CHAPTER - TWO
INTERNATIONAL TAX AGREEMENTS AS TOOL
TO PREVENT TAX EVASION

2.1 Introductory

Broadly speaking, the ‘International Tax Regime’ consists of two essential elements, namely ‘International Tax Agreements’ and ‘International Aspects of Domestic Tax Statutes’. This chapter revolves around the first essential, that is, ‘International Tax Agreements’. International Tax Agreements, as a matter of fact, are the agreements between two or more countries, which avoid double taxation by way of allocating taxing rights over an income between these countries and/or prevent fiscal evasion by providing provisions for exchange of information and assistance in collecting tax. Thus, the two fold purposes of such agreements are avoidance of double taxation and prevention of tax evasion.

International law imposes a few limits on the tax sovereignty of different countries. As a result, income from cross-border investments and activities may generally be taxable both in the source country, which is the country where investment or other activity took place, and in the residence country, which is the country of the investor or the trader, according to their respective domestic tax laws.\(^{57}\) Double taxation is widespread today because the vast majority of states, in addition to levying taxes on domestic

\(^{57}\text{United Nations Model Double Taxation Convention Between Developed and Developing Countries: 2011 Update, Department of Economic and Social Affairs, United Nations, March 2012, p. 1.}\)
assets and domestic economic transactions, also levy taxes on the assets situated and transactions carried out in other countries to the extent that they benefit the resident taxpayers. Double taxation may also arise when a person is deemed to be a resident simultaneously by two (or more) states, or when source rules overlap because two (or more) states find the same economic transaction or asset to be within their territory.⁵⁸

This double taxation can be avoided unilaterally or bilaterally. Under the unilateral method, either a country of source or a country where the taxpayer is resident unilaterally concedes the primary right to tax to the other state. The bilateral method includes ‘proportionate division’ method, that is, dividing taxes between two states according to some pre-determined formula and ‘classification and assignment’ method, that is, classifying income according to type and assigning primary rights to tax certain types of income to one state and other types to other.⁵⁹

With the growth of multinational companies and with the relaxation in rules regulating the free flow of capital, the problem of tax evasion has also increased manifold. Such enterprises exploit the loopholes in law due to which their income is not taxed in any country or shifting of profits to jurisdiction with lower tax takes place. This problem is further worsened by the existence of tax havens and harmful tax competition. Curbing such menace is always in the economic interests of the country.

Avoidance of international double taxation and prevention of tax evasion is a significant aspect of countries’ investment climate, which is essential for investment flow between countries, the exchange of goods and services, the movement of capital and persons, as well as the transfer of technology. Thus,


the need for international tax agreements arises with two main objectives of avoiding double taxation and preventing tax evasion. Apart from these main objectives, the other reasons for need of such agreements have been highlighted in the next section.

2.2 Need for International Tax Agreements

The problem of double taxation can be avoided unilaterally if one of the states involved withdraws its tax claim. On behalf of the state of residence, this unilateral move often is achieved pursuant to a method developed under the Anglo-American law whereby the state of residence, to the extent it is not simultaneously the source state, allows a credit for the tax levied in the source state up to an amount equal to its own tax charge.60

India gives tax deduction to the assessee which is equivalent to the tax calculated at rates applicable in India.61 In other countries, double taxation is avoided unilaterally through the allowance of exemptions: Switzerland exempts income from permanent establishments and real property located abroad; the Netherlands and Australia exempt foreign source income generally if the income is taxed in the source country.62 As a rule, however, unilateral measures are insufficient to avoid double taxation because these rules generally do not cover all situations giving rise to double taxation, and they may apply to double taxation situations inconsistently depending on which state’s measures are applied. Similarly, unilateral measures lack in curbing the menace of international tax evasion which require a coordinated action by different countries.

The tax agreements provide for the tax claims of two governments both

60 Sections 901 to 908 of the *Internal Revenue Code*, United States, 1954.
legitimately interested in taxing a particular source of income either by assigning to one of the two the whole claim or else by prescribing the basis on which the tax claim is to be shared between them. Such agreements seek to eliminate the double taxation of certain income where a resident of one country derives income from a source in another country and aims to ensure facilitating international trade and commerce, flow of investments as also equitable collection of revenue. The agreements tend to achieve the aforesaid aims by:

(I) Clarifying where a country of source may tax non resident in respect of certain types of income;

(II) Limiting rate of tax a country of source may apply to certain types of income; and

(III) Providing foreign tax credits in the country of residence against taxes paid in that country on income having source in the other country.

This classification and assignment of jurisdiction to tax prevents tax evasion and also avoids double taxation.

Still another benefit from the taxpayers' point of view is that, to a substantial extent, a tax treaty provides against non discrimination of foreign tax payers or the permanent establishments in the country of source as compared to domestic taxpayers. Usually, every treaty contains a 'non discrimination' article. A provision to this effect was also added in the Indian Income Tax Act.

63 Ostim (Inspector of Taxes) v. Australian Mutual Provident Society, (1960) 39 ITR 210 (HL)
Tax treaties between countries help a taxpayer of one country to know with somewhat greater certainty the potential limits of his tax liability in the other country. They play a significant role in the promotion of international investment and transfer of technology by ensuring that until a particular tax treaty is revoked or is amended, the foreign taxpayers have a sort of long term guarantee about the uniformity and the possible extent of their tax liability in the country of source which the domestic taxpayers of the country of residence do not generally have because of the unilateral and omnipotent jurisdiction of the domestic legislature to make changes in tax laws whenever considered necessary.\textsuperscript{67}

To ascertain that tax evasion or tax avoidance does not reduce the flow of revenue to a trickle, nations have concluded tax treaties relating to income, estate, inheritance, or gift taxes which provide for reciprocal exchanges of information and, in a more limited form, for technical assistance in the enforcement of municipal tax laws. This type of collaboration may take the form of routine exchange of information, of spontaneous disclosure by one jurisdiction to another, of specific requests of assistance, and also of simultaneous examination of a taxpayer by the respective authorities of two or more countries.\textsuperscript{68}

The tax agreements usually provide for various kinds of administrative assistance like assistance in recovery of tax and service of documents. Assistance is defined broadly to include actions against one who is liable

\textsuperscript{66} Explanation to section 91 of the \textit{Income Tax Act}, 1961.

\textsuperscript{67} I.P. Gupta, \textit{International Law in Relation to Double Taxation of India}, LexisNexis Butterworths, New Delhi, India, 2007, at p. 181.

indirectly for payment of tax. Such provisions widen the territory in which domestic tax powers can be effective. Under this clause, the requested state recovers tax claim of the applicant as if they were its own.

### 2.3 Development of Tax Treaties: A Historical Perspective

As a matter of fact, knowledge of tax history is an important foundation for understanding the current tax practice and for examining the possibility for future tax reform. This includes some knowledge of what has been tried before, how these methods worked, why they were discarded, what order historical developments occurred and why various tax relationships exist now and so on.

It may be appropriate to point out that, the problems of international taxation are not of recent origin. During the middle ages, theologians and canonists discussed, in the context of property taxes, the moral right of one city or kingdom to tax the wealth situated within its territory but owned by a foreigner, or wealth owned by its own subjects but situated in other kingdoms. Such conflicting claims were settled by following situs rule in case of immovable property however, the problem persisted for taxation of movable property. 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.

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71 J. Hemdon, Relief from International Income Taxation: The Development of International Reciprocity for the Prevention of Double Income Taxation, Callaghan & Co.,
In the year 1823, the Great Britain introduced a law which declared that any country could export goods to the British colonies in its own as well as in the English ships on the condition that the corresponding privileges were granted by the countries benefiting from the law.\textsuperscript{72} In India, the problem came on the forefront when income tax was first levied in the year 1860 by the princely states and the British Government at the centre.\textsuperscript{73} 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.

Meanwhile in the United States, the Revenue Act of 1918 took the pioneering step of adopting a foreign tax credit.\textsuperscript{74} Allowing a credit rather than a deduction for foreign taxes was a bold move that exposed the United States to significant revenue loss.\textsuperscript{75} Earlier only Belgium and the Netherlands, which adopted heavily on foreign trade, had provided credit for taxes paid to their colonies or major trading partners. Refining the foreign tax credit concept in 1921, the credit was permitted to shelter only the foreign source income of the taxpayer, thus preserving residence-based tax on the domestic income of the taxpayer.\textsuperscript{76} However, all these happenings were unilateral in nature and have not contributed much towards development of tax treaties.

Prior to the First World War, there were relatively few tax treaties and there were only a few participating countries however, there can be little doubt as

\textsuperscript{72} J.L. Laughlin and H.P. Willis, Reciprocity, The Baker & Taylor Co, San Diego, 1903, p. 5.


\textsuperscript{74} Sections 222(a) (1), 238 (a) and 240 (c) of the Revenue Act of 1918, United States, 1918.


\textsuperscript{76} Sections 222(a) (5) and 238 (a) of the Revenue Act of 1921, United States, 1921.
to the lasting impact of these treaties on modern international tax relations. The early treaties were considerably shorter than their modern day counterparts however the essential elements (reciprocity, residence and source) remain the same.\textsuperscript{77} The earliest recorded agreement specifically in the field of taxation was in 1843.\textsuperscript{78} This agreement, between France and Belgium, regulated administrative co-operation between the two countries with regard to taxation 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 which refer to estates in which these countries are reciprocally interested’.\textsuperscript{79}

Although, Belgium was a pioneer in the conclusion of the tax administrative co-operation treaties, concluding further agreements with the Netherlands and Luxembourg in 1845. However, the Austrian experts were prophetic when stating upon the conclusion of the 1899 treaty between Austro-Hungary and Prussia, the first comprehensive international double income taxation agreement, that it formed the foundation ‘for establishing an international tax law following unitary principles for the whole Central European web of states’.\textsuperscript{80}

The formal steps which ultimately led to the formation of international tax


\textsuperscript{79} Article 1 of the \textit{Convention Regulating the Relations between the Administrative Services of France and Belgium} (France-Belgium) (21 August 1843).

regime after the First World War can be discussed under the following heads.

2.3.1 The League of Nations

In the Geneva Conference of 1921, it was recommended by the Economic and Finance Commission of the League of Nations that double taxation should be avoided by agreement between the nations. To facilitate this process, two committees of experts, namely, the Committee of Economic Experts and the Committee of Technical Experts were constituted. The Committee of Economic Experts gave its report on double taxation in 1923 and the Committee of Technical Experts gave its report on double taxation and fiscal evasion in 1925. The enlarged committee of Technical Experts 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 twenty seven countries and gave their first draft in 1928.

Following the recommendations of this meeting, the League of Nations then appointed a Permanent Fiscal Committee. The International Chamber of Commerce also gave its cooperation in the matter which resulted in a Draft Convention for ‘Allocation of Business Income Between States for Purposes of Taxation’ in 1935. In 1939, the Fiscal Committee recommended the revision of 1928 draft due to the improvements contained in numerous tax treaties concluded since then and the new emerging problems and trends. This work of revision and codification was undertaken by a sub-committee which emerged with a convention namely, ‘Model Bilateral Convention for the Prevention of International Double Taxation and Fiscal Evasion’ and a protocol. This is popularly known as the Mexico Model Tax Convention 1943.
The Fiscal Committee in its Tenth Session held at London in March 1946 further reviewed the Mexico Model. This revision culminated into a work which is popularly known as London Model Convention 1946. The major difference between the Mexico Model and the London Model is that the former gave exclusive jurisdiction of taxation to the country of source. The country of residence could also impose tax. However, it must give credit to the taxes paid in the country of source. However, the latter sought to encourage capital flow from industrialized countries to developing country by giving exclusive jurisdiction to the country where the income was ultimately received or the country of residence.

2.3.2 The Organisation for Economic Cooperation and Development

Due to considerable dissimilarities between the two model conventions promulgated by the League of Nations, the Fiscal Committee of the Organisation for Economic Cooperation and Development felt a desirability to harmonize them. This committee prepared four reports from 1958 to 1961 and came out with a final draft named ‘Draft Double Taxation Convention on Income and Capital’ and is popularly known as the ‘OECD Model Convention 1963’. The OECD Model Convention 1963 has minor variations to the London Model Convention given by the League of Nations. However, this convention had great influence on the subsequent negotiations of bilateral tax treaties as it was used as a basic document of reference in negotiations between member and non-member countries and even between non-member countries. Moreover, the existence of the commentary alongwith Model Convention facilitated the interpretation and the enforcement of the bilateral conventions in common lines.

Since then, the said convention and its commentary thereon has constantly been elaborated and revised by the organisation in light of further experience and developments. The organisation came out with its Second Model Convention alongwith a commentary in the year 1977. This was further improved upon in 1992 version of the Model Convention. Subsequently, the Model Convention has been revised in the years 2000, 2003, 2005, 2008 and 2010 respectively.

The main approach which is followed by the OECD Convention is that the country of residence will avoid double taxation through the credit method or the exemption method in respect of different types of income and the country of source will reduce its scope of jurisdiction to tax and its rates of tax where the jurisdiction to tax is retained.

2.3.3 The United Nations

In 1965, the Secretary General of the United Nations expressed that the existing tax conventions did not commend themselves to the needs of the developing countries due to which there was need for more appropriate treaty pattern. Further, the Economic and Social Council also expressed its belief that there was need of tax treaties between developed and developing countries as these treaties could promote the flow of investment which would be helpful for economic development of developing countries. The council then requested the UN Secretary General to set up an Ad-Hoc Working Group consisting of experts and tax administrators from both developing and developed countries to formalise such tax treaties which would be acceptable to both and would also safeguard their respective revenue interests.

In response to this, the United Nations Ad-Hoc Group of Experts was set up in 1968 comprising eighteen people, ten from developing and eight from
developed countries. Later on, two more experts from different countries were added. The group had a number of meetings from 1968 to 1979 and prepared eight reports. It also formulated a few guidelines which could provide technical assistance for the formulation of future treaties. On the basis of these guidelines, a Draft Model Convention was prepared by the United Nations Secretariat. This Draft was 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 and more recently in 2011.

### 2.3.4 Regional Level Endeavours

Apart from the above mentioned global efforts of the League of Nations, the United Nations and the Organisation of Economic Cooperation and Development, there have also been some regional efforts for the development of International Model Tax Conventions. The Asian-African Legal Consultative Organisation has formulated a few principles for avoidance of double taxation on reference made by the Government of India. The governments of different countries are left to decide the manner by which such recommendations are to be incorporated.

A Commission of the Cartagena Agreement adopted in November 1971, the ‘Model Convention for the Avoidance of Double Taxation Between member Countries and other Countries of the Andean Sub-region’. Another multilateral convention is the ‘Convention on Administrative Assistance in Tax Matters’ concluded in November 1972 (later revised in 1973 and 1976) between Denmark, Finland, Iceland, Norway and Sweden. On 26 June 1981, the United States of America published a model Income Tax Treaty. This 1981 model was withdrawn in 1992 and was replaced by the ‘United States Model Income Taxation Convention’ of 20 September 1996. The South Asian Association for Regional Cooperation (SAARC) has also framed its own multilateral convention in tax matters.
2.4 Kinds of International Tax Agreements

In pursuance to the two objectives of avoiding double taxation and prevention of tax evasion, countries enter into various tax agreements which can divided into following sub heads:

(I) Double Tax Conventions: These agreements cover both the objectives of avoiding double taxation and preventing tax evasion. They are typically based of the model conventions prepared by the OECD and the UN with minor variations. India has signed 90 double tax conventions till date.

(II) Tax Information Exchange Agreement: The main difference between double tax convention and tax information exchange agreement is that the former deals with both avoidance of double taxation and prevention of tax evasion where as later deals only with prevention of tax evasion. They are bilateral agreements and India has signed 14 such agreements with other countries.

(III) Convention on Mutual Administrative Assistance in Tax Matters: This is a multilateral convention prepared by the Organisation for Economic Cooperation and Development which specifically deals with prevention of tax evasion. After an amendment in 2009, more than fifty countries have either become signatories or have stated their intention to do so. India became a signatory to this treaty on 26 January 2012.

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83 ibid.

2.5 India’s Double Tax Conventions and Model Tax Conventions: Comparative Analysis

In view of the standard models drafted by the Organisation of Economic Cooperation and Development and the United Nations which are used in all bilateral tax agreements, a new era of genuine ‘International Tax Regime’ is now in the process of developing. Any researcher in this field can have a holistic knowledge of the model tax conventions which form the basis of all such treaties and any variation from them may be studied specifically in relation to a particular country.

India’s bilateral tax treaty network consists of Double Tax Conventions (both comprehensive and limited agreements) and tax information exchange agreements. Although the Model Conventions promulgated by the Organisation of Economic Cooperation and Development and the United Nations provide the base for all such treaties however, still there are variations involved. This section shall comparatively analyse the Double Tax Conventions to which India is a party and the next section shall point out the reasons why there is an emergence of international tax agreements which specifically deal with prevention of tax evasion.

2.5.1 Preamble

The preamble part of double tax conventions normally provides that the agreement between two governments is entered into for avoidance of double taxation and prevention of fiscal evasion with respect to taxes. One rarely finds any variation from this objective which is similarly worded in all the tax treaties entered into by different countries.

A treaty is best understood if we know its reasons and objects. The preamble
provides us with the key to understand it.\textsuperscript{85} The importance of preamble is well highlighted in court’s\textsuperscript{86} observation that a literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated in so far as the particular item is concerned. The two fold purposes which can be extracted from the preamble of such agreements are avoidance of double taxation and prevention of tax evasion.

2.5.2 Personal Scope

The first article of the Double Tax Conventions deals with applicability of such agreements on ‘Persons’ who are residents of one or both of the contracting states.\textsuperscript{87} The wording of this article is identical in the UN Model Convention, the OECD Model Convention and the Indian treaties. The only exception to this rule is the India’s treaties with Greece and Libya, which have no express provisions for personal scope.

Most of the Indian treaties define ‘Person’ as ‘an individual, a company, body of persons and any other entity which is treated as a taxable unit for tax purposes’. The treaties with Bulgaria\textsuperscript{88}, Italy\textsuperscript{89} and Romania\textsuperscript{90} define ‘Person’ as having the same meaning assigned to it in the taxation laws in force in the

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\textsuperscript{86} John N. Gladen v. The Queen, 85 DTC 5188.
\textsuperscript{88} Article 3(e) of Agreement for avoidance of double taxation and prevention of fiscal evasion with Bulgaria (India-Bulgaria) (9 May1996) Notification No: GSR 205(E).
\textsuperscript{89} Article 3(e) of the Agreement for avoidance of double taxation and prevention of fiscal evasion with Italy (India-Italy) (25 April 1996) Notification No: GSR 189(E).
\textsuperscript{90} Article 3(e) of the Agreement for avoidance of double taxation with Romania (India-Romania) (8 February 1988) Notification No: GSR 80(E).
\end{flushright}
respective contracting states. The treaty with Malaysia\textsuperscript{91}, Japan\textsuperscript{92}, Libya\textsuperscript{93} and Sri Lanka\textsuperscript{94} define ‘Person’ as an individual, a company and any other body of persons. These treaties miss out the phrase ‘any other entity which is treated as taxable unit under respective taxation laws of contracting countries’. The treaties with the United Kingdom\textsuperscript{95} and Ireland\textsuperscript{96} has different wording but are similar in substance. They define ‘Person’ to include an individual, a company and any other entity which is treated as a taxable unit under the taxation laws in force in the respective contracting states but subject to paragraph 2 of this article, does not include a partnership. The second paragraph states that a partnership which is treated as a taxable unit under the Income Tax Act, 1961 shall be treated as a person for the purpose of this convention. The treaty with the United States of America\textsuperscript{97} defines person to include an individual, an estate, a trust, a partnership, a company, any other body of persons, or any other taxable unit.

\textsuperscript{91} Article 3(i) of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Malaysia (India-Malaysia) (12 October 2004) Notification No: GSR 667(E).

\textsuperscript{92} Article 3(e) of the Agreement for avoidance of double taxation and prevention of fiscal evasion with Japan (India-Japan) (1 March 1990) Notification No: GSR 101(E). [Amended by Notification No SO 753(E), 16 August 2000 (w.r.e.f. 1 October 1999); SO 1136(E), 19 July 2006 (w.r.e.f. 28 June 2006); SO 2528 (E), 8 October 2008 (w.r.e.f. 1 October 2008); and No. 19/2012, 24 May 2012 (w.e.f. 1 April 2012)].

\textsuperscript{93} Article 3(b) of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Libyan Arab Jamahiriya (India-Libyan Arab Jamahiriya) (1 July 1982) Notification No: GSR 22(E).

\textsuperscript{94} Article 3(b) of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Sri Lanka (India-Sri Lanka) (19 April 1983) Notification No: GSR 342(E).

\textsuperscript{95} Article 3(f) of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with United Kingdom of Great Britain and Northern Ireland (India-UK) (11 February 1994) Notification No: GSR 91(E).

\textsuperscript{96} Article 3(c) of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Ireland (India-Ireland) (20 February 2002) Notification No: 45/2002.

\textsuperscript{97} Article 3(e) of the Agreement for Avoidance of Double Taxation of Income with USA (India-USA) (20 December 1990) Notification No: GSR 990(E).
While discussing the definition of ‘Person’, the concept of ‘Treaty Shopping’ assumes importance because usually the multi-national companies form and incorporate artificial legal persons like a base company or a conduit company in one of the contracting countries to take advantage of the beneficial provisions in the treaty. The Organisation for Economic Cooperation and Development has stressed that the contracting states do not have to grant benefits of a double taxation treaty where such arrangements or transactions constitute an abuse of the treaty, irrespective of whether the relevant anti-abuse rules are incorporated in the treaty or domestic law only. However, it may become extremely burdensome for taxpayers to prove that they are acting bonafide, once the proposed clause by the Organisation for Economic Cooperation and Development is incorporated in a tax treaty. Hence, while the Organisation is concerned about treaty shopping, it has also made very clear in the commentaries that bonafide arrangements and transactions motivated by sound business reasons should not be obstructed by anti-abuse rules.

Domestic laws of the contracting countries may differ in tax treatment of partnerships. Some countries like India treat partnership as a taxable entity where as some countries treat partnerships as fiscally transparent, that is, the entity is as such not liable to tax in such country. This difference gives rise to the problem of application of a particular treaty as the definition of ‘person’ shall include partnership only if it is a taxable entity. The experts of the United Nations have left it to the negotiating states to examine and resolve this problem while concluding a tax treaty.

2.5.3 Taxes Covered

The term ‘Tax’ has neither been defined in the Model Conventions nor in their commentaries. However, the words ‘Tax’ and ‘Taxation’ are frequently used
in tax treaties. They are not interchangeable and connote different meanings. According to the Webster’s Dictionary and the 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.98

Usually, Article 2 of the Double Tax Conventions define covered taxes. This article of the OECD Model Convention is reproduced almost unchanged in the United Nations Model Convention. The main intention to have such article is to know whether the treaty applies to the tax in question. The Organisation for Economic Cooperation and Development has highlighted the intention of having this article as follows:99

(I) To make the terminology and nomenclature relating to the taxes covered by the convention more acceptable and precise;

(II) To ensure identification of the contracting states’ taxes covered by the convention;

(III) To widen as much as possible the field of application of the convention by including, as far as possible, and in harmony with the domestic laws of the contracting states, the taxes imposed by their political sub divisions or local authorities;

(IV) To avoid necessity of concluding a new convention whenever the contracting states domestic laws are modified; and

(V) To ensure for each contracting state notification of significant changes in the taxation laws of the other state.

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Paragraph 1 of this article on ‘Taxes Covered’ includes all taxes on income or capital levied by state or its political sub divisions or local authorities irrespective of the manner in which they are applied. Paragraph 2 defines the expression ‘all taxes on income and capital’. Paragraph 3 specifies what taxes are covered at the time treaty is signed. As far as the Indian treaties are concerned, the taxes covered differ from country to country. For example, the Tax Treaty with Austria 100 covers Income Tax and surcharge thereon in India and Income Tax and Corporation Tax in Austria whereas the Tax Treaty with Finland 101 covers Income Tax, Surcharge and Wealth Tax in India and State Income Tax, Corporation Tax, Communal Tax, Church Tax, Withholding Tax and State Capital tax in Finland. Paragraph 4 obliges the competent authorities of the respective states to update and inform each other of changes which have been made in their respective taxation laws, at the end of each year.

The rates on which taxes are to be computed are the subject matter of respective domestic laws. The tax treaties are not capable of deciding such rate but their function is to limit the authority of the contracting states to tax. At first the income is charged to tax. Thereafter it is computed at the rates mentioned in domestic tax laws which are subject to the maximum limit as prescribed in tax treaty.

2.5.4 Resident

The provisions of tax treaty apply to a ‘Person’ who is a ‘Resident’ of one or both of the contracting states. Thus treaty benefits are available only if a

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100 Article 2 of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Austria (India-Austria) (20 September 2001) Notification No: GSR 682(E).

person is ‘Resident’ under the domestic laws of either or both of the contracting states. The treaty provisions relating to resident do not define its constituents but comes into play only when a person is regarded as resident by both the contracting states. If a person falls within the definition of person under the domestic law of only one country, then resort to treaty provisions is not required. For example, a person who is a citizen and habitual resident of country X has a stay of period exceeding six months in country Y, then both the countries may claim him to be a resident under there domestic laws respectively. In such cases, the treaty proceeds to assign a single state of residence to such person. Thus, the main functions of the concept ‘resident of a contracting state’ can be highlighted as follows:

(I) It determines the application of personal scope; and

(II) It resolves the conflict between two residences; and

(III) It resolves conflict between residence and source.

The texts of both the OECD and the UN Model Conventions are similarly worded except that in the UN Model Convention ‘a place of incorporation’ is expressly mentioned as a criterion. As far as the Indian treaties are concerned, some of them use ‘Fiscal Domicile’ instead of ‘Residence’ in the title.

Domicile refers to civil rights. It means one’s connection with the territory and not with the membership of the community which is at the root of the notion of citizenship or nationality. It determines a person’s personal status and the law applicable to him in the matters such as majority or minority, marriage,

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103 Article 4 of the OECD Model Convention, 2010.
104 Article 4 of the UN Model Convention, 2011.
divorce or succession.\textsuperscript{106}

On the contrary, ‘citizenship’ refers to a political status usually conferred by some law and ‘residence’ refers to the physical connection with a particular territory.\textsuperscript{107} For tax purposes, domicile has more practical meaning, in the sense of residence, the physical presence in the country and in majority of cases, the domicile and residence coincide.

The first paragraph of this article defines the term resident as a person who is liable to tax therein by reason of domicile, residence, place of management or any other criterion of a similar nature. The United Nations Model Convention also has the words ‘place of incorporation’ added to these reasons. It may be noticed that the tax treaties do not set specific rules as to how states should design their domestic laws on tax residency. Such rules for deciding the residential status of a person can be found in the domestic laws of contracting country. The second line of this paragraph which is similarly worded in both the model conventions clarifies that the person who is liable to tax for incomes from sources only, in a particular state, is excluded from the definition of ‘resident’.

As far as the Indian treaties are concerned, the substance of first line of this paragraph is present there in all the treaties. However, the second line is missing in number of treaties like the ones with Bangladesh\textsuperscript{108}, Belgium\textsuperscript{109},

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  \item \textsuperscript{106} K. Radha Krishnan Nayyar v. Radha, AIR 1992 J & K 1.
  \item \textsuperscript{107} D.P. Mittal, 2007, at p. 1.379.
  \item \textsuperscript{108} Article 4 of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Bangladesh (India-Bangladesh) (8 September 1992) Notification No: GSR 758(E).
  \item \textsuperscript{109} Article 4 of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Belgium (India-Belgium) (31 October 1997) Notification No: GSR 632(E). [Amended by Notification No: SO 54(E) dated 19-1-2001]
\end{itemize}
Brazil\textsuperscript{110} and China\textsuperscript{111} which does not make any difference as India has no rule to fix tax residency just because of the fact that an income is sourced from its' jurisdiction.\textsuperscript{112}

The second paragraph of the OECD Model Convention proceeds to fix tax residency in case of an individual who falls within the definition of ‘resident’ in both the countries. It lays down four rules to be applied in ascending order. The first rule clarifies that he shall be deemed to be the resident of the state in which he has a permanent home available to him. In case he has permanent home available in both the countries, then centre of vital interest (both economical and personal) has to be seen.

The second rule states that where centre of vital interest cannot be determined, one has to see the test of habitual abode. The concept of habitual abode encompasses two totally different situations. In the first, local ties have never become close enough to result in permanent home and in the second case, the links with both countries are so close that permanent homes have been established in either of them, and it is not possible to determine where the centre of personal and economic interest is situated. The next rule states that if he has habitual abode in both states or in neither of them, then he shall be deemed to be resident only of the state of which he is a national and the last rule leaves it to the contracting states to decide by mutual agreement if he is national of both states or neither of them. All these rules are similar in most of the tax treaties with India with certain exceptions like Japan\textsuperscript{113}, Indonesia\textsuperscript{114} and Nepal\textsuperscript{115}. Such treaties miss out one or other

\textsuperscript{110} Article 4 of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Brazil (India-Brazil) (31 March 1992) Notification No: GSR 381(E).

\textsuperscript{111} Article 4 of the Agreement for Avoidance of Double Taxation of Income and the Prevention of Fiscal Evasion with China (India-China) (5 April 1995) Notification No: GSR 331(E).

\textsuperscript{112} Sections 4, 5 and 6 of the Income Tax Act, 1961.

\textsuperscript{113} Article 4 of the Agreement Between India-Japan, 1990.
rule but always retain the fourth rule by which countries can decide the tax residency of the individual by mutual agreement.

The third paragraph deals with the legal persons other than individuals like company, partnership, limited liability partnerships etc. In such cases, the tax treaties lay down the rule of effective management for deciding the tax residency of a person in case it falls under the term ‘resident’ in both jurisdictions. Both the model conventions have preferred ‘place of effective management’ to be decisive criterion over the ‘place of incorporation’. Majority of the bilateral treaties with India have also settled on the same criterion of ‘place of effective management’. However, the tax treaties with USA\textsuperscript{116}, Japan\textsuperscript{117} and Canada\textsuperscript{118} lay the criterion to be decided by the Mutual Agreement and the Tax Treaty with China lays down the criterion of ‘head office location’.

2.5.5 Permanent Establishment

In case of multinational companies which have commercial presence over different jurisdictions, the article\textsuperscript{119} seeks to clarify the jurisdiction in which the particular profits of an enterprise shall be taxable. For example, if a company X is having its head office at jurisdiction A and branch offices at jurisdictions B, C and D, then the profits attributable to these branches shall be taxable in

\textsuperscript{114} Article 4 of the Agreement for Avoidance of Double Taxation with Indonesia (India-Indonesia) (4 February 1988) Notification No: GSR 77(E).


\textsuperscript{116} Article 4 of the Agreement Between India-USA, 1990.

\textsuperscript{117} Article 4 of the Agreement Between India-Japan, 1990.


\textsuperscript{119} Article 5 of the OECD Model Convention, 2010.
respective jurisdictions where they are established, as ‘branch’ constitutes permanent establishment under a tax treaty. It avoids double taxation as the jurisdiction A may try to tax global income of company X and jurisdictions B, C and D may try to tax on the basis of source rule. This article bends toward the source rule if the commercial presence of company X in other jurisdictions constitute permanent establishment. 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 is always treated as business income and not as royalty, interest, dividend or capital gains.

(II) The employment remuneration paid to the employees of a permanent establishment is taxable in the state of permanent establishment irrespective of the duration of stay.

2.5.5.1 Permanent Establishment Under the OECD and the UN Model Conventions

The first two paragraphs of the OECD Model Convention have been identically reproduced in the UN Model Convention.\(^{120}\) These paragraphs define permanent establishment as a fixed place of business through which an enterprise carries out its business wholly or partly. Further, it specifically includes a place of management, a branch, an office, a factory, a workshop and a mine, oil or gases well, a quarry or any other place of extraction of natural resources.

The third paragraph deals with a building or construction of installation project. In such cases, the permanent establishment comes into existence

\(^{120}\) Article 5 of UN Model Convention, 2011.
after twelve months under the OECD Model Convention and after six months according to the UN Model Convention. The furnishing of certain services result in permanent establishment under the UN Model Convention if activities of such nature continue for a period more than six months within any twelve month period but this clause is missing in case of the OECD Model Convention.

The fourth paragraph of the OECD Model Convention excludes the use of certain facilities like storage, display or delivery of goods from definition of permanent establishment. However, the UN Model Convention excludes ‘delivery’ from such exclusion clause.

The other paragraphs of the respective clauses in the model conventions deal with agents acting as permanent establishment. The provisions according to which a dependent agent is deemed to be a permanent establishment of an enterprise and the structure of article 5 of the model conventions differ to some extent. To sum up, the provisions of this clause, it may be noticed that the term ‘permanent establishment’ has been defined in relation to a fixed place, construction site, services rendered and agency relationship.

2.5.5.2 Permanent Establishment Under the Indian Treaties

Rules relating to permanent establishment by way of fixed place are almost identical in all the Indian treaties with no material differences. The second paragraph of the Indian treaties does not restrict themselves to the places included in model conventions where as they broaden their horizons to include places like farm, plantation and other places where agriculture, forestry, plantation or related activities are carried on.\textsuperscript{121} The provisions

\textsuperscript{121} Article 5 of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Armenia (India-Armenia) (8 December 2004) Notification No: GSR 800E.
relating to construction project or building site which form a distinct paragraph in the model treaties are covered by the second paragraph which do not make any difference in the substance. However, most of the Indian treaties have adopted the time frame of six months to constitute a permanent establishment in case of building or construction site which favours the UN Model Convention. The essence of the provision which exclude use of certain facilities like storage, display or delivery of goods from definition of permanent establishment remains unchanged in Indian treaties. As far as agents acting as permanent establishment is concerned, the Indian treaties are influenced by the UN pattern.

To sum up, the things we can say that the provision relating to permanent establishment in the Indian treaties are based on the model conventions with more influence of the UN treaty.

2.5.6 Income from Immovable Property

The article on income from immovable property is based on the principle of source, that is, the income from immovable property derived by a resident of the contracting state may be taxed in other state where the property is situated. The OECD Model Convention\textsuperscript{122} divides it into four paragraphs. The first paragraph lays down the general principle of source. The second paragraph defines the term ‘immovable property’ to have same meaning as given under the law of contracting state. It specifically includes items like livestock, equipment used in agriculture, usufruct of immovable property etc. in the definition of immovable property. The third paragraph clarifies that the provisions of first paragraph shall also apply to income derived from direct use, letting or use in any other form of immovable property. All these three paragraphs are identically reproduced in the UN Model Convention.\textsuperscript{123}

\textsuperscript{122} Article 6 of the OECD Model Convention, 2010.

\textsuperscript{123} Article 6 of the UN Model Convention, 2011.
The fourth paragraph in the OECD Model Convention further clarifies that the provisions of first and third paragraphs shall also apply to the income from immovable property of an enterprise. Here the UN Model Convention goes a step forward to include income from immovable property used for the performance of independent personal services.

The Indian treaties also contain an article on income from immovable property which is based on the principle of source similar to that of the Model Conventions. One of the differences which are noticed in the Indian treaties is that of items specifically included in second paragraph of this clause. For example, treaties with Germany\textsuperscript{124}, Libya\textsuperscript{125} and the USA\textsuperscript{126} do not mention any items to be included or excluded from definition of immovable property. Another important difference is there in the treaties with Bangladesh\textsuperscript{127}, Egypt\textsuperscript{128} and Romania\textsuperscript{129} which lays down the rule that such income ‘may only be taxed’ by the state of source. The rule ‘may be taxed’ gives priority of taxation where as ‘may only be taxed’ leaves no room for priority or secondary right to tax.

The Indian treaty with Portugal\textsuperscript{130} include income from movable property or

\textsuperscript{124} Article 6 of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Germany (India-Germany) (29 November 1996) Notification No: SO 836(E).

\textsuperscript{125} Article 5 of the Agreement Between India-Libyan Arab Jamahiriya, 1982.

\textsuperscript{126} Article 6 of the Agreement Between India-USA, 1990.

\textsuperscript{127} Article 6 of the Agreement Between India-Bangladesh, 1992.

\textsuperscript{128} Article 6 of the Agreement for Avoidance of Double Taxation with the United Arab Republic (Egypt), (India-Egypt) (30 September 1969) Notification No: GSR 2363.

\textsuperscript{129} Article 6 of the Agreement Between India-Romania, 1988.


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income derived from services connected with the use or the right to use the immovable property as assimilating income from immovable property. In some countries like Finland, Kyrgyz and Namibia, ownership of shares or other corporate rights in a company entitles the owner of such shares or corporate rights to the enjoyment of immovable property held by the company. In such cases the tax treaties provide that income from direct use, letting, or use in any other form of such right to enjoyment may be taxed in the contracting state in which immovable property is situated\(^{131}\).

2.5.7 Taxability of Business Profits

The general rule contained in the tax treaties is that the business profits derived by an enterprise shall be taxable in the contracting state to which it belongs. However, if such enterprise carries out any business activity through a permanent establishment situated in other state, then the profits which can be attributed to such permanent establishment may be taxed in that other state.\(^{132}\) The United Nations Model Convention\(^{133}\) has expanded the scope of taxability to other state in the following cases:

(I) If sales in that other state of goods or merchandise is of the same or similar kind as those sold through permanent establishment. 

(II) If other business activities are carried on in that other state of the same or similar kind as those effected through that permanent establishment.

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\(^{132}\) Article 7 of the OECD Model Convention, 2010.

\(^{133}\) Article 7 of the UN Model Convention, 2011.
In such situations, the United Nations Model Convention has applied the ‘Principle of Attraction’ and has allowed the other state to tax irrespective of whether the permanent establishment is involved in the underlying business transaction or not.

This article also provides for the general principles for determining the profits attributable to such permanent establishment. The specific rules for determining taxable income attributable to such permanent establishment have to be laid by the domestic laws of different countries.\textsuperscript{134}

In many of the India’s double tax conventions, Paragraph 4 relating to the apportion method and paragraph 6 relating to same profits attribution year by year has been omitted. The profits derived from insurance business have been excluded from treaty coverage in case of Australia and New Zealand. Almost all the treaties to which India is a party have followed either OECD or the UN convention in substance and some of them have added clarifications at some places and have made minor departures from the model treaties.

\subsection*{2.5.8 Income from Shipping, Inland Waterways Transport and Air Transport}

The OECD Model Convention lays down the general rule that the profits from operation of ships or aircraft in international traffic shall be taxable only in the contracting state in which the place of effective management of an enterprise is situated.\textsuperscript{135} The UN Model Convention provides for two alternative options in its model treaty. Alternative A is similar to the OECD Model Convention however Alternative B provides taxing rights to other state if the shipping activities are more than casual.\textsuperscript{136} The profits to be taxed in

\textsuperscript{134} Rule 10 of the \textit{Indian Income Tax Rules}, 1962.
\textsuperscript{135} Article 8 of the \textit{OECD Model Convention}, 2010.
\textsuperscript{136} Article 8 of the \textit{UN Model Convention}, 2011.
that other state are to be determined on the basis of an appropriate allocation of the overall net profits derived by the enterprise from its shipping operations. The tax computed in accordance with such allocation is to be reduced by a percentage established through bilateral negotiations.

Both the Model Conventions provide that the profits from the operation of boats engaged in inland waterways transport shall be taxable only in the contracting state in which the place of effective management of an enterprise is situated. In cases where the place of effective management of a shipping enterprise of an inland waterways transport enterprise is aboard a ship or a boat, then it shall be deemed to be situated in the contracting state in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in contracting state of which the operator of the ship or boat is a resident. This provision is similar in both the alternatives under the UN Model Convention.

The Indian treaties incorporate various deviations from the general rules laid in the model conventions. Some treaties have no separate provisions on shipping activities\textsuperscript{137} and in some the place of effective management has been replaced by the enterprise’s country of residence. Further, India has also concluded limited agreements on avoidance of double taxation in respect of income from international air transport with some countries.\textsuperscript{138} All these agreements exempt the income from operating aircraft on reciprocity basis.

### 2.5.9 Associated Enterprises


\textsuperscript{138} Afghanistan, Ethiopia, Iran, Kuwait, Lebanon, Pakistan, People’s Republic of Yemen, UAE, Saudi Arabia and Yemen Arab Republic.
Associated enterprises are those enterprises which are subject to the same centre of direction and control or if one enterprise participates directly or indirectly in the management, control or capital of other enterprise. Due to their association with each other, they try to shift the profits to a low tax jurisdiction by altering the terms of a transaction. For example, an associated enterprise in jurisdiction X may overcharge its own subsidiary in Jurisdiction Y to shift the profits from jurisdiction Y to jurisdiction X. The main motive being to lower the tax burden as jurisdiction X is having low tax rates. That is why this specific field of taxation has been labelled ‘transfer pricing’.

The article related to associated enterprises allocates the overall profits derived by such enterprises in accordance with functions actually performed and risks actually borne by them. The first paragraph of this article lays down 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 to two non-associated enterprises. The second paragraph 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 other jurisdiction. This is done in order to avoid double taxation of the same value.

The Indian double tax 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. Therefore, the

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139 Article 9 of the OECD Model Convention, 2010; Article 9 of the UN Model Convention, 2011.
140 Article 9 of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Malta (India-Malta) (22 November 1995) Notification No: SO 761(E); Article 9 of the Agreement for Avoidance of Double Taxation of Income and the Prevention of Fiscal Evasion with Cyprus (India-Cyprus) (26 December 1995) Notification No: GSR 805(E); Article 9 of the Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Australia (India-Australia) (22 January
provisions under the domestic law of India shall apply in such cases. Some treaties have omitted the provisions of second paragraph relating to financial adjustments.

2.5.10 Dividend Income

The term ‘Dividend’ refers to income from shares or other rights, not being debt claims, participating in profits, as well as income from other corporate rights which are subject to the same treatment as income from shares by the laws of the state of which the company making the distribution is a resident. The first two paragraphs of the article relating to dividend income from the basic principle and paragraph 3 defines the term ‘dividend’. The provisions of this article are applicable when dividend is paid by a company resident of one state to the persons who are resident of other contracting state. If dividends are paid to a third party then ordinary rules of domestic law will apply.

This article grants right to both the states where the company paying dividend is a resident and the country where person receiving the dividend is a resident. However, if tax is imposed by the state where company paying dividend is a resident, then as per the OECD Model Convention, such tax should not exceed five percent of the gross amount if the person receiving the dividend is another company holding at least twenty five percent capital

143 Article 10 of the OECD Model Convention, 2010; Article 10 of the UN Model Convention, 2011.
of company paying dividend. In other cases, the OECD Model Convention prescribes an upper limit of fifteen percent. The UN Model Convention does not prescribe any upper limit of taxes however leaves it to the contracting states to establish it by way of mutual negotiations.

Most of the India’s Double Tax Conventions have adopted the text of some of the model conventions with some exceptions. The treaty with Greece grants right to tax dividend income to only that state where company paying the dividend is a resident.\textsuperscript{144} The treaty with Libya grants right to tax dividend income to only that state where company paying the dividend is registered.\textsuperscript{145} In contrast to this, the treaty with Syria grants right to tax dividend income to only that state where the person receiving the dividend is resident.\textsuperscript{146}

Paragraph 4 of the article on dividend income specifies that in a case where person receiving the dividend has a permanent establishment in the country where the company paying the dividend is situated and the holding for which the dividend is paid is effectively connected with such permanent establishment, then the provisions of article relating to permanent establishment shall apply. The UN Model Convention also includes fixed base along with permanent establishment for excluding the applicability of article relating to dividend income. The India’s treaties are also in line with the provisions of the UN Model Convention.

\textbf{2.5.11 Interest Income}

\textsuperscript{144} Article 8 of the Agreement for Avoidance of Double Taxation with Greece (India-Greece) (17 March 1967) Notification No: GSR 394.

\textsuperscript{145} Article 9 of the Agreement Between India-Libyan Arab Jamahiriya, 1982.

The Model Conventions grant rights of taxation to both the state of residence and the state of source.\textsuperscript{147} However, in case of the OECD Model Convention, the rate of taxation is limited to ten percent of the gross amount if the country of source exercises the right to tax. The UN Model Convention leaves the upper limit of tax to be decided by the contracting states by mutual negotiations. Paragraphs 3 of both the conventions define interest as an income from debt claim of every kind. Paragraphs 4 of these conventions exclude the applicability of this article in cases where interest income is earned by a person who carries on business through permanent establishment and the debt claim is effectively connected with such permanent establishment. Paragraph 5 is a deeming provision which specifies that interest shall be deemed to arise where the payer is a resident however, if the person paying the interest has in a contracting state a permanent establishment or fixed base, then the interest shall be deemed to arise in state where such permanent establishment is situated. The last paragraph acts as a check on any kind of transferring of profits by overcharging interest in case of associated enterprises. In such cases, the excess amount of interest which is charged by the enterprise shall be ignored from beneficial treatment under this section and normal rules of taxation shall apply with due regard to provisions of any convention.

Paragraph 1 and paragraph 2 respectively of India’s treaties follow the provisions of the model conventions with slight deviations. Barring few exceptions\textsuperscript{148}, India’s treaties contain a third paragraph which exempts taxation of interest by source state in some cases. The definition of interest has been included in all treaties except with the one’s with Greece and Libya. Similarly, barring the same exceptions of Greece and Libya, all provisions relating to permanent establishment, source rule and arm’s length

\textsuperscript{147} Article 11 of the OECD Model Convention, 2010; Article 11 of the UN Model Convention, 2011.

\textsuperscript{148} India’s International Tax Agreements with Australia, Belgium, UAR Egypt and Singapore.
pricing in case of associated enterprises are present an all of India’s treaties.

2.5.12 Royalties

There is a sharp distinction between the provisions of the OECD and the UN Model Conventions on Rules Relating to Taxability of Royalty Income. Article 12 of the OECD Convention consists of four paragraphs and it recognises residence based principle for taxation of royalty income. The second paragraph defines royalty as payment of any kind received as consideration for use of or right to use of any copyright, patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. The third paragraph excludes applicability of the residence based principle in case royalty income is derived from permanent establishment and the right of property in respect of which royalties are paid is effectively connected with such permanent establishment. The last paragraph excludes the applicability of these provisions where the royalty payments exceed the arm’s length price in case of associated enterprises.

In a sharp contrast to the provisions of the OECD Model Conventions, the UN grants right to tax royalty income to both the states of residence and source. In case this right is exercised by the state of source, then an upper limit may be prescribed by way of mutual negotiations among the contracting countries. The definition of royalty is more comprehensive and includes payments made for use of or right to use industrial, commercial or scientific equipment. However, the two exceptions of permanent establishment and associated enterprises are present in this convention. India’s treaties are based on the UN Model Convention and provide a limited right to tax by source country. The other provisions are also similar in substance.

2.5.13 Capital Gains
The article on taxability of capital gains has been divided into paragraphs each of which deals with different kinds of property. The first paragraph deals with alienation of immovable property and grants right of taxation to the contracting state where the property is situated. Similarly, in case of movable property forming part of business property of permanent establishment, including gains from alienation of such permanent establishment, shall be taxed in state where such permanent establishment is situated.

The third paragraph deals with alienation of ships or aircrafts operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to the operation of such ships, aircrafts or boats. In such cases, the model conventions grant right of taxation to the state where effective management of the enterprise is situated.

The fourth paragraph of the OECD Model Convention and the fourth and fifth paragraph of the UN Model Convention deals with taxability in alienation of shares. Where the shares derive more than fifty percent of their value directly or indirectly from immovable property, the OECD Model Convention grants right of taxation to state where such immovable property is located. The UN Model Convention also includes interest in a partnership, trust or estate along with the alienation of shares for deciding the jurisdiction of a state. The fifth paragraph of the UN Model Convention also gives right of taxation to the state of source in cases where the shares derive a value less than fifty percent and leaves it to the contracting states for deciding the percentage through bilateral negotiations. The last paragraph of both the Model Treaties establish residence rule of taxation in gains from alienation of any other property.

149 Article 13 of the OECD Model Convention, 2010 and Article 13 of the UN Model Convention, 2011.
The India’s treaties with Libya and Malaysia do not contain provision on taxability of capital gains. The other treaties have followed the structure of the model conventions with some deviations. For example, India’s treaties with Bangladesh, Canada and Egypt do not provide for taxation of movable property belonging to a permanent establishment or fixed base.\textsuperscript{150} As far as income from alienation of shares is concerned some of the treaties grant right of taxation to residential state of alienator\textsuperscript{151}, some to the residential state of company\textsuperscript{152} and some of them do not make separate provision for such kind of income.\textsuperscript{153}

### 2.5.14 Independent Personal Services

Article 14 of the UN Model Convention deals with taxability in case of income arising from professional services or other activities of an independent character. The professional services are defined to include independent scientific, literary, artistic, educational or teaching activities as well as independent activities of physicians, lawyers, engineers, architects, dentist and accountants. Residence rule prevails in taxing such services except in cases where the person carries out such services through a fixed base. The existence of such base shifts the situs of taxation to state of source. Apart from the fixed base, the UN Model Convention also bends toward state of source in cases where the stay of individual exceeds one hundred and eighty three days in aggregate in any twelve months period commencing or ending in fiscal year concerned.

\textsuperscript{150} Article 14 of the Agreement Between India-Bangladesh, 1992; Article 14 of the Agreement between India-Egypt, 1969; Article 13 of the Agreement Between India-Canada, 1998.

\textsuperscript{151} India’s International Tax Agreement with Cyprus and Thailand.

\textsuperscript{152} India’s International Tax Agreements with Bangladesh, Finland and Russia.

\textsuperscript{153} India’s International Tax Agreement with the UK and the USA.
It may be noticed that the OECD Model Convention which originally used the ‘fixed base’ criterion has now deleted this provision and has merged it with the article relating to business profits. However, the UN Model Convention still uses both the ‘fixed base’ and ‘stay based’ criterion for source based taxation. The Indian treaties have not been updated in tune with the OECD Convention and they still retain the clause on independent personal services. However, some of the India’s treaty incorporate different criterion for such taxation. For example, India’s treaty with Brazil lays down a sole criterion where remuneration is paid by a resident or borne by a permanent establishment of source state.\footnote{Article 14 of the Agreement Between India-Brazil, 1992.} The treaty with Greece makes source based taxation as a rule and carves out some exceptions from it.\footnote{Article 14 of the Agreement Between India-Greece, 1967.}

Some of the India’s Double Tax Conventions use the word ‘individual’ in contrast to the use of the word ‘resident’ by the Model Conventions. The term ‘resident’ which is wider in purport includes any legal person who under the laws of that state is liable to tax therein by reason of his domicile, residence, place of incorporation, place of management or any other criterion of similar nature. Thus, payments to an enterprise in respect of activities of employees or other personnel which are subject matter articles 5 and 7 also fall under the purview of article 14 if a treaty uses the word ‘residence’. Hence, use of word ‘individual’ is more appropriate than ‘resident’.

\subsection*{2.5.15 Dependent Personal Services}

The expression ‘dependent personal services’ is used by the UN Model Convention in contrast to the OECD Model which uses the expression ‘income from employment’.\footnote{Article 15 of the OECD Model Convention, 2010 and Article 15 of the UN Model Convention, 2011.} The provisions of this article are subject to provisions of Article 16 (Director’s Fee and Remuneration of Top-Level

\footnote{Article 14 of the Agreement Between India-Brazil, 1992.}

\footnote{Article 14 of the Agreement Between India-Greece, 1967.}

\footnote{Article 15 of the OECD Model Convention, 2010 and Article 15 of the UN Model Convention, 2011.}
Managerial Officials), Article 18 (Pension and Social Security Payments) and Article 19 (Government Service). The general rule relating to taxability of income from employment is that the services may be rendered anywhere but the country of residence can levy taxes on its residents. The country of source can also exercise right to levy tax except in following circumstances:

(I) The stay of employees does not exceed a period of one hundred and eighty three days in twelve months;

(II) The employer is not a resident of other state; and

(III) The remuneration paid to employee is not borne by a permanent establishment which employer has in other state.

In case both the states exercise their right to tax, then a relief is available in terms of Article 23. The last paragraph of both the Model Conventions discuss taxability of income from employment exercised aboard a ship or aircraft operated in international traffic or aboard a boat engaged in inland waterways transport. The situs of tax in such cases shall be the contracting state in which the place of effective management of enterprise is situated.

The Article 16 of the OECD Model Convention discusses taxability of director’s fee and other similar payments derived by a resident of a contracting state in his capacity as a member of the ‘Board of Directors’ whereas the UN Model Convention also includes salaries, wages and other similar remuneration in capacity as ‘top-level managerial position’. Both the conventions uphold jurisdiction to tax by the country where company is resident.

The OECD Model Convention suggests that pension and other social security payments paid to a resident of contracting state shall be taxable in the country of residence only. It makes exclusion in favour of payments received
under government service which is dealt by the provisions of Article 19 (Government Service). In contrast, the UN Model Convention gives two alternatives for taxing pension and social security payments. The first alternative is similar to the OECD Model Convention and only difference is that the social security payments are also given the same treatment as pensions received under government service. In addition to the provisions of first alternative, the second alternative under the UN Model Convention provides taxing rights to both the states if pension or other social security payment is made by a permanent establishment or a resident of other state.

The provisions of Article relating to taxability of income from government service are identical in both the Model Conventions.\textsuperscript{157} This article is divided into three paragraphs. The first paragraph deals with salaries, wages and other similar remuneration but other than pension and gives the country where government or local authority is residing a primary right to tax. However, the other state can also exercise its right to tax if the individual is a resident of other state and also a national of that state or such individual did not become a resident of other state solely for purpose of rendering the services. The second paragraph deals with pensions paid a contracting state or a political sub-division or local authority for services rendered to that state and gives that state a sole right to tax. The third paragraph applies when salary, wages, pension and other similar payments are paid for services rendered in connection with a business carried on by a state. In such cases, the provisions of Article 15 (income from employment), Article 16 (director’s fee) and Article 18 (pensions) shall apply.

India’s treaties are similar to the Model Conventions with some minor deviations. Some treaties make reference to articles relating to Artistes and sportsperson, Entertainers, Professors, Teachers and students in addition to

\textsuperscript{157} Article 19 of the OECD Model Convention, 2010; Article 19 of the UN Model Convention, 2011.
pensions, government service and director’s fee. As far as the provisions relating to director’s fee are concerned, a very few treaties have second paragraph relating to top level managerial positions. A good number of India’s treaties include annuities along with pension and other similar payments under article 18. Lastly, some of them use the word ‘remuneration’ instead of salaries under article relating to government service.

2.5.16 Artistes, Sportspersons and Students

Article 17 of the UN and the OECD Model Conventions deals with the income earned by an entertainer, such as a theatre, motion picture, radio or television artist, or a musician, or as a sportsman from his personal activities. The taxability of such income has been discussed under three categories. Firstly, if the income accrues to such person in his own capacity then the country where performance is made shall levy tax. Secondly, if the income does not accrue to the performer as such but to a third person, then the country in which activities of the performer are exercised shall have the right to tax. Both these categories are subject to the provisions of articles relating to business profits, independent personal service and dependent personal services. The last category deals with those cases when the performer’s visit is supported wholly or mainly by public funds and in such situations the state of residence gets the jurisdiction to tax. The India’s treaties follow similar rule as enshrined in model conventions.

Article 20 of both the Model Conventions deal with the payments made to students or business apprentices in relation to their education or training and states that the other state has no right to tax such payments. Most of the Indian treaties have this clause limited by a time lap of say three to seven years. Some of them treat such payments as exempted income and some of them prescribe the upper limit of tax exemption.

158 India’s International Tax Agreements with Denmark, Korea and Poland.
2.5.17 Other Income

Article 21 of both the Model Conventions is residuary in nature. It upholds the jurisdiction of residence state to tax any income which is not covered by any other provision of the convention. However, an exception is provided in case income is attributable to a permanent establishment in case of the OECD Model Convention and permanent establishment or fixed base in case of the UN Model Convention. The latest OECD Model Convention does not use the expression ‘fixed base’ as it has merged the concepts of fixed base and permanent establishment by deletion of article 14 (independent personal services). The UN Model Convention also contains a third paragraph which provides that the source jurisdiction may also levy tax in residuary cases and in case both the states levy tax on same income, then relief under article 23 is available to the person.

2.5.18 Taxability of Capital

Apart from incomes earned in different jurisdiction, the model conventions also contain a rule relating to taxability of capital items as such. They divide the capital items into four categories. Firstly, the immovable items as referred under Article 6 and owned by a resident of contracting state may be taxed in the state where they are located. Secondly, the capital represented by movable items forming part of business property of a permanent establishment may be taxed in state where permanent establishment is located. The UN Model Convention also refers to fixed base in addition to permanent establishment. Thirdly, capital represented by ships, aircrafts and boats may be taxed in state where place of effective management is located. Lastly, the model conventions uphold the jurisdiction of residence to

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159 Article 22 of the OECD Model Convention, 2010 and Article 22 of the UN Model Convention, 2011.
tax in cases which are not covered by above clauses.

All of the India’s treaties do not contain a provision relating to taxability of capital items. This is in line with the provisions of article 2 (taxes covered) which do not recognise such taxes as subject items. However, if any treaty contains such provisions, then it is in line with the rules contained in the Model Conventions.

2.5.19 Methods for Elimination of Double Taxation

The two important objectives of tax agreements are to avoid double taxation and to prevent fiscal evasion. Article 23 of the Model Convention provides guidelines for achieving one of these objectives relating to avoidance of double taxation. This Article is divided into two parts namely, article 23A (Exemption Method) and article 23B (Credit Method).

Before highlighting the relevant provision of these parts, an analysis of different provisions that allocate either source or residence or both countries to tax a particular income is required. To understand this analysis, the following terminology which has been used by the model conventions must be considered:

(I) Where a country has a sole right to tax and other country is precluded from levying any tax;

(II) Where a country has a priority to tax and if this option is exercised, then other country does not levy any tax;

(III) Where both the countries have a right to tax and in case of double taxation relief is available in terms of Article 23.
The following table has been prepared to indicate different jurisdictions where a particular income is taxable under the model conventions.

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Taxable Item</th>
<th>the OECD Model</th>
<th>the UN Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Income earned from immovable property (Article 6)</td>
<td>The state of source has the prior right to tax.</td>
<td>Identical to the OECD Model.</td>
</tr>
<tr>
<td>2</td>
<td>Business profits which are not derived through Permanent Establishment (Article 7)</td>
<td>The state of residence has the sole right to tax.</td>
<td>The rule under the UN Model Convention is similar in substance.</td>
</tr>
<tr>
<td>3</td>
<td>Business profits derived through Permanent Establishment (Article 7)</td>
<td>Source State Right to Tax Income which is Attributable to such Permanent Establishment</td>
<td>Source State Right to Tax Income which is Attributable to such Permanent Establishment</td>
</tr>
<tr>
<td>4</td>
<td>Shipping, Inland Waterways Transport and Air Transport (Article 8)</td>
<td>(a)If place of effective management is situated in one of the contracting states : State of</td>
<td>The rule under the UN Model Convention is similar in substance.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Residence</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>------------</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) If place of effective management is situated in a third state: State of Source</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Dividends (Article 10)</td>
<td>Priority of the state where recipient is residing. In case state where company is a resident imposes the tax, then such tax should not be more than prescribed limit.</td>
<td>Priority of the state where recipient is residing. In case state where company is a resident imposes the tax, then a maximum limit has to be prescribed by mutual negotiations.</td>
</tr>
<tr>
<td>6</td>
<td>Interest (Article 11)</td>
<td>Priority of the state where recipient is residing. In case state where such interest arises imposes the tax, then such tax should not be more than prescribed limit.</td>
<td>Priority of the state where recipient is residing. In case state where such interest arises imposes the tax, then such tax should not be more than a maximum limit prescribed by mutual negotiations.</td>
</tr>
<tr>
<td></td>
<td>Royalties (Article 12)</td>
<td>The state where beneficial owner is residing has the sole right to tax.</td>
<td>Priority of the state where recipient is residing. In case state where such royalty arises imposes the tax, then such tax should not be more than a maximum limit prescribed by mutual negotiations.</td>
</tr>
<tr>
<td>---</td>
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<td>------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>8</td>
<td>Capital Gains (Article 13)</td>
<td>The state where immovable property is situated has the priority to tax.</td>
<td>Identical to the OECD Model Convention</td>
</tr>
<tr>
<td>9</td>
<td>Independent Personal Services (Article 14)</td>
<td>This clause has been deleted in the OECD Model.</td>
<td>The state where the person rendering such services is resident has the sole right to tax.</td>
</tr>
<tr>
<td>10</td>
<td>Dependent personal Services (Article 15), Director’s Fee (Article 16), Pensions (Article 18) and Government Service (Article 19)</td>
<td>The state where person is resident has the right to tax in certain conditions.</td>
<td>The rule under the UN Model Convention is similar in substance.</td>
</tr>
<tr>
<td></td>
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<td></td>
</tr>
<tr>
<td>11</td>
<td><strong>Artistes and Sportspersons (Article 17)</strong></td>
<td>The state of source has a priority to tax.</td>
<td>The rule is identical to the OECD Model.</td>
</tr>
<tr>
<td>12</td>
<td><strong>Students (Article 20)</strong></td>
<td>The state where student is visiting shall not levy any tax.</td>
<td>The rule is identical to the OECD Model.</td>
</tr>
<tr>
<td>13</td>
<td><strong>Other Income (Article 21)</strong></td>
<td>The state of residence shall have the sole right to tax.</td>
<td>Both the states have right to tax.</td>
</tr>
<tr>
<td>14</td>
<td><strong>Capital Items (Article 22)</strong></td>
<td>The state where capital is located shall have the sole right to tax.</td>
<td>The rule under the UN Model Convention is similar in substance.</td>
</tr>
</tbody>
</table>

An analysis in the above table reveals that apart from the cases where a particular jurisdiction has sole right to tax, there is a possibility of double taxation by both source and residence state. In such cases, Article 23 comes into play and provides two alternatives for giving relief.

The general rule as enshrined in first paragraph of Article 23A states that where the income may be taxed in country of source and it exercises such jurisdiction in reality then the country of residence should exempt such
income from tax. This general rule is subject to the provisions of the second and the third paragraph. The second paragraph deals specifically with the cases mentioned under Article 10 (Dividend) and Article 11 (Interests) where the country of source can exercise its jurisdiction to tax only up to the maximum limit prescribed under the treaty. In such circumstances, the country of residence can impose tax however it should provide for a deduction which shall be equal to the amount paid in other jurisdiction. The third paragraph provides that the country of residence can nevertheless take into account the exempted income for calculating tax on remaining income or capital.

The fourth paragraph is an exception to the general rule contained in first paragraph. It states that the provisions of first paragraph shall not apply where the country of source applies the provisions of the convention to exempt such income or capital from tax.

The second alternative for avoidance of double taxation as provided under Article 23B states that the country of residence should give deduction for the tax paid in country of source. The only difference between the two alternatives is that the Article 23A provides for exemption as a general rule where as Article 23B provides for deduction of tax.

2.5.20 Non Discrimination

The Article on non discrimination is identical in both the model treaties and has been divided into six paragraphs.\(^{160}\) The first paragraph provides equal treatment of nationals of two contracting states. This treatment is extends to all nationals who are residing in the contracting states. However, the equal treatment is not absolute in nature and subjected to the words ‘in the same

\(^{160}\) Article 24 of the OECD Model Convention, 2010 and Article 24 of the UN Model Convention, 2011.
circumstances’. Consequently, a contracting country can distinguish between its nationals and nationals of other country if its national is residing in some third state as the two persons are not in the same circumstances with respect to residency.

The second paragraph 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 paragraph. The third paragraph provides equal treatment to permanent establishment of other contracting state in relation to the taxation levied on an enterprise of that state carrying on the same activities. The fourth paragraph is designed to end a particular form of discrimination resulting from the fact that in certain countries the deduction of interest, royalties and other disbursements allowed without restriction when the recipient is resident is restricted or even prohibited when he is a non-resident. It is open to the contracting states to modify this provision in the bilateral conventions to avoid its use for tax avoidance purposes.161

The provision of the fifth paragraph puts an end to the discrimination relating to enterprises resident in a contracting state, the capital of which is owned or controlled by residents of other state. Its object is to ensure equal treatment for such enterprises in relation to the enterprises whose capital is owned or controlled by its own residents in a contracting state. The last paragraph of article 24 makes it clear that operation of this article is restricted by the provisions of article 2 (taxes covered). It applies to taxes of every kind and description.

### 2.5.21 Mutual Agreement Procedure

The Article on mutual agreement procedure provides a mechanism for taxpayers to bring to the attention of competent authorities, issues and problems that may arise under the convention.\textsuperscript{162} It is divided into four paragraphs out of which the first three paragraphs are identical in both the Model Conventions. The first paragraph enables a person to present his case before the competent authority of his country if he considers that the action of one or both of the contracting states result in taxation not in accordance with provisions of this convention. The limitation period expires in three years from the first notification of the action resulting in taxation not in accordance with provisions of this convention.

The other three paragraphs deal with the procedure to be adopted if such case is presented before the competent authority. The second paragraph states that the competent authority shall endeavour to resolve the case by mutual agreement with the competent authority of other country in case following two conditions are fulfilled:

(I) The objection must appear to be justified;

(II) The competent authority itself is not able to arrive at a satisfactory solution.

Any agreement reached by the competent persons has an overriding effect over the domestic law. The third paragraph provides that the competent persons may communicate with each other for resolving any difficulties or doubts arising as to the interpretation or application of the convention. They may also consult together for the elimination of double taxation in cases not provided for in the convention.

\textsuperscript{162} Article 25 of the OECD Model Convention, 2010 and Article 25 of the UN Model Convention, 2011.
The fourth paragraph in the OECD Model Convention clarifies that the competent authorities may communicate with each other directly, including through a joint commission consisting of themselves or their representatives. The fourth paragraph in the UN Model Convention, in addition to the provisions contained in the OECD Model Convention, provides that the competent authorities shall develop appropriate bilateral procedures, conditions, methods and techniques for implementation of the mutual agreement procedure. However, a competent authority may devise appropriate unilateral procedure to further facilitate the bilateral methods.

2.5.22 Exchange of Information

Article 26 of both the Model Conventions deals with exchange of information amongst the competent authorities of contracting states. According to the commentary on the OECD Model Convention, such an Article is desirable to give administrative assistance for the purpose of ascertaining facts in relation to which the rules of the convention are to be applied. Moreover, in view of the increasing internationalisation of economic relations, the contracting states have a growing interest in the reciprocal supply of information on the basis of which domestic taxation laws have to be administered, even if there is no question of the application of any particular article of the convention.

Any information received under this Article is treated as secret and may be disclosed only to persons or authorities (including courts and administrative bodies) concerned with assessment, collection, enforcement, prosecution or determination of appeals in relation to the taxes which are subject of the treaty. Such persons are allowed to disclose the information in public court proceedings or in judicial decisions.

The provisions of this 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 these cases, the obligation to supply information does not exist.

The second paragraph states that the contracting state is not obliged to provide information in following cases:

(I) Where the contracting state has to carry out administrative measures at a variance with the laws and administrative practice of other country;

(II) Where the information is not obtainable under the laws or in normal course of administration of the contracting state; and

(III) Where the supply of information would disclose any trade, business, industrial, commercial or professional secret or trade process or information which is contrary to public policy.

Despite of such limitations, as mentioned in paragraph 2 above, this article is an important tool for prevention of international tax evasion and avoidance.

2.5.23 Assistance in Collection of Taxes

The Article on assistance in collection of taxes has recently been added in the two Model Conventions.\textsuperscript{163} It provides that the revenue claims which can no longer be contested in the claimant state can be collected by the other state as if they were the claim of its own. The term ‘revenue claim’ includes all kinds of taxes, pertaining interests, administrative cost and penalties. However, such revenue claim does not have any priority under the laws of

\textsuperscript{163} Article 27 of the OECD Model Convention, 2010 and Article 27 of the UN Model Convention, 2011.
collecting state. Even the validity of such claim cannot be brought into question before the courts or administrative bodies of such collecting state. In cases, where the revenue claim ceases to exist before the tax has been collected and remitted, the claimant state is under a duty to promptly notify the collecting state and either suspend or withdraw the request. The last paragraph of this article clarifies that the contracting state has no obligation to do following tasks:

(I) To take administrative measures which are at variance with its laws and administrative practice or contrary to its public policy;

(II) To provide assistance as long as the claimant has not pursued all reasonable measures available under its own laws and administrative practice; and

(III) To provide assistance if the administrative burden is clearly disproportionate to the benefit of the claimant state.

Apart from the above mentioned Articles, the Model Conventions and India’s treaties also contain some miscellaneous provisions relating to members of diplomatic missions and consular posts, territorial extension and final provisions. Article 28 of the model treaties provide that the provisions of tax treaty do not affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or the provisions of special agreements. Article 29 provides that operation of such treaty may be extended either in entirety or with modifications to any territory of contracting states which are specifically excluded. The Article on ‘final provisions’ contains Article relating to date from which such treaty has to come into force and way by which such treaty can be terminated.

2.6 Emergence of Specific Agreements for Preventing Tax Evasion
Content analysis of the provisions relating to prevention of tax evasion in comparison to provisions relating to avoidance of double taxation in double tax conventions reveals a lopsided picture. A major chunk of international tax agreements which includes approximately twenty one articles deal with avoidance of double taxation. They define and classify different incomes and assign either source or residence jurisdiction a primary right to tax. The other jurisdiction is obliged either to exempt such income or give credit for the taxes paid in respect of such income.

Only two provisions namely, assistance in collection of taxes and exchange of information deal specifically with prevention of tax evasion. One of these provisions relating to assistance in collection of taxes has been recently incorporated in model conventions and as a consequence many of the India’s treaties do not contain provision to this effect. Moreover, these two provisions are also not comprehensive and exhaustive to prevent international tax evasion and a lot needs to be done. Hence, it can be concluded that the international tax agreements are not a comprehensive or exhaustive tool to prevent tax evasion which is considered to be one of their two objects. Due to this reason there is an emergence of specific tax treaties which deal with prevention of tax evasion in a comprehensive manner.

2.6.1 Tax Information Exchange Agreements

Tax information agreements provide for exchange of information relating to tax matter. Typically speaking such agreements contain following provisions:

(I) The object and scope clause which specifies that the information under such agreement includes any information which is of foreseeable relevance to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims,
or the investigation or prosecution of tax matters;

(II) The jurisdictional clause which provides that the contracting parties are obliged to share any information available to them in their territorial jurisdiction without any regard to the residential status of the person;

(III) A clause to specify and enlist various taxes which are covered by the treaty and a definitional clause defining various terms used in the treaty;

(IV) The core clause of such tax information exchange agreements is named as ‘exchange of information upon request’. This clause contains detailed procedure that how the information has to be provided to other jurisdiction;

(V) The article on tax examinations allows the representatives of competent authorities to enter the territory and interview individuals and conduct examination of records;

(VI) There are certain exceptions for providing information where a country can decline the request of other country. Such exceptions are covered under ‘possibility of declining a request for information’ clause;

(VII) The confidentiality clause ensures that the information provided to other country is kept confidential. The other party can use such information only for the purpose it is provided and can disclose it to courts and tribunals; and

(VIII) The agreements on information exchange also provide for assistance
in tax collection and an article for sharing administrative costs. The normal costs are to be borne by the requested country where as extraordinary costs above a prescribed limit are to be borne by requesting country.

Apart from the above mentioned clauses there certain miscellaneous provisions relating to mutual agreement procedure, date on which agreement shall come into force and termination clause. These clauses are similar to the clauses under double tax conventions discussed above.

2.6.2 The Convention on Mutual Administrative Assistance in Tax Matters, 2011

The Organisation for Economic Cooperation and Development which has prepared the Convention on Mutual Administrative Assistance gives four key benefits of such convention. Firstly, its multilateral approach provides single legal basis for multi-country cooperation. Secondly, it provides uniformity as a coordinating body ensures a consistent application. Thirdly, it is wider in scope than tax information exchange agreement or double tax conventions as it provides for extensive form of cooperation on all taxes. Lastly, it provides flexibility to the contracting parties as reservation option for certain clauses is available to them. The major clauses of such convention provides for different forms of assistance covering exchange of information, assistance in recovery and service of documents.¹⁶⁴

There are three kinds of exchange of information provided in the convention namely, exchange of information on request¹⁶⁵, automatic exchange of

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¹⁶⁵ id., Article 5.
information\textsuperscript{166} and spontaneous exchange of information\textsuperscript{167}. As the name suggests under exchange of information on request clause, a request from a contracting country is a pre requisite. As far as automatic exchange of information is concerned, the contracting parties are free to decide the categories by mutual agreement. The circumstances in which there shall be spontaneous exchange of information are cases where a contracting party has grounds for supposing that there shall be loss of tax in other state. Further, spontaneous information may also be provided where tax liability in one state is going to have effect on tax liability of other state or there is artificial transfer of profits.

This convention also provides for simultaneous tax examinations in the respective territories of the contracting parties relating to the affairs of same person.\textsuperscript{168} Similar to the tax information exchange agreements, a provision for tax examinations abroad is also provided in this convention which enables the competent authorities to send their representatives in other contracting party for interviewing and examining records.\textsuperscript{169}

Under Article 11 of this convention states signing the treaty are obliged to assist the other states in recovery of tax claims as if the claims were there own. The obligation to provide assistance in the recovery of tax claims concerning a deceased person or his estate is limited to the value of estate. The contracting should also take measures of conservancy on request of other state.\textsuperscript{170}

Article 17 deals with provisions relating to service of documents by one country in territory of other contracting party. The requested country is

\textsuperscript{166} \textit{id.}, Article 6.
\textsuperscript{167} \textit{id.}, Article 7.
\textsuperscript{168} \textit{id.}, Article 8.
\textsuperscript{169} \textit{id.}, Article 9.
\textsuperscript{170} \textit{id.}, Article 12.
obliged to effect service of documents by method prescribed by its own domestic laws. In case no translation is provided and the person served is unable to understand such language, then the requested party may provide such translation in official language or ask the requesting party to provide for same. Alternatively, a contracting party is also free to serve the documents through post.

2.7 Conclusion

From the above discussion, it can be observed that the main purpose of international tax agreements is to avoid double taxation and the prevent tax evasion as both these objectives are indispensable for the growth of a country’s economy and attraction of foreign investment. This is why various countries enter into international tax agreements with other countries. These agreements are negotiated, ratified and implemented like other international agreements on different subjects. A unique feature of such treaties is that they are of self executing nature and once ratified, the implementation is automatic. The domestic laws of different countries contain provisions to this effect.

Historically speaking, the growth of international tax agreements can be witnessed in the period after the First World War took place. Prior to this period, there was limited number of international tax agreements which were shorter in version than their modern day counterparts. However, their contribution towards development of international tax regime cannot be doubted as the principles relating to residence, reciprocity and source remains the same. With the establishment of the League of Nations, then United Nations and the OECD, there was a growth of tax agreements as these organisations prepared the Model Conventions which laid basis for agreements between different countries. These Model Conventions are also revised by the respective organisations to incorporate recent changes in
international tax regime.

Comparative analysis of India’s Double Tax Conventions with the Model Conventions reveals that they are mainly based on the Model Conventions in substance. The provisions relating to basis of charge, persons and taxes covered, classification of different incomes like dividend, interest, business etc. and allocating either source or residence jurisdiction are based on model conventions with some variations.

A content analysis of the different provisions of the Double Tax Conventions reveal that a major chunk of these provisions deal with avoidance of double taxation and only two provisions deal with prevention of tax evasion. This led to an emergence of specific tax treaties dealing comprehensively with the subject of tax evasion. Such tax treaties are known as the tax information exchange agreement and convention on mutual administrative assistance in tax matters. These treaties comprehensively deal with the main aspects of preventing tax evasion like assistance in recovery, exchange of information and service of documents.