TAXATION OF FEES FOR TECHNICAL SERVICES

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SOURCE RULE FOR FTS

- **Section 9(1)(vii) of the Income Tax Act, 1961: Fees for Technical Services Income**

The following Income shall be deemed to accrue or arise in India: Income by way of fees for technical services payable by -

a) the Government; or

b) a person who is a resident, except where the fees is payable in respect of services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

c) a person who is a non-resident, where the fees is payable in respect of services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

SOURCE RULE FOR FTS

- The SC in Ishikawajima (2007) 288 ITR 408(SC) held that offshore services not only must be utilized in India but also be rendered in India as part of its business or have sufficient territorial nexus -live link with India to become taxable
- Explanation to Section 9 – Income (Interest/Royalties/FTS) of a non-resident shall be deemed to accrue or arise in India under section (1) and shall be included in the total income of the non-resident, whether or not,—
- (i) the non-resident has a residence or place of business or business connection in India; or
- (ii) the non-resident has rendered services in India.
- Cadila Healthcare [TS-743-ITAT-2022(Ahd)] - Mere doing the export activity from India cannot be treated as business carried outside India. Being an exporter and customers situated outside India and receiving payment against export sales, is only a source of receipt outside India but not a source of "income" outside India.. to be covered under the exception Assessee should have utilised the services in the business carried on outside India or making or earning income from any source outside India.
- Infosys Limited
- [TS-272-ITAT-2022(Bang)] [TS-272-ITAT-2022(Bang)] Merely because the clients are outside India does not means that the assessee is carrying on business outside India.

DEFINITION OF FTS

Explanation 2 to Section 9(1)(vii) –

- **FTS means any consideration (includes lump sum consideration) for rendering any:**
  - Managerial
  - Technical
  - Consultancy Services
- **Includes –** Provision of services of technical / other personnel
- **Excludes: –** Construction; Assembly; Mining; any like project; Income chargeable as Salary

TAXABILITY OF FTS UNDER ACT

Taxability under Act

- If No PE
  Section 115A
  10% at Gross basis
- If effectively connected to PE – Section 44DA – Net basis

BRIEF OVERVIEW OF ARTICLE 12 –FTS IN DTAA / UN MC

Particulars	Details
Article 12(1)	Distribution of rights of the Contracting States
Article 12(2)	Ceiling of Gross taxation by the State of Source subject to Beneficial Ownership
Article 12(3)	Meaning of the term 'FTS'
Article 12(4)	Article (1) /(2) not to apply if FTS is effectively connected with PE / Fixed Base of Non Residents in the State of Source (in such cases Article 7 / 14 shall apply)
Article 12(5)	Arising of FTS in the State of Source • Where payer is Resident; and / or • If the Payer has a PE / Fixed Base in the State of Source and the FTS is connected and borne by such PE / Fixed Base
Article 12(6)	Adjustments for related party transactions • Excess over Arm's-length price to be taxable as per domestic provisions

FTS UNDER MODEL TAX CONVENTIONS

UN Model	OECD/US Model
<u>Article 12A : Fees for Technical Services</u> 1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. 2. However, notwithstanding the provisions of Article 14 and subject to the provisions of Articles 8, 16 and 17, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed ___ percent of the gross amount of the fees [the percentage to be established through bilateral negotiations]. 3. The term "fees for technical services" means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made: a) to an employee of the person making the payment; b) for teaching in an educational institution or for teaching by an educational institution; or c) by an individual for services for the personal use of an individual .	There is no separate article on FTS.

FTS UNDER MODEL TAX CONVENTIONS

UN Model	OECD/US Model
<u>Article 12A :</u> • Right to State of Source to tax FTS on gross basis subject to beneficial ownership • Article not to apply if income is effective connected with PE (Article 7) or IPS (Article 14) • The meaning of management, technical services (including professional services) and consultancy similar to Indian domestic law principles outlined earlier and overlap between three envisaged. • DTAA benefit not available to any excess profits arising due to special relationship between the parties	There is no separate article on FTS. On par with Business Income i.e. Taxable in State of Source only if attributable to PE of NR therein

SOURCE OF INCOME

- **CIT v. Havells India Ltd. (352 ITR 376)(Delhi):** The High Court held that the issue is whether the export sales proceeds received from goods manufacture and exported from India constitute a source inside or outside India. To decide the same we are making a distinction between the source of the income and the source of receipt of the monies. In order to fall within the second exception provided in section 9(1)(vii)(b) [similar to section 9(1)(vi)(b)] of the Act, the source of the income and not the receipt should be situated outside India.
- **Titan Industries Ltd. V. ITO (11 SOT 206) (Bangalore-ITAT):** The ITAT held that the assessee company which was engaged in manufacture and sale of watches under the patent name 'TITAN' having an associate company incorporated in Singapore for promoting sales of watches in APAC region and got its patent registered in Hong Kong could claim the exception clause u/s 9(1)(vii)(b) for the fees paid to register the patent.
- **Lufthansa Cargo India Pvt Ltd. V. DCIT (92 TTJ 837) (Delhi-ITAT):** The payments for repair of aircrafts abroad which were acquired for operating on international routes only was held to fall under the exclusion clause of 9(1)(vii)(b)[similar to 9(1)(vi)(b)].

MANAGERIAL SERVICES

- **R. Dalmia v. CIT (1977) 106 ITR 895 (SC)**
  - In the context of business, "manage" means "to control, to guide, to administer, to conduct or direct affairs; carry on business"
  - "Management" includes the act of managing by direction, or regulation, or administration or control or superintendence.
  - The words "person concerned in the management of the business" mean a person not only directly participates or engages in the management of the business but also one who indirectly controls its management through the managerial staff, from behind the scenes.

TECHNICAL SERVICES

- **Bharti Cellular Ltd (2010) 330 ITR 239 (SC) / Kotak Securities [2016] 383 ITR 1 (SC)**
  - The words "technical services" have got to be read in the narrower sense by applying the **rule of Noscitur a sociis**, particularly, because the words "technical services" in section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services". Thus, Technical Services are one which involve Human intervention [Bharti Cellular (SC)]
  - "Technical services" like "Managerial and Consultancy service" would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is this feature that would distinguish/identify a service provided from a facility offered. [Kotak Securities (SC)](tailored service)
  - Where there is no exclusivity and each and every member avails services – more a facility and not a technical services [Kotak Securities (SC)]

HUMAN INTERVENTION TEST

- **Bharti Cellular Ltd (2010) 330 ITR 239 (SC) / Kotak Securities [2016] 383 ITR 1 (SC) –**
  - FTS necessarily entails human intervention. Consultant who provides the service has to a human being. A machine cannot be regarded as a consultant.
- **Madhyanchal Vidyut Vitran Nigam Ltd. (All.)**
  - ...in transmission of electricity, there was no human touch or effort and if the term "technical" was read applying the **principle of noscitur a sociis** with the term "managerial or consultancy, the provisions of sec 194J were not applicable.
  - mere involvement of technology would not bring something within the ambit of technical services“

HUMAN INTERVENTION TEST

- **UN-Automated Digital Service (ADS)**
  - Proposed new art. 12B for taxing income from ADS, i.e. any service provided on internet / electronic network, requiring minimal human involvement from service provider
  - The term “automated digital services” includes especially:
    - Online advertising services;
    - Supply of user data;
    - Online search engines;
    - Online intermediation platform services;
    - Social media platforms;
    - Digital content services;
    - Online gaming;
    - Cloud computing services; and
    - Standardized online teaching services
  - Source State be allowed to levy a gross basis tax at bilaterally negotiated rate
  - Alternatively, 30% of Source State's profits of service provider be taxed @ provided in domestic law

CONSULTANCY SERVICES

- **GVK Industries Ltd (2015) 371 ITR 453 (SC) –**
  - The expression, managerial, technical or consultancy service are not defined in the Act- the general and common usage of the said words has to be understood at common parlance.
  - The term "consultancy" has been defined in the Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field."
  - The word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. The word consult has also been defined in the said Dictionary as "ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval from for a proposed action".
  - It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant.

MEANING OF ‘PAID’ AND IMPACT ON DEEMED ACCRUAL

- **FTS in DTAA** – Taxation if arising in the contracting state and paid to resident of the other contracting state
- **Paid** – defined under Section 43(2) of the Income-tax Act 1961
  - ‘Paid’ means actually paid or incurred according to the method of accounting
  - Whether above definition is relevant for Article 3(2) and can be imported for DTAAs?
- **DTAA do not provide for cash basis and also have no withholding tax provisions** – thus, accrual for non-resident recipient has no relevance for withholding tax purposes which is basis earlier of payment or credit by Payer – Refer Flakt AAR (2004)
- **R/FTS taxable do not accrue till approval of the RBI is obtained (or any other Regulator)**
  - Booz, Allen & Hamilton – (2013) Mum AT / 2015 Bom HC dismissed the appeal filed by Department against the ITAT order

CONCEPT OF BENEFICIAL OWNERSHIP

- **OECD MC (Articles 1, 10, 11 and 12)**
  - Improper use of conventions (Article 1)
  - Articles - BO Term not to be used in a narrow or technical sense but object and purpose of tax conventions
  - Agent, nominee and conduits, etc. not BOs
  - OECD MC 2014 incorporates several past documents / proposals for BO
- **IBFD International Tax Glossary**
  - Beneficial owner is a common law term whose meaning has been developed by the Courts. The term is distinct from the term 'Legal Owner'
- **US Model Convention**
  - Regards beneficial owner as a person if the income is attributable to him for tax purposes as a resident
- **Article 3(2) of Model Convention**
  - Whether meaning as per domestic tax law to be adopted? [Section 2(22) , Section 79, etc.]

CONCEPT OF BENEFICIAL OWNERSHIP

- **CBDT Circular 789 dt .3 April 2000** under India–Mauritius DTAA in the context of FIIs, etc.: TRCs issued by Mauritius Tax Authorities sufficient evidence of residence status as well as BO
- **SC in Azadi Bachao Andolan (2003)** - Circular prevails even if inconsistent with the Act for DTAA purposes. Bom HC in Universal Music (2013) / HSBC Mum AT (2018) – TRC sufficient evidence of BO
- **Golden Bella Holdings (2019) (Mum AT):** Back to back arrangement (Hold Co) not to be considered as without economic substance unless constraint by contractual, legal or economic arrangement
- **Tiger Global (2020) (AAR)**: Real management /control was not with Mauritius BoD but with US person who was BO of entire group structure - application rejected as structure only to avail treaty benefits

FTS –SITUATIONS UNDER INDIA DTAAS

- **Situation 1 - Absence of Article on FTS**
  - Business profits i.e. taxation of Non-Resident in India only in their PE situation
  - Most beneficial situation for Non-Residents − E.g. Mauritius, UAE, etc.
- **Situation 2 - Presence of Article on FTS akin to ITA (e.g. DTAA with Japan, Germany, etc)**
  - Ambit and Taxation on gross basis - Taxation / implications very similar to that under ITA
  - Include generally services linked to / ancillary and subsidiary to income in the nature of Royalty

FTS –SITUATIONS UNDER INDIA DTAAS

- **Situation 3– Scope, rate and accrual of FTS more beneficial as compared to ITA**
  - Scope of FTS Article more restrictive then ITA (India-USA DTAA- See next few slides)
  - NR to NR payments & accrual in India more restrictive (generally only if payer NR has PE in India and FTS is effectively connected to such PE) except few tax treaties e.g. India-USA DTAA
  - For taxability, work to be done in source country (e.g. India-China DTAA) [Refer Ashapura Minichem Ltd. [2010] 40 SOT 220 (MUM.)]
- **Situation 4 - FTS effectively connected with PE in India**
  - Taxation on net basis for income attributable to the PE with Onerous compliances

FTS –SITUATIONS UNDER INDIA DTAAS

- **Situation 5 - Scope of FTS Article restrictive as compared to ITA**
- Provisions of the India-USA DTAA most relevant (Article 12 / Fees for Included Services)
  - Payment for rendering any Technical services (expertise in Technology) or Consultancy Services (Advisory services but in the technical field)
    - Managerial Services absent
    - Illustrations of technical fields / sector given in protocol E.g. Engineering, etc.
  - Include services ancillary /subsidiary qua Royalty (various factors specified)
    - E.g. Consultancy services to improve manufacturing process post grant of rights

FTS –SITUATIONS UNDER INDIA DTAAS

- **Situation 5 - Scope of FTS Article restrictive as compared to ITA**
  - Services to satisfy the make Available concept in respect of technical knowledge, experience, skill, know-how, or processes, (Fees for Included Services [FIS]) (See Next Slide) or consist of development and transfer of technical plan or technical design
  - Exclude services ancillary / subsidiary and inextricably / essentially linked to the sale of goods other then those constituting Royalty
  - Specific exclusions for services availed for personal use, services for teaching in educational institutions, etc.

‘MAKE AVAILABLE’ CLAUSE

- **India-US DTAA**
  - Making available any technical knowledge, experience, skill, knowhow or process
    - Person acquiring the services enabled to apply the technology
    - Mere Technology input / use of product technology by itself not sufficient and various examples
      - Engineers helping Indian Manufacturer on how to produce products and information / advice = FIS [Ex 3]
      - US Computer programming firm modifying the sales software = FIS [Ex 5]
      - Modifying product formulas and training employees for the same = FIS [Ex 6]
      - Computer simulation of Marketing fees = Not FIS [Ex 7]
      - Repairs, inspections, etc. of machines = Not FIS [Ex 9]

‘MAKE AVAILABLE’ CLAUSE

- De Beers India Minerals (P.) Ltd, the Hon’ Karnataka High Court while elaborating the meaning of the term 'make available’, held as under:
- Service should be aimed at transmitting knowledge.
- Recipient of the service should receive an enduring benefit and should be able to utilize the knowledge on its own in the future for performance of services without the aid of the service provider.
- Payment would be regarded as FTS only when the twin test of rendering services and making technical knowledge available at the same time is satisfied.
- If all of the above criteria are satisfied, then only can the payment meet the ‘make available’ criteria and hence, be considered as FTS as per the DTAA and chargeable to tax accordingly.

‘MAKE AVAILABLE’ CLAUSE

- **India Singapore DTAA**
  - FTS... in consideration for services of a managerial, technical or consultancy nature, if such services:
    a) are ancillary
    b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the tech. contained therein.
    c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

‘MAKE AVAILABLE’ CLAUSE

- **Concept of make available exists in more than other dozen treaties**
  - Directly – Australia, Canada, Cyprus, Malta, Netherlands, Portugal, Finland, Singapore, USA, UK, etc.
  - In some DTAA the term ‘managerial’ is included additionally with technical and consultancy (e.g. Singapore)
  - Due to MFN Clause – Belgium, France, Spain, Sweden
  - Australia – Concept of FIS included in definition of Royalty

FTS –DECISIONS ON MAKE AVAILABLE

- **Hindustan Aeronautics Ltd. -** mere rendering of flight testing services would not be taxable unless the person receiving the services is enabled to utilize the services on its own in the future without having recourse to the person providing the service. Further, The subsequent action of the assessee to carry out the improvement based on the test results given by French Co cannot be considered as a basis for 'make available' services rendered by CGTM France to the assessee.

- **Perfetti Van Melle ICT & BV [TS-145-ITAT-2022(DEL)] -** fees for providing Information & Communication Technology (ICT) service to Indian subsidiary is not FTS as the make available clause read into India-Netherlands DTAA from India-Portugal DTAA by invoking MFN clause was not satisfied

FTS –DECISIONS ON MAKE AVAILABLE

- IRunway India Private Limited [TS-331-ITAT-2022(Bang)] - Distinguishes between ‘make available’ and ‘make use’
- Manthan System Inc [TS-777-ITAT-2022(Bang)] - sales and marketing services rendered by the Assessee to Indian entity does not fall within the ambit of FTS as defined under Section 9(1)(vii) or FIS under Article 12 of India-US DTAA, since the said services are not of technical managerial or consultancy in nature and does not fulfil the ‘make available’ condition
  - States that the fact that the provision of the service may require technical input by the person providing the service does not mean that technical knowledge, skills, etc., are made available to the person purchasing the service since the technology is considered ‘made available’ when the person acquiring the service is enabled to apply the technology, which is not the case

FTS –DECISIONS ON MAKE AVAILABLE

- **ONGC– Delhi AT – Jan 2019 (Advise, support / investigation services)(India-Netherlands DTAA)**
  - Well Platform Accident Investigation services – not FTS as make available condition not satisfied as recipient of services could not independently undertake such endeavor in future as ONGC did not gain any technical knowledge, experience or skill for conducting such investigation.
- **Havells India – Del AT – Sep 2020**
  - Payment for testing / certification services of products to be exported does not satisfy the make available criteria as prescribed under the India-Netherlands Tax Treaty
- **Decore Exxoils – Indore AT – Oct 2020 (India – USA DTAA)**
  - Training services for pilots as per Directorate General of Civil Aviation manual and services in form of component parts or manual alerts, and service bulletins to aircraft operator for aircraft maintenance – not FIS as only to qualify as eligible.

MOST FAVOURED NATION(MFN) CLAUSE

- More favorable DTAA terms granted to other countries extended to existing treaty countries by Source Country
  - Lower tax rate or narrowing the scope of income liable to tax
- Generally MFN status is contained in the protocol/ exchange of notes
- MFN Clause is generally only prospective
- Application is automatically or by negotiation and then notification

MOST FAVOURED NATION(MFN) CLAUSE

- **Examples of key Indian tax treaties with MFN status** in the context of R/ FTS (includes DTAA amended)
  1. India - Netherlands DTAA
  2. India – Finland DTAA
  3. India - Belgium DTAA
  4. India – Hungary DTAA
  5. India - France DTAA
  6. India - Sweden DTAA
  7. India - Switzerland DTAA
  8. India - Spain DTAA

MOST FAVOURED NATION(MFN) CLAUSE

- **Variants of MFN Clause**
  - OECD member vs. Any Country
  - Automatic vs. Negotiation

- **Example: India - Swiss DTAA** (With reference to Articles 10. 11 and 12)
- If after the signature of the Protocol of 16 Feb 2000 under any Convention. Agreement or Protocol between India and a third State which is a member of OECD, India should limit its taxation at source on dividends interest, royalties or FTS to a rate lower or a scope more restricted than the rate or scope provided for in this Agreement, then Switzerland and India shall enter into negotiations without undue delay in order to provide same treatment to Switzerland as that provided to the third State

MOST FAVOURED NATION(MFN) CLAUSE

- In Steria (India) Ltd case, Delhi HC held that payment by an Indian company to a French company for management services does not constitute Fees for Technical Services under India-France DTAA
  - By virtue of MFN clause, notes that India-UK excludes managerial services less restrictive FTS definition appearing in India-UK DTAA, must be read as forming part of the India-France DTAA as well
- Torrent Pharmaceuticals Ltd case, payments were made by assessee to a Switzerland based company which were considered as FTS. ITAT rejected to borrow make available clause from India-Portoguese DTAA noting that unless protocol was actually re-negotiated and approved, 'make available' limitation in India – Portuguese DTAA could not apply to Swiss remittances.

CBDT CIRCULAR

- (i) unilateral decree of a treaty partner does not represent a shared understanding on the applicability of the MFN clause,
- (ii) the third state should be the member of OECD on the date of conclusion of the DTAA with India,
- (iii) concessional rate or restricted scope to apply from the date of entry into force of the DTAA with the third state and not from the date on which such third state becomes an OECD member,
- (iv) as per SC ruling in Azadi Bachao Andolan, a notification u/s 90 is required and states that India has not issued any notification for importing the beneficial provisions from DTAAs with Slovenia, Lithuania & Colombia to the DTAAs with France, the Netherlands or Switzerland, and
- (v) import of concessional rates by invoking MFN clause cannot be done selectively and the benefit of lower rate or restricted scope of source taxation will available only when the conditions specified in the Circular are met

MFN RULING

- Pune ITAT in GRI Renewable Industries S.L [TS-79-ITAT-2022(PUN)] held that once DTAA is notified all its integral parts, including Protocol, get automatically notified and there remains no need to again notify the individual limbs of the DTAA.
- "It becomes ostensible that the CBDT has mandated the issuance of a separate notification for importing the benefits of a treaty with second State into the treaty with the first State" by relying on provisions of Section 90(1)
- Further observes that the Circular specifying the need for a separate notification for importing the beneficial treatment from another DTAA as a corollary of Section 90(1) overlooks the plain language of the provision in juxtaposition to the language of the Protocol, which treats the MFN clause an integral part of the DTAA
- Circular attaches a new disability of a separate notification for importing the benefits of a DTAA with the second State into the treaty with first State, thus, cannot operate retrospectively to the transactions taking place in any period prior to its issuance

R / FTS –BACK OFFICE AND IT SUPPORTS

- **Shell Technology - AAR - 2011**
  - Business support services consisting of back office financial services (Accounts Receivable, Accounting, Credit collection, Taxation, etc.) are not in the nature of FTS under the India Netherlands tax treaty as services are provided without any involvement of the Service Recipient – thus, Make Available condition not satisfied under India-Netherlands DTAA
- **Aktiebolaget SKF – Mum AT -2020**
  - IT services rendered were subservient to royalty agreement and were ancillary and subsidiary to main royalty agreement as they were meant to function together and Royalty agreement cannot be effectively implemented unless integrated with IT support - Taxable as FTS – India-Sweden DTAA (make available argued via MFN India-Portugal DTAA)

REIMBURSEMENTS

- **A.P. Moller Maersk A S – SC – Feb 2017 (IndiaDenmark DTAA)**
  - Global telecomunication facility provided by shipping company to all its Agents on cost allocation and reimbursement basis is a common facility and an integral part of business allowing agents to discharge their role more effectively. It is in the nature of reimbursement of expenses (without any profit element) and therefore is not income chargeable to tax. It is also not any services to agents and not a technical service.
- **T-3 Energy Services India (P.) Ltd- Pun ATFeb 2018**
  - The cost allocation without any profit element for providing bandwidth services/ lease line charges is in the nature of reimbursement and there was no liability to withhold tax. The payment is also not Royalty as amendments in the Act cannot be read into the Treaty.

REIMBURSEMENTS

- Michael Page [TS-624-ITAT-2022(Mum)] - receipts from Indian entity towards business support services and referral fees cannot be treated as Fees for Technical Services (FTS), since it did not satisfy the make available clause as envisaged in Article 12 of India-Singapore DTAA
- NTT Asia Pacific Holdings Pte Ltd [TS-612-ITAT-2022(Mum)] - A mere incidental advantage to the recipient of service is not enough. The test is the transfer of technology

COMMISSION

- **Hical Infra Private Limited - Bang AT – Apr 201**9 - The commission agent activities were FTS as it involved technical expertise of checking the quality of goods and Assessee could not substantiate that this work could be done by persons who do not have the technical expertise
- **Shri Jogendra L. Bhati – Ahd AT – Apr 2019** - Agent's activities in the nature of liaising with local authorities, registration of products, export of goods, clearance of goods from customs, storage, warehousing and physical delivery of goods do not amount to managerial, technical or consultancy services and hence not FTS. However, market research and market survey for new pharma products is FTS.
- **Digi Drives P Ltd – Del AT – Aug 2020 -** Mere rendering of service of procurement of export orders by a non-resident company for Indian company does not fall in category of managerial/consultancy services as explained in Explanation 2 to section 9(1)(vii)

COMMISSION

- **Apurva Goswami [TS-400-ITAT-2022(DEL)]** - business promotion agents rendering services for promotion of sales (of services) and soliciting new clients and are appointed only with a view to propagate and solicit business overseas and not to render any managerial, advisory, technical or consultancy services…are entitled to receive a minimum stipulated sum as remuneration for services rendered along with additional percentage as further add on in event of any contract getting materialised

SECONDMENT AND FTS

- **Reimbursement of salary / other expenses of seconded employees to overseas entities – not FTS :**
  - Secondees under the Control / Command / Supervision of Indian entity who is responsible for their risks/ reward / outcome
  - Obligation of Indian Entity to pay salary to the secondees
  - Social security, insurance, relocation exps – committed for secondees (reimbursements/ otherwise)
  - Payment to secondees subject to withholding under Section 192 as Salaries
  - Terms of appointment between the Indian entity and secondee / secondment agreement
  - Employer – employee relationship between the Indian entity and secondee (Right to appoint / terminate the secondment, etc.); Real and economic employer instead of legal employer
  - No mark up / profit element on reimbursements, if any, to Foreign Entity

SECONDMENT AND FTS

- Centrica Offshore (Delhi HC) - Reimbursement of the salary (initially disbursed by the overseas counterpart) by the Indian entity to be taxable in India on grounds that the same is in the nature of Fees for Technical Services (satisfying the make available conditions)
- Flipkart Internet Private Limited [TS-503-HC-2022(KAR)] – Salary reimburesement is not FTS
- Goldman Sachs Services Pvt. Ltd [TS-341-ITAT-2022(Bang)] - salary reimbursement of Goldman Sachs' seconded employees not taxable as FTS
- Marks and Spencer Reliance India Pvt. Ltd [TS-178-HC-2017(BOM)]

INDEPENDENT PERSONAL SERVICES AND FTS

- **Article 14(1): UN Model**
  - Income in respect of professional services, or other activities of an independent character shall be taxable only in Resident State (of person performing them)
- Source State has the taxing rights, if
  - Exception 1: Income attributable to fixed base regularly available to him, for performing his activities
  - Exception 2: Income derived from activities in Source State where his stay 183 days (in any 12-mth period commencing / ending in the fiscal year)
  - Exception 3: Remuneration / transaction value for such service exceeds certain amount (eg. India Canada). Not present in most of DTAAS

INDEPENDENT PERSONAL SERVICES AND FTS

- **Nature of independent activities covered**
  - Scientific, Literary, Artistic, Educational and Teaching
  - Physicians, Lawyers, Engineers, Architects, Dentists and Accountants
  - Article on FTS may contain an exclusion for items covered under IPS E.g. Japan / New Zealand
  - Even otherwise, if applicable, the Article on IPS should prevail over Article on FTS
    - IPS being a more specific Article within the Services Category
    - Tax position is generally more beneficial under IPS Article
- **DLF Ltd (2019) Del AT:**
  - Benefits of the Article 15 of India-UK DTAA granted to UK Partnership Firm / LLP for consultancy services rendered during IPO (several other judicial precedents also exists)

RECENT CONTROVERSIES IN FTS

- **IT & Software related services -**
  - In Microstrategy Singapore Pte Limited Vs DCIT (ITAT Delhi), the court held that "Insofar as the issue of treating the amount received towards provisions of software related services as FTS, we have noticed that the Assessing Officer has not brought any cogent material on record to demonstrate that while providing the software related maintenance service, the assessee has made available any technical knowledge, knowhow, skill etc. so as to enable the recipient of such service to use it independently in exclusion of the assessee. Therefore, in our considered opinion, the conditions of Article 12(4)(b) of the Treaty are not satisfied. That being the factual position emerged on record, the amount received cannot be treated as FTS. Therefore, the addition made is deleted."
- Red Hat India Pvt. Ltd [TS-672-ITAT-2022(Mum)]
  - Sale of software subscription not FTS
- Godaddy [TS-756-ITAT-2022(DEL)]
  - web-hosting charges as FTS under Section 9(1)(vii) as well as Article 12 of the India-US DTAA as web hosting services is ancillary to domain name registration services and thus, taxable as FTS.:ITAT DEL

Thanks !

THANKS !

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