is important to note decision in the case of Engineering Analysis where similar issue came before the Honorable Supreme Court. Here, there was a sale of copyrighted software. The rights in connection to such software were not parted nor rights were given to sell this software to any other person. It was held that it amounts to only sale of copyrighted software and not right to use copyright. Hence, same is not royalty.
6. In this instant case, Best Plc intends to licence as a service this software. It intends to retain all the right in relation to copyright of the software and only earn licence fee. In this case, facts are similar and there is a sale of copyrighted software, and not right towards copyrighted software, accordingly, same shall not qualify to be a royalty.
However, tax authorities can contest that right to use computer software including granting of licence forms part of definition of royalty.

Further, one shall also look into India UK DTAA - Article 13 on Royalties. Definition of royalty as per Article 13 does not include fees for licence of copyrighted software.
7. Customers in India (hotel chains) will be liable to withold taxes in India if a non resident is liable to taxes in India. Based on above, since, Best Plc is not liable to tax in India for Licence fees, there is no liabiloity to withhold taxes.
8. However, it is adivsable to file an application under section 195(2) of the Act, to seek view of the income tax department. Alternatively, Best Plc or persons liable to deduct taxes can file an application with Board for Advance Rulings to avoide unnecessary disputes.

Part 2
1. There are two line to business for Best Plc. One - it intends to earn licence fees from its own proprietory hotel booking management software. second is customers can book hotel stay via network /website. Best does not charge any convenience fees for this booking :
2. Vide Finance Act, 2020 - Scope of equalisation fees was expanded. Thereby, any amount received by e-commerce operator from ecommerce supply or services. made /facilitated/ provided to
i. person resident in India
ii. NR in specified circumstances
iii person who buys goods or services using internet protocol in India.
3. Ecommerce supply or services includes
i. Online sale of goods or ecommerce operator
ii.Online provision of services etc.
4. There is a threshold limit of INR 2 Crores, thereby ecommerce operator would be liable to pay 2% of Equalisation levy if his total consideration exceeds such thershold.
5. Since Best allows customers to book the hotel rooms via website or platforms it owns, such facility would qualify to be Online provision of services.
6. Also, as Best gives a digital platform for booking the rooms

it shall qualify to be e commerce operator.
Accordingly, such services would be liable to equalisation levy.
7. Giving the software on licence via clould would also form part of online provision of goods and services.
8. Therefore, licence fees received would be subject to equalisation levy at the rate of 2%.
9. Best would be required to comply with these provisions and pay equalisation levy on quarterly basis by 7th of next month.Eg. For quarter ending June by 7th July and for March by 31 March.

Answer-to-Question-_2__

Part 2

1. The withholding rates are mentioned in the Dividend Article in the DTAA between India and France. As per Article on Dividend that rate of witholding is 10%.
2. In case any person intends to take a benefit of beneficial rate, such person qualify to be beneficial owner as per the DTAA.
3. Most favoured nation clause (MFN) which allows a treaty partner to give a benefit or restrict the scope of the DTAA on the basis if any of the treaty partners enter into tax traty with any other OCED member country which has restricted scope or benefical rate of tax rates.
4. India and France DTAA has a MFN Clause. Para 7 of the Proctocol to the treaty restrictes the scope of taxation of dividends wherein it states that same rate , scope as provided in that convention shall apply to this convention from the date on which Indian convention enters into force.
5. Based on the above, the MFN clause operates automatically, once India enters into an convention with third state (which is a member of the OECD) and that enters into force.
6. The tax treaty with Solvenia and Colombia was entered into force when such countriesd were not OECD members,
7. Similar situation arised in the case of Concentrix Netherlands, where such entity intended to take the benefit of MFN clauise in India Netherlands treaty abd take the benefit of 5 % of tax rate on dividend.
8. The Delhi High court in the case of Concentrix Netherlands allowed the benefit of lower tax rate on dividend based on the MFN clause.
Other Countries has issued a notificatin stating that MFN clause shall apply since India has entered into more beneficial

restricted scope with othwr third party. To this, CBDT, Income tax department has issued a circular in the month of February 2022, clearky stating the following:
i. Benefit of MFN clause can be taken only depending on explicit mention of such clause in the tax trety.
ii. The thrid party with whom India has entered into shall be a member of OECD when entering into treaty with INdia.
iii. Subsequent inrolment as memebr of OECD would not help.
iv. Elegibiloty of the MFN clause cannot be given unilaterally by any country.
v. MFN caluse can be invoked only when the CBDT issues a notification in this regard under section 90 by dicussing with contracting state.

9. It may be noted that similar issue came up recently in the Pune tribunal where MFN clause benefoit was allowed.
10. Steria case on similar grounds shall also be of use in the aforemnentioed case.
11. Currently while Indian Judicial Courts are allowing the benefit of MFN clause, clearing stating that there is no precondition that third party has to be PECD memeber while entering into treaty. Howeevr, circular issued recently, gives a different view.
12. It may be noted that circular issued are binding only on the departemtn, abd not on the High court or assessee.
13. Further, decision pronounced by the HC would have more persuasaive value than circuar. Though this contriversy has to be setteled only decusion of tge Apex court.
14. Considering the above, ABC India can adopt the 5 % rate based on MFN clause, howeevr, same shall not be without dispute by the Tax authorities.

Part 3

Considering the controvery on rhe issue of using the MFN clause, ABC SA has the following options to achieve certainity.

1. ABC India can file application before the Assessing Officer under section 195 seeking the determination of tax rate.
2. Application can be filed before the Board for Advance rulings to determine the exact rate of TDS it should apply. Such application shall be accompanied with applicable fees and subject to admissbikity.
3. It was wait for the decision of the Apex Court on such issue.

Part 4

ABC SA would require to apply for PAN since in order to get a lower rate of witholding taxes. As per section 206AB, inserted via Finance Act, 2021 where any person who is having a TDS exceedibg INR 50,000 and not filed its retunr of income for last 2 years, then persoin responsible to withhold taxes has the responsilbiloty to deduct taxes at higher of 1. double the rate in force prescribed or 2. 5% .

Therefore, PAN is required to be applied.

Part 1

For taking the benefits of DTAA , ABC SA has to
1. Qualify as resident of France as per DTAA.
2. HAs to qualify as beneficial owner as per DTAA>
3. Beneficial oweber is a person who has the right to use the dividend received. It should not be under any obligation to transfer to remit the dividend income to any other person/
4. ABC SA not to run any business in India, through a permanent establishment.

Answer-to-Question-__1_

Part 1

1. F Co is resident of France. Based on the Re domiciliation F Co is no more resident of UK. Under section 90, assessee would be able to take the benefit of DTAA if that is beneficial. For taking treaty benefits F Co, has to quaoilify to be resident of either of contracting states. F Co would be treated to be a person under article 3 of the DTAA Inda and France. As per Article 4 Resident of a contracting state means a person who is liable to tax by reason of domicile, residence,place of management etc.
2. F Co, is not paying taxes in France on account of tax holiday availibility. This doesnt meant that F co is not liable to tax in that country.
3. Liable to tax means that that entity is liable to taxes as per domestic law, but includes entites availing any benifit or tax holiday aavaulble .
4. Further, as per secttion 2 liable to tax has been defined to mean that that country has rights to tax that entity ,, but it includes entity which is not being taxed due to any relief in domestic tax laws.
5. BAsed on above, India cannot treaty benefit to F Co on the basis that it is not liable to tax.

Part 2

1. India has signed the MLI and same is ratified. One of the important decision taken was to include PPT principle purpose test or LOB Limitation on benefits in the DTAA>
2. As per PPT - any benefit given in the treaty can be denied it is found that one of the main purposes of entring into

transaction was seeking tax benefit.
3. India France DTAA also has the PPT test Article 7 Prevention of treaty abuse. If reasoble to conclude that taking tax benefit was one of the main purposes.
4. Based on the facts, the decision of redomiciliation was based on the lossed F co was incurring in the UK. Also, inbvesytment in shares in India was not the main business ofthe Fc Co. The decision was purely commercial.
5. Considering the same, PPT cannot be invoked just because F co gets a benefit in France.

Part 3,

Based on BEPS - Action 6 PRevention of treaty abuse, PReamble was decidedto be acdded. to all treaties to clarify that intention of executing treaty is avoding doubel taxation and not allowing non doule taxation.
Preamble forms a main part ogf a treaty as it defines what treaty partners intend to gain by siging such treaty.
Though there are double non taxation in this case, it is fully within the treaty limits. There is no misuse of treaty benefits. Azadi bacho anodolan case can be referred here, As,F co gets the benefit within the dommestic law if frabce and as per DTAA, pereamble cannit be invoked to deny trety benefit, as each teraty has PPT or LOB clauses.

Part 4

Compentent athoritiers can enter into MAP where they find that treaty is being misued. However, F co should be duly onformed of the decision to go for MAP. Competwent auhtoties of INdia have to write to Competwent auhtoties of France to find a solution to this.

Answer-to-Question-_5__

Part 2

In case GAAR provisions are said to be applicable, the consequensеs are as follows:
1. Accomodating party shall not be considered as accomodating party.
2. Transaction will be tretaed by considerong one or more connecting parties to be one.
3. considering transacrtion as if accomodating party was not there
4 Refuse to accept certain part of the transactoin considered to be taken for tax benfit.
5. Consider whole transaction void.
6. Rechareterise the transactions.

Part 3

Wheere a Assessing Officer intends to invoke GAAR, it has to write to PCIT Principle Commissioner for seeking apprival.
Opportuionty t=of being heared to be given to assessee.
upon receipt of submission by assessee m case has to be decided and order has to be passed by a committe formed of PCIT.

Appeal can be filed against the order passed under section 144BA.

Part 4

GAAR shall not be applicable if the total tax benefit intended to be receiuved from whole transaction by all the parties is within 3 Crores.

PArties can also apply for Board for advance rulings for seeking understaing if the transaction is withing the tax law

Safe harbour rules shall also apply for GAAR provisions.

Part 1

GAAR can be invoked if the main pupose of ttransactoin is obtaining the tax benefit.
There are 4 parameteres
1. tranasaction lacks commerccial substance,
2. tranasaction is made to abuse priovisions of law