



CONTENTS

| | PAGE |
|--------------------------|------|
| <i>About the authors</i> | I-5 |
| <i>Preface</i> | I-7 |
| <i>Acknowledgement</i> | I-9 |
| <i>Chapter-heads</i> | I-11 |
| <i>List of cases</i> | I-51 |

1

TAX SCHEME IN INDIA

| | | |
|-------|---|----|
| 1.1 | Tax scheme | 1 |
| 1.1.1 | Tax in India | 2 |
| 1.1.2 | Tax under treaties - DTAA's | 2 |
| 1.2 | Basis of taxation | 4 |
| 1.2.1 | Residence | 4 |
| 1.2.2 | Source | 6 |
| 1.2.3 | The Mix | 7 |
| 1.2.4 | Table : Chargeable income and persons | 8 |
| 1.3 | Income subject to tax | 8 |
| 1.3.1 | Source & place of accrual | 9 |
| 1.3.2 | Profits from property | 10 |
| 1.3.3 | Profits from property arises | 11 |
| 1.4 | Off shores sales | 13 |
| 1.4.1 | Attribution of profit | 16 |
| 1.4.2 | Attribution of sale profits | 18 |
| 1.4.3 | Profits from multi-sourced assets or activities | 19 |

CONTENTS

I-16

| | PAGE | |
|--------|--|----|
| 1.5 | Income received in and outside India | 21 |
| 1.5.1 | Receipt by cheque | 22 |
| 1.5.2 | Receipt is first receipt | 22 |
| 1.5.3 | Income deemed to be received | 22 |
| 1.6 | Computation of income | 24 |
| 1.7 | Tax levy | 24 |
| 1.8 | Nature of income | 24 |
| 1.8.1 | Contract works income | 25 |
| 1.8.2 | CIF Contracts income | 26 |
| 1.8.3 | FOB Contracts income | 27 |
| 1.9 | Deemed accrual of income in India | 28 |
| 1.10 | Double taxation | 29 |
| 1.10.1 | Avoidance of double taxation | 30 |
| 1.10.2 | Avoidance method | 32 |
| 1.10.3 | Relief or credit method | 32 |
| 1.10.4 | Parenthesis of double taxation | 32 |
| 1.11 | Treaty adoption by countries | 33 |
| 1.11.1 | Treaties and Constitution of India | 35 |
| 1.11.2 | The DTAA is not bad excessive delegation | 37 |
| 1.11.3 | DTAAs are not illegal and <i>ultra vires</i> the powers of the Central Government under section 90 | 38 |
| 1.12 | Unilateral tax relief and section 91 of Indian 1961 Act | 39 |
| 1.13 | Treaties | 41 |
| 1.14 | India's tax treaties and agreements | 41 |
| 1.15 | Effect of tax incidence - Minimising/avoiding tendency | 42 |
| 1.16 | Double non-taxation | 43 |
| 1.17 | Global fairness | 45 |

2

DOUBLE TAX TREATIES

| | | |
|-----|--------------------------------------|----|
| 2.1 | DTAA - An interaction of two systems | 46 |
| 2.2 | DTAA - Objectives | 47 |
| 2.3 | Scope of DTAA | 48 |

| | PAGE |
|--|------|
| 2.4 Emergence of model conventions | 49 |
| 2.4.1 OECD Model Convention (OECD MC) | 51 |
| 2.4.2 United Nations Model Convention (UN MC) | 52 |
| 2.4.3 OECD MC and UN MC | 52 |
| 2.4.4 OECD MC and US MC | 53 |
| 2.4.5 OECD MC and Andean MC | 53 |
| 2.4.6 Indian policy | 54 |
| 2.4.7 Model conventions developed International Tax Law | 56 |
| 2.4.8 Exemption in respect of income of non-resident in India | 61 |

3

ASSESSMENT AND JUDICIAL REVIEW

| | |
|---|----|
| 3.1 Assessment | 66 |
| 3.2 Procedure for assessment | 66 |
| 3.3 CBDT instructions on assets location | 67 |
| 3.4 Account | 68 |
| 3.5 Assessment of income | 69 |
| 3.5.1 Assessment at arm's length price | 69 |
| 3.5.2 Variable tax breaks | 69 |
| 3.5.3 MCs | 70 |
| 3.5.4 Search or requisition or other cases | 70 |
| 3.6 Pre-assessment Advance Redress Mechanism | 71 |
| 3.6.1 Dispute Resolution Panel | 71 |
| 3.6.2 Advance Ruling Authority | 71 |
| 3.6.3 Advance Price Agreements | 72 |
| 3.7 Correction of assessments & grievance redressal | 72 |
| 3.7.1 Modification of Assessments at the instance of Revenue | 73 |
| 3.7.2 Grievance Redress at the instance of Tax Payers | 74 |
| 3.7.3 Remedies at a glance | 74 |
| 3.8 Rectification of mistakes | 76 |
| 3.9 Appeals against assessments | 77 |

CONTENTS

I-18

| | PAGE |
|--|------|
| 3.9.1 Appeal to Commissioner (Appeals) | 77 |
| 3.9.2 Appeal to the Appellate Tribunal | 78 |
| 3.9.3 Appeal to High Court u/s 260A | 78 |
| 3.9.4 Appeal to Supreme Court u/s 261 | 79 |
| 3.10 Revision by CIT | 80 |
| 3.11 Settlement by Settlement Commission | 80 |
| 3.12 Judicial review/constitutional remedies | 81 |
| 3.12.1 High Court | 81 |
| 3.12.2 Supreme Court | 82 |
| 3.13 Remedy under DTAA | 83 |
| 3.14 Remedies under civil law | 86 |
| 3.14.1 Civil law remedies for the assesseees | 86 |
| 3.14.2 Civil law remedies for Revenue | 87 |
| 3.14.3 Interim remedies | 87 |
| 3.14.4 Caveat | 87 |
| 3.14.5 Intervention | 87 |
| 3.15 Other administrative supportive remedies | 88 |
| 3.15.1 Pure administrative | 88 |
| 3.15.2 Waiver of interest and penalty by CIT/ITO | 88 |
| 3.15.3 Approval of CIT for retention of books impounded | 88 |
| 3.15.4 Appeal to Tax Recovery Commissioner and to Board | 88 |
| 3.15.5 Condoning of delay by Board | 88 |
| 3.15.6 Through the Elected Representative | 89 |
| 3.15.7 Remedy of Arbitration & Conciliation | 89 |
| 3.15.8 Political and legal remedy | 89 |
| 3.15.9 Remedy of public opinion | 90 |

4

ARTICLE 1 - APPLICATION OF CONVENTIONS

| | |
|-------------------------------|----|
| 4.1 UN MC and OECD MC | 91 |
| 4.2 US MC | 91 |
| 4.2.1 Clause 1 | 92 |
| 4.2.2 Clause 2 (US MC) | 93 |

| | PAGE |
|-------|-----------------------------------|
| 4.2.3 | Clause 3 (US MC) 94 |
| 4.2.4 | Clause 4 (US MC) 94 |
| 4.2.5 | Clause 5 (US MC) 94 |
| 4.2.6 | Clause 6 (US MC)/OECD MCC 95 |
| 4.2.7 | Indian position 102 |
| 4.2.8 | The term "person" in India 103 |
| 4.2.9 | Scope of Convention 104 |
| 4.3 | Article 1 in India's treaties 104 |

5

TAXES COVERED

| | |
|-----|---|
| 5.1 | Article 2 in Model Conventions 105 |
| 5.2 | Clause 1 107 |
| 5.3 | Clause 2 107 |
| 5.4 | Clause 3 107 |
| 5.5 | Clause 4 108 |
| 5.6 | Indian DTAA's 108 |
| 5.7 | Table on article 2 in Indian DTAA's 108 |

6

ARTICLE 3 - TREATY TERMS GENERAL

| | |
|-------|--|
| 6.1 | Core terms - Article 3 115 |
| 6.2 | General rules of interpretations of treaty terms 116 |
| 6.3 | Table of article 3 in model conventions 119 |
| 6.4 | US MC article 3 : General definitions 121 |
| 6.5 | Person 122 |
| 6.5.1 | Individual 123 |
| 6.5.2 | Company 124 |
| 6.5.3 | Company includes body corporate 124 |
| 6.5.4 | Body of persons 124 |
| 6.5.5 | Local authority 125 |
| 6.5.6 | Other entities 126 |

CONTENTS

I-20

| | PAGE |
|---|------|
| 6.6 Enterprise | 136 |
| 6.7 Enterprise of a Contracting State/Other State | 136 |
| 6.8 International Traffic | 137 |
| 6.9 Competent Authority | 137 |
| 6.10 National | 138 |
| 6.11 Business | 138 |
| 6.12 United States | 139 |
| 6.13 Pension Fund | 139 |
| 6.14 Tax | 139 |

7

UNDEFINED TREATY TERMS

| | |
|--|-----|
| 7.1 Undefined Terms - Article 3(2) | 140 |
| 7.2 Meaning of Undefined Terms in DTAA | 141 |
| 7.2.1 As regard the application of the Convention at any time by a Contracting State | 141 |
| 7.3 Any term not defined therein shall... have the meaning it has at that time under the law of that State for purposes of the taxes to which the Convention applies | 142 |
| 7.3.1 Any term not defined therein | 142 |
| 7.3.2 To have the meaning which it has under the law of the contracting State | 143 |
| 7.3.3 Law of the State applying the treaty (lex fori) | 143 |
| 7.3.4 Law of the source State | 144 |
| 7.3.5 Law of the residence State | 144 |
| 7.3.6 Context of the tax treaty | 144 |
| 7.3.7 For the purposes of taxes to which convention applies | 145 |
| 7.3.8 At that time | 145 |
| 7.4 Any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State | 146 |
| 7.5 Unless the context otherwise requires | 147 |
| 7.6 Indian approach | 149 |
| 7.7 Learned Authors views | 150 |

| | PAGE |
|---|------|
| 7.7.1 Prof. Dr. Klaus Vogel | 151 |
| 7.7.2 Michael Lang | 151 |
| 7.8 When the state laws do not assign any meaning | 152 |
| 7.8.1 A meaning as notified | 152 |
| 7.8.2 A meaning by supplementary means | 153 |
| 7.8.3 Other law of the state | 154 |
| 7.9 When state laws and DTAA differ | 154 |
| 7.10 When neither state law provides a meaning | 154 |
| 7.10.1 Judicial precedents | 154 |
| 7.10.2 Ordinary meaning | 154 |
| 7.10.3 Commentaries on the OECD MC | 155 |
| 7.11 When state laws amend or enlarge the meaning | 156 |

8

TREATY TERM - RESIDENCE

| | |
|---|-----|
| 8.1 Term residence - Article 4 | 157 |
| 8.2 Resident in India | 157 |
| 8.2.1 Presence in India | 158 |
| 8.2.2 Relaxation of general presence requirement of 60 days to 182 days | 159 |
| 8.2.3 Leaving India for the purposes of employment outside India | 159 |
| 8.2.4 Control and management of its affairs is situated | 160 |
| 8.3 Residence under model conventions | 162 |
| 8.3.1 Clause 1 : Residential Status | 167 |
| 8.3.2 Resident of a Contracting State | 168 |
| 8.3.3 Person liable to tax | 168 |
| 8.3.4 Supreme Court of India - Observes | 169 |
| 8.3.5 AAR's views | 170 |
| 8.3.6 Other courts views | 172 |
| 8.3.7 Learned Authors views | 174 |
| 8.3.8 OECD views | 175 |
| 8.3.9 Foreign diplomats and consular staff | 175 |

CONTENTS

I-22

| | PAGE | |
|-------|---|-----|
| 8.4 | Liable to tax | 176 |
| 8.4.1 | Residence | 176 |
| 8.4.2 | Domicile and/or citizenship | 176 |
| 8.4.3 | Place of incorporation | 177 |
| 8.4.4 | Place of management | 177 |
| 8.4.5 | Any other criterion of a similar nature | 177 |
| 8.4.6 | Liable to tax <i>vis-à-vis</i> partnerships, funds, charities | 177 |
| 8.4.7 | State, sub-division or local authorities are included | 179 |
| 8.5 | Clause 2 (US MC) inclusions | 180 |
| 8.6 | Clause 2 (Clause 3 in US MC) tie breaking rule | 180 |
| 8.6.1 | Permanent home | 182 |
| 8.6.2 | Residence, abode, home or dwelling place | 183 |
| 8.6.3 | Centre of vital interest | 184 |
| 8.6.4 | Habitual abode | 186 |
| 8.6.5 | Dr. Rajni Kant's Tie breaking case of AAR India | 186 |
| 8.6.6 | To Sum Up | 187 |
| 8.7 | Clause 3 - Tie Breaking Rule for Non-living Persons | 188 |
| 8.7.1 | Place of effective management | 188 |
| 8.7.2 | Position under Indian 1961 Act | 190 |
| 8.7.3 | Residence of entity other than company | 192 |
| 8.8 | Clause 4 in US MC | 193 |
| 8.9 | India's approach in a tax treaty | 193 |
| 8.9.1 | Australian tax treaty | 193 |
| 8.9.2 | Canadian tax treaty | 194 |
| 8.9.3 | Japan tax treaty | 194 |
| 8.9.4 | USA tax treaty | 194 |
| 8.9.5 | Position in DTAA's of India | 195 |
| 8.9.6 | Table of India's DTAA's on Article 4 | 195 |

9

TREATY TERMS - ARTICLE 5 - PERMANENT ESTABLISHMENT

| | | |
|-----|------------------------------|-----|
| 9.1 | Permanent Establishment (PE) | 203 |
|-----|------------------------------|-----|

| | PAGE |
|--|------|
| 9.2 Provisions in Indian 1961 Act | 203 |
| 9.3 Provisions in Double Taxation Avoidance Agreements (DTAAs) | 207 |
| 9.4 Table showing PE under UN MC & OECD MC | 209 |
| 9.4.1 UN MC and OECD MC differs on PE | 214 |
| 9.4.2 UN MC and OECD MC - Comparison | 216 |
| 9.5 Clause 1 - Fixed place/basic rule PE | 217 |
| 9.5.1 Fixed place of business | 217 |
| 9.5.2 Through that place business is carried on | 218 |
| 9.5.3 The facility | 219 |
| 9.5.4 Place of business | 220 |
| 9.5.5 Premises | 222 |
| 9.5.6 Facilities or installation | 223 |
| 9.5.7 Space | 224 |
| 9.5.8 Machinery or equipment | 224 |
| 9.6 Duration PE | 228 |
| 9.6.1 Business Activities that is required is not of Preparatory/auxiliary nature | 230 |
| 9.6.2 Enterprise | 231 |
| 9.6.3 Business of an enterprise...carried on | 231 |
| 9.6.4 Leasing of tangible or intangible property may be business | 233 |
| 9.6.5 Business in Partnership | 234 |
| 9.6.6 Business of Joint venture | 234 |
| 9.6.7 Business by a Trust | 235 |
| 9.6.8 Franchising Business | 235 |
| 9.6.9 Business through Personnel | 236 |
| 9.7 Clause 2 - Specific PE | 236 |
| 9.7.1 A Place of management | 237 |
| 9.7.2 A Branch | 237 |
| 9.7.3 Sales outlet | 239 |
| 9.7.4 Office | 239 |
| 9.7.5 A factory | 240 |
| 9.7.6 Workshop | 241 |
| 9.7.7 A mine, an oil or gas well, a quarry and any other place of extraction of natural resources | 241 |

CONTENTS

I-24

| | | PAGE |
|-------------|---|------|
| 9.8 | Clause 3 - Construction PE | 241 |
| | 9.8.1 Building site | 242 |
| | 9.8.2 Exploration of mineral oils | 242 |
| | 9.8.3 Exploration of natural resources | 243 |
| | 9.8.4 Construction | 243 |
| | 9.8.5 Minimum threshold period for PE | 245 |
| | 9.8.6 Single or many projects | 247 |
| | 9.8.7 Country-wise duration PE including of service PE | 248 |
| 9.9 | Clause 3(b) - Service PE | 249 |
| | 9.9.1 Software | 252 |
| | 9.9.2 Computer program | 253 |
| | 9.9.3 Material and professional services | 255 |
| | 9.9.4 Management services | 255 |
| | 9.9.5 Consultancy service | 256 |
| | 9.9.6 Morgan Stanley | 257 |
| | 9.9.7 Place of service | 257 |
| | 9.9.8 Provision of services by the Business Process | 258 |
| | 9.9.9 Credit card | 259 |
| | 9.9.10 Services in turnkey project | 259 |
| | 9.9.11 Composite contract | 261 |
| 9.10 | Clause 4 - Activities not PE | 262 |
| | 9.10.1 Preparatory and auxiliary activity | 264 |
| | 9.10.2 Preparatory and auxiliary activity may constitute PE | 265 |
| | 9.10.3 Scientific research | 267 |
| | 9.10.4 Servicing patent or know-how | 268 |
| | 9.10.5 Use of facilities | 268 |
| 9.11 | Clause 5 - Agency PE | 275 |
| | 9.11.1 Habitually exercises an authority to conclude contracts | 276 |
| | 9.11.2 Habitually exercises authority | 278 |
| | 9.11.3 Habitually maintains a stock of goods or merchandise | 279 |
| | 9.11.4 Habitually securing orders | 279 |

| | PAGE |
|--|------|
| 9.11.5 Severally of agents | 280 |
| 9.11.6 Ostensible agency | 280 |
| 9.11.7 Usual authority | 280 |
| 9.11.8 Agency by estoppels | 281 |
| 9.11.9 Agency for treaty purposes | 281 |
| 9.11.10 Dependent agent | 281 |
| 9.11.11 Dependence test | 282 |
| 9.11.12 Agent versus buyer of goods | 283 |
| 9.11.13 Agent or sales representative | 285 |
| 9.11.14 Independent agents | 286 |
| 9.12 Clause 6 - Insurance agent | 286 |
| 9.13 Clause 7 - Broker general commission & other agents | 288 |
| 9.13.1 Broker and general commission agents | 288 |
| 9.13.2 Other agents with independent status | 289 |
| 9.13.3 Legal and economic independence | 290 |
| 9.13.4 In the ordinary course of business | 291 |
| 9.14 Agent versus ISP | 292 |
| 9.15 Agent versus FII | 293 |
| 9.16 AAR's Ruling | 294 |
| 9.17 Clause 8 : Controlled company | 295 |
| 9.17.1 Arm's Length Principal-to-Principal transactions | 297 |
| 9.17.2 Group Companies PE | 298 |
| 9.18 Specific Instances | 300 |
| 9.18.1 E-business PE | 300 |
| 9.18.2 Digital Goods or services | 300 |
| 9.18.3 Server-fixed place of business | 301 |
| 9.18.4 Server-place of management | 303 |
| 9.18.5 Server-factory or workshop | 304 |
| 9.18.6 Server-preparatory or auxiliary activities | 305 |
| 9.18.7 Server whether an agent | 305 |
| 9.19 India's approach | 306 |
| 9.20 Reference notes for Article 5 | 307 |
| 9.21 Table of PE in Indian DTAA's | 315 |

10**TREATY TERMS**

| | | |
|-------------|--|-----|
| 10 | Article specific term articles 6-22 | 330 |
| 10.1 | Table of Article 6 immovable property defined | 330 |
| | 10.1.1 Article 6 clause 2 defines the term immovable property | 331 |
| | 10.1.2 Indian laws | 331 |
| | 10.1.3 Specific inclusions in immovable property | 332 |
| | 10.1.4 Specific exclusions from immovable properties | 333 |
| 10.2 | Article 10 Dividend defined | 333 |
| | 10.2.1 US MC defines | 333 |
| | 10.2.2 Dividend meaning | 334 |
| | 10.2.3 Dividend and Compensation | 335 |
| | 10.2.4 Indian law on dividend meaning | 336 |
| 10.3 | Article 11 Interest defined | 336 |
| | 10.3.1 US MC | 337 |
| | 10.3.2 Interest defined | 337 |
| | 10.3.3 Debt-claims | 338 |
| | 10.3.4 Bonds, securities, notes | 338 |
| | 10.3.5 Indian cases by AAR on interest | 341 |
| | 10.3.6 Debt secured by mortgage | 342 |
| | 10.3.7 Interest on Bond | 343 |
| | 10.3.8 Interest on Debenture | 343 |
| | 10.3.9 Interest on Security | 343 |
| | 10.3.10 Bond and debentures of Participating Profit | 344 |
| | 10.3.11 Bond, debenture and security with Premium | 344 |
| | 10.3.12 Premiums and prizes on Government securities | 346 |
| | 10.3.13 On non-traditional financial instruments | 346 |
| | 10.3.14 Instance of no interest | 346 |
| | 10.3.15 Penalty excluded | 347 |
| | 10.3.16 Other income which may be treated as interest | 348 |
| 10.4 | Article 12 Royalty | 349 |
| | 10.4.1 US MC | 349 |

| | PAGE |
|---------|---|
| 10.4.2 | Royalty defined 350 |
| 10.4.3 | Copyright 350 |
| 10.4.4 | Technology 351 |
| 10.4.5 | Patent 351 |
| 10.4.6 | Design 352 |
| 10.4.7 | Trademark 352 |
| 10.4.8 | Model 352 |
| 10.4.9 | Process 353 |
| 10.4.10 | Equipments 353 |
| 10.4.11 | OECD on equipment 353 |
| 10.4.12 | Know-how 353 |
| 10.4.13 | Royalty does not include 354 |
| 10.5 | Article 14 Professional Services 355 |
| 10.6 | Meaning of professional services 355 |
| 10.6.1 | Activities of independent character 357 |
| 10.7 | India's DTAA 358 |

11

USE OF IMMOVABLE PROPERTY

| | |
|--------|---|
| 11.1 | Property income 359 |
| 11.2 | Usage of Immovable Property - Lease rent or licence fee 360 |
| 11.2.1 | Table of Article 6 Immovable Property defined 360 |
| 11.2.2 | Article 6 clause 2 defines the term Immovable Property 360 |
| 11.2.3 | Indian laws 361 |
| 11.2.4 | Specific inclusions in immovable property 362 |
| 11.2.5 | Specific exclusions from immovable property 362 |
| 11.3 | Article 6 of Model Conventions 364 |
| 11.4 | Income from immovable property 366 |
| 11.4.1 | Clause 1 - Source State's Right to Tax 367 |
| 11.4.2 | Clause 2 - Immovable Property defined 367 |
| 11.4.3 | Clause 3 - Form of Usage 370 |
| 11.4.4 | Clause 4 - Usage of all Immovable Properties 371 |

CONTENTS

I-28

| | PAGE |
|--|------|
| 11.5 Indian Treaties approach | 372 |
| 11.6 Table of provisions India's treaties on article 6 | 374 |

12

BUSINESS INCOME

| | |
|---|-----|
| 12.0 Goods, equipments and documents/know-how | 380 |
| 12.1 Business connection in India | 380 |
| 12.2 DTAA provisions | 383 |
| 12.3 Table on article 7 in MCs | 384 |
| 12.4 UN, OECD and US MCs provisions | 389 |
| 12.5 Rules for determining taxable income | 389 |
| 12.6 Clause 1 - Taxability of Business Profits | 392 |
| 12.6.1 PE Principle | 393 |
| 12.6.2 FAP Principle | 393 |
| 12.6.3 Turnkey Contracts & FAP | 393 |
| 12.6.4 OECD | 394 |
| 12.6.5 India's Position | 395 |
| 12.6.6 Table of Indian DTAAs on clause 1 | 396 |
| 12.7 Clause 2 article 7 - Attribution on ALP | 405 |
| 12.7.1 Direct method of profit determination and allocation | 407 |
| 12.7.2 Realisation of taxable profit, point of time | 407 |
| 12.7.3 International large project business | 408 |
| 12.7.4 Main contractor & Sub-contractor | 409 |
| 12.7.5 Materials | 410 |
| 12.7.6 Engineering | 412 |
| 12.7.7 Supervision of manufacture | 412 |
| 12.7.8 Profit Allocation | 413 |
| 12.7.9 Executive and administrative overheads | 414 |
| 12.7.10 Profit mark-up | 414 |
| 12.7.11 Requisite equipment of PE | 414 |
| 12.7.12 Intangible assets | 415 |
| 12.7.13 Intra-company services | 416 |

| | PAGE |
|---|------|
| 12.7.14 OECD | 417 |
| 12.7.15 Profit allocation in India | 418 |
| 12.7.16 Table showing details of Indian DTAA's on clause 2 | 419 |
| 12.8 Clause 3 - Rules of allocation | 427 |
| 12.8.1 Profits attributable to good management | 430 |
| 12.8.2 Allotment of capital and interest charges | 430 |
| 12.8.3 OECD | 431 |
| 12.8.4 Attribution of free capital | 432 |
| 12.8.5 Indian Approach | 433 |
| 12.9 Clause 4 - Indirect Apportionment Methods | 435 |
| 12.9.1 Apportionment by cost | 435 |
| 12.9.2 Apportionment by revenue | 436 |
| 12.9.3 Apportionment schemes under Indian law | 436 |
| 12.9.4 Apportionment by revenue | 437 |
| 12.10 Clause 5 OECD & Clause 4 US MC | 439 |
| 12.11 Clause 5 UN and US MCs | 439 |
| 12.12 Clause 6 UN and US MCs | 440 |
| 12.12.1 Items of income not covered by Article 7 | 441 |
| 12.12.2 Decisions on attribution of profits | 441 |
| 12.12.3 Decisions on DTAA v. Domestic Law | 445 |
| 12.13 Clause 4 OECD MC and Clause 6 UN MC | 446 |
| 12.13.1 Items of income not covered by Article 7 | 446 |
| 12.13.2 Clause 7 in India's DTAA's | 446 |

13

USE OF EQUIPMENT ASSETS AND MACHINERY

| | |
|---|-----|
| 13.1 Hiring income | 447 |
| 13.2 Income from any source situate in India | 449 |
| 13.3 Hiring as royalty | 452 |
| 13.4 Composite letting of premises | 454 |
| 13.5 Lease of business undertaking | 455 |
| 13.6 Position under treaties | 455 |

14**TAX ON E-COMMERCE**

| | | |
|----------------|---|-----|
| 14.1 | E-commerce meaning | 456 |
| 14.2 | Manner of doing E-Commerce | 457 |
| 14.3 | Global tax system | 457 |
| 14.3.1 | Residence, a tax base | 458 |
| 14.3.2 | Source, another tax base | 459 |
| 14.3.3 | Connecting Factors | 459 |
| 14.3.4 | Residence in DTAA and Domestic Law | 460 |
| 14.3.5 | Source - A Connecting Factor | 460 |
| 14.3.6 | Permanent Establishment (PE) and Virtual PE | 460 |
| 14.4 | Taxability of e-business profits | 461 |
| 14.5 | Kinds of e-commerce | 462 |
| 14.6 | Internet network | 462 |
| 14.7 | OECD MCC | 463 |
| 14.8 | US MCC adds | 467 |
| 14.9 | Taxation framework conditions | 467 |
| 14.10 | Source and location of profit in e-commerce | 469 |
| 14.11 | Type of transactions in computer software | 469 |
| 14.12 | Place where income arises | 470 |
| 14.12.1 | Place of contract | 471 |
| 14.12.2 | Conducting of trade | 472 |
| 14.12.3 | Essentials of contract | 472 |
| 14.12.4 | Electronic conclusion of contract | 474 |
| 14.13 | Place of operations is from which profits arise | 475 |
| 14.13.1 | Soliciting orders | 476 |
| 14.13.2 | Delivery of goods | 476 |
| 14.13.3 | Place of payment | 477 |
| 14.13.4 | Place of business | 477 |
| 14.14 | Place of income for rendering services | 477 |
| 14.15 | India and the source rule | 480 |
| 14.16 | Royalties | 481 |

| | PAGE |
|---|------|
| 14.17 PE or Business Connection | 482 |
| 14.18 India's High Powered Committee Report | 483 |
| 14.19 Income arising rule - Two approaches | 486 |
| 14.20 Indian Cases on E-commerce Tax | 487 |
| 14.21 Tax avoidance | 490 |
| 14.22 Sanghavi on alternate tax allocation | 490 |
| 14.23 A study on Google's operations and Tax Planning | 491 |
| 14.24 Google in context of Indian Tax | 493 |
| 14.25 Suggestion of Alternative Taxation Scheme | 495 |
| 14.26 Nishit Desai on base erosion approach | 495 |

15

ARTICLE 8 - TRANSPORT INCOME

| | |
|--|-----|
| 15.0 Income from shipping & aircrafts | 497 |
| 15.1 Shipping & AIR | 497 |
| 15.2 Article 8 in model conventions | 498 |
| 15.3 Summary of UN & OECD Models | 500 |
| 15.4 Cross-Border Transport Business and PE | 501 |
| 15.5 Clauses 1 and 2 - Profits from operation of ship & aircraft | 502 |
| 15.6 Indian position | 504 |
| 15.7 Clauses 2 and 3 - Profits from boats & inland waterways | 506 |
| 15.8 Clauses 3 and 4 : Place of effective management | 506 |
| 15.8.1 Position in India | 507 |
| 15.8.2 Affairs | 507 |
| 15.8.3 Expressions meaning | 507 |
| 15.8.4 Activity directly connected | 511 |
| 15.8.5 OECD on shipping | 512 |
| 15.8.6 Interest on funds and sundry investments | 514 |
| 15.8.7 Service contract | 515 |
| 15.8.8 Leasing of ships and aircrafts | 516 |
| 15.8.9 Leasing of containers | 516 |
| 15.8.10 Bareboat charges | 517 |
| 15.8.11 Profit subject to treaty | 518 |

CONTENTS

I-32

| | PAGE |
|---|------|
| 15.8.12 Casual | 518 |
| 15.8.13 Determination of profits | 519 |
| 15.9 Clauses 4 and 5 - Participation pool, joint business or agency | 519 |
| 15.10 India's approach in DTAA's | 520 |
| 15.10.1 Indo-Australia DTAA | 520 |
| 15.10.2 Indo-Canada DTAA | 520 |
| 15.10.3 Indo-France DTAA | 521 |
| 15.10.4 Indo-German DTAA | 521 |
| 15.10.5 Indo-Japan DTAA | 521 |
| 15.10.6 Indo-UK DTAA | 521 |
| 15.10.7 Indo-US DTAA | 522 |
| 15.11 Table showing country wise position on article 8 | 522 |
| 15.12 Agreements other than comprehensive treaties, dealing with international air transport only. | 555 |

16

ASSOCIATED ENTERPRISE AND TP RULES

| | |
|---|-----|
| 16.0 Associated enterprise transactions | 559 |
| 16.1 Insurgence of transfer pricing | 560 |
| 16.1.1 Legislative inserts to recoup | 560 |
| 16.1.2 Foreign exchange outflow | 561 |
| 16.1.3 Table of income shopping | 561 |
| 16.2 DTAA axe | 562 |
| 16.2.1 Meaning of Associated Enterprise (AE) | 563 |
| 16.2.2 Enterprise | 564 |
| 16.2.3 Permanent establishment | 565 |
| 16.2.4 Transaction and international transaction | 565 |
| 16.2.5 Income presumed | 566 |
| 16.2.6 Arm's length price | 567 |
| 16.2.7 Safe harbour rules | 568 |
| 16.2.8 UN and OECD MCs on Article 9 | 568 |
| 16.3 Analysis of MCs | 570 |
| 16.3.1 Clause 1 - Incorporating ALP | 571 |

| | PAGE | |
|---------|--|-----|
| 16.3.2 | Clause 2 - Corresponding adjustment by other State | 572 |
| 16.3.3 | Clause 3 - Judicial finality | 574 |
| 16.3.4 | Reservations | 574 |
| 16.3.5 | Splitting of a contract is another area | 578 |
| 16.3.6 | Commercial and financial relations | 579 |
| 16.4 | Arm's length price (ALP) | 580 |
| 16.4.1 | CUP | 580 |
| 16.4.2 | RM | 581 |
| 16.4.3 | Cost plus method | 581 |
| 16.4.4 | CPM | 581 |
| 16.4.5 | Problems posed | 582 |
| 16.4.6 | ALP of intangibles | 582 |
| 16.4.7 | Committee on Fiscal Affairs OECD | 583 |
| 16.4.8 | ALP of Intra Group Services | 583 |
| 16.4.9 | OECD Guidelines | 584 |
| 16.4.10 | UN MC | 585 |
| 16.4.11 | Transfer Pricing (or ALP) a study of comparables | 585 |
| 16.4.12 | Steps in comparability analysis process | 586 |
| 16.5 | Bricks Countries Practices | 591 |
| 16.6 | Article 9 in Indian treaties | 592 |
| 16.7 | Table of India's other DTAA's | 593 |

17

ARTICLE 10 - DIVIDEND

| | | |
|--------|--|-----|
| 17.1 | Dividend Income | 596 |
| 17.1.1 | Indian Law on dividend meaning | 597 |
| 17.2 | Indian provisions | 598 |
| 17.3 | DTAA on dividend income | 599 |
| 17.4 | Table on dividends in MCs | 600 |
| 17.5 | US MC on dividends | 603 |
| 17.6 | Analysis on MCs | 605 |
| 17.6.1 | Clause 1 - Right of Residence State to Tax | 606 |

CONTENTS

I-34

| | PAGE |
|---|------|
| 17.6.2 Clause 2 - Source State Right to Tax | 607 |
| 17.6.3 Clause 3 (US MC only) - Dividend received by pension fund | 618 |
| 17.6.4 Clause 4 (US MC only) - RIC and REIT | 619 |
| 17.6.5 Clause 3 (Clause 5 in US MC) - Dividend meaning | 620 |
| 17.6.6 Clause 4 (Clause 6 US MC) : Dividend as business income | 626 |
| 17.6.7 Clause 5 (Clause 7 US MC) - Effectively connected | 627 |
| 17.6.8 Clause 8 (in US MC only) - Branch profits | 629 |
| 17.7 Position of India | 630 |
| 17.8 Clauses in other treaties | 631 |

18

ARTICLE 11 : USE OF MONEY - INTEREST INCOME

| | |
|--|-----|
| 18.1 Interest | 635 |
| 18.2 UN MC & OECD MC | 636 |
| 18.2.1 Table of Article 11 in UN and OECD | 637 |
| 18.2.2 US MC Article 11 : Interest | 639 |
| 18.2.3 Difference in two MCs - UN and OECD | 640 |
| 18.2.4 Provisions in two MCs | 641 |
| 18.3 Clause 1 - Primary right to tax of residence State | 641 |
| 18.4 Clause 2 - Source State limited right to tax | 643 |
| 18.4.1 Source State exclusive right to taxation | 645 |
| 18.4.2 Interest arising or deemed to arise | 646 |
| 18.4.3 Location of accrual | 647 |
| 18.4.4 India's approach for location of interest arising | 649 |
| 18.4.5 Beneficial owner | 650 |
| 18.4.6 Rates of withholding tax | 651 |
| 18.4.7 Table of Clause 2 in India's treaties & variations (WHT = Withholding Tax) | 654 |
| 18.5 Clause 3 - Interest Defined | 660 |
| 18.5.1 Debt claims | 661 |
| 18.5.2 Bonds, securities, notes | 661 |
| 18.5.3 Location of debt claim | 662 |

| | PAGE | |
|---------|---|-----|
| 18.5.4 | Unpaid purchase price | 662 |
| 18.5.5 | Interest compensation or damage | 664 |
| 18.5.6 | Discount not interest | 665 |
| 18.5.7 | Thin capitalisation | 665 |
| 18.5.8 | Indian cases by AAR | 666 |
| 18.5.9 | Debt secured by mortgage | 667 |
| 18.5.10 | Interest on Bond | 668 |
| 18.5.11 | Interest on Debenture | 668 |
| 18.5.12 | Interest on Security | 668 |
| 18.5.13 | Bond and debentures of Participating Profit | 669 |
| 18.5.14 | Bond, debenture and security with premium | 669 |
| 18.5.15 | Premiums and prizes on Government securities | 671 |
| 18.5.16 | Non-traditional financial instruments payments | 671 |
| 18.5.17 | Instance of no Interest | 671 |
| 18.5.18 | Penalty excluded | 672 |
| 18.5.19 | Other income which may be treated as interest | 673 |
| 18.5.20 | Table of Indian DTAA's with changes | 674 |
| 18.6 | Clause 4 - Interest Attributable to PE/FB | 675 |
| 18.6.1 | OECD | 675 |
| 18.6.2 | Doctrine of 'Force of Attraction' | 677 |
| 18.7 | Clause 5 - Interest deemed to arise | 678 |
| 18.7.1 | Interest payable for a PE in a third State | 679 |
| 18.8 | Clause 6 - Interest at Arm's length price (ALP) | 680 |
| 18.8.1 | Special relationship | 680 |
| 18.8.2 | Anti-Avoidance Concern | 683 |
| 18.8.3 | Indian DTAA's Approach | 683 |
| 18.8.4 | Table - Withholding tax rates for interest | 683 |

19

ARTICLE 12: USE OF KNOW-HOW ROYALTY

| | | |
|------|--------------------------------|-----|
| 19.1 | Royalty | 687 |
| 19.2 | Know-how (royalty) | 688 |
| 19.3 | Usage consideration is royalty | 689 |

CONTENTS

I-36

| | PAGE |
|--|------|
| 19.4 Know-how meaning | 692 |
| 19.4.1 Technology | 692 |
| 19.4.2 Copyright | 693 |
| 19.4.3 Technical Know-how | 693 |
| 19.4.4 Intellectual properties | 693 |
| 19.5 Royalty under Model Conventions | 694 |
| 19.6 Royalty in Model Conventions : ARTICLE 12 | 694 |
| 19.7 Models differ | 698 |
| 19.7.1 Clause 1 - Residence State to tax | 699 |
| 19.7.2 Clause 2 (UN MC) - Source State's right to tax | 701 |
| 19.7.3 Clause 3 - Royalty defined | 703 |
| 19.7.4 OECD on usage of equipment | 711 |
| 19.7.5 Usage of know-how | 713 |
| 19.7.6 Engineering as know-how | 717 |
| 19.7.7 Not royalty receipts | 721 |
| 19.7.8 Royalty vs. Outright transfer | 724 |
| 19.8 Computer Software | 727 |
| 19.8.1 Transfer of computer software | 729 |
| 19.8.2 OECD MCC on computer software royalty | 731 |
| 19.8.3 UN MC | 733 |
| 19.8.4 Retention of ownership in property | 733 |
| 19.8.5 Software and Business | 734 |
| 19.8.6 Usage and sale - Distinction | 739 |
| 19.8.7 Pools | 741 |
| 19.8.8 Turnkey plants | 742 |
| 19.8.9 Partly business and partly royalties | 742 |
| 19.8.10 TAG | 743 |
| 19.9 Conflict in domestic law and DTAA | 745 |
| 19.9.1 Effect on Taxation of Software payments as royalty Post 2012 amendment in India | 745 |
| 19.9.2 Channel Guide India Ltd. (CGI) | 745 |
| 19.9.3 B4U International Holdings Ltd. (B4U) | 746 |
| 19.9.4 Sandoz Pvt. Ltd. (SPL) | 746 |
| 19.9.5 WNS North America Inc. (WNA) | 747 |

| | PAGE |
|--|------|
| 19.9.6 Ericsson Radio System AB | 747 |
| 19.9.7 Nokia Networks OY (NN) | 748 |
| 19.9.8 Kendle India (P.) Ltd. | 748 |
| 19.10 Software - The transaction test | 749 |
| 19.11 Software know-how or services | 751 |
| 19.11.1 Provision of services | 751 |
| 19.11.2 Provision of know-how | 751 |
| 19.12 Technical know-how, technical services and technical assistance | 752 |
| 19.13 Royalty and fees for technical services | 754 |
| 19.14 Technical services/included services | 756 |
| 19.15 Made available technology | 759 |
| 19.16 Included services | 761 |
| 19.17 Excluded services | 762 |
| 19.18 Cloud computing income | 762 |
| 19.18.1 Cloud Computing New emergence | 764 |
| 19.18.2 Indian Tax & Cloud Computing | 765 |
| 19.18.3 Cloud computing as royalty | 765 |
| 19.18.4 Case Law | 766 |
| 19.18.5 OECD & Cloud Computing | 769 |
| 19.19 Live telecast payment | 770 |
| 19.20 Indian approach | 771 |
| 19.21 Clause 4 UN MC & clause 3 OECD MC | 771 |
| 19.22 Clause 5 (UN MC) - Deemed to arise | 774 |
| 19.23 Clauses 6 UN MC and 4 OECD MC - Arm's length | 775 |
| 19.24 Royalties and Technical Fees - India's approach | 776 |
| 19.25 Table showing DTAAAs with India | 777 |

20

ARTICLE 12 - TECHNICAL SERVICES

| | |
|--|-----|
| 20.1 Models and DTAAAs | 784 |
| 20.2 General Backdrop | 784 |
| 20.3 Fee for technical services | 786 |

CONTENTS

I-38

| | PAGE |
|--|------|
| 20.3.1 Managerial services | 786 |
| 20.3.2 Consultancy services | 787 |
| 20.4 Cases of FTS | 788 |
| 20.5 Cases of no FTS | 791 |
| 20.6 Specifically excluded cases of FTS | 796 |
| 20.7 Mixed cases of FTS | 797 |
| 20.8 Cases of FTS but assessable under specific head | 800 |
| 20.9 Support services | 803 |
| 20.10 Make available | 804 |
| 20.11 Position of Indian DTAA's on FTS with various countries | 809 |
| 20.12 Table of country-wise position | 809 |
| 20.13 Table of beneficial owner of FTS | 814 |

21

ARTICLE 13 - TRANSFER INCOME - CAPITAL GAINS

| | |
|--|-----|
| 21.0 Transfer of property (Capital Gains) | 815 |
| 21.1 Immovable and movable property | 815 |
| 21.2 OECD UN and US MCs on article 13 | 816 |
| 21.3 Right to tax | 821 |
| 21.4 Clause 1- Source state to tax | 822 |
| 21.4.1 Sparing Capital gains | 822 |
| 21.4.2 Capital Gains computation | 824 |
| 21.4.3 Property | 825 |
| 21.4.4 Immovable Property | 826 |
| 21.4.5 Movable property | 829 |
| 21.4.6 Share | 829 |
| 21.4.7 Alienation or Transfer | 829 |
| 21.4.8 Sale | 832 |
| 21.4.9 Compelled sale | 833 |
| 21.4.10 Hire-purchase | 834 |
| 21.4.11 Lease | 836 |
| 21.4.12 Exchange | 838 |

| | PAGE |
|--|------|
| 21.4.13 Possession in part performance of contract | 839 |
| 21.4.14 Transferring enjoyment of property | 839 |
| 21.4.15 Interest in partnership or trust | 840 |
| 21.4.16 Partner's contribution as capital | 840 |
| 21.4.17 Distribution on dissolution of firm | 842 |
| 21.4.18 Coparcener throwing property in hotchpot of family | 842 |
| 21.4.19 Partition of HUF | 843 |
| 21.4.20 Family arrangement | 844 |
| 21.4.21 Release | 844 |
| 21.4.22 Disclaimer | 844 |
| 21.4.23 Distribution in liquidation of a company | 846 |
| 21.4.24 Redemption of bonds | 847 |
| 21.4.25 Amalgamation of companies | 847 |
| 21.5 Clause 2 - Alienation of PE/FB & its property | 848 |
| 21.6 Alienation of undertaking as a whole | 849 |
| 21.7 Clause 3 - Ships or aircraft | 849 |
| 21.8 Clause 4 - Alienation of shares abetting immovable property | 850 |
| 21.9 Clause 5 - Alienation of other shares | 851 |
| 21.10 Clause 6 - Alienator's residence state right | 852 |
| 21.11 Indian DTAA's on article 13 | 852 |
| 21.12 Provisions in Indian DTAA's in comparison with MCs | 853 |

22

ARTICLE 14 - INDEPENDENT SERVICES INCOME

| | |
|-------------------------------------|-----|
| 22.0 Professional services | 878 |
| 22.1 Nature of professional income | 879 |
| 22.2 Deemed income | 879 |
| 22.3 Trading in services | 880 |
| 22.4 Model conventions | 881 |
| 22.5 Article 14 in MCs | 882 |
| 22.6 Summary of provision in Models | 883 |

CONTENTS

I-40

| | PAGE |
|--|------|
| 22.7 Clause 1 - Residence state to tax | 886 |
| 22.7.1 Companies also could render services | 887 |
| 22.7.2 Fixed Base (FB) | 888 |
| 22.7.3 Minimum period presence | 889 |
| 22.8 Clause 2 - Meaning of professional service | 889 |
| 22.8.1 DTAA's and professional services | 890 |
| 22.8.2 Activities of Independent character | 891 |
| 22.8.3 A somewhat different connotation in DTAA's | 892 |
| 22.9 India's DTAA | 892 |
| 22.10 Table summarising Indian DTAA's position | 892 |

23

**ARTICLE 15 - DEPENDENT
SERVICES INCOME**

| | |
|--|-----|
| 23.0 Income from dependent services | 897 |
| 23.1 Indian 1961 Act | 898 |
| 23.2 Model conventions | 899 |
| 23.2.1 Article 15 : Dependent personal services | 899 |
| 23.2.2 US model convention : Income from employment | 900 |
| 23.3 Clause 1 - Right to Tax remuneration | 901 |
| 23.3.1 OECD comments | 902 |
| 23.3.2 Body Shopping | 903 |
| 23.3.3 Contract for or of service determines | 903 |
| 23.3.4 Servant, Contractor or Agent | 904 |
| 23.3.5 Employee and Director | 904 |
| 23.3.6 Salary | 905 |
| 23.3.7 Wage | 905 |
| 23.3.8 Emoluments from employment | 905 |
| 23.3.9 Other similar remuneration | 905 |
| 23.3.10 Employees' Stock Option | 906 |
| 23.4 Clause 2 - Taxable where employment is exercised | 907 |
| 23.4.1 Analysis of Article 15 | 909 |
| 23.4.2 Physical presence test | 909 |

| | PAGE | |
|--------|---|-----|
| 23.4.3 | Remuneration paid by resident of the State | 910 |
| 23.4.4 | Remuneration - "Borne" by PE/FB | 911 |
| 23.4.5 | Abuse of International hiring out of labour | 912 |
| 23.4.6 | Test of 183-day and 90-day rule | 913 |
| 23.5 | Clause 3 - Employment aboard a ship or aircraft | 914 |
| 23.6 | Double taxation credit | 914 |
| 23.7 | Tax equalisation | 915 |
| 23.8 | ESOP benefits | 916 |
| 23.8.1 | Stages in a ESOP | 916 |
| 23.9 | Approach in Indian DTAA's | 917 |
| 23.10 | Table of Indian DTAA's with changes in article 15 | 918 |

24

ARTICLE 16 - DIRECTOR FEE AND REMUNERATION

| | | |
|--------|--|-----|
| 24.0 | Directors' fees & remuneration | 924 |
| 24.1 | Article in model conventions | 924 |
| 24.2 | Clause 1 - Company residence state-right to tax | 926 |
| 24.2.1 | Fees and other similar payments | 926 |
| 24.2.2 | Resident of a Contracting State | 926 |
| 24.2.3 | Receipts in his capacity as member of the board of directors | 926 |
| 24.2.4 | Director of a non-resident company of the other State | 927 |
| 24.3 | Clause 2 - Top managerial officials remuneration | 928 |
| 24.4 | Article 16 in Indian DTAA's | 928 |
| 24.5 | Table of article 16 in DTAA's | 929 |

25

ARTICLE 17 - INCOME OF ARTISTES AND SPORTSMEN

| | | |
|------|---|-----|
| 25.0 | Artists and sportspersons/sportsmen | 932 |
| 25.1 | India's provisions | 932 |
| 25.2 | Tax on non-resident as per section 115BBA | 933 |

CONTENTS

I-42

| | PAGE |
|--|------|
| 25.3 Guidelines on taxation of income Circular No. 787/2000 dated 10-2-2000 | 934 |
| 25.4 Notification under section 10(39) Indian 1961 Act | 938 |
| 25.5 Provisions in MCs | 938 |
| 25.6 Coverage under the article | 940 |
| 25.7 Clause 1 - Activities | 941 |
| 25.7.1 AAR on Golf Promotion | 942 |
| 25.7.2 Illustration of indirect payments in OECD | 945 |
| 25.7.3 Fee for performance | 946 |
| 25.7.4 Activity covered | 946 |
| 25.7.5 Tax where activities are exercised | 946 |
| 25.7.6 Tax by other State | 947 |
| 25.7.7 Entertainer resident of the Contracting State | 947 |
| 25.7.8 Sports person | 947 |
| 25.8 Clause 2 - Income accruing to another person | 948 |
| 25.9 OECD MCC | 950 |
| 25.10 Article 17 in India's treaties | 950 |
| 25.11 Table showing differentiating features | 952 |

26

ARTICLE 18 - PENSIONS SOCIAL SECURITY ALIMONY AND CHILD SUPPORT PAYMENTS

| | |
|---|-----|
| 26.0 Pensions and social security payments | 954 |
| 26.1 Table of UN and OECD MCs | 954 |
| 26.2 US MC : Pensions, social security, annuities, alimony and child support | 955 |
| 26.3 Analysis of MC provisions | 956 |
| 26.3.1 Residence State right to tax Pensions | 957 |
| 26.3.2 Pensions and other similar remuneration | 957 |
| 26.3.3 Pensions Meaning | 958 |
| 26.3.4 Other similar remuneration | 959 |
| 26.3.5 Annuity | 960 |
| 26.3.6 Alimony | 961 |

| | PAGE |
|---|------|
| 26.3.7 Child support payments | 961 |
| 26.3.8 Gratuity or Provident Fund or Gifts | 961 |
| 26.3.9 Payments under social scheme | 962 |
| 26.4 Table of Indian treaties on article 18 | 964 |
| 26.5 US MC by Article 18 also provide for Pension Funds | 976 |
| 26.6 Analysis of article 18 in US MC | 978 |

27

ARTICLE 19 - SERVICES INCOME

| | |
|---|-----|
| 27.0 Government Service | 981 |
| 27.1 Tax in India | 981 |
| 27.2 Provisions in models for Government salaries | 981 |
| 27.3 Analysis of MCs | 984 |
| 27.3.1 Clause 1 | 984 |
| 27.3.2 Meaning of salaries, wages or similar remuneration | 985 |
| 27.3.3 Exempted salary income | 985 |
| 27.4 Clause 2 | 986 |
| 27.4.1 Meaning of pension | 986 |
| 27.4.2 Exemption of pension income | 987 |
| 27.5 Clause 3 | 987 |
| 27.5.1 Services in connection with business | 988 |
| 27.5.2 Indian DTAA details | 988 |
| 27.5.3 Table showing substantive changes in Article 19 | 989 |

28

ARTICLE 20 - SERVICES INCOME

| | |
|---------------------------------|------|
| 28.0 Article 20 - Students | 997 |
| 28.1 Table of MCs for students | 997 |
| 28.2 Analysis of MC provisions | 999 |
| 28.2.1 Clause 1 : Taxing rights | 999 |
| 28.2.2 Payment received exempt | 1000 |
| 28.2.3 Training | 1001 |
| 28.2.4 Maintenance | 1001 |

CONTENTS

I-44

| | PAGE |
|---|------|
| 28.3 Clause 2 (in US MC only) | 1001 |
| 28.4 Clause 3 (in US MC only) | 1002 |
| 28.5 Student or business trainee or apprentice | 1002 |
| 28.6 Teachers and researchers | 1002 |
| 28.7 Indian DTAA's | 1003 |
| 28.8 Table of changes in wordings | 1004 |
| 28.9 India's approach | 1006 |
| 28.10 Remuneration Exemption - Professors, Teachers & Scholars | 1007 |

29

ARTICLE 21 - OTHER INCOME

| | |
|---|------|
| 29.0 Other income | 1008 |
| 29.1 Models on article 21 - other income | 1008 |
| 29.2 Analysis of article 21 in MCs | 1010 |
| 29.2.1 Clause 1 - Residence State to tax | 1011 |
| 29.2.2 Clause 2 - Income associated with PE/FB | 1012 |
| 29.2.3 Clause 3 (UN MC) | 1013 |
| 29.3 Position in treaties with India | 1015 |
| 29.4 Table showing Indian treaty details | 1016 |

30

ARTICLE 22 - CAPITAL

| | |
|---|------|
| 30.0 Tax on capital | 1023 |
| 30.1 Akin to wealth tax in India | 1023 |
| 30.2 Taxation of capital in models | 1024 |
| 30.3 Analysis of MCs | 1025 |
| 30.3.1 Clause 1 - Capital of immovable property | 1026 |
| 30.3.2 Clause 2 - Capital of movable business property | 1026 |
| 30.3.3 Clause 3 - Capital of ships and aircrafts | 1027 |
| 30.3.4 Clause 4 - Capital of other elements | 1027 |
| 30.4 Indian treaties | 1028 |
| 30.4.1 Reservations of States | 1028 |

| | PAGE |
|---|------|
| 30.4.2 DTAAAs with India | 1029 |
| 30.4.3 Table bearing specific significant features | 1030 |

31

DTAA - LIMITATION ON BENEFITS (LOB)

| | |
|--|------|
| 31.0 Limitation on benefits | 1034 |
| 31.1 Analysis of LOB concept | 1037 |
| 31.1.1 Clause 1 - Extent of benefit | 1038 |
| 31.1.2 Clause 2 - Qualified person | 1038 |
| 31.1.3 Clause 3 - Conduct of Trade or Business | 1042 |
| 31.1.4 Clause 4 - CAOS discretion to grant benefit on request | 1045 |
| 31.1.5 Clause 5 - Definitions | 1046 |
| 31.2 LOB in Indian DTAAAs | 1047 |
| 31.3 Table of Indian DTAAAs having limitation of benefits | 1047 |

32

DOUBLE TAXATION/DOUBLE NON-TAXATION

| | |
|---|------|
| 32.0 Double Taxation | 1069 |
| 32.1 Juridical Double Taxation | 1069 |
| 32.2 Economic Double Taxation | 1070 |
| 32.3 Methods of eliminating double taxation | 1070 |
| 32.4 Double non-taxation | 1071 |
| 32.5 Provisions in MCs on articles 23A & 23B | 1071 |
| 32.6 US MC on relief from double taxation | 1075 |
| 32.6.1 Analysis of provisions in MCs | 1076 |
| 32.6.2 US treaty Peculiarity | 1077 |
| 32.7 Three methods of elimination | 1077 |
| 32.7.1 Exemption method | 1078 |
| 32.7.2 Credit method | 1080 |
| 32.7.3 Tax Sparing Credit (TSC) | 1083 |
| 32.7.4 Tax sparing in two forms | 1084 |
| 32.8 Indian DTAAAs | 1084 |

CONTENTS

I-46

| | PAGE |
|---|------|
| 32.9 Indian position | 1086 |
| 32.10 Table of articles 23A and 23B in Indian DTAA's | 1087 |
| 32.11 Double non-taxation | 1127 |

33

ARTICLE 24 : NON-DISCRIMINATION

| | |
|--|------|
| 33.0 Non-discrimination | 1133 |
| 33.1 Discrimination & Differentiation | 1134 |
| 33.2 Non-discrimination in MCs | 1137 |
| 33.3 US MC on discrimination | 1139 |
| 33.4 Analysis of provisions of MCs | 1140 |
| 33.5 Any taxation or any requirement connected therewith | 1141 |
| 33.6 Taxation and not rate of tax is discrimination | 1141 |
| 33.7 Requirements Connecting Taxation | 1143 |
| 33.8 Clause 1 nationals and non-discrimination | 1144 |
| 33.8.1 Nationals | 1144 |
| 33.8.2 Nationality and Citizenship | 1145 |
| 33.8.3 Nationals and Residents | 1146 |
| 33.9 Clause 2 - Stateless persons | 1146 |
| 33.9.1 In the same circumstances | 1148 |
| 33.9.2 Other and more burdensome taxation | 1150 |
| 33.9.3 More burdensome and not the favourable or concessional treatment is sought to be prevented | 1151 |
| 33.9.4 Nationality non-discrimination and Indian Taxation | 1151 |
| 33.10 Clause 3 - PE | 1153 |
| 33.10.1 Taxation less favourably levied | 1154 |
| 33.10.2 Assessment aspect of equality in treatment | 1157 |
| 33.11 Clause 4 - Deduction of expenses | 1157 |
| 33.11.1 Deduction of interest, royalties etc. | 1157 |
| 33.11.2 Other expenses | 1158 |
| 33.12 Clause 5 - Ownership non-discrimination | 1158 |
| 33.13 Clause 6 - Non-discrimination and taxes covered | 1159 |
| 33.14 Most Favoured Nation Clause | 1159 |
| 33.15 Table of provisions in all DTAA's with India | 1162 |

34**MUTUAL AGREEMENT PROCEDURE (MAP)**

| | | |
|-------------|---|------|
| 34.0 | Objectives of MAP | 1192 |
| 34.1 | MAP through competent authority | 1192 |
| 34.2 | A mechanism for resolution of dispute | 1193 |
| 34.3 | MAP independent to law appeal | 1194 |
| | 34.3.1 UN MC - Difficulties and doubts | 1195 |
| | 34.3.2 OECD Illustrations | 1196 |
| | 34.3.3 US MCC Technical Explanation Examples | 1196 |
| | 34.3.4 States attitude | 1197 |
| 34.4 | Article 25 in MCs | 1198 |
| | 34.4.1 US MC on mutual agreement procedure | 1202 |
| | 34.4.2 Analysis of MC provisions | 1203 |
| | 34.4.3 Indian DTAA on MAP | 1204 |
| 34.5 | Table of DTAA on Article 25-MAP | 1205 |

35**EXCHANGE OF INFORMATION (EOI)**

| | | |
|--------------|--|------|
| 35.0 | Exchange of information | 1212 |
| 35.1 | Exchange in widest possible extent | 1212 |
| 35.2 | Table of provision - EOI | 1213 |
| 35.3 | US MC - on exchange of information and administrative assistance | 1215 |
| 35.4 | Information that may be exchanged | 1217 |
| 35.5 | Taxpayer call on CA for relief | 1218 |
| 35.6 | Clause 1 : Foreseeably relevant information exchange | 1219 |
| | 35.6.1 OECD Example | 1220 |
| | 35.6.2 Prevention of fraud or evasion of taxes | 1220 |
| 35.7 | Clause 2 : Secrecy & disclosure of information obtained | 1221 |
| 35.8 | Clause 3 : Exceptions | 1222 |
| 35.9 | Clause 4 : Irrespective of need of seeking state | 1222 |
| 35.10 | Clause 5 : Information not be withheld | 1223 |
| 35.11 | Clause 6 (UN only) : Accomplishing evolution of methods | 1223 |

CONTENTS

I-48

| | PAGE |
|---|------|
| 35.12 Indian DTAA's and article 26 | 1224 |
| 35.12.1 Separate agreements | 1224 |
| 35.12.2 Part of DTAA's | 1224 |

36

DTAA - MUTUAL ASSISTANCE (MA)

| | |
|---|------|
| 36.0 Article 28 in UN MC OECD MC | 1231 |
| 36.1 Analysis of the provision | 1235 |
| 36.2 Conclusion of agreements | 1236 |
| 36.3 India's position | 1237 |
| 36.4 UN MC or OECD MC | 1237 |
| 36.5 Type of assistance | 1237 |
| 36.5.1 Type 1 | 1237 |
| 36.5.2 Type 2 | 1238 |
| 36.5.3 Type 3 | 1239 |
| 36.6 Indian DTAA's | 1240 |

37

DTAA - DIPLOMATIC AGENTS IMMUNITY

| | |
|--|------|
| 37.0 Article 28 in Model Conventions | 1243 |
| 37.1 Analysis of provision in MCs | 1243 |
| 37.2 Privilege | 1244 |
| 37.2.1 Fiscal privileges | 1244 |
| 37.2.2 Diplomatic and consular privileges | 1245 |
| 37.3 Domestic law | 1245 |
| 37.4 DTAA's | 1246 |
| 37.5 Indian DTAA's | 1246 |

38

TERRITORIAL EXTENSION

| | |
|---|------|
| 38.0 Article 28 (OECD MC) | 1247 |
| 38.1 Territorial extension/exclusion of the convention | 1247 |

39**ENTRY INTO FORCE AND THE TERMINATION
OF CONVENTION**

| | | |
|-------------|---|------|
| 39.0 | Article 29 - Entry into force | 1249 |
| 39.1 | Article 30 - Termination | 1250 |
| 39.2 | Articles 28 and 29 UN MC, US MC & articles 29 and 30 OECD MC | 1251 |
| 39.3 | US MC on entry into force and termination | 1252 |

40**MANAGEMENT OF EXPATRIATE
WORKFORCE**

| | | |
|--------------|---|------|
| 40.0 | Cross border movement | 1253 |
| 40.1 | Assignments in India | 1253 |
| 40.2 | Immigration | 1254 |
| 40.3 | General visa conditions | 1254 |
| 40.4 | Business Visa | 1255 |
| 40.5 | Employment Visa | 1256 |
| 40.6 | Other Visas | 1257 |
| 40.7 | Registration of foreign nationals | 1258 |
| 40.8 | Forms of Expatriate Assignments | 1258 |
| | 40.8.1 Long term assignment - Deputation/Secondment to Host Entity | 1258 |
| | 40.8.2 Long-term assignment - Direct Employment with Indian company | 1259 |
| | 40.8.3 Short-term assignment/business travel | 1259 |
| 40.9 | Employer/Employee - Social Security considerations | 1259 |
| 40.10 | Tax management | 1261 |
| | 40.10.1 Procedural - Tax registrations and compliances | 1261 |
| | 40.10.2 PAN | 1261 |
| | 40.10.3 Tax Return | 1261 |
| | 40.10.4 TCC | 1262 |
| | 40.10.5 Tax implications | 1262 |
| | 40.10.6 On the expatriate employee | 1262 |
| | 40.10.7 Taxable salary | 1263 |

CONTENTS

I-50

PAGE

| | | |
|-----------------|--|------|
| 40.10.8 | Perquisites and trailing benefits are income from employment | 1264 |
| 40.10.9 | Tax equalisation benefit may not be income | 1265 |
| 40.10.10 | Tax on Social Security and withdrawals may not be Income | 1267 |
| 40.11 | India exempt certain remuneration | 1267 |
| 40.11.1 | Remuneration granted exemption under DTAA's | 1268 |
| 40.11.2 | Possibility of double taxation and remedies under DTAA's | 1270 |
| 40.11.3 | Double tax relief under DTAA's | 1270 |
| 40.11.4 | Tax on foreign company employer | 1271 |
| 40.11.5 | Service tax implications | 1276 |
| 40.11.6 | Tax implications on the Indian entity employer | 1279 |

41

INCOME OF NON-RESIDENTS - EXEMPTION COMPUTATION AND TAX

| | | |
|-------------|---|------|
| 41.0 | Income of non-residents | 1281 |
| 41.1 | Exemption of non-residents income in India | 1281 |
| 41.2 | Special provisions for computing income of non-residents | 1286 |
| 41.3 | Special provisions for tax on non-residents | 1288 |
| 41.4 | Special provisions for benefits to non-residents - Chapter XIII | 1289 |

APPENDICES

| | | |
|----------------------|--|------|
| APPENDIX A | : RELEVANT SECTIONS OF INCOME TAX ACT, 1961 | 1293 |
| APPENDIX B | : SAFE HARBOUR RULES | 1347 |
| APPENDIX C | : RELEVANT SECTIONS OF WEALTH TAX ACT, 1957 | 1367 |
| APPENDIX D | : UN MC CONVENTION BETWEEN (STATE A) AND (STATE B) WITH RESPECT TO TAXES ON INCOME AND CAPITAL | 1388 |
| APPENDIX E | : OECD MC MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL | 1413 |
| APPENDIX F | : US-MC 2006 INCOME TAX CONVENTION | 1436 |
| SUBJECT INDEX | | 1467 |